

2017 JOINT SPRING MEETING

**GROUP LEGAL SERVICES ASSOCIATION
SOLO, SMALL FIRM, AND GENERAL PRACTICE DIVISION
STANDING COMMITTEE ON GROUP & PREPAID LEGAL SERVICES
MAY 18-20, 2017
SCOTTSDALE, ARIZONA**

ERISA UPDATE: PART II

**THURSDAY, MAY 18, 2017
11:45 - 12:45**

PRESENTER: KATHERINE HESSE



About the Presenter

Katherine A. Hesse is a founding partner of Murphy, Hesse, Toomey & Lehane, LLP, a multi-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts.

Ms. Hesse practices primarily in labor and employment and employee benefits law. She serves as counsel to business, government, and not-for-profit entities including hospitals, colleges and single and multi-employer private and public retirement and welfare plans. She counsels clients on a daily basis on employment and benefits issues and has litigated numerous employment and benefits cases before the state and federal trial and appellate courts, administrative agencies and arbitrators. Ms. Hesse is also an active practitioner in a variety of forms of alternative dispute resolution including mediation, conciliation, fact finding and several forms of arbitration.

Ms. Hesse sits on the Board of the International Foundation of Employee Benefit Plans, chairs its Government Liaison Committee, and formerly chaired its Attorneys Committee. She also served as president of the International Society of

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Certified Employee Benefit Specialists. She sits on the editorial board of Benefits Quarterly, the Pension Editorial Advisory Board for Wolters Kluwer (which houses brands such as Aspen Publishing and CCH), and formerly wrote the legal column for Aspen Publishers, Inc. Managing Employee Health Benefits. Ms. Hesse speaks frequently on employment and benefits issues.

A graduate of Smith College and Boston University School of Law, Ms. Hesse is admitted to the federal and state trial and appellate bars in Massachusetts and the District of Columbia and the Supreme Court of the United States. Ms. Hesse has received a number of awards for her professional service and for her charitable commitments including the 1997 recipient of the prestigious Cushing-Gavin Award for excellence in providing legal counsel.

ABA GLSA/GP Solo Joint 2017 Spring Meeting

Fiduciary Responsibility Refresher

Part 2

Presented by

Katherine A. Hesse

Murphy, Hesse, Toomey & Lehane, LLP

May 18, 2017

Fairmont Scottsdale Princess, Scottsdale, AZ

Purpose of Today's Session

- To give you some basic tools to allow you to be prudent fiduciaries of your pension and health funds.
- To ensure you understand the legal framework within which you operate. See how key cases illustrate this.
- To refresh your knowledge of best practices for trustees and administrators in providing benefits to covered employees.
- To leave you with a checklist of key takeaways.

Overview

- Part 1 - Maintaining Tax-exempt Status
- Part 2 - Key Documents Every Trust Should Have
- Part 3 - What It Means to Be a Fiduciary
 - » The New DOL Fiduciary Rules
- Part 4 - Selecting and Monitoring Providers
- Part 5 - Guiding Principles
 - » Spotlight: Communications and Disclosure
- Part 6 - Key Takeaways

Overview

- Part 1 - Maintaining Tax-exempt Status
- Part 2 - Key Documents Every Trust Should Have
- Part 3 - What It Means to Be a Fiduciary
 - » The New DOL Fiduciary Rules
- Part 4 - Selecting and Monitoring Providers
- **Part 5 - Guiding Principles**
- Part 6 - Key Takeaways

The Guiding Principles: The D's

D's to Remember:

- Dignity
- **Discretion**
- Diversity
- **Disclosure**
- **Due Diligence**
- Due Process
- Documentation

D's to Avoid:

- Delay
- Discrimination
- Deceit

Dignity



"Don't look at this as a demotion, look at it as the stripping away of your last shred of dignity."

Dignity

- Treat employees with courtesy and respect.
- Listen carefully.
- Be as responsive as possible.
- Practice the Golden Rule.
- Examples? Little Sisters, Montanile (delay)

Discretion

- Retain Discretion,
- But Exercise It
- Consistently!



"But I do exercise. I exercise discretion."

