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"**Anatomy of an Employment Agreement**"

Date: September 12, 2019 – 10:00 AM PDT / 1:00 PM EST

Description: Employment agreements vary from simple offer letters to complex executive employment agreements incorporating multiple plans and attachments. This presentation breaks down the components of an executive employment agreement and reviews the purpose of each component, best practices and tax-traps for the unwary.

Topics discussed include: At-will vs term contracts; Definitions of "cause" and "good reason"; Severance benefits and post-termination healthcare continuation; Provisions every employment agreement should contain; Restrictive covenants; Clawbacks.

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ERISA Litigation Update: 401(k) and 403(b) Excessive Fee Lawsuits

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Discussion Overview

- Excessive Fee Litigation: How We Got Here
- Recent Notable Decisions
- Lessons Learned: Mitigating Risk

Excessive Fee Litigation:
How We Got Here

Excessive Fee Litigation: How We Got Here

- In September 2006, the initial wave of "excessive fee" lawsuits was filed against fiduciaries of large defined contribution retirement plans across the country.
- Allegations in these early cases included that plan fiduciaries:
  - offered retail class investment options when identical, less expensive institutional class options were available;
  - allowed uncapped administrative fees to be collected through revenue sharing; and
  - retained imprudent, poorly performing investment options in the plans.

Excessive Fee Litigation: How We Got Here

Early Decisions

Excessive Fee Litigation: How We Got Here

- Some early cases ended up turning on the number and types of investment options offered by the plan.
- *Hecker v. Deere & Co.,* 556 F.3d 575 (7th Cir. 2009)
  - Allegations targeted the number and mix of the Deere plan's investment options.
  - In *Hecker,* the Deere plan offered twenty-three mutual funds, two additional funds, and a fund of Deere stock.
  - Seventh Circuit dismissed plaintiff's claims, finding the plan "offered a sufficient mix of investments for their participants."
  - The decision includes one of the most often-quoted (by defendants) statements: "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund."

Excessive Fee Litigation: How We Got Here

- Decisions turning on the number/types of investment options, cont.
- *Braden v. Wal-Mart*, 588 F.3d 585 (8th Cir. 2009)
  - The Wal-Mart plan offered fewer (ten) retail share mutual funds, a collective trust, a Wal-Mart stock fund, and a stable value fund.
  - Eighth Circuit: plaintiffs had sufficiently pled that the Wal-Mart plan "includes a relatively limited menu of funds which were selected by Wal-Mart executives despite the ready availability of better options." The court also found that "these options were chosen to benefit the trustee at the expense of the participants."

Excessive Fee Litigation: How We Got Here

- *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011)
  - Third Circuit agreed with the analysis in the *Hecker* and *Braden* cases.
  - Unisys Plan offered a variety of options along the risk and fee spectrum, and Plan menu closer to what was offered in *Hecker* than in *Braden*.

Excessive Fee Litigation: How We Got Here

- Cases involving failure to offer less expensive investment options, cont.
- *Tibble v. Edison Int'l,* 843 F.3d 1187 (9th Cir. 2016)
  - Primary allegations related to offering retail share class investment options instead of institutional class options, and focused on the fiduciary duty to *monitor*, effectively extending the time that plaintiffs have to challenge alleged fiduciary breaches.
  - The Ninth Circuit held that "regardless of when an investment was initially selected, a fiduciary's allegedly imprudent retention of an investment is an event that triggers a new statute of limitations period."

Excessive Fee Litigation: How We Got Here

- Cases involving conflicts of interest

- *Tussey v. ABB,* 850 F.3d 951 (8th Cir. 2017)
  - Swapping existing funds for certain Fidelity funds was "motivated in large part to benefit Fidelity Trust and ABB, not the Plan participants."

