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What to Expect from Washington with a New White House and Congress: Critical Legislative and Judicial Issues That Will Affect Employers

December 3, 2008

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Introduction

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Topics to Discuss

- Title VII
- Pay Discrimination
- Arbitration
- ADAAA
- FMLA
- GINA
- Pension Protection
- 401(k) Fiduciary Liabilities

Title VII and Pay Discrimination

Ledbetter and Progeny

- *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).
- *Ledbetter* makes clear that a plaintiff can challenge only discrete acts of alleged discrimination within the applicable limitations period, *i.e.* 180 or 300 days for Title VII.
- Current effects of past discrimination are not actionable, *e.g.*, each paycheck does not cause a new claim to accrue.
- Focus is on pay and promotion (and other decisions) during proposed liability period, *e.g.*, starting pay for new employees and pay increases for existing employees.

Fair Pay Restoration Act (H.R. 2831)

- Bill # S.1843 (related bill—H.R. 283, Ledbetter Fair Pay Act passed in July 2007).
- Designed to rebut ruling in *Ledbetter* and to amend Title VII and the ADEA “to clarify that an unlawful practice occurs each time compensation is paid pursuant to a discriminatory compensation decision or other practice, and for other purposes.”

Fair Pay Restoration Act (H.R. 2831)

- On April 23, opponents of H.R. 2831 blocked the Senate vote on the bill by a narrow margin.
- 57 senators voted to consider the bill – just three votes shy of the 60 needed. In a procedural move before the vote closed, Maj. Leader Harry Reid (D-NV) switched his vote to "no" so he could move to reconsider, making the final official tally 56-42 (with 2 senators not voting)

Fair Pay Restoration Act (H.R. 2831)

- Amends Title VII and ADEA; applies to ADA and Rehabilitation Act
- Re: discrimination in compensation, an unlawful act occurs
 - when a discriminatory compensation decision or other practice is adopted;
 - when an individual becomes subject to a discriminatory compensation decision or other practice; or
 - when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Fair Pay Restoration Act (H.R. 2831)

- Plaintiff may seek “recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”

Possible Responses to *Ledbetter* by Plaintiffs' Bar if Act Does Not Pass

- Possible arguments regarding what constitutes a “pay decision” that causes a claim to accrue, *i.e.* the decision not to give a pay increase
- Possible arguments regarding application of the discovery rule to pay claims, which may create individual issues rendering class certification inappropriate
- Possible resurgence of Equal Pay Act claims
 - Only for gender discrimination claims
 - Generally a two-year statute of limitations (three years for “willful” violations)
 - Proceed under FLSA opt-in certification procedure
- Possible state or local pay class claims, triggering longer statute of limitations periods

Paycheck Fairness Act (H.R. 1338)

- Amends the Equal Pay Act to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages.
- Revises the exception to the prohibition for a wage rate differential based on any other factor other than sex. Limits such factors to bona fide factors, such as education, training, or experience.

Paycheck Fairness Act (H.R. 1338)

- Bona fide factor defense shall apply only if the employer demonstrates that such factor:
 - is not based upon or derived from a sex-based differential in compensation;
 - is job-related with respect to the position in question; and
 - is consistent with business necessity.
- Defense does not apply where the employee demonstrates that:
 - an alternative employment practice exists that would serve the same business purpose without producing such differential; and
 - the employer has refused to adopt such alternative practice.

Paycheck Fairness Act (H.R. 1338)

- Eliminates the “establishment” comparator
- Prohibits retaliation for
 - inquiring about, discussing, or disclosing the wages of the employee or another employee
 - making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, hearing, or action under section 6(d) (sex discrimination)
- Makes compensatory and punitive damages available for sex discrimination claims
- Allows Rule 23 class actions available for sex discrimination claims
- Provides for the EEOC to collect pay information as described by the sex, race, and national origin of employees

Employment Non-Discrimination Act (ENDA) (H.R. 3685)

- Prohibits discrimination on basis of actual or perceived sexual orientation, including actions based on actual or perceived sexual orientation of a person with whom the individual associates or has associated.
- Prohibits preferential treatment or quotas.
- Allows only disparate treatment claims.
- Prohibits retaliation just as Title VII does.

