
ERISA Litigation Update

BY:

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American Health Care Act of 2017

- A reconciliation bill that originated in the House Committees on Ways and Means and Energy and Commerce
- After a number of setbacks, passed by the House on May 4, 2017
- Repeals and replaces many spending and revenue related ACA provisions
- Also includes some provisions that arguably are questionable under a literal reading of the Byrd Rule
- Addresses Medicaid, the individual market, GHPs and various other healthcare rules
- Senate has stated it will not vote on the AHCA in its current form.

Employee Benefit Litigation Update

- ❑ Supreme Court – “church plan” cases
 - ❑ Shows entrepreneurial nature of plaintiffs’ bar.
 - ❑ Challenging 30+ year settled construction of statute
 - ❑ Had substantial success, but Supremes may have ended it though

- ❑ Dave & Buster ERISA Sec. 510 litigation:
 - ❑ Section 510 claim against Employer
 - ❑ Significant exposure to employer

- ❑ Fee litigation:
 - ❑ Major exposure area for employers with 401(k) and 403(b) plans
 - ❑ Have later presentation dedicated to ways to limit exposure

Church Plan Cases – Background

- ❑ Beginning in April 2013 two lead plaintiff's firms (Keller Rohrback and Cohen Milstein) started suing large Catholic and other religiously affiliated healthcare systems, claiming their pension plans were not ERISA-exempt "church plans."
- ❑ We won our case, *Overall v. Ascension Health*, but string of losses in other cases, *Dignity Health*, *Saint Peters*, and *Advocate Health*. Plaintiffs were 3-0 at appellate courts.
- ❑ Other plaintiffs' firms jump in, start suing:
 - ❑ More that 30 church-affiliated organizations sued to date.
 - ❑ Over 500 Private Letter Rulings recognizing "church plans"; estimate may be more than thousand religiously affiliated pension plans at risk.

Church Plan Cases –The Issue and the Supreme Court Ruling

Supremes granted cert petition in *Dignity Health, Saint Peters*, and *Advocate Health*.

- ❑ The lead issue is whether a church must “establish” the “church plan,” or whether ERISA permits a church-affiliated entity to both maintain and establish the plan.
 - ❑ Meaning of “include” in the statute. Statute says “church plan” is a plan established and maintained by a church, and that a “church plan” **includes** a plan maintained by a church-affiliated organization.
 - ❑ *Ascension*: If A is exempt and A includes C then C is exempt.
 - ❑ Plaintiffs nonetheless developed clever arguments why “include” should be read narrowly.
- ❑ In *Advocate* in 8-0 decision Supremes adopt natural reading of include that we won on in *Ascension*.

Church Plan Cases – Issues Post Supreme Court

- Is the organization controlled by or associated with a church?
 - First Amendment gives churches a protected zone in which to decide who is within their religious community, and how to organize their “good works” ministries.
- What is the “principal purpose” organization that can maintain the “church plan”?
 - Likely the main issue left.
 - IRS accepted internal plan benefit committees.
 - Sufficient? Correction rights if not?

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- Basic elements to establish ERISA § 510 violation:
 - The plan is an employee benefit plan within the meaning of either section 3(1) or 3(2) of ERISA and meets the coverage requirements of section 4 of ERISA.
 - The complainant is a participant or beneficiary of the plan within the meaning of section 3(7) or 3(8) or is a person who has given information, testified, or is about to give testimony relating to ERISA.
 - The complainant was discharged, fined, suspended, expelled, disciplined, or discriminated against for exercising any right to which the complainant is entitled under the provisions of an employee benefit plan, Title I of ERISA, or section 3001 of ERISA, or for the *purpose of interfering with the attainment of any right to which the complainant may become entitled under the plan*, or Title I of ERISA . . .

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The Class Action Complaint:

In *Dave & Buster's*, plaintiff's filed a complaint alleging that the company impermissibly reduced workers' hours to avoid its obligations under the Affordable Care Act's employer mandate.

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Maria De Lourdes Parra Marin, the named plaintiff, alleged that she regularly worked over 30 hours at Dave & Buster's Times Square location until mid-2013, when her hours (and those of hundreds of other employees) were reduced, allegedly to prevent her from maintaining full-time status, thereby causing her to lose health coverage eligibility under the company's group health plan.

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Cause of Action:

The sole cause of action is that the Dave & Buster's violated ERISA 510 [29 U.S.C. 1140] by "converting Plaintiff and the class from full-time to part-time status, Defendants interfered with the attainment of their rights to participate in the Dave & Buster's [health] Plan...."

Remedies Sought:

1. Immediate Reinstatement;
2. Class equitable restitution to make Plaintiff and Class whole for the loss of wages and benefits with interest;

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3. Equitable restitution to make Plaintiff whole for the costs of health insurance and reimburse Plaintiff and Class for the any out of pocket costs for medical claims that would have been paid in whole or in part as if they and their beneficiaries had continued to participate in the Dave & Buster's Plan; and
4. Reasonable Attorney's Fees.

Fee Litigation – Issues and Recent Developments

- ❑ Plaintiffs' firms started filing these suits in mass in 2006.
- ❑ By 2015, Plaintiffs' firms had achieved substantial financial success:
 - ❑ An August 2015 article noted that the firm (Schlichter) that started bringing many of the ERISA fee lawsuits in 2006 has collected \$70 million in fees to date.
 - ❑ In April 2015 in *Haddock v. Nationwide* a \$140 million settlement was approved that included attorney's fees and expenses of more than \$50 million.
 - ❑ In July 2015 on the eve of trial, *Abbott v. Lockheed Martine* settled for a \$62 million payment that included \$22.3 million in attorney's fees and \$160,000 in incentive awards for named plaintiffs.

Fee Litigation – Issues and Recent Developments

- ❑ Experience in the cases has shown that ERISA fee litigation operates like *hydraulic pressure*, probing for liability from any weak aspect of plan management and administration, even if the 401(k) or 403(b) plan is overall collectively sound and well managed.
 - ❑ *E.g.*, plaintiffs may bring 10 claims, lose on 9, and yet win substantial fees and recovery on the one claim in which they won.

Fee Litigation – Issues and Recent Developments

- ❑ Plaintiffs continue to file fee suits at record pace:
 - ❑ Have targeted plans as small as \$9 million in plan assets.
 - ❑ Started suing non-profit institutions offering 403(b) plan.
 - ❑ Keep expanding and developing theories of potential liability, e.g., even challenging the offering of Vanguard index funds.

Fee Litigation – Issues and Recent Developments

- ❑ Some defense wins acquiring immediate dismissal, but because of fact-intensive nature of the claims, many get into expensive and burdensome discovery.
 - ❑ Plaintiffs use this discovery to probe for more claims – the hydraulic pressure problem.
 - ❑ Costs of discovery can be in millions, document and witness intensive, need for extensive experts.

Fee Litigation – Issues and Recent Developments

- ❑ Wins in *Disney* and *Chevron*. Will talk about in more detail later on ways to mitigate exposure, but they illustrate:
 - ❑ Advantages of having a mix of investment options, including low-cost index funds.
 - ❑ Helps chances of quick dismissal if can show that are monitoring funds by removing persistent poor performers, and by seeking lowest-cost share classes.