Discretion

- Make sure plans and SPDs provide discretion to the employer/administrator
 - to construe, interpret and apply terms and to resolve ambiguities;
 - to amend or change those policies/handbooks/plans at any time.
- Employee communications such as handbooks should also include both discretionary language and right to amend.

Discretion

- Exercise discretion reasonably and consistently.
- Provide adequate notice/avoid retroactive amendments whenever possible.
- Still must comply with the law, the CBA, and your own policies.
- Examples: McCaffree, Stephanie C., Rodriguez-Lopez, Halo and Tedesco.

McCaffree Financial Corp. v. Principal Life Ins. Co., 2016 WL 98332, --- F.3d ---- (8th Cir. Jan. 8, 2016).

- Eighth Circuit held that financial advisor for employee retirement benefit plan could not be liable for breach of fiduciary duties for excessive investment management fees because fee structure that was alleged to be excessive was agreed to in contract between financial advisor and plan sponsor.
 - An outside party is not a fiduciary of a plan simply by negotiating terms for providing services to that plan
 - After entering into the agreement, the advisor could be a fiduciary

McCaffree Financial Corp. v. Principal Life Ins. Co. (Cont'd)

- Note that a party may act as a fiduciary in some respects with regard to a plan's participants, but that does not necessarily give the participants the right to sue that party for fiduciary breach.
 - Some discretionary act must serve as the basis for a claim.

McCaffree Financial Corp. v. Principal Life Ins. Co. (Cont'd)

- In this case, the allegation was based on the advisor charging an “account” fee on top of mutual fund fees that it also charged.
 - Because the plan sponsor agreed to this layering of fees, and the layering was the sole basis for the claim, the financial advisor was not liable as a fiduciary for this fee structure.

McCaffree Financial Corp. v. Principal Life Ins. Co. (Cont'd)

- Lessons learned:
 - Consider investment options carefully, paying particular attention to fees
 - Monitor all investment decisions
 - Stay abreast of evolving practices in investment management

Stephanie C. v. BCBS of MA HMO Blue, Inc., 2016 WL 629058, --- F.3d --- (1st Cir. Feb. 17, 2016).

- *Claim determinations* – First Circuit held that a plan followed proper process and sufficiently communicated with the claimant in denying claim for health benefits, but that plan had not granted discretion to plan administrator by placing discretionary clause in plan document that was not provided to claimant.

Stephanie C. v. BCBS of MA, HMO Blue, Inc., 2016 WL 629058, --- F.3d --- (1st Cir. Feb. 17, 2016).

- One plan document provided to plan participants stated that administrator:
 - “decides which health care services and supplies that you receive (or you are planning to receive) are medically necessary and appropriate for coverage”
 - First Circuit found this insufficient to grant discretion
- Clearer grant of discretion in agreement between plan sponsor and administrator also was not effective because participants did not get this document

And a follow on case : Stephanie C. v. BCBS of MA, 852 F.3d 105 (1st Cir. 2017)

– Lessons Learned

- Utilize and document a thorough and prompt claim review process
- Make sure necessary plan terms are stated in all documents and provide them to plan participants and beneficiaries
- Draft discretionary clauses carefully

Rodríguez-López v. Triple-S Vida, Inc., 850 F.3d 14 (1st Cir. 2017) Cont.

■ **Background:**

- Employer: Plan Sponsor and administrator
- Jefferson-Pilot (“JP”): Plan specified that JP was to receive the forms and proof of loss for disability benefits
- Triple-S: allegedly replaced JP → however, the Plan was never amended to reflect such replacement; and the participants were not otherwise notified of this change
- Triple-S: denied Rodríguez’s request for long-term disability benefits → Rodríguez then filed suit

Rodríguez-López v. Triple-S Vida, Inc., 850 F.3d 14 (1st Cir. 2017) Cont.

- District Court: granted Triple-S' motion for summary judgment, applying the arbitrary and capricious standard of review.
- Rodriguez then filed, arguing that incorrect standard of review had been applied.
- First Circuit: held that Rodriguez was correct, and that the District Court should have applied a *de novo* standard of review. . .

Rodríguez-López v. Triple-S Vida, Inc., 850 F.3d 14 (1st Cir. 2017)

Applicable legal framework:

- When reviewing a challenge to a denial of benefits, it “is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”

Rodríguez-López v. Triple-S Vida, Inc., 850 F.3d 14 (1st Cir. 2017)

- If a participant/covered beneficiary receives adequate notice of such reservation, then “a deferential arbitrary and capricious or abuse of discretion standard” is applied.

