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BENEFITS REPORT

The Final Frontier: Adding a Retirement Tier

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401(k) plans have been with us for almost 40 years. Over that time, the focus for most plans has been on helping participants accumulate savings that will be consumed in retirement. With the decline in defined benefit plans, 401(k) plans are providing an increasingly large percentage of the supplemental retirement income for their participants. Now that many of those participants are at or near retirement age, plan sponsors are considering ways to help participants in the decumulation stage of saving, when retirement assets are spent.

A recent Issue Brief from the Employee Benefits Research Institute (EBRI) suggests that rollover Individual Retirement Accounts (IRAs) are not being used as effective investment alternatives for 401(k) plan assets. Once participants leave 401(k) plans and roll over their assets into IRAs, EBRI points out

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Trucker Huss, APC is pleased to announce that the firm has been named a National Tier 1 firm for ERISA Litigation and a Metropolitan Tier 1 firm (San Francisco) for Employee Benefits (ERISA) Law and ERISA Litigation by U.S. News — *Best Lawyers*® "Best Law Firms" 2020 List. The firm also received recognition in the area of Employee Benefits (ERISA) Law nationally.

In addition to the firm's ranking, three Trucker Huss attorneys were selected by their peers for inclusion in The Best Lawyers in America© 2020:

- **Bradford Huss** — Employee Benefits (ERISA) Law and ERISA Litigation (25 Year Anniversary on the List)
- **Clarissa A. Kang** — ERISA Litigation
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that their asset allocation is unlikely to match the asset allocation they had in their 401(k) plans, with a significant drop in the allocation of assets to equities or target date/balanced funds.[1]

Accordingly, it can be helpful for retirees to have access to investment options in their 401(k) plan that allow them to use their plan accounts during retirement as an effective tool to supplement their other sources of retirement income. A Retirement Tier is one potential solution to help these participants manage their assets properly in the decumulation stage.

Retirement Tiers

A recent series of white papers (the "White Papers") sponsored by the Defined Contribution Institutional Investment Association (DCIIA) discusses the concept of including a Retirement Tier as a means of helping older participants. A Retirement Tier is described in the White Papers as "…a range of products, solutions, tools and services, all of which allow a defined contribution (DC) plan sponsor to broaden the plan's goal from one wholly focused on savings to one that also accommodates and supports participants who are near, entering, or in retirement."

In a nutshell, the White Papers focus on plan design ideas to assist those at or near retirement. As the White Papers point out, there are many ways to do this, and one size does not fit all. In other words, plan sponsors can mix and match the components of a Retirement Tier as best suits its goals and labor force.

The components could include:

- Offering former participants and retirees the option to fund their retirement through ad hoc partial withdrawals from the plan rather than rolling over a lump sum distribution into an IRA;
- Including more retirement income investment options, such as annuities offered inside or outside the plan;
- Adding investment options that are appropriate for participants making withdrawals;
- Providing targeted communications to participants who are near or in retirement on how to invest their savings while taking withdrawals; and
- Encouraging employees to consolidate their retirement savings by rolling into the plan any amounts accumulated in IRAs and plans of former employers.

The White Papers describe some of the benefits of offering a Retirement Tier. For example, by encouraging "roll-ins" and permitting partial withdrawals — as opposed to the current all-or-nothing lump sum distribution requirements found in most plans — a plan should see an increase in the total assets held by the plan. A larger plan asset base should provide the plan with greater leverage to negotiate lower recordkeeper and investment fees, which is to the benefit of all plan participants. Additional benefits of a Retirement Tier listed in the White Papers include:

- More satisfied and secure employees who are better prepared for the decumulation stage of retirement planning;
- Plan administration is more seamless when dealing with a former participant or retiree who is then rehired;
- Retirees are able to access familiar investment options that have been vetted by the plan fiduciaries;
- Better retirement outcomes for participants; and
- A happier and more productive workforce.

