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Recent Court Decisions Extend the Statute of Limitations for Breach of Fiduciary Duty Lawsuits under ERISA

by Kimberly S. Couch on September 30, 2021

ERISA Fiduciary Duties and Liability

Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), a plan fiduciary must (i) act prudently, for the exclusive purposes of providing benefits to plan participants and defraying plan expenses, and in accordance with plan documents, and (ii) invest plan assets to minimize the risk of large losses, unless it is clearly prudent not to do so.[1] A fiduciary must not engage in self-dealing or other prohibited transactions under ERISA.

A plan fiduciary may be held personally liable to make up any losses to a plan resulting from a breach of fiduciary duties, and may be subject to monetary penalties, excise taxes, and injunctive relief. As a general rule, fiduciary liability is established through governmental audits by the Department of Labor ("DOL") and the Internal Revenue Service ("IRS"), and civil actions brought by the DOL, IRS, and plan participants.[2]

Statute of Limitations for Breach of Fiduciary Duties

ERISA contains a statute of limitations for commencing actions based on a breach of fiduciary duties under ERISA. Specifically, Section 413 of ERISA states that no action may be commenced with respect to a fiduciary's breach of responsibility, duty, or obligation or a violation of ERISA's fiduciary provisions after the earlier of:

- six years after (i) the date of the last action which constituted a part of the breach or violation, or (ii) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation; or
- three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.[3]

Accordingly, the statute of limitations for bringing a claim based on an ERISA fiduciary breach or violation is six years unless a plan fiduciary can establish that the claimant had actual knowledge of the breach, which allows the shorter, three-year statute of limitations to apply. The term "actual knowledge" is not defined in ERISA.

ERISA requires plan fiduciaries to disclose substantial information about the plan and plan benefits to participants and beneficiaries. It also imposes stringent reporting requirements on plan fiduciaries, including the filing of annual reports (Form 5500) with the DOL. The DOL has issued detailed regulations and other official guidance mandating the timing, content, and method of providing these disclosures and reports. These rules presume that participants and the DOL review information contained in disclosures and reports. Thus, it appears reasonable to conclude that "actual knowledge" of a fiduciary breach relating to information contained in a participant disclosure or government report should be imputed from the date of the disclosure or report, triggering the three-year statute of limitations for suits against plan fiduciaries. Nevertheless, the U.S. Supreme Court has not agreed with this analysis.

Recent Court Cases on ERISA Statute of Limitations

In 2020, the United States Supreme Court issued a decision in Intel Corp. Investment Policy Comm. v. Sulyma stating that a participant must be aware of information to have "actual knowledge" for purposes of ERISA's statute of limitations. Although the participant did not deny receiving written disclosures about a plan's investments, he testified that he did not remember reading the disclosures and was not aware of their contents. Accordingly, the Court declined to apply the shorter three-year statute of limitations that would have barred the participant's claim for a breach of fiduciary duty. Please see our blog titled Supreme Court: written disclosure not enough to show actual knowledge in ERISA suits for a review of the decision.

Recently, the DOL successfully argued that the Supreme Court's decision in *Sulyma* should serve as precedent to extend the statute of limitations for the DOL to bring fiduciary breach claims against plan fiduciaries. *In* Walsh v. Bowers, 2021 WL 4240365 (D.HI Sept. 17, 2021), the defendant (Bowers) argued that ERISA's three-year statute of limitations for fiduciary breach cases should apply to bar the DOL's lawsuit because the DOL had actual knowledge of the alleged fiduciary breach when the defendant filed a Form 5500 for its plan. The defendant maintained that the Form 5500 filed in October of 2013 contained sufficient information to alert the DOL of the alleged breach. The DOL countered that it did not have actual knowledge of the breach as of the date of the Form 5500 filing because the government did not review the filing until December 2014. The United States District Court for the District of Hawaii held for the DOL, finding that the DOL did not have actual knowledge until it reviewed the Form 5500 in December of 2014. The District Court acknowledged (as the United States Supreme Court had in the *Sulyma* case) that actual knowledge could be attributed to a plaintiff if the plaintiff was "willfully blind" to information presented regarding a fiduciary breach, but it found that the defendant had not presented evidence establishing willful blindness by the DOL.[4]

Takeaways for Plan Fiduciaries

The U.S. Supreme Court's decision in *Sulyma* and reliance on that decision by the District Court in the *Bowers* case have significantly weakened the three-year statute of limitations defense for fiduciary breach cases based on actual knowledge of a breach.

In light of these decisions, plan fiduciaries should take the following actions to foreclose fiduciary breach suits and make the strongest possible case to have a fiduciary breach suit dismissed.

- Follow a prudent process in making fiduciary decisions and document the process and decisions made.
- Ensure participant disclosures and government reports comply with ERISA and pertinent DOL and IRS regulations and retain records of disclosure, such as certified mail, electronic read receipts, participant responses, and DOL notification of filings as evidence of a claimant's actual knowledge. (But recognize that these actions may not trigger the three-year statute of limitations if the recipient claims failure to read the disclosure/report or remember the content.)
- If a violation or possible breach occurs, take action to correct the violation or breach using the IRS Employee Plans Compliance Resolution System and the DOL Voluntary Fiduciary Correction Program as appropriate. If a prohibited transaction occurs, timely file IRS Form 5330 and pay the applicable excise tax.
- Ensure plan claims and appeals procedures are up to date and follow them.
- Consider adding a forum selection clause to your plan documents to specify the jurisdiction for filing lawsuits against the plan and plan fiduciaries.

A plan fiduciary may be sued for a breach of fiduciary duty even if the fiduciary has been diligent in taking the actions described above. Accordingly, plan fiduciaries should ensure that there is an adequate fiduciary insurance policy in place to cover claims, litigation expenses, monetary awards, and excise taxes.

Please contact a member of Verrill's Employee Benefits & Executive Compensation Group if you have any questions about the cases discussed in this blog or on ERISA fiduciary compliance generally.

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[1] A plan fiduciary is anyone who has or exercises discretionary authority or control with respect to plan administration or assets or is paid to invest plan assets or provide investment advice for a fee or other remuneration.

[2] Although ERISA fiduciary violations are under the DOL's jurisdiction, the DOL and IRS jointly review Form 5500 filings, and a plan fiduciary's failure to comply with IRS regulations and reporting requirements may be treated as an ERISA fiduciary breach.

[3] Prior to 1987, the ERISA statute of limitations contained a constructive knowledge provision that allowed the three-year statute of limitations to commence from the earliest date on which the plaintiff could have been expected to obtain knowledge of a breach or violation.

[4] The Supreme Court in *Sulyma* acknowledged that a claimant should not be able to indefinitely extend the statute of limitations by willfully refusing to review documents.

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