Here, there was no clear grant of authority to Triple-S to make eligibility determinations under the Plan; and it cannot be implied. The District Court’s decision is vacated and remanded.

Lesson: Both the plan AND the SPD should state discretionary standard clearly.

Halo v. Yale Health Plan, Dir. Of Benefits & Records Yale Univ., 819 F.3d 42 (2nd Cir. 2016)

Background:

- 29 C.F.R. § 2560.503-1 – requires that a claimant receive certain information re: an adverse benefit determination, including:
 - specific reason(s) for determination
 - reference to specific plan provisions on which determination is based
 - description of additional material/information needed for claimant to perfect claim and an explanation of why such material/information is needed
 - info re: review procedures, time limits, right to sue

Halo v. Yale Health Plan, Dir. Of Benefits & Records Yale Univ., 819 F.3d 42 (2nd Cir. 2016)

Background:

- Halo was student at Yale. She was unhappy with results of eye surgery performed by doctors within network. She then had surgery with doctors out of network whose treatment was covered only if condition was emergency/urgent, or if treatment was approved in advance.
- Plan rejected coverage → Halo filed suit → applying the “substantial compliance doctrine,” the district court granted summary judgment in favor of plan.

Halo v. Yale Health Plan, Dir. Of Benefits & Records Yale Univ., 819 F.3d 42 (2nd Cir. 2016)

Holding:

- “when denying a claim for benefits, a plan's failure to comply with the Department of Labor's claims-procedure regulation, 29 C.F.R. § 2560.503–1, will result in that claim being reviewed *de novo* in federal court, unless the plan has otherwise established procedures in full conformity with the regulation and can show that its failure to comply with the regulation in the processing of a particular claim was inadvertent *and* harmless.” → plan has the burden of proof.

Halo v. Yale Health Plan, Dir. Of Benefits & Records Yale Univ., 819 F.3d 42 (2nd Cir. 2016)

Holding (cont.):

- “[C]ivil penalties are not available to a participant or beneficiary for a plan's failure to comply with the claims-procedure regulation.”
- “[A] plan's failure to comply with the claims-procedure regulation may, in the district court’s discretion, constitute good cause warranting the introduction of additional evidence outside the administrative record.” (*e.g.*, when plan’s compliance failures adversely affected development of record)

Tedesco v. I.B.E.W. Local 1249 Insurance Fund, et. al., 2016 WL 7436029 (2nd Cir. 2016)

- Claim re: denial of benefits dismissed on grounds that adverse benefit decision was not arbitrary and capricious. While the appeal was pending, court issued decision in Halo.
- Court remanded case so that the lower court could consider whether the procedural deficiencies in case warranted a *de novo* review, and if so, whether the claim should still be dismissed.
- Although overpayment notifications Tedesco received were procedurally deficient, overpayment claim failed on the merits because the plan entitled trustees to recover amount that Tedesco's employer would have paid toward her health insurance had she not declined coverage from her employer.

Disclosure/Loose Lips Sink Ships



Disclosure aka Communication/Loose Lips

- Use all available communications opportunities and frame communications so that they will be most likely to be understood by all.
- Avoid legal or highly technical language.
- And always remember: Loose lips sink ships!
- Examples? Santana-Diaz, Koning, Yafei, O'Shea,



Santana-Diaz v. Metropolitan Life Ins. Co., 816 F.3d 172 (1st Cir. 3/14/2016)

- Generally, under ERISA, a plan can establish its own statute of limitations for lawsuits over plan-related disputes, so long as the limitations period is reasonable.
 - Including a limitations period that begins to run before the claimant receives a final denial.
- If the plan declines to do so, state-law statutes of limitations applicable to similar claims will apply.

Santana-Diaz v. Metropolitan Life Ins. Co., 816 F.3d 172 (Cont'd)

- ERISA regulations require that “any adverse benefit determination” include:
 - [a] description of the plan’s review procedures and the time limits applicable to such procedures, including a statement of the claimant’s right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review;
- 29 CFR 2560.503-1

Santana-Diaz v. Metropolitan Life Ins. Co., 816 F.3d 172 (Cont'd)

- In this case, a disability-benefits claimant, Santana-Diaz, appealed his benefits termination under a 24-month mental-health-disability limitation.
- The plan had specified a 3-year statute of limitations, but failed to make any mention of this internal statute of limitations in several claim denial notices to the claimant

Santana-Diaz v. Metropolitan Life Ins. Co., 816 F.3d 172 (Cont'd)

- The First Circuit ruled:
 - (1) the regulatory requirement that an adverse determination include “a statement of the claimant’s right to bring a civil action” required notifying claimants of a plan’s specific internal statute of limitations for filing suit, and
 - (2) failure to do so rendered the plan’s internal deadline inapplicable.
 - Even when the claimant has other documents communicating these time limits.

Santana-Diaz v. Metropolitan Life Ins. Co., 816 F.3d 172 (Cont'd)

- Lessons learned:
 - Include as much information as possible in denial notices and other participant/beneficiary communications.
 - Follow ERISA regulations, erring on the side of providing more detail where the regulations appear unclear as to what is required.

Koning v. United of Omaha Life Ins. Co., 2015 WL 5603094, --- Fed. Appx. --- (6th Cir. Sept. 24, 2015).

- *Claim determinations* –An administrator should explain why it makes a decision contrary to the submitted supporting documentation.
- Here, Vicki Koning worked for many years with chronic back pain, until finally reaching a point where she determined her condition prevented her from working.
- She was denied long-term disability benefits under her employer's plan.

Koning v. United of Omaha Life Ins. Co. (Cont'd)

- The claim administrator had found no physical change in her condition at the time she claimed benefits, and so denied the claim because she had worked with her condition for many years before.
- The court here sent the claim back to the insurance company for redetermination, finding that it failed to address medical documentation from Ms. Koning's treating physician providing a credible and well-supported opinion that she was permanently disabled.

Koning v. United of Omaha Life Ins. Co. (Cont'd)

- Lessons Learned:
 - The administrator should provide the reason or reasons for the denial.
 - Address countervailing evidence of all types and explain why the decision made is correct notwithstanding the contrary evidence.
 - Ignore the treating physician's evidence at your peril.

Yafei Huang v. Life Ins. Co. of N. Am., 801 F.3d 892 (8th Cir. Sept 3, 2015).

- *Misrepresentation* – An insurance company denied life insurance benefits to the wife of a deceased plan participant because the participant failed to notify the plan as to the change in his health status, which was required under the plan terms.
- The wife sued for breach of fiduciary duty (not for wrongful denial of benefits), claiming that someone working for the insurer had told her over the phone that health status was not relevant to coverage.

Yafei Huang v. Life Ins. Co. of N. Am.

(Cont'd)

- The Eighth Circuit dismissed her claim, noting that the health status update requirement was clearly stated in the summary plan description and in the plan's application form.
- Lessons learned:
 - Emphasize key plan terms in your SPD and include reminders as often as feasible.
 - Train your staff on what to say, and what not to say, in response to participant and beneficiary questions.

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016)

Background:

- 37 year UPS employee was diagnosed with cancer and decided to retire upon becoming eligible. Not knowing that the employee was terminally ill, HR advised him to maximize his time on payroll by taking his accrued vacation and personal time → doing this, the employee delayed his retirement date.
- January 7, 2010: employee's last date of employment and employee submits retirement application, indicating that his annuity starting date would be March 1, 2010.
- Employee's children listed as beneficiaries of plan.

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016) Cont.

- Employee selected a “Single Life Annuity with 120-Month Guarantee” payment plan option selected → under this plan, a reduced benefit would be paid to the employee for his lifetime, with a guarantee of 120 payments.
 - Section 5.4 of Plan states: “[i]f a Participant **dies after the Annuity Starting Date** but before receiving 120 monthly payments, the monthly payments shall be paid to the Participant’s Beneficiary.”

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016) Cont.

- Retirement application **did not** state that the employee needed to survive the annuity starting (March 1, 2010) date as a prerequisite to the 120 payment guarantee; HR also never said this to employee.
- Retirement application did state, however, as follows: “I will receive a monthly benefit for my lifetime with a guarantee of monthly payments for a period of 10 years. If I die within the 10-year guarantee period, my beneficiar[ies] will continue to receive my monthly benefit amount for the remainder of the guarantee period.”