Excessive Fee Litigation: How We Got Here

- Sample of Settlements and Judgments:

Velazquez v. MFS	$6.8 million (settlement)	May 2019
Tussey v. ABB, Inc.	$55 million (settlement)	March 2019
Cassell v. Vanderbilt	$14.5 million (settlement)	April 2019
Simms v. BB&T	$24 million (settlement)	December 2018
In Re Northrop Grumman	$16.8 million (settlement)	Oct. 2017
Tibble v. Edison	$13.1 million (judgment)	Sept. 2017
Main v. American Airlines	$22 million (settlement)	2017
Gordon v. Mass Mutual	$30.9 million (settlement)	2016
Krueger v. Ameriprise	$27.5 million (settlement)	2015
Novant Health	$32 million (settlement)	2015
Abbott v. Lockheed	$62 million (settlement)	Feb. 2015
Haddock v. Nationwide	$140 million (settlement)	April 2015
Spano v. Boeing	$57 million (settlement)	Nov. 2015
Diebold v. Northern Trust	$36 million (settlement)	2015
Beesley v. International Paper	$30 million (settlement)	2014
Amara v. Cigna	$35 million (settlement)	2013
Franklin v. First Union	$26 million (settlement)	2001

Recent Notable Decisions

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Recent Notable Decisions: 401(k)

- *White v. Chevron*, 752 F. App'x 453, 2018 WL 5919670 (9th Cir. 2018)
  - Ninth Circuit summarily affirmed district court's order dismissing case.
  - Plaintiffs failed to state a claim for breach of the duty of loyalty because they presented no plausible allegations that the Committee had the interests of Chevron, the sponsor, or Vanguard, the recordkeeper, at heart when it chose to include Vanguard funds in its plan.
  - Plaintiffs failed to plausibly plead that the *process* by which the funds were selected and monitored was imprudent.

Recent Notable Decisions: 403(b)

- *Sacerdote v. NYU* , 328 F. Supp. 3d 273 (S.D.N.Y. 2018)
  - The district court heard testimony from Committee members and expert witnesses on the issue of procedural imprudence.
  - Even though the court found "troubling" the "level of involvement and seriousness with which several Committee members treated their fiduciary duty," it concluded the NYU Committee, as a whole, did not act imprudently.
  - The Committee received good advice from its investment advisor and more "well-equipped" Committee members, and it "performed its role adequately."

Recent Notable Decisions: 403(b)

- *Sacerdote v. NYU* (cont.)
  - The court concluded that Committee prudently monitored fund performance by:
    - receiving an reviewing "detailed report[s]" from its investment advisor ahead of meetings,
    - discussing performance at quarterly Committee meetings,
    - being active at meetings and asked questions of the investment advisor,
    - using its investment policy statement for guidance on a quarterly basis, and
    - employing a "Watch List" to review struggling funds.

Recent Notable Decisions: 403(b)

- *Sacerdote v. NYU* (cont.)
  - Even if the plaintiffs *had* shown imprudence by the committee, the court found that, "in order to be entitled to recover damages, the Plan(s) must have also suffered a causally related loss," which they failed to show.
  - The court challenged the plaintiffs' comparison of one of the funds in the plan to a dissimilar Vanguard fund to show loss, finding it not a suitable comparator.
  - But note … it could have gone much differently.

Recent Notable Decisions: 401(k)

- *Meiners v. Wells Fargo*, 898 F.3d 820 (8th Cir. 2018)
  - Plaintiffs argued that the Wells Fargo Committee selected overly expensive and poorly performing "proprietary" target date funds (funds that were managed by Wells Fargo).
  - To demonstrate loss to the Plan based on this alleged breach, the plaintiffs compared the Wells Fargo funds to less expensive Vanguard alternatives, which employed a different investment strategy.
  - Eighth Circuit affirmed that the "Vanguard fund's performance was not a meaningful benchmark."
  - Court also dismissed allegations that the Wells Fargo funds were too expensive, since the plaintiffs only compared the fees to other funds with "some similarities."
  - This approach would "permit plaintiffs to dodge the requirement for a meaningful benchmark by merely finding a less expensive alternative fund or two with some similarity."

