

**By:
Al Holifield
and
Kelly Mann**

**Holifield Janich Rachal
Ferrera, PLLC**

**Knoxville, TN
Chicago, IL
New Orleans, LA
Washington, D. C.
aholifield@holifieldlaw.com**

**Phone: (865) 566-0115
Fax: (865) 566-0119**

ERISA Recent Developments of Interest

Overview Topics

Litigation developments:

- **U.S. Chamber of Commerce v. U.S. Department of Labor (2018 WL 3301737)**
- **Divane et al. v. Northwestern University et al. (U.S. District Court, ND Illinois 1:16-cv-08157)**
- **Patterson v. Capital Group Companies, Inc., et al. (2018 WL 748104)**
- **CNH Industrial N.V., et al. v. Jack Reese, et al. (583 U.S. __ (2018))**
- **American Orthopaedic & Sports Medicine v. Independence Blue Cross Blue Shield, No. 17-1663, 2018 WL 2224394 (3d Cir. May 16, 2018)**
- **Recent support for plan venue provisions and other plan terms that can lower plan costs**
- **Fee litigation on 401(k) and 403(b) plans**

Overview Topics – Non-litigation

- Bipartisan Budget Act of 2018 (“Budget Act”)
- IRS Determination Letter Program for 2019
- Wellness Program Update
- New Disability Regulations – Effective April 1, 2018
- DOL Audits
- Fiduciary Duties

ERISA Litigation Updates

U.S. Chamber of Commerce v. U.S. Department of Labor (17-10238)

- The court of appeals in a 2 to 1 decision decided to invalidate the Fiduciary Rule.
- The DOL did not appeal the ruling.
- So, all that stuff we told you about last year you can forget!

Divane et al. v. Northwestern University, et al. (1:16-cv-08157)

Another win for the Employers!

This case was a lawsuit against the colleges' retirement plans alleging that the proprietary funds were charging too high of fees and were underachieving in the market place.

Patterson v. Capital Group Companies, Inc., et al. (CV 17-4399 (PJWx))

Another win for Employers!

Capital Group was sued alleging that Capital received higher fees on their proprietary funds. Fiduciaries are required to look at more than just pricing when choosing investment options.

CNH Industrial N.V., et al. v. Jack Reese, et al. (583 U.S. __ (2018))

Another win for employers!

The U.S. Supreme Court ordered the Sixth Circuit to interpret vesting rights of participants using ordinary contract principals. The Sixth Circuit, in a prior case, had created the “Yard-Man” rule which stated when analyzing collective bargaining agreements there is a presumption of vesting.

Vellali v. Yale University, 308 F.Supp.3d 673

Well you can't win them all!

Complaint alleged that fiduciaries breached three fiduciary duties:

- Duty of loyalty
- Duty of prudence
- Duty to avoid engaging in a prohibited transaction

The Court dismissed the breach of loyalty claim but allowed the prudence and prohibited transaction claim to proceed.

**American Orthopedic & Sports Medicine v.
Independence Blue Cross Blue Shield, No. 17-1663,
2018 WL 2224394 (3d Cir. May 16, 2018)**

The Third Circuit joined six other circuit courts holding that a health plan can enforce its anti-assignment clause.

ERISA Non- Litigation Updates

IRS Determination Letter Program for 2019

It appears that the IRS will allow individually designed retirement plans to participate in the determination letter (“DL”) program in 2019. This would be a welcome move for employers and other plan sponsors, who have been unable to obtain determination letters with respect to most ongoing plans.

Recent Trends in DOL Investigations and IRS Audits

- DOL's regular program of issuing advance guidance and enforcing the statute continued in a more conventional manner and produced a variety of results.
- Was your employee benefit plan selected for an audit? If so, do not panic.

Bipartisan Budget Act of 2018

The BBA amends Section 401(k) of the Internal Revenue Code (“Code”) to permit the withdrawal of the following amounts, in addition to elective deferrals, in the event of hardship:

- qualified nonelective contributions (“QNECs”)
- qualified matching contributions (“QMACs”)
- safe harbor contributions (other than QACA safe harbor contributions that are subject to a vesting schedule)
- earnings on the above contributions *and* on elective deferrals

The BBA also amends Code Section 401(k) to provide that a participant is not required to take any available loan under the plan before taking a hardship withdrawal.

The BBA is effective for plan years beginning after December 31, 2018.

Wellness Program Update

- What happens when HIPAA meets GINA and then runs into the ADA?
- The answer: *AARP v. EEOC*, 267 F.Supp.3d 14 (D.D.C. 2017).

New Disability Regulations – Effective April 1, 2018

The new rules contain:

- mandatory independent claims review;
- additional opportunities for claimants to review and respond to any new information or rationale used in denying a claim;
- additional content requirements for benefit denial notices;
- the treatment of certain rescissions of coverage as denials of benefits that trigger the plan's appeals process; and

New Disability Regulations – Effective April 1, 2018

- the provision of English language assistance and foreign language versions of applicable notices.
- If an affected plan fails to follow the new procedures, a participant whose disability-related claim is denied will generally be deemed to have exhausted administrative remedies and may immediately file a suit for benefits.

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

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

- 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 (7th Cir. August 10, 2017).

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

- 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.

Fiduciary Duties and Process

What are your fiduciary duties?

- Duty of loyalty
 - Prohibited transaction issues arise out of this duty
- Duty of prudence
 - Duty to monitor service providers arises out of this duty
 - This duty is about the process
- Duty to diversify
- Duty to follow the terms of the plan (except when in conflict with ERISA)

ERISA 101

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