The White Papers make a good case for including a Retirement Tier design in a 401(k) plan. There are, however, some cost and legal issues that plan sponsors should consider. Specifically, if plan administration fees are being paid by the plan sponsor, those costs may go up with an increased participant headcount. And, although allowing partial withdrawals by retirees and former employees may lead to a larger plan asset pool, it may also, in the eyes of some, increase fiduciary risk simply due to the fact that there are more participants in the plan without an ongoing employment relationship with the plan sponsor. At the same time, retirees who have access to a Retirement Tier in the plan after retirement may be more satisfied with the options provided for their financial wellness in retirement, making them less inclined to sue.

Recordkeeping

Another concern with encouraging former employees to maintain account balances is keeping track of them. Once a participant terminates employment, the direct connection to the plan sponsor is lost. It then becomes important that former employees regularly inform the plan of any address changes so that they can receive their benefits in a timely manner. It should be noted that the Department of Labor (DOL) has an ongoing enforcement program in which plan fiduciaries have been accused of breaching their fiduciary duty for failing to follow up on uncashed checks and missing participants. This highlights the importance of selecting a recordkeeper that can assist in tracking former employees who remain in the plan. Plan fiduciaries must use due diligence and prudence in their selection of service providers. Plan sponsors considering adding a Retirement Tier should determine whether their existing recordkeeper has the capacity to track a large number of former employees, and, if not, they should consider finding a new recordkeeper who can.

Annuities

The Retirement Tier design can also include an annuity option as a means of reducing investment and longevity risk for retirees. If plan sponsors exercise this option, then plan fiduciaries will have to select an insurance carrier to provide the annuity payments. This is a fiduciary function which requires due diligence and prudence in the decision-making process. Many plan fiduciaries are wary of taking on this fiduciary responsibility out of concern that the insurance company could go bankrupt a number of years later causing their selection process to come under scrutiny. The DOL has a regulatory safe harbor to assist fiduciaries in limiting their potential liability, but many have felt that it is of little practical help. Congress is considering a more robust annuity safe harbor as part of the SECURE Act of 2019, but it remains to be seen whether this will make a difference or even be enacted. Plan participants who are allowed to take partial distributions as part of a Retirement Tier concept may also have the ability to access their own out-of-plan annuities, which would not have the same implications for the plan fiduciaries.

Discrimination Testing

Another important legal consideration is the application of non-discrimination tests under Internal Revenue Code section 401(a)(4). The Retirement Tier contemplates offering additional investment options that will be beneficial to those at or near retirement. Under Treasury regulations, the right to a particular investment option is a benefit, right, or feature that must be tested for non-discrimination. If a Retirement Tier investment option is offered to all participants, this test would be easily satisfied. There are several ways the non-discrimination testing can be satisfied with respect to both the Retirement Tier itself and an ad hoc distribution option.

If a plan sponsor wants to limit those investment options to participants at or near retirement age, then the plan would have to be tested for discrimination to see whether this group of employees includes a sufficient number of non-highly compensated employees. Obviously, this will depend on the plan's demographics and would likely be more problematic for smaller employers. Deciding which option would be best for a plan depends on a number of factors that need to be determined on a plan-by-plan basis.

Designing the Retirement Tier

One last point to consider is that plan design is a settlor function. The decision to add discretionary plan amendments for a Retirement Tier, such as the ad hoc distribution features, would not be subject to fiduciary review; therefore, any expenses associated with amending a plan to add a Retirement Tier could not be paid out of plan assets. This would include any pre-amendment consulting costs. Implementation of a Retirement Tier, however, would be a fiduciary function.

Conclusion

The Retirement Tier design is something plan sponsors may wish to consider. It has been reported that the baby boomer generation is reaching age 65 at the rate of 10,000 people per day, so there is a potential need. Participants who move their assets out of 401(k) plans and into IRAs may face higher investment costs and do not have access to the fiduciary fund selection provided by the plan. However, plan sponsors should consider the legal issues in any decision to move forward with adding a Retirement Tier.

If you are considering whether to add a Retirement Tier to your 401(k) plan and would like to discuss these or other factors specific to your plan, please contact a Trucker Huss attorney.

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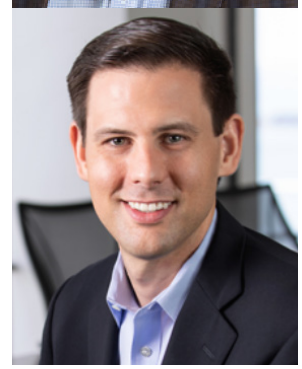
[1] Craig Copeland, *Comparing Asset Allocation Before and After a Rollover From 401(k) Plans to Individual Retirement Accounts*, EBRI (Nov. 7, 2019).