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016) Cont.

- **February 21, 2010:** employee passes away – before the March 1st annuity starting date → Plan's administrator sent O'Sheas a letter denying payments under annuity plan, explaining that the decedents spouse (if he had one) would be able to recover under the plan.

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016) Cont.

- O'Sheas appealed twice → appeals denied both times by the UPS Retirement Plan Administrative Committee.
- O'Sheas then filed suit, alleging a claims for (a) benefits under ERISA § 502(a)(1)(B); and (b) equitable relief under ERISA § 502(a)(3)(B) → District Court dismisses claim

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016) Cont.

- On appeal to the First Circuit, the dismissal is upheld:
 - plain language of Section 5.4 of Plan guarantees 10 years of payment if the participant survives the annuity starting date.
 - O'Sheas would have been eligible for benefits if their father passed away *after* the March 1st annuity starting date.
 - Since O'Shea passed away *before* March 1st, only his spouse/ domestic partner (if he had one) would be eligible to receive benefits.

O'Shea through O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 2016)

- First Circuit also notes that:
 - despite UPS not having cited specific provision of the plan, the court could still rely on those provisions as the O'Sheas were on notice of the implications of such provision → ERISA's notice provision was met.
 - Equitable relief also denied as any alleged misrepresentation made to the decedent when he selected his retirement benefits was released when the decedent executed the release of claims on February 2010—*after* the alleged misrepresentation had occurred.

Communicate, Communicate, Communicate

- Pay attention to legal requirements.
 - Make all required communications timely and in the manner required.
 - In some cases, you may need to look at providing some information in other languages.
 - If you comply electronically, make sure you have met all the proper criteria.
- Remember: Communication is a two-way street.

Communication in the Workplace

- All employee benefits communications should be careful, timely, accurate and complete.
- Training fund office staff, employer HR and benefits staff, supervisors and managers, and union stewards and business agents about acceptable statements, comments and actions are also critical steps to avoiding lawsuits.

Due Diligence



Due Diligence

- Due diligence means doing your homework.
- Investigate thoroughly: don't rely on stereotypes, hearsay, or assumptions.
- Due diligence is important in all aspects of plan administration from development of the SPD and the ensuring of consistent treatment, to the adoption of an investment policy and the careful selection of investments and the regular review and monitoring of same.

Due Diligence

- Stay current and get appropriate advice before taking the action
 - Retain appropriate expertise if you are not adequately qualified.
 - Remember to monitor the professionals that you do select; sift all recommendations with an eye to practicalities, financial and legal ramifications and public perception.
 - Document your review process and why you made the decisions you did.
 - Examples?
Tibble, Amgen, Montanile, Tyson Foods, Koning, Perez,
Severstal, Scoles

Tibble v. Edison International, 843 F.3d 1187 (9th Cir. 2016)

- U.S. Supreme Court ruled in unanimous statute of limitations decision that pension plan fiduciaries can be liable for **continuing** to include a particular investment option for a 401(k) plan, and not simply for the initial decision to include the investment option.
- Fiduciaries have a duty to monitor the continued prudence of earlier decisions.

Tibble v. Edison International, 843 F.3d 1187 (9th Cir. 2016) Cont.

Background:

- Edison sponsors a defined-contribution 401(k) Savings Plan. “[P]articipants’ retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses.” → expenses may “significantly reduce the value of an account in a defined-contribution plan.”
- This case concerns claim that Edison breached its fiduciary duties by offering “higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available”

Tibble v. Edison International, 843 F.3d 1187 (9th Cir. 2016) Cont.

- 6-year statute of limitations under relevant ERISA provision
- At least 3 of disputed funds were added *more* than 6 years before complaint was filed → case has been subject to a great deal of litigation

Ninth Circuit:

- Beneficiaries did not forfeit failure-to-monitor argument either on appeal or in the district court; Edison, on the other hand, did
- Phillips v. Alaska Hotel and Restaurant Employees Pension Fund, 944 F.2d 509 (9th Cir. 1991), which held that statute of limitations under 29 U.S.C. § 1113(2) begins when plaintiff has actual knowledge of breach does NOT apply . . .

