

Where Employers Get In Trouble: Fiduciary Duties

Brooks Magratten
Pierce Atwood LLP
Providence, RI

ERISA

Every

Ridiculous

Idea

Since

Adam



What Law Controls?

ERISA



Non-ERISA



When Does ERISA Apply?

- Private Employer or Union
- Employee Benefit Plan



What are ERISA Plans?

- Pension
- Health
- Sickness
- Accident
- Disability
- Life Insurance
- AD&D Coverage
- Vacation
- Apprenticeship or Training
- Day Care Services
- Scholarship Funds
- Prepaid Legal Services

Church Plans



Government Plans



Ms. Smith comes to see you...



Safe Harbor



Can You Have Just a Little ERISA?



Why Do We Care?

- Reporting: Form 5500
- Fiduciary Duties
- Plan Documentation
- Plan amendments
- Statutory Penalties
- Minimum Funding Requirements
- PBGC protection
- Claim Procedures
- Litigation Benefits

Who Are The Fiduciaries?

FIDUCI - WHAT?

Fiduciaries

A person is a fiduciary to the extent they:

- i. Exercise any discretionary authority or discretionary control respecting plan management or exercises any authority or control respecting management or disposition of assets;
- ii. Render investment advice for a fee or other compensation;
- iii. Have any discretionary authority or discretionary responsibility in the administration of the plan.

Prohibited Transactions

A fiduciary...shall not cause a plan to engage in:

- A. sale or leasing of property between the plan and a party in interest;
- B. lending money between a plan and a party in interest;
- C. furnishing goods, services...between a plan and party in interest;
- D. transfer of plan assets to a party in interest;
- E. acquisition of employer security or real property in violation of §407(a).

Fiduciary Duties Regarding Pension Plans

- Act solely in the interest of Plan participants and beneficiaries
- Carry out duties prudently
- Follow Plan documents
- Diversify Plan investments
- Pay only reasonable Plan expenses

Hiring a Service Provider

- Research before hiring
- Understand the scope of services provided
- Interview provider
- Understand the fee structure
- Document, document, document

Fees

- Fees paid to a vendor must be reasonable.
- Plan's administrative expenses must be reasonable.

Litigation Against Investment Houses

- Brotherston v. Putnam Investments
(1st Cir. Oct. 15, 2018)
 - › Failure to offer diverse investment options.
 - › Putnam charged employees top fees.
 - › First Circuit allows class action to proceed.



Litigation Against Academia



Vellali v. Yale University

(D. Connecticut March 30, 2018)

- Yale's 403(b) Plan
- Allegations of breach of fiduciary duties of prudence and loyalty.
- Fiduciaries engaged in prohibited transactions.

Vellali v. Yale University

- Yale imprudently entered into a “bundled services” contract with TIAA-CREF.
- Investment Committee failed to scrutinize underperforming investment options.
- Plan entered into unfavorable fee arrangements for recordkeeping services.
- Plan offered too many investment options.

Cassell v. Vanderbilt University

(M.D. Tennessee, Jan. 5, 2018)

- Breach of duties of loyalty & prudence.
- Prohibited transactions.
- Plan locked into certain TIAA-CREF investments.
- Plan failed to solicit competitive bids for recordkeeping services.
- Plan had too many recordkeepers.
- Plan Administrator failed to supervise.

Tracey v. MIT

(D. Massachusetts, Oct. 19, 2018)

- MIT retained “imprudent and excessive cost investment options that enriched Fidelity at the Plan’s expense.”
- MIT allowed Fidelity to collect excessive recordkeeping and administrative expenses.
- MIT engaged in prohibited transactions.

Liability for Breach of Fiduciary Duty

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries shall be personally liable to make good to such plan any losses to the plan and to restore to the plan any profits which have been made through use of plan assets....

Failure to Provide Plan Documents

A Plan administrator's failure to respond to a written request for plan documents within 30 days can result in a penalty of up to \$100 per day of noncompliance.



What are Plan Documents?



- Plan Document
- SPD
- Insurance Policy
- Annuity Contract
- Trust Agreement
- Certificate of Insurance
- Internal memos

Impact of *Cigna v. Amara*

What happens when the HR Department misrepresents benefits to which an employee may be entitled?



Courts Can Order Plan Reformation

Amara opens door to plan reformation and estoppel as a basis to change Plan terms.



ERISA §510 Claims



No person may discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which they are entitled under a Plan.

So What Does This All Mean?



- Know if you are in ERISA
- Know who the fiduciaries are
- Have fiduciary liability coverage
- Perform a Plan audit regularly

Questions?



Presenters

Brooks Magratten

One Financial Plaza,
Suite 2600
Providence, RI 02903

PH / 401.490.3422