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Benefits Spotlight

It's Never Safe to Rest on Your Fiduciary Laurels

Your obligations as a fiduciary under ERISA call for you to act entirely in the interests of plan participants. Two recent court decisions highlight the need for fiduciary diligence.

A July 18 online article about fiduciary breach in ***CFO*** discussed the March, 2014, decision by the Eighth Circuit Court of Appeals to uphold, in part, an earlier court's multi-million dollar judgment in a class-action lawsuit involving plan fees. The appeals court ruled in Tussey v. ABB Inc. that plan participants were entitled to $13.4 million in reimbursement from ABB. The case involved a number of alleged fiduciary breaches, for which the lower court originally rendered a $35.2 million judgment in favor of the plaintiffs. The appeals court sent several of the matters back to the district court, a decision the plaintiffs have recently appealed to the U.S. Supreme Court. The process is nothing if not long and drawn out--not to mention costly to fiduciaries. Noting Tussey's landmark stature and that there are a number of other cases involving plan fees yet to be settled, the article goes on to provide tips on how to avoid litigation and minimize fiduciary risk, especially from the perspective of the CFO. But really, the tips are appropriate for anyone who serves as a fiduciary of an employer-provided retirement plan.

A second ERISA-related case also offers cautionary advice for fiduciaries. The Supreme Court's recent ruling in **Fifth Third Bancorp v. Dudenhoeffer** is the subject of Groom Law's June 30, 2014, ***Benefits Brief***. In this case, the high court ruled that ERISA fiduciaries are no longer entitled to a presumption of prudence when it comes to company stock. This is a departure from most Circuit Court rulings in the past, according to the article. It goes on to state that while the specific case before the high court involved an ESOP plan, the decision has broader implications for plan fiduciaries of publicly traded companies that include company stock in their retirement plans. The article points out that, until this ruling, most ERISA "stock drop" cases had been dismissed based on the presumption of prudence by the plan sponsor. That presumption is no longer valid. Nevertheless, Groom Law also notes that the court recognized a need to protect fiduciaries from frequent lawsuits. It has set a fairly high threshold for plaintiffs to successfully argue that the plan sponsor should have stopped further investments in the plan based on *non-public information*. Acting on such information is a breach of securities law. The article highlights several considerations the ruling poses for plan sponsors. The first is whether or not to include officials who have material, non-public information on the retirement plan's Investment Committee. A second is whether to engage an independent fiduciary to manage employer stock investments.

Another area where fiduciaries can run afoul of ERISA is in **revenue sharing**--an arrangement whereby qualified retirement plan vendors share a portion of fees (commonly, 12b-1 fees and sub-transfer agency fees) they receive from investment funds with the plan sponsor to offset plan administrative expenses. It's a fairly common practice, but prudent fiduciaries will want to ensure that they fully understand how the arrangement works to avoid violating ERISA regulations. A July, 2014, **article** by law firm McKenna Long and Aldridge discusses this issue and provides a checklist of questions you should ask.

Changing Approaches--and Attitudes--about Wellness Programs

Many employers have initiated wellness programs in an attempt to improve employee health and, as the theory goes, lower or contain their healthcare costs. Wellness programs run the gamut, from simple things like gym memberships or step counting contests (remember-you need to walk 10,000 steps a day!) to more sophisticated strategies involving biometric screenings to identify and prevent potential health problems. To encourage participation, many employers have employed a "carrot" approach that rewards employees who voluntarily participate. Indeed, the Affordable Care Act encourages this sort of incentive by increasing the maximum reward--in the form of a premium reduction--that employers can provide to employees who participate in a wellness initiative. (A 2-part article from law firm Nixon Peabody explains how wellness programs work within the ACA's framework. Here are links to both: **Part 1** and **Part 2**.) But more recently, some employers have begun turning to the "stick" approach--pegging premium reductions to actual health improvement outcomes. A tracking **poll** by the Kaiser Family Foundation looked at public perceptions about employer-sponsored wellness programs. Results of the poll, which was conducted in June of 2014, show that while people generally approve of wellness programs, they are not too keen on the idea of employers tying premiums to participation. They are even less enthusiastic about tying premiums to meeting specific health goals. The poll included people who have workplace-provided healthcare coverage as well as those who did not.

In other wellness developments, the Health Enhancement Research Organization (HERO) has collaborated with Mercer to produce an update of its scorecard for employers. This is a free, online tool that employers can use to gauge how their wellness programs stack up against best practices. The announcement on the HERO website indicates that **Scorecard 4.0** includes questions on new practices, such as the outcomes-based programs mentioned above, gamification, engagement and incentive strategies. Employers can complete the scorecard and receive a free report.

The Last Word

How many of your employees would quit their jobs if they could replace the healthcare coverage your company provides with comparable coverage and pricing? Quite a few, apparently. Results from a **survey** by Securian Financial indicate that as many as 4 out of 10 employees (40%) would turn in their resignations if they could find replacement coverage that is equivalent in price and quality to what their employer offers.

Finally, the title of this article by Pete Swisher in ***Journal of Pension Benefits*** says it all: "Stupid Investment Tricks: Interesting, Risky, or Downright Dumb Retirement Plan Investments." The article would be funny if it weren't for the fact that the author claims each example to be true.