

**By:  
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# **ERISA Recent Developments of Interest**

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# Overview Topics

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## 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

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- Bipartisan Budget Act of 2018 (“Budget Act”)
- IRS Determination Letter Program for 2019
- Wellness Program Update
- DOL Audits
- IRS EPCRS
- Fiduciary Duties

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# ERISA Litigation Updates

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

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- 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)

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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))**

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**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))

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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

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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)**

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

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# ERISA Non- Litigation Updates

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# IRS Determination Letter Program for 2019

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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

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- 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

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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

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- 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).

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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.

# Fiduciary Duties and Process

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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

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