U.S. Supreme Court Considering Three ERISA Cases in October Term 2019



**JOSEPH C. FAUCHER
and BRIAN D. MURRAY**

NOVEMBER, 2019

The Employee Retirement Income Security Act of 1974 (ERISA) has generated numerous U.S. Supreme Court decisions since its enactment, and this year's term is no exception. The Court is currently considering three ERISA cases involving a range of significant issues.

First, in *Retirement Plans Committee of IBM v. Jander*, the Court will reexamine the pleading standard plaintiffs must satisfy in order to avoid dismissal of lawsuits alleging that a fiduciary failed to prudently act on inside information in managing plans that offer company stock (commonly known as "stock drop" cases). Second, in *Intel Corp. Inv. Policy Comm. v. Sulyma*, the Court will decide whether ERISA's three-year statute of limitations, which runs from the earliest date on which a plaintiff has "actual knowledge" of a fiduciary breach, bars suit where a plaintiff has access to all relevant information more than three years prior to filing the lawsuit, even if he or she failed to actually review the information. Third, in *Thole v. U.S. Bank, N.A.*, the Court will consider whether a participant in an ERISA-governed defined benefit pension plan may sue to restore losses to the plan caused by a fiduciary breach, even if the plan is capable of paying all benefits due. We address each of these cases below.

Retirement Plans Committee of *IBM v. Jander*[1]

The Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014), made it very difficult for plaintiffs to survive early motions to dismiss in cases challenging the inclusion of the sponsor company's stock as a plan investment option. In these so-called "stock drop" lawsuits, which were common prior to *Dudenhoeffer*, plaintiffs typically allege that fiduciaries failed to prudently: (i) sell the plan's holdings in the company stock, (ii) cease additional purchases of the stock, or (iii) disclose negative inside information to the market.

Dudenhoeffer requires plaintiffs to satisfy a rigorous two-part test in order to successfully allege that a fiduciary failed to prudently act on non-public information in managing plans that offer company stock. First, plaintiffs must sufficiently plead an alternative action the fiduciary could have taken that would not have violated securities laws (i.e., insider trading rules). Second, plaintiffs must plead facts that show why a prudent fiduciary in that fiduciary's position would not have viewed the alternative action as more likely to harm the stock fund than help it.

In the wake of *Dudenhoeffer*, courts across the country have dismissed almost every "stock drop" lawsuit under this two-part test. However, the U.S. Court of Appeals for the Second Circuit reversed that trend in *Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620 (2d Cir. 2018).*

The plaintiffs in *Jander* were participants in a 401(k) plan sponsored by IBM. One of the Plan's investment options was an IBM Company Stock Fund (the "Fund"), which was primarily invested in IBM stock. In October 2014, IBM announced the sale of its microelectronics business division, and a related $2.4 billion write-down of its assets, which caused IBM's share value to decline by over 7%. The plaintiffs alleged that IBM knew this division was struggling financially, but failed to take action to prevent the foreseeable drop in IBM's stock price that occurred once IBM announced the sale of the division.

The plaintiffs claimed that IBM could have taken several alternative courses of conduct to mitigate the losses to the Fund, including making earlier public disclosures about the true financial health of the microelectronics division, which in turn would have reduced IBM stock to its actual value. The district court dismissed the case under *Dudenhoeffer* on the grounds that the plaintiffs failed to allege that a prudent fiduciary in the defendants' position would not have viewed their proposed alternatives as more likely to harm the Fund than help it. Other district courts had previously rejected the "earlier disclosure" theory advanced by the *Jander* plaintiffs.