ENDA – Summary of Provisions (H.R. 3685)

- Inapplicable to the relationship between the United States and members of the Armed Forces, including the Coast Guard.
- Inapplicable to a corporation, association, educational institution, or society exempt from religious discrimination provisions under the Civil Rights Act of 1964.

ENDA – Summary of Provisions (H.R. 3685)

- Important caveats:
 - Employers may still enforce rules and policies that do not intentionally circumvent the act's purposes if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation.
 - Employers may still take adverse action against an individual because of a charge of sexual harassment against that individual, provided sexual harassment rules/policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation.

ENDA – Summary of Provisions (H.R. 3685)

- Employer not required to treat a couple who is not married in the same manner as the covered entity treats a married couple for purposes of employee benefits.
- Regarding benefits, declares that the terms "married" and "marry" refer to a legal union between one man and one woman as husband and wife, incorporating DOMA definition.

Arbitration

Arbitration Fairness Act of 2007

- Employers increasingly turning toward arbitration as a means of dispute resolution of individual and class based employment claims
 - Speedier resolution
 - Less cost
 - Curtailed discovery
 - More private

Arbitration Fairness Act of 2007

- Some in Congress believe that:
 - Arbitration should only be between commercial entities of generally similar sophistication and bargaining power.
 - Corporations are now improperly requiring employees to give up their right to have disputes resolved by a judge or jury by requiring binding arbitration.
 - Most employees have little or no meaningful option whether to submit their claims to arbitration.

Arbitration Fairness Act of 2007

- Some in Congress believe that:
 - Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.
 - Mandatory arbitration undermines the development of public law for civil rights and consumer rights because there is no meaningful judicial review of arbitrators' decisions
 - Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent

Arbitration Fairness Act of 2007

- Some in Congress believe that:
 - Many corporations add to their arbitration clauses unfair provisions that tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles away from their homes.

Arbitration Fairness Act of 2007

- The draft legislations provides, among other things, that:
 - No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of
 - An employment, consumer, or franchise dispute; or
 - A dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

Arbitration Fairness Act of 2007

- Important Employment Law Related Definitions:
 - Employment dispute: a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standard Act.
 - Pre-dispute arbitration agreement: any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement

Arbitration Fairness Act of 2007

- Important Considerations:
 - Does not apply to collective bargaining agreements
 - Open question if employers would be able to continue to “require” non-binding arbitration in ADR process
 - Federal Courts will have jurisdiction to decide whether arbitration agreement is valid in light of statute
 - Can always attempt to agree to arbitration after employment dispute arises

ADA Amendments Act of 2008

The Pre-Amendment ADA: Aftermath of Supreme Court Jurisprudence

- *Sutton v. United Airlines* (1999) and its progeny - mitigating measures must be considered in determining “substantially limited” prong and thus “disability” status within meaning of ADA
- *Toyota Motor Mfg. v. Williams* (2002) – impairment must prevent or severely restrict performance of activities that are of central importance to most people’s daily lives.
- A 2006 study showed that plaintiffs lost more than 97% of ADA employment discrimination claims, more than under any other civil rights statute.
 - This rate is the highest federal case failure rate second only to prisoners’ rights cases.

ADAAA Major Provisions: Broadening the Scope of Coverage

- The ADAAA explicitly overturns the decision in *Toyota Motor* by clarifying that “substantially limits” does not mean “prevents or severely restricts.”
- Instead:
 - The term “substantially limits” must be interpreted consistently with the broad remedial purpose of the ADAAA – that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations.
 - The question of whether an individual’s impairment is a disability under the ADA “should not demand an extensive analysis.”
- Congress went so far as to include a non-exhaustive list of major life activities and major bodily functions, which are designed to restore protections for employees who were accepted by various court decision, including *Toyota Motor*.
 - The list of major life activities includes: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Included on the list of major bodily functions are: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

ADAAA Major Provisions: Elimination of the Disability Mitigation Defense

- ADAAA explicitly overturns *Sutton* and its progeny by **permitting courts to evaluate an employee's disability without regard to "mitigating measures."**
- These mitigating measures now **cannot** be analyzed in interpreting an employee's alleged disability.
- This will cause a significant expansion of the group of individuals protected by the ADA, by including, for example, employees suffering from epilepsy, diabetes, depression, bipolar disorder, cancer, and many other conditions that can be managed through medication or other treatment.
 - **E.g., Employer receives a request from accommodation from an employee who suffers from high blood pressure, albeit controlled by medication.**

ADAAA Major Provisions: Expansion of the “Regarded As” Provision

- According to the terms of the ADA, an employee may prove that he or she is covered by the Act by proving that he or she is “regarded as” having an impairment by his or her employer.
- Previously, employees often were required to show that their employer perceived them to be incapable of performing not just the job they had been denied, but also a range of jobs.
- Now, an individual can establish protection under this prong by establishing that he or she was subjected to an adverse action prohibited by the ADA because of an actual or perceived impairment, ***whether or not the impairment limits or is perceived to limit a major life activity.***
 - E.g., Employer subjects employee to adverse action because employee is perceived to suffer from severe food allergies although the employee does not, in fact, have any such allergies.
- This extension is limited, however, to exclude transitory and minor impairments with an actual or expected duration of six (6) months or less (such as the common cold, etc.).

ADAAA Major Provisions: Episodic Impairments and Those in Remission

- The ADAAA modifies the ADA to clarify that when evaluating a person who suffers from an episodic impairment or one that is in remission, employers and courts must determine whether the condition would substantially limit a major life activity **when active**.
- Certain conditions like epilepsy or post-traumatic stress disorder may now be protected under the ADA.
 - E.g., Employer terminates an employee who, in the past, suffered occasional seizures. At the time of termination, the employee was seizure-free for over one year.

Practical Implications: Pending Litigation

- There is nothing in the text of the statute or the legislative history indicating that the amendment should be applied retroactively to ADA cases – and motions – already pending.
- We believe that the current position of the EEOC is that the amendment will be applied prospectively and *not applied to pending litigation*.
 - But that's not to say your judge won't apply the new standard to pending cases with motions post-January 1, 2009.
 - Consider proactive approach, especially with pending motions. If you have an argument that you win under the new standards, you should consider supplemental briefing and/or, if necessary, supplemental discovery.

FMLA

Summary of New FMLA Regulations

- New regulations take effect on January 16, 2009
- Regulations and discussion amount to 200 pages in federal register:
- Please join us for our webcast presentation “*Are you Prepared? New Regulations to Go into Effect Under the Family and Medical Leave Act (FMLA)*”
 - **One-hour webcast on the new FMLA regulations with Corrie Fischel Conway, Carrie Gonell, and Mike Ossip.**
 - **December 4 and December 9 at 2:00 pm ET.**
 - **To register, go to <https://morganlewis.webex.com>.**

Summary of the New FMLA Regulations

- The full text of the rule—including full-text versions of DOL’s prototype notices and certification forms—is available through the DOL website at <https://www.dol.gov/esa/whd/fmla/finalrule.htm>

Family and Medical Leave Act: Past, Present, and Future

- On January 28, 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008.
 - **Law amends the Family and Medical Leave Act of 1993 (FMLA) to provide broader leave protections to families of members of the armed services.**
- On November 17, 2008, DOL issued final regulations under the FMLA, significantly altering notice and certification requirements associated with FMLA.
 - **Regulations do not significantly alter what constitutes a serious health condition or the ability of an employee to take unforeseeable intermittent leave—two of the major issues employers have struggled with over the years.**

Family and Medical Leave Act: Definition of “Serious Health Condition”

- DOL failed to address in any substantive way the definition of “serious health condition.” DOL adopted, instead, modest clarifications:
 - **Two visits must occur within a 30 day period from when the initial incapacity occurs. The final rules also provide that the first visit must occur in person (i.e., not via phone call or other means) within 7 days of the first day of incapacity.**
 - **Healthcare provider, and not the employee or patient, must make the determination as to whether a second visit during the 30-day period is needed.**
 - **“Periodic” means visiting a physician twice or more per year for the same condition. (The current regulations define a chronic, serious health condition as one that requires “periodic visits for treatment,” but fail to define what “periodic” means.)**

Family and Medical Leave Act: Intermittent Leave

- The final rule will not require that employers account for FMLA leave in small increments simply because their payroll systems are capable of doing so.
 - Employers need only use the smallest increment of time used to account for other forms of leave, provided that increment is no more than one hour.
 - For example, if an employer uses 30-minute intervals to account for sick leave and 1-hour increments to account for vacation time, the employer must use the smaller of those increments (i.e., 30 minutes) for FMLA purposes.
- Under the final rule, employers may maintain policies that require leave to be taken in different increments at different times -- e.g., all forms of leave may only be taken in 1-hour increments during the first hour of a shift -- provided that the increment is no more than 1 hour.
- An employer cannot deduct against an employee's FMLA entitlement time during which the employee is working.
 - For example, if an employee becomes ill 30-minutes before the end of a shift, the employer may not deduct one hour of leave even if the employer uses one hour as its smallest leave increment.
- The final rule includes a narrow exception to the minimum increment rule for "physical impossibility" -- situations in which an employee is physically unable to access the worksite after the start of a shift or depart from the worksite after the end of a shift (e.g., a flight attendant who will miss her flight if she takes leave at the start of a shift). When this exception applies, an employer may designate as FMLA leave and deduct the entire period that the employee is forced to be absent.

Family and Medical Leave Act: Substitution of Paid Leave

- The terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave, including paid vacation, personal leave, family leave, sick leave, and paid time off.
 - Under the final rule, if an employer's policy requires vacation leave to be taken in full-day increments, an employee substituting vacation for FMLA leave would have no right to use less than a full day of vacation leave.
- FMLA substitution provisions are not applicable when an employee receives disability benefits while taking FMLA leave, but the employer and employee may agree to have paid leave run concurrently with FMLA leave to supplement disability benefits.
- An employer can require an employee to provide more or different medical information pursuant to a disability benefit plan as long as the employer makes clear that the failure to provide this additional information only jeopardizes receipt of disability benefits, not the entitlement to unpaid FMLA leave. This same rule applies in the case of workers' compensation benefits. The final rule clarifies that an employer may use this additional information to determine whether the need for leave qualifies under the FMLA.

Family and Medical Leave Act: Eligibility Requirement

- Employers are required to count for eligibility purposes any breaks in service of up to *seven* years.
- If the employee is not eligible for FMLA leave at the commencement of a leave because the employee has not met the 12-month length of service requirement, the employee may meet this requirement while on FMLA leave, since leave time counts towards length of service.
- When an employee, who is jointly employed, is stationed at a fixed worksite for a period of at least one year, the employee's worksite, for purposes of the employee's eligibility, is the actual physical place where the employee works.

Family and Medical Leave Act: Counting FMLA Leave

- When a holiday occurs during an employee's scheduled workweek and an employee is taking a full week of leave, the holiday counts against the employee's 12-week leave entitlement.
- The time an employee works in a voluntary light-duty position does not count against the employee's FMLA entitlement.
- The right to restoration is held in abeyance during the period of time the employee performs a light-duty assignment.

Family and Medical Leave Act: Employer Notice Requirements

- **General Notice:** An employer must provide a “general” notice of the FMLA provisions by posting a notice in a location available to both employees and applicants.
 - Employers can satisfy the posting requirement through an electronic posting of notice provided requirements are met.
 - Employers who do not maintain employee handbooks or otherwise distribute FMLA policies to their employees will need to distribute a copy of the general notice to each employee at the time of the employee’s hire, either in paper or electronic form.
 - It will no longer be sufficient to distribute this general notice only in connection with a specific FMLA leave request.
- **Eligibility Notice:** An employer must provide “eligibility” notice of whether the employee meets the statutory eligibility criteria -- employment by the employer for 12 months, at least 1,250 hours of service in the 12 months prior to the leave request, and employment at a worksite where 50 or more individuals are employed within 75 miles.
- **Rights and Responsibilities Notice:** An employer must provide a “rights and responsibilities” notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.
- **Designation Notice:** An employer must provide a “designation” notice of whether the particular leave requested will be designated as FMLA leave.

Family and Medical Leave Act: Employee Notice Requirements

- Employees may be required to follow established call-in procedures for calling in absences and requesting leave absent “unusual circumstances” (e.g., no one answers the call-in number).
 - The final rule explicitly states that where an employee does not comply with the employer’s usual procedure, and no usual circumstances justify that failure, the employer may properly delay or deny FMLA leave.
- The final rule provides examples of what constitutes sufficient notice, including the following: a condition renders the employee unable to perform the functions of the job; the employee is pregnant or has been hospitalized overnight; the employee or the employee’s family member is under the continuing care of a healthcare provider; the leave is due to a qualifying exigency, such as a covered military member is on active duty or call to active-duty status; and the leave is for a family member whose condition renders the family member unable to perform daily activities.
 - Also, the final rule makes clear that calling in “sick” in the case of unforeseeable leave is not enough to trigger an employer’s obligation to determine if the leave is arguably FMLA protected.
 - The final rule also provides that when an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must *specifically reference* the qualifying reason for leave when notifying the employer.

Family and Medical Leave Act: Medical Certification Requirements

- DOL has adopted two simplified forms – one form to be used when the need for leave is for the employee's own serious health condition and a second form to be used when the need for leave is to care for a family member with a serious health condition.
 - The forms contain new areas for medical providers to provide sufficient medical facts—symptoms, doctor visits, medical treatment regimen—for employers to make a determination as to eligibility.
 - The forms specifically allow doctors to provide a diagnosis, which is not permitted under the current regulations. (Employers, however, cannot reject certifications that do not contain diagnoses and employers still need to be cognizant of state laws, such as California's, that prohibit an employer from requesting such information under state law.)
- The final rule also eliminates the need for an employer to use its healthcare provider for the clarification process.
- The final rule provides that an employer may require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns (i.e., a reasonable belief of significant risk of harm to the individual employee or others) provided that the employer includes that requirement in its designation notice.

Family and Medical Leave Act: Exigency Leave

- The final regulation identifies eight different circumstances that will qualify as an “exigency,” including:
 - *Short-term notice deployment*, when a covered military member is notified of an impending call to duty seven or less calendar days prior to the date of deployment. In such circumstances, an employee is entitled to up to seven days of leave for this purpose;
 - *Military events and related activities*, including official ceremonies, programs, or events sponsored by the military, related and family support, or assistance programs sponsored or promoted by the military, military service organizations or the American Red Cross;
 - *Childcare and school activities*, including the arrangement of alternative childcare and attendance at school meetings;
 - *Financial and legal arrangements*, to make or update legal arrangements for the covered military member or act as his or her representative before a government agency;
 - *Counseling*, for oneself, for the covered military member, or for a child of the military member;
 - *Rest and recuperation*, to spend time with a covered military member who is on short-term leave during the period of deployment (up to five days for each leave);
 - *Post-deployment activities*, including arrival ceremonies and funeral arrangements; and
 - *Additional activities*, provided that the employer and employee agree that such activities shall qualify as an exigency.
- The final rule also makes clear that exigency leave is limited to circumstances involving a family member in the National Guard or Reserves or a retired member of the regular armed forces or the reserves.

Family and Medical Leave Act: Leave to Care for Service Member

- An employee who is the spouse, son, daughter, parent, or next of kin of a covered service member is entitled to up to 26 weeks of unpaid leave in a single 12-month period to care for that service member.
- The regulations make clear that an employee may utilize the 26-week entitlement for *each* service member and for *each* illness or injury incurred.

Family and Medical Leave Act: What's Next?

- Look out for paid leave entitlement proposals from the Obama administration...

GINA

Genetic Information Nondiscrimination Act (GINA)

- Health insurance provisions take effect in May 2009
- Employment provisions take effect in November 2009
- GINA prohibits employers from using genetic information for decisions on:
 - Hiring
 - Firing
 - Promotion
 - Job assignments
- GINA prohibits group health plans and health insurers from basing eligibility decisions or premium determinations on genetic information

GINA

- “Genetic information” is defined as
 - Genetic tests of the individual
 - Genetic tests of family members
 - The manifestation of a disease or disorder in family members
- Employers are prohibited from requesting, requiring, or purchasing an employee’s genetic information

GINA

- This does not apply to
 - Information needed to comply with certification requirements of FMLA and other leave laws
 - Information inadvertently obtained through lawful inquiries, e.g. ADA, as long as the employer does not use the information in a discriminatory manner
- Genetic information must be treated as confidential medical records and kept in separate files

GINA

- Remedies are the same as under Title VII
- Enforced by EEOC with same charge filing process
- No disparate impact charges permitted

GINA

- Insurance-related decisions by group health plans and health insurers
- GINA prohibits
 - Use of genetic information to adjust premiums or contribution amounts
 - Requesting or requiring genetic testing of an individual or family members (including fetuses and embryos)
 - Plans and insurers from requesting, requiring, or purchasing genetic information for underwriting purposes or prior to an individual's enrollment in the plan

GINA

- These prohibitions do NOT:
 - Limit or prohibit the ability of a healthcare professional to request an individual to undergo a genetic test
 - Preclude a group health plan or health insurer from obtaining or using the results of a genetic test in making a payment of claim determination as long as only the minimum amount of information needed is requested

Pension Protection Act of 2009

Pension Protection Act of 2006

- Made clear that cash balance plans are lawful
- Changed the funding mechanism for defined benefit plans

Pension Protection Act of 2006

- Defined benefit pension plans guarantee certain benefits
- Employer is responsible for funding
- Congress, as part of “Pension Protection,” accelerated funding obligations

Pension Protection Act of 2006

- Requires that employers fund plans faster than they did previously
 - Assets values are not smoothed over time
 - Lowers funding required when investments outperform the expected rate of return
 - But when the market goes down, can dramatically increase funding obligations
 - Also impacts benefit entitlements

So, What Happened?

- The last few months...
- Impact on pension plans
 - **Incredible funding requirements to maintain current levels of benefits**
 - **May prevent lump-sum payouts**
 - **May require benefit cuts**
- Impact on employers
 - **Benefit cuts impact employee morale**
 - **Funding obligations exacerbate other financial difficulties (extra bill just when you don't need it)**

Pension Protection Act of 2009?

- Employer groups are mobilized
- Asking Congress for pension funding relief
 - **Reduce funding obligations temporarily**
- Unclear if Congress will pass this legislation
- Unclear if President will sign it
- Details???
- Now, or next administration
- Other steps you can take?

401(K) Fiduciary Liability

- What does it mean to be a fiduciary?
- Hot Topics
 - Stock-Drop
 - Mutual Fund Fees and Expenses

401(k) Fiduciary Liability

- You might be a fiduciary if:
 - **You are involved in 401(k) plan administration**
 - **You help make decisions about investment options to be made available in a 401(k) plan**
 - **You talk to anyone about benefits matters**
 - Matching
 - Buy company stock (or company prospects)
 - HR orientation process

Why Hot Topics?



401(k) Hot Topics

- Company “stock drop” cases
 - 401(k) plan (or ESOP) offers company stock to participants, and the price of the stock goes down
 - Usually tied to negative announcement
 - Looks like a securities case (“Defendants knew...”)
 - Not subject to heightened pleading requirements of securities laws

Company “stock drop” cases

- Defenses in litigation
 - “Presumption of prudence”
 - Fiduciaries engaged in prudent process to identify investment options, including company stock
 - Insider trading problem with plaintiffs’ claims
 - Short-term price swings do not affect prudence
 - Investment was required by the plan documents

Company “stock drop” cases

- Litigation avoidance
 - Don't let your stock price fall
 - Don't offer company stock in the plan
 - Make the plan documents clear: “hard wire” the investment in company stock
 - Document prudent process by fiduciaries
 - Regular meetings to discuss the plan and review investment performance
 - Professional consultants

401(k) Fees and Expenses Cases

- Cases challenge all of the investment options other than company stock (because usually no expenses)
- Claims
 - Could have used less expensive options
 - “Revenue sharing” not disclosed
 - Retail vs. Institutional mutual funds
 - Mutual funds versus separate accounts or commingled trusts
 - Active versus passively managed funds
- Potential exposure

401(k) Fees and Expenses Cases

- Litigation avoidance
 - Procedural prudence
 - Selecting investment options
 - Reviewing fees and expenses against benchmarks
 - Document reasons for selection of particular investments over others
 - Document reasons for not selecting lower cost alternatives
 - 404(c) defense
 - Review the plan documents
 - “Hard wire”

Contact Information



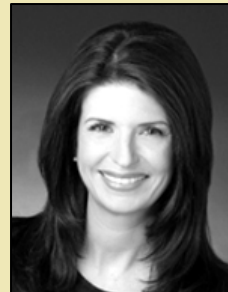
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