Recent Notable Decisions: 401(k)

- *Wildman v. American Century*, 362 F. Supp. 3d 685 (W.D. Mo. 2019)
  - Case tried over an 11 day bench trial.
  - Plan offered American Century funds, but contained a diverse array of asset classes and investment styles along risk/reward spectrum.
  - Committee members received a "Fiduciary Toolkit" when they joined the Committee, including the Plan's "Investment Policy Statement."
  - Committee met at least three times per year.
  - Before the meetings, the Committee received materials, which included comparisons of fund performance and fees.
  - Meeting materials included "Watch List" for underperforming funds.
  - Relied on advice from Aon Hewitt, investment advisor.

Recent Notable Decisions: 401(k)

- *Wildman v. American Century* (cont.)
  - Rejected the opinions of plaintiffs' experts:
    - Fiduciaries should strive to attain the standards espoused by plaintiffs' process expert, but ERISA does not require it.
    - Plaintiffs' damages expert, Dr. Steve Pomerantz, compared the Plan's funds to certain benchmarks to show loss. The court gave Dr. Pomerantz's models no weight, finding that they could not be used to determine damages.
  - In the 8th Circuit, a plaintiff must prove breach and a prima facie case for loss, then burden shifts to defense to disprove causation. (Contrast with *Brotherston,* and 1st Circuit approach.)

Recent Notable Decisions: 401(k)

- *Brotherston v. Putnam Inv.*, 907 F.3d 17 (1st Cir. 2018)
  - First Circuit accepted plaintiffs' expert testimony that the overall net returns of the Plan fell below the returns generated by the passive investment options that the plan could have offered.
  - Diverging from *NYU* and *Meiners*, the court allowed the plaintiffs to compare the plan's actively managed funds to passively managed Vanguard funds (of the same Morningstar category) to establish that the plan suffered loss as a result of the committee's activities.

Recent Notable Decisions: 401(k)

- *Brotherston v. Putnam Inv.* (cont.)
  - The First Circuit put itself on a plaintiff-friendly side of a circuit split on the issue of who bears the burden of proof on causation.
  - On January 11, 2019, Putnam filed petition for certiorari on whether:
    - the plaintiff bears the burden of proving that losses to the plan *resulted from* a fiduciary breach, as the U.S. Courts of Appeals for the 2nd, 6th, 7th, 9th, 10th and 11th Circuits have held, or whether ERISA defendants bear the burden of disproving loss causation; and
    - showing that particular investment options did not perform as well as a set of index funds, selected by the plaintiffs with the benefit of hindsight, suffices as a matter of law to establish "losses to the plan."
  - Distributed for Conference on April 18, 2019.
  - On April 22, 2019, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States.

Recent Notable Decisions: 401(k)

- *Sulyma v. Intel*, 909 F.3d 1069 (9th Cir. 2018)
  - Alleged breach of fiduciary duty regarding alternative investments.
  - Focused on whether statute of limitations ran as disclosure of alternative investments were made in fund facts sheets, notices, SPD.
  - While knowledge of illegality under ERISA is not required, mere knowledge that the underlying action occurred is not enough.
  - Must know an extra something, that he or she had "reason to sue."
  - Constructive knowledge not sufficient. Rejected the 6th Circuit precedent in *Brown v. Owens Corning* (when a plaintiff can access documents, failure to read them is not an excuse for filing untimely).
  - Supreme Court granted certiorari on June 10, 2019.

Recent Notable Decisions: 401(k)

- *Fuller v. SunTrust,* No. 11-784 (N.D. Ga. Jul. 16, 2019)
  - The plaintiffs alleged successor Committee members were liable for prior members' selection of proprietary funds.
  - A successor fiduciary is not liable for the breaches of a former fiduciary, but may be liable for failing to remedy the continuing effects of a breach by the former fiduciary, *if he or she knows of them*.
  - Successor fiduciary must have "actual knowledge" of the breach.
  - The plaintiffs failed to present evidence that successor fiduciaries had actual knowledge of alleged breaches in selecting affiliated funds.
    - Fact that successor fiduciaries familiarized themselves with Plan documents and past actions of Committee was not sufficient to create triable issue.
    - No requirement that successor fiduciaries "scour past meeting minutes and interrogate [Committee] members for any indication of prior breaches."

Recent Notable Decisions: 403(b)

- *Sweda v. Univ. of Penn.*, 923 F.3d 320 (3d Cir. 2019)
  - The Third Circuit reversed the district court's dismissal of fiduciary breach, finding that the plaintiff adequately alleged Penn paid unreasonable investment and administrative fees.
    - But the court upheld dismissal of prohibited transaction claims because plaintiff did not plead intent to benefit the party in interest.
  - A mix and range of investment options will not insulate fiduciaries from liability.
  - While the plaintiff did not directly allege how Penn mismanaged the Plan, she provided circumstantial evidence that the court could use to "reasonably infer" that a breach had occurred.
  - Penn's arguments that it had a prudent process goes to the merits, and was "misplaced" at the motion to dismiss stage.

Recent Notable Decisions: 403(b)

- *Vellali v. Yale University*, 308 F. Supp. 3d 673 (D. Conn. 2018)
  - The plaintiffs plausibly alleged that the defendants did not weigh the benefits and burdens of offering retail versus institutional share investment options, that recordkeeping fees were unreasonable based on comparison to flat fee arrangements, and that Yale and VP of HR failed to monitor the Committee to ensure compliance with fiduciary duties.
  - Dismissed claim related to the number of various investment options ("decision paralysis" claim).

Lessons Learned:
Mitigating Risk

Lessons Learned: Mitigating Risk

- **Understand fiduciary duties**
  - Committee members, and other fiduciaries of the Plan, must understand their responsibilities under ERISA.
  - Fiduciaries are personally liable for breaches. Company should have fiduciary liability insurance covering Committee members.
  - Fiduciaries should attend periodic fiduciary training with, for instance, investment advisors or outside ERISA counsel.
  - Anticipate deposition questions directed at challenging knowledge of ERISA fiduciary responsibilities.
  - Fiduciary onboarding should include review of fiduciary duties, Plan documents, and the Plan's investment options.
  - But, no requirement that successor fiduciaries "scour" past minutes or "interrogate" Committee members.

Lessons Learned: Mitigating Risk

✦ Prepare for Committee meetings

- Receive and review materials
  - From investment advisors (information about the financial markets, fund performance, fees, fiduciary responsibilities, and detailed analysis of certain funds)
  - From benefits department (plan, IPS, participant communications).
- Thoroughly review the materials ahead of the meetings.
- Mark them up, make notes, and prepare questions.
- Committee members, and any other fiduciaries, should know *how* to read the packets to prepare for meetings, and ask questions if they do not fully understand the materials.
- Fiduciaries should also be prepared to perform independent research ahead of meetings if they need to, so they can fully understand the materials and discussion.

Lessons Learned: Mitigating Risk

- **Active, thoughtful, and independent analysis at Committee meetings**
  - Committee should meet regularly (at least quarterly) and actively engage with the materials, the investment advisors, others invited to the meetings (*e.g.,* investment fund managers or service providers), outside ERISA counsel, the benefits department staff, and, importantly, with each other.
  - Bring the materials prepared by investment advisors that the Committee members previously reviewed and marked with notes and questions.
  - Be ready to discuss the materials at the meetings, and ask questions as needed.
  - Be ready to ask the investment advisor questions about investments and strategy.