Tibble v. Edison International, 843 F.3d 1187 (9th Cir. 2016) Cont.

Ninth Circuit:

- . . . when a plaintiff does not have actual knowledge of a breach of a continuing duty and when § 1113(l) applies, as in this case
- Case is remanded “on an open record for trial on the claim that, regardless of whether there was a significant change in circumstances, Edison should have switched from retail-class fund shares to institutional-class fund shares to fulfill its continuing duty to monitor the appropriateness of the trust investments”
- On remand, district court is to reevaluate beneficiaries’ request for attorneys’ fees and costs

Tibble takeaways

- Under trust law, a plan fiduciary is obligated to:
 - Regularly review all investment offerings
 - The timing and extent of which will depend on the surrounding circumstances, and
 - Dispose of imprudent investments within a reasonable amount of time.

Tibble takeaways, Cont.

- Trustees making investment-related decisions should always document all of their analysis, reasoning, and related efforts to show prudent decision-making processes.
- Valuation is always an issue for privately traded shares. See Perez v. Bruister. For publically-traded securities, it is much easier as the fiduciary can show its publically available market price.

Perez v. Bruister, 2016 WL 2343009 (5th Cir. 5/3/2016)

- Federal district court did not err in finding that owner of closely-held corporation acted as a fiduciary of ESOP and breached fiduciary duties by interfering with valuation process and sale of owners stock in the corporation to the ESOP.

Severstal Wheeling, Inc., et. al., v. WPN Corp., et. al., 659 Fed.Appx. 24 (2nd Cir. 2016)

Background:

- WPN and its sole employee, LaBow were named fiduciaries of two defined contribution plans sponsored for the employees of Severstal
- Plans were funded and maintained through trust sponsored by WHX Corp. (“Combined Trust”)
- Severstal separated from WHX → portion of assets transferred from the Combined Trust into a separate trust (“Severstal Trust”); before/after transfer, trust managed by WPN/LaBow
 - No liability imposed on WHX, *not* a fiduciary. See Severstal Wheeling, Inc. v. WHX Corp., 659 Fed.Appx. 28 (2nd Cir. 2016).

Severstal Wheeling, Inc., et. al., v. WPN Corp., et. al.,
659 Fed.Appx. 24 (2nd Cir. 2016) Cont.

- Following a bench trial, district court found that WPN and LaBow breached their fiduciary duties under § 3(21)(A)(ii) of ERISA, finding that:
 - WPN and LaBow were investment managers to the plans → they were fiduciaries → had discretionary authority and responsibility for administration of plans
 - LaBow had directed treasurer of WHX to transfer *all* of the assets in 1 account (undiversified portfolio) from the Combined to the Severstal Trust

Severstal Wheeling, Inc., et. al., v. WPN Corp., et. al.,
659 Fed.Appx. 24 (2nd Cir. 2016) Cont.

LaBow breached his fiduciary duties by selecting the assets in that account as the *only* asserts to be transferred AND never informed the Committee either .
..
... before or after the transfer which investments had been transferred knowing that the account manager for that 1 account was not going to manage the assets AND without taking steps to ensure the ongoing and prudent management of the assets.

Severstal Wheeling, Inc., et. al., v. WPN Corp., et. al.,
659 Fed.Appx. 24 (2nd Cir. 2016) Cont.

- Second Circuit holds that it had no basis to set aside the lower court's decision in light of LaBow's and WPN's failures to present any arguments that suggest that the lower court's factual findings were "clearly erroneous"
- Argument that they were not fiduciaries had also been rejected by lower court upon making explicit factual findings, and there was nothing on appeal to indicate findings were "clearly erroneous"

Due Process



Due Process

- Develop sound policies and procedures and adhere to them.
- Beware of overly complicated processes.
- Usually, processes should be in writing or otherwise clearly published.
- Importance of both procedural and substantive due process.
- Examples? Scoles, Jones, Waskiewicz

Scoles v. Intel Corp. Long Term Disability Benefit Plan, 657 Fed.Appx. 667 (9th Cir. 2016)

Ninth Circuit:

- As part of denying LTD benefits, ERISA requires a claims administrator to tell the claimant “in a manner calculated to be understood by the claimant,’ ‘[t]he specific reason or reasons for the adverse determination’ and ‘[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary.’” 29 C.F.R. § 2560.503–1(g)(1).
 - This in turns means that a “meaningful dialogue between ERISA plan administrators and their beneficiaries” is required.