On appeal, the Second Circuit reversed, concluding that "several allegations" in the plaintiffs' complaint stated a viable claim under *Dudenhoeffer*. First, it found the plaintiffs sufficiently pled that the Plan's fiduciaries knew the IBM stock was artificially inflated because they knew about the microelectronics division's struggles. Second, it found the fiduciaries could have disclosed information about the division's actual financial health earlier through IBM's quarterly SEC filings and normal participant disclosures. Third, it found that Plan fiduciaries could have foreseen that an inevitable disclosure of the division's financial struggles would have negative effects on IBM's reputation and value. Fourth, a reasonable fiduciary would not have feared the market would overreact to an early disclosure, because IBM traded in an efficient market, and a truthful disclosure would bring the stock to its true value. Fifth, the court concluded that fiduciaries knew that disclosure about the struggling division was inevitable because they were actively working to sell it. The court found this fifth point "particularly important" because this was not a case where the decision was to release the information or not to release it. Rather, it was a decision between an early disclosure and an inevitable later disclosure.

The Supreme Court agreed to hear argument on whether *Dudenhoeffer*'s "more harm than good" pleading standard can be satisfied by generalized allegations that an earlier disclosure would have benefited the plan. The Court heard oral argument earlier this month, but has not yet issued a decision. Corporate insiders who also serve as plan fiduciaries will be paying close attention to the *Jander* decision, which may provide clearer guidance as to how such insiders should conduct themselves to balance their fiduciary duties under ERISA with their duties as insiders under the securities laws.

Intel Corp. Inv. Policy Comm. v. Sulyma

ERISA's statute of limitations requires plaintiffs to bring claims for breach of fiduciary duty within three years of the date on which they have "actual knowledge" of the breach or violation. *Intel Corp. Inv. Policy Comm. v. Sulyma* presents the Supreme Court with an opportunity to address the meaning of "actual knowledge," which is currently the subject of directly conflicting decisions in the Sixth and Ninth Circuits.

In *Sulyma*, a former employee and participant in two of Intel's retirement plans brought a putative class action against the plans' fiduciaries, alleging that they committed fiduciary breaches by imprudently investing the plans' assets in two funds, which underperformed following the Great Recession relative to index funds and comparable portfolios due to higher fees and unduly risky investment choices.

Sulyma alleged that upon learning about the funds' poor performance, he filed his complaint against Intel on October 29, 2015 in the U.S. District Court for the Northern District of California. Intel moved to dismiss Sulyma's complaint as time-barred, on the grounds that Sulyma had actual knowledge of the alleged breach more than three years before filing the complaint.

Intel pointed to the fact that it had disclosed information about the plans' asset allocation and underlying investment strategy more than three years prior to the filing of the complaint. Specifically, Intel pointed to various documents it made available to Sulyma and all other plan participants, and several disclosures on Intel websites explaining Intel's investment choices. Sulyma accessed some of this information on Intel's websites, but testified that he was not actually aware of the precise composition of his retirement accounts. The district court dismissed the case as time-barred under the three-year statute of limitations, and Sulyma appealed.

The Ninth Circuit reversed, holding that Sulyma did not have "actual knowledge" of Intel's alleged breaches more than three years before filing his lawsuit. The court held that "actual knowledge" means something between "bare knowledge of the underlying transactions" and actual knowledge of the existence of a claim under ERISA. The court explained that in order to invoke the three-year statute of limitations, a defendant must show that the plaintiff has "sufficient knowledge to be alerted to the particular claim" under ERISA. The court concluded that although Sulyma had sufficient information available to him to know about the allegedly imprudent investments more than three years before he filed suit, a dispute of fact existed as to whether he had "actual knowledge" based on his deposition testimony that he was unaware that the funds had been invested in risky investments, and that he did not recall reading the documents alerting him to such investments.

Sulyma directly contradicts the Sixth Circuit's decision in *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564 (6th Cir. 2010). The court in that case held that when a plan participant is given specific instructions on how to access plan documents, his failure to read the documents does not shield him from having actual knowledge of the documents' terms. On June 10, 2019, the Supreme Court agreed to hear argument regarding the meaning of "actual knowledge." Oral argument is scheduled for December 4, 2019.

Thole v. U.S. Bank, N.A.

In *Thole*, two participants in the U.S. Bank defined benefit pension plan brought a putative class action against the plan's fiduciaries, alleging that they breached their fiduciary duties and engaged in prohibited transactions under ERISA by investing the Plan's entire investment portfolio in equities, including over 40 percent of the Plan's assets in parent company U.S. Bancorp's own mutual funds.

