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# ERISA Recent Developments of Interest

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# Overview topics

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- ❑ DOL Fiduciary Rule – Current status and implication for plans and service providers.
  
- ❑ Litigation developments:
  - ❑ Recent support for plan venue provisions and other plan terms that can lower plan costs
  - ❑ Supreme Court Church Plan ruling
  - ❑ Dave & Buster's Section 510 claim for cutting hours to avoid benefits
  - ❑ Fee litigation on 401(k) and 403(b) plans
  - ❑ Mental health parity litigation

# DOL Fiduciary Rule Update

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- ❑ Current status of rule:
  - ❑ Beginning June 9, 2017:
    - ❑ Broader definition of investment fiduciary applies
    - ❑ Subject to duty to act in best interests of participants
  - ❑ Other aspects of rule in limbo – DOL seeking to extend applicability date until July 1, 2019.
- ❑ Lots of court challenges to the new rule. DOL has won to date, though had hostile questioning in recent argument in Fifth Circuit.
- ❑ What does this mean for plans and service providers:
  - ❑ Broader definition of who is a fiduciary to the plan
  - ❑ Potential greater protection for plan and participants, but broader fiduciary duty to appoint and monitor service providers.

# DOL Fiduciary Rule Update

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- ❑ Investment advice fiduciary: (i) “call to action” regarding investments or investment management (ii) for which receive direct or indirect compensation.
  - ❑ E.g., investment lineup in a plan; rollover from plan to IRA.
  - ❑ Note employees of company offering 401(k) plan generally not covered since not receiving compensation for any investment advice offered employees. Cf. if bonus for signing up for certain investments.
  
- ❑ Parts of rule currently applicable:
  - ❑ Broad definition of fiduciary investment advice
  - ❑ Comply with impartial conduct standards: (i) receive no more than reasonable compensation, (ii) act prudently and in client’s best interest, and (iii) refrain from making misleading statements.

# DOL Fiduciary Rule Update

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- ❑ Parts in limbo until July 2019:
  - ❑ Creating contractual rights to enforce rules on IRA rollovers.
  - ❑ More stringent requirements on selling certain annuities.
  - ❑ Other BIC exemption requirements on procedures.
  
- ❑ Some key recent clarifications:
  - ❑ Recommendations to participate and contribute to a plan are not fiduciary as long as they do not include recommendations with respect to specific investments.
  - ❑ Providers have some relief on 408b-2 disclosures – though do need to disclose accurate and complete description of services if they would be providing fiduciary investment advice under the new rule.

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# ERISA Litigation Developments

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If you could save your  
company \$100,000 would  
you?

# Plan Venue Provisions – Actions You Can Take to Lower Plan Costs

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- ❑ ERISA has broad venue provisions that typically allow a plaintiff to sue wherever he resides, even if far from where employer operates and plan is administered. E.g., participant retires and moves to Alaska.
- ❑ DOL has argued that these venue options are mandatory, but courts to date have disagreed. Plans CAN limit venue to where they are administered unless there are exceptional circumstances. *E.g., In re Mathias*, 2017 WL 3431723 (7<sup>th</sup> Cir. August 10, 2017).



# Other Plan Provisions – Actions You Can Take to Lower Plan Costs

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- ❑ To lower costs, plans can limit lawsuits to where they are administered.
- ❑ Other plan provisions that courts have approved to lower costs:
  - ❑ Plan statute of limitations limiting time in which participant can bring suit.
  - ❑ Anti-assignment clauses to block suits by out-of-network providers.
  - ❑ Arbitration provisions that can block or limit class actions (where current battles are being fought).
- ❑ Each of these areas has complex requirements to meet, and requires advice of knowledgeable plan counsel to be successful. But plan savings can be dramatic.

# ERISA 101

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- Review Plan Documents
- Review Plan Operations
- Review Benefit Offerings
- Review Communications to Employees

# Supreme Court “Church Plan” Ruling – Some Background

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- ❑ 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 than 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

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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

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- 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?

# Dave & Busters

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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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# Dave & Busters

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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.