Scoles v. Intel Corp. Long Term Disability Benefit Plan, 657 Fed.Appx. 667 (9th Cir. 2016) Cont.

- there was no “meaningful dialogue”
- denial of benefits letter did not explain why Scoles did not qualify for benefits, relying on the lack of sufficient “Objective Medical Findings” in Scoles’ claim file
- letter affirming denial of benefits was “opaque and uninformative” – did not provide Scoles with information concerning specific reason(s) for adverse determination

Ninth Circuit:

- holds that there was an abuse of discretion – Scoles was not given an opportunity to provide evidence so satisfy the “unexplained interpretation of the term ‘Objective Medical Findings’”

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago, 2016 IL 119618 (S. Ct. Ill., 2016).

- Illinois Supreme Court held that a state pension reform law was unconstitutional because it violated the state constitutional right to vested pension benefits for public employees.
- This case is one of many recent cases challenging cuts to expected public pension benefits for state and municipal employees. Unlike some states, however, Illinois has constitutional protections for statutory pension rights.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago Cont.

- The Illinois constitution provides: “Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago Cont.

- Facing a \$20 billion pension fund deficit in the city of Chicago, the state legislature passed a law reducing pension benefits and increasing required contributions by both employees and public employers. Union representatives were involved in drafting the law, and the vast majority of them supported it.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago Cont.

- Union members participating in two affected pension funds sued the funds, arguing the new law was unconstitutional. The city of Chicago intervened to defend the law.
- In effect, the Illinois constitutional pension protection clause creates vested, irrevocable benefits for employees and retirees once state law establishes those benefits.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago Cont.

- The Illinois Supreme Court agreed with the pensioners. The Court rejected the City's argument that the pensioners "benefited" from the new law by avoiding the pension funds' insolvency.
- The "benefits" protected, the Court held, were the annuity amounts to be received, with no regard to how the employers funded the plans, and so could not be reduced through legislation.

Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago Cont.

- Notably, the Court found the unions did not ratify the changes contained in the new law by their participation in drafting proposed language to the legislature.
- Unions, the Court held, could only waive constitutional pension rights for their members through the collective bargaining process. Here, no such process occurred.

Waskiewicz v. UniCare Life & Health Ins. Co., 802 F.3d 851 (6th Cir. Oct. 2/Dec. 7, 2015).

- Even with discretionary clauses, courts may still overturn claim determinations.
- This case presents a situation where the court overturned a claim denial that appeared entirely in accordance with plan terms because the court found the denial to be contrary to the “spirit of employer-provided health care benefits generally and with this Plan specifically.”

Waskiewicz v. UniCare Life & Health Ins. Co. Cont.

- Here, an employee had an emotional and mental breakdown for several months, and didn't report the reason for her absence from work until well after the required notification period for purposes of receiving disability benefits.
- She was terminated retroactively effective as of the first day of her absence.
- This termination date made her ineligible for disability benefits because she was not a “covered employee” at the time of disability onset.

Waskiewicz v. UniCare Life & Health Ins. Co. Cont.

- The court ruled in favor of the claimant, explaining:
 - “An insurance policy can hardly be said to provide employee disability ‘insurance’ at all if it protects against sudden disability but not if the employer immediately discharges the employee because of the disability before she gets a chance to apply for the benefits.”
- Lesson learned:
 - Remember fundamental fairness/the “smell” test
 - Hard facts make bad law.

Documentation



I HAD NO CHOICE, HIS DOCUMENTATION WAS WEAK.

