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Lawsuits over the years and what it means for plan sponsors

Formation of lawsuit trends

The barrage of excessive fee lawsuits filed in 2006 started a trend that continues to this day. At first, plan sponsors saw early signs of success in getting cases dismissed.

However, this changed after a few years when participants started honing in on claims of self-dealing, i.e. the plan's fiduciaries benefitting themselves at the expense of the plan's participants. Dozens of additional lawsuits have been brought, and plan participants have won both trials and settlements, totaling in the hundreds of millions (over $6.2 billion).

One of the most famous cases alleging self-dealing was Tussey v. ABB, which alleged that the plan sponsor caused the 401(k) participants to overpay for services to the plan recordkeeper so that the plan sponsor would receive free or discounted services for other benefit plans to which they were responsible for the cost. Almost ten years later and after a four-week trial and multiple appeals, the case finally settled for tens of millions of dollars.

Why lawsuits arise

While plan sponsors accidently self-dealing will happen from time to time, many plan sponsors have heeded the lessons from these lawsuits and have addressed any outstanding issues.

Today, the vast majority of lawsuits allege process violations, meaning the fiduciaries failed to have a good process in place to act in the participants' best interests, and thus the participants were harmed. Allegations include the plan paying excessive recordkeeping fees, failing to monitor the amount of revenue sharing generated, keeping underperforming investments in the plan, and failing to offer an appropriate mix of investment vehicles.

Additionally, the Department of Labor, the federal agency that regulates private retirement plans, has increased its enforcement related to these same issues through a nationwide workforce of plan investigators. When an investigation occurs, it can feel and look a lot like a lawsuit, including pages and pages of document requests about the plan.

It is also important to note that unlike class action lawyers, the Department of Labor does not limit their efforts to large plans that results in large damages. The Department of Labor is happy to investigate a plan with only ten participants if they believe harm has occurred. As an example, a recent lawsuit was brought against a small plan sponsor accused of failing to remit employee salary deferrals to the plan, which effectively amounts to theft. The plan sponsor not only faces civil liability, but also criminal liability under federal law.

5 ways to mitigate plan sponsor liability

Despite the headline grabbing nature of each new lawsuit, there is good news to be found, and that is where a plan sponsor can demonstrate that they have engaged in a prudent process as evidence they are acting in plan participants best interests. In a recent trial decision in Wildman v. American Century, the plan's fiduciaries were cleared of all wrongdoing based heavily on their best practices, which included:

1. Assembling a plan committee made up of diverse individuals with diverse viewpoints
2. Holding a minimum of three meetings per year and special meetings as necessary
3. Hiring a competent, trustworthy plan advisor
4. Providing each new committee member with a fiduciary training manual (consider performing this action during the first committee meeting and recording it in the meeting notes)
5. Regularly reviewing the plan's investments and their performance, including the use of a Watch List

Since most plan sponsors are not experts with regard to retirement plans, many rely on the support of professionals to assist them. A retirement plan advisor can assist plan sponsors with ERISA best practices to mitigate fiduciary risk. For more information on best practices or to discuss your company's retirement plan, contact us to setup a conversation.

[1] NAPA "ERISA Litigation Tab: $6.2 billion." April 15, 2019.