# Dave & Busters

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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.



# Dave & Busters

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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;

# Dave & Busters

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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

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- ❑ Plaintiffs' firms started filing these suits in mass in 2006.
- ❑ By 2015, Plaintiffs' firms had achieved substantial financial success:
  - ❑ 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 Martin* settled for a \$62 million payment that included \$22.3 million in attorney's fees and \$160,000 in incentive awards for named plaintiffs.
- ❑ Firm that started this litigation in 2006 (Schlichter Bogard) has made \$111 million in fees to date

# Fee Litigation – Issues and Recent Developments

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- 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

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- ❑ 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

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- ❑ 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

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- ❑ 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.

# ACA and Federal Mental Health Parity Act: Benefit Mandates Leading to Litigation

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## Federal Mental Health Parity Act:

- Financial requirements (copayments, coinsurance, deductibles, etc.) and treatment limitations (limitations on the frequency of treatment, number of outpatient visits, amount of days covered for inpatient stays, etc.) applicable to mental health benefits generally can be no more restrictive than those applied to medical benefits.
- Many similar state Acts also exist.
- Federal Parity Act applies to **plans with 50 or more employees**. Enforced through ERISA under the Federal Parity Act.

Causing major changes in how mental health benefits are evaluated and paid.



# ACA and Federal Mental Health Parity Act: Benefit Mandates Leading to Litigation

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The DOL's final rules on the Federal Parity Act went into effect in 2014:

- These rules demand parity on **non-quantitative treatment limitations**, such as medical management standards; medical necessity or medical appropriateness determinations; formulary design for prescription drugs; standards for admission to plan provider networks; determining usual, customary, and reasonable fee charges; implementing “fail first” policies

This expansion is leading to more litigation. Currently targeting insurers and large employers. Current indirect impact on small and mid-market employers; but plaintiffs typically expand who sue if successful.

# ACA and Federal Mental Health Parity Act: Some Recent Litigation Examples

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*Alexander v. United Behavioral Health*, No. 14-CV-02346-JCS, 2015 WL 1843830 (N.D. Cal. Apr. 7, 2015). Participants in a plan administered by United Behavioral Health filed a class action complaint against UBH.

- Alleged that UBH coverage guidelines are more restrictive than generally accepted standards in the mental health community.
- Upon a motion to dismiss, court held that Plaintiffs stated a claim against UBH for breach of fiduciary duty and improper denial of benefits under ERISA.

*Wit v. United Behavioral Health*, 2016 U.S. Dist. Lexis 127435 (N.D. Cal. Sept. 19, 2016), approved nationwide class under different plans, for claim that UBH committed a fiduciary breach by applying its guidelines.

# ACA and Federal Mental Health Parity Act: Some Recent Litigation Examples

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*New York State Psychiatric Ass'n., Inc. v. UnitedHealth Group, et al.*, 980 F.Supp.2d 527 (S.D.N.Y. 2013). Various plaintiffs filed class action complaint against their various benefit plans' insurers after not being fully reimbursed for mental health benefits. Alleged that UnitedHealth adopted improper standards for coverage of mental health care

- Required “compelling evidence” that psychological conditions would deteriorate without care
- Preapproval for mental health services

District Court thought claims had substantive merit, but dismissed them because United was not the “plan administrator” for the plans at issue.

# ACA and Federal Mental Health Parity Act: Some Recent Litigation Examples

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*New York State Psychiatric Ass'n., Inc. v. UnitedHealth Group, et al.*, 2015 WL 4940352 (2d Cir. Aug. 20, 2015). On appeal, Second Circuit reverses dismissal, and remands case to district court:

- A claims administrator that controls the claim for benefits may be sued under ERISA § 502(a)(1)(B) in a claim for benefits.
- Medical associations have broad standing to assert the claims of their medical providers (who typically rely on assignment of the plan participants' rights to benefits).

Will make benefit claims seeking to enforce the Parity Act and ACA easier to pursue, may also make “systemic” litigation by provider groups against insurers who handle thousands of plans easier as well.