Documentation

- The reasons for good documentation are many, not the least of which is that judges, juries, arbitrators, and administrative agencies expect it.
- Know the difference between good and bad documentation.
- Don't promise more documentation than you can deliver.
- Document facts rather than conclusions.
- Example: Tyson's Foods

Diversity



Diversity

- Age
- Gender
- Ethic Background
- Race
- Religion
- National origin
- Disability
- Color
- Gender identity
- Sexual orientation
- Military service or Veteran status
- Genetic Information

Diversity

- Primary Language
- Neighborhood/school attended
- Introvert or extrovert
- Understand directions more readily orally - don't read well
- Detail or big picture person
- Leader or follower
- Close talker/loud speaker/loner

Diversity

- Cultural competency is the watchword.
- Be sensitive to people's varying backgrounds and special needs.
- Develop a communication style that works for you and then adapt as needed to each individual's needs.
- Create an atmosphere of dignity and respect where each person feels that their contributions are valued and where diversity is celebrated.
- Be alert to possible accommodations that may be needed.
- Example: Obergefell, Transgender guidance.

Delay



Delay

- Act/Respond as promptly as possible under the circumstances.
- Always adhere to any time limits set forth in your CBA, policies, employee handbooks, or other relevant source.
- Document agreements to extend timelines.
- Investigations should be as prompt as possible under the circumstances.
- Keep employees informed of need for additional time.

Delay

- Be proactive – try to anticipate potential issues and plan your strategy ahead of time so that you can respond quickly.
- Example this year? Montanile.



Discrimination



Discrimination

- Avoid illegal discrimination or the appearance of it.
 - Remember an intent to discriminate is not necessary if there is an adverse disparate impact on a protected class.
- Consistency is perhaps the single most important guiding principle in handling workplace issues.

Discrimination

- This consistency should include:
 - Consistency with the plan document and SPD, CBA/handbook/policy and how they have been previously interpreted and applied to other employees.
 - Consistency among departments, divisions, locations, and supervisors.
 - Internal consistency vis-à-vis the employee.
 - Example: Obergefell, Abdus-Shahid.

Abdus-Shahid v. Mayor of City Council of Baltimore, 2017 WL 35725 (4th Cir. Jan. 4, 2017).

Background

- Plaintiffs were married in an Islamic ceremony in Baltimore, MD; they never obtained marriage license and/or marriage certificate. As part of their Muslim faith, the Plaintiff's believe that their relationship is governed by Islamic law and that do not need a marriage license and its contrary to their beliefs
- Abdus-Shahid worked as civil engineer for City's Dept. of Transportation → had health insurance and enrolled spouse/children. Following a city-wide audit, his spouse's insurance was revoked as he could not provide official court-certified state marriage certificate; marriage cert. insufficient

Abdus-Shahid v. Mayor of City Council of Baltimore, 2017 WL 35725 (4th Cir. Jan. 4, 2017).

- Plaintiffs then filed suit → district court dismissed complaint.

Fourth Circuit:

- First Amendment's Free Exercise clause
 - Plaintiffs' failed to articulate claim; individual is not excused from complying with neutral laws that are generally applied. City's requirement for court-issued certificate before recognizing any marriage for health insurance eligibility is "a valid and neutral law of general applicability"; requirement is "facially neutral"
- Maryland Local Government Tort Claims Act
 - Claim barred because Plaintiffs did not fulfill notice requirements.

Abdus-Shahid v. Mayor of City Council of Baltimore, 2017 WL 35725 (4th Cir. Jan. 4, 2017).

Fourth Circuit:

- Title VII claim
 - A plaintiff must pursue administrative remedies before filing a Title VII lawsuit; and a federal court may *only* consider the allegations asserted in an EEOC charge
 - Here, Abdus-Shahid’s disparate impact claim cannot survive motion to dismiss because it was not asserted in Abdus-Shahid’s EEOC complaint

Deceit



Deceit

- It is better to say nothing than to lie.
- Using a false reason for a job action can cause an inference of discrimination.
- Example Perez v. Bruister

Overview

- Part 1 - Maintaining Tax-exempt Status
- Part 2 - Key Documents Every Trust Should Have
- Part 3 - What It Means to Be a Fiduciary
 - » The New DOL Fiduciary Rules
- Part 4 - Selecting and Monitoring Providers
- Part 5 - Guiding Principles
 - » Spotlight: Communications and Disclosure
- Part 6 - **Key Takeaways**

The Guiding Principles: The D's

D's to Remember:

- Dignity
- **Discretion**
- Diversity
- **Disclosure**
- **Due Diligence**
- Due Process
- Documentation

D's to Avoid:

- Delay
- Discrimination
- Deceit

Questions



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