Lessons Learned: Mitigating Risk

- **Active, thoughtful, and independent analysis at Committee meetings**
  - Consider questions for the other vendors or members of the benefits department about the day to day operations of the Plan.
  - For example: payment of recordkeeping costs, plan expense accounts, participant disclosures, or amount of service provider fees generally.
  - Debate the topics with each other.
  - Show independent judgment by the Committee.

Lessons Learned: Mitigating Risk

✦ Performance and fees

- The fees and performance of the investment options should be reviewed at *every* meeting.
- The investments offered should be sufficient in number and mix, along the risk/reward spectrum.
- Investment fund fees should be benchmarked against industry standards for funds in the same peer group (*i.e.*, same type of fund).
- Know that there are different fee structures for different types of funds.
- Committee members should understand the difference between an active investment strategy (where fund managers actively trade investments within the fund) and a passive strategy (where the fund merely tracks a market index, like the S&P 500).

Lessons Learned: Mitigating Risk

✦ Performance and fees

- Because actively managed funds require "active" management, they are more expensive.
- Performance of these funds should take into account the amount participants pay to invest in them.
- Debate the propriety of including actively managed funds where, net of fees, these funds may underperform the market over time.
- Courts have consistently dismissed claims that active funds are imprudent as a matter of law.
- It is important to review these options, discuss them, and come to a reasoned decision about which types of funds to offer.

Lessons Learned: Mitigating Risk

✦ Performance and fees

- Committee should be aware of other investment structures that may be available, which could reduce fund management fees.
- Likewise, "collective trust" or "separately managed account" investments (which also require certain assets amounts to qualify), may provide lower fees.
- Committee should be aware of these options, ask about them, follow up, and if their Plan qualifies, be prepared to include them as investment options.

Lessons Learned: Mitigating Risk

✦ Performance and fees

- Regarding investment performance, the Plan Committee must understand *how* performance is measured.
- Know whether the performance measurement includes fees paid to the fund's investment managers or revenue sharing paid to the Plan's service providers.
- Consider asking investment advisor about instituting a "Watch List" to track poorly performing funds, if they do not have one already.
- The Watch List should be tied to an Investment Policy Statement, both of which should be reviewed at Committee meetings. And, document this review in the meeting minutes.
- Fund managers may need to be invited to meetings to provide reasons why qualitative measurements may warrant retention of a fund where quantitative data may say otherwise.

Lessons Learned: Mitigating Risk

✦ Performance and fees

- Consider whether to include new investment options.
- No duty to "scour the market" for the cheapest options available.
- Plaintiffs have been mostly unsuccessful in making "apples to oranges" comparisons between different types of investments to promote the inclusion of less expensive, passive funds.
- Nevertheless, question investment consultants about options available in the marketplace that would fulfil the same strategy, risk, and cost.
- Funds affiliated with a sponsor or service provider (*i.e.*, recordkeepers or trustees) could draw unwanted attention.
- Whether or investment options are added or changed, the important thing is to *consider* the options at regular intervals, and document that consideration.

Lessons Learned: Mitigating Risk

✦ Performance and fees

- Follow a documented process in selecting new funds (*e.g.*, something outlined in the IPS).
- Analyze quantitative information on fees and historical investment performance.
- Analyze qualitative information (*e.g.* investment objective, strategy, organizational strength, and track record of portfolio managers).
- Invite the managers of candidate funds to the meetings and question them directly.
- Review the recommendation of the investment advisor and the available information, and request more information if needed for a decision.
- Ask about options to reduce fees (*e.g.* other share classes, separate accounts or collective trusts).

Lessons Learned: Mitigating Risk

✦ Performance and fees

- Although the Committee should take the investment consultant's advice, it must also act independently.
- That means, at times, the Committee may need to reject the investment consultant's advice if it disagrees.
- Remember, the Committee has a duty to monitor the investment consultant as well, which may include asking the consultant to leave the meetings so the Plan Committee can review the consultant's performance.

Lessons Learned: Mitigating Risk

✦ Know the key documents

- Committee members should be familiar with key documents governing the Plan's administration, for example:
  - official Plan document,
  - trust agreement,
  - Plan Committee Charter (as applicable),
  - Investment Policy Statement ("IPS"), and
  - vendor agreements.
- Committee members should periodically review these documents for consistency and update as applicable.
- Common issues that come up in the cases involve Plan administrative changes and amendments.

Lessons Learned: Mitigating Risk

- **Know the key documents**
  - The IPS has been particularly important in this litigation.
  - The Committee should regularly review and revisit its IPS, with the investment consultant's help.
  - The IPS should be reviewed against the Plan's investment lineup to make sure the Plan's investments fit with its guidelines.
  - For instance, the Committee should make sure it is monitoring fund performance according to guidelines in the IPS, and including the appropriate amount and types of investment options.
  - If changes need to be made to the IPS, the Committee should work with the investment consultant to review and implement those changes.

Lessons Learned: Mitigating Risk

✦ Monitoring the Plan's service providers

- Although benefits department oversees day-to-day ministerial Plan functions, the ultimate responsibility to oversee the Plan's outside service providers (and their fees) rests with the Committee.

- Outside service providers may include the recordkeeper, investment consultant, trustee, outside counsel, auditors, and any other service providers to the Plan.

- Monitor the performance of these entities, the types of services they provide, and, importantly, their fees and how those fees are paid.

Lessons Learned: Mitigating Risk

✦ Monitoring the Plan's service providers

- Common claims in this litigation involve allegedly unreasonable fees paid to the plan recordkeepers.
- Early cases targeted revenue sharing arrangements whereby a recordkeeper would receive a portion of the fees paid to fund managers based on the assets invested in a particular option.
- Plaintiffs argued that "uncapped" revenue sharing fees could exceed a reasonable amount as more assets are invested in a given fund, and the assets grow with positive performance.
- Although courts have unanimously agreed that these revenue sharing arrangements are not imprudent as a matter of law, courts have viewed capped or flat fee arrangements favorably.

Lessons Learned: Mitigating Risk

- **Monitoring the Plan's service providers**
  - The market for recordkeeping has evolved since the onset of this excessive fees litigation.
  - Recordkeeping fees have been reduced as the market became more competitive.
  - The Committee should regularly consider renegotiating the fees paid to all of the Plan's vendors, including its recordkeeper.
  - At regular intervals (*e.g.*, every five years), the Committee should request proposals from prospective service providers, including recordkeepers, to ensure the Plan's fees are competitive.

Lessons Learned: Mitigating Risk

✦ Understand investment concepts

- Committee members are not required to be investment experts. That is why the Committee hires an investment consultant.
- Committee members come from various functions within an organization and have varying levels of investment knowledge.
- Nevertheless, members should be well-versed in basic investment concepts so they can understand the materials and the discussions at the meetings.
- Avoid perception of "rubber stamping."
- If you are unsure about certain concepts, ask questions.
- Committee members are held to the standard of a prudent fiduciary in their shoes with the same information.
- Committee members must be able to understand the information provided, to make reasoned, thoughtful decisions.

Lessons Learned: Mitigating Risk

- **Document Committee meetings**
  - If you find yourself in a lawsuit, judges say that witness testimony is great, but documents win the day.
  - Minutes should capture the key discussions and decisions of the Committee.
  - State reasons for actions taken.
  - State reasons for possible actions discussed but not taken.
  - Show all topics discussed.

Lessons Learned: Mitigating Risk

- **Role of the benefits department**
  - Define Benefit Staff Responsibilities
    - Day-to-Day Plan operational and ministerial tasks
    - Liaison with service providers
    - Assist in preparation for meetings and agenda
    - Payment of Plan expenses
    - Participant communications
  - Benefit Staff are not fiduciaries: the Buck Stops With the Committee
    - The Committee has the ultimate duty to monitor the benefits department in Plan administration matters
    - Benefits staff should regularly communicate with Committee members

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