The plaintiffs alleged that the defendants' investment decisions resulted in the Plan suffering losses of $1.1 billion in 2008, thereby causing the Plan to go from being significantly overfunded in 2007 to being underfunded in 2008, where it remained through the filing of the lawsuit in 2013. The plaintiffs alleged that the Plan would have suffered smaller losses in 2008 had the defendants properly diversified Plan's assets. The defendants moved to dismiss the complaint arguing, among other things, that the plaintiffs lacked standing to sue, because they could not establish that they had suffered any individual losses. This is a common argument in cases involving defined benefit plans, where the plan sponsor essentially bears the risk of underfunding. The district court determined that although the plaintiffs did not allege that their benefit levels had actually decreased, they had standing to pursue their claims because defendants' alleged breaches injured the plaintiffs by causing an increased risk of default to the Plan.

While the lawsuit was pending, defendants made $311 million in voluntary excess contributions to the Plan, thereby causing the plan to once again become overfunded. The defendants then moved to dismiss the plaintiffs' lawsuit on the basis that the plaintiffs no longer had standing to sue. The district court dismissed the case, but did so on the basis that the case became moot once the plan was overfunded. Thus, the court reasoned, the plaintiffs no longer had a concrete interest in the monetary and equitable relief they originally sought.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of the plaintiffs' lawsuit on the basis that the plaintiffs lacked statutory standing under ERISA. The court held that in order to bring suit for fiduciary breach under ERISA sections 502(a)(2) and (a)(3), plaintiffs must show actual injury) — to the plaintiffs' interest in the plan under (a)(2) and to the plan itself under (a)(3) — and that no injury exists where the plan is overfunded. In so ruling, the Eighth Circuit broke from the Second, Third and Sixth Circuits, which have held that no individual financial loss is necessary to seek injunctive relief under ERISA §502(a)(3).

The Supreme Court agreed to hear arguments regarding whether an ERISA plan participant or beneficiary may seek monetary or injunctive relief under ERISA § 502(a)(2) and (3) without demonstrating individual financial loss or the imminent risk thereof, and whether the plaintiffs have demonstrated Article III standing. Oral argument is scheduled for January 13, 2020.

The *Thole* decision will have significant implications for defined benefit plan fiduciaries. Should the Supreme Court affirm the Eighth Circuit's decision, it will provide defendants in defined benefit plan fiduciary breach litigation with a powerful tool to obtain dismissal of lawsuits alleging fiduciary misconduct, so long as the plan remains fully funded and able to pay out benefits to retirees.

[1] For further discussion regarding this case, see Joseph C. Faucher and Dylan D. Rudolph, "Second Circuit Breathes New Life Into Company Stock Litigation," Trucker Huss Benefits Report Newsletter, February 2019 (Vol. 28, No. 2).

FIRM NEWS

On October 15, **Brad Huss** joined a Defined Contribution Institutional Investment Association (DCIIA) panel discussion hosted by Wells Fargo Asset Management on the latest trends and best practices in retirement income. The topics included decumulation of plan assets and Retirement Tier investments.

On November 19, **Clarissa Kang** was a panelist on a CLE Webinar hosted by Strafford entitled, *ERISA Remedies: Key Enforcement Provisions and Scope of Equitable Relief for Benefit Claims*. Topics covered included best practices for navigating issues in the litigation of benefit claims, available remedies under ERISA, defenses for plan administrators, and recent case law developments in benefits suits relating to remedies under ERISA.

On November 21, **Angel Garrett** spoke at the Institute for Inclusion in the Legal Profession's (IILP) Silicon Valley symposium. This symposium featured a review on the state of diversity and inclusion and included roundtable panel discussions about diversity and inclusion in the legal profession.

On December 12 at 10 AM – 11 AM PST, **Craig P. Hoffman** will present a Webinar: *Multiple Employer Plans — The Latest Word on MEPs and PEPs.* Interest in multiple employer plans (MEPs) continues to grow. As directed by the President, the Department of Labor has issued final regulations permitting employer associations and PEOs (professional employer organizations) to sponsor MEPs. Register here.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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