

Hot Topics in ERISA Litigation

A Reflection on 2022 and Previewing What May Be in Store for 2023

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Today's Agenda

- 401(k) Fee and Investment Litigation Update
- Overview of DOL Cybersecurity Guidance
- COBRA Notice Litigation Update

401(k) Fee and Investment Litigation Update

Plaintiffs' Theories

- Plan Administration and Recordkeeping Fees
 - Revenue sharing is not controlled/aggressively negotiated given size of plan
 - Fees exceed median/average fees, fees paid by other plans
- Investment Claims
 - Excessive investment management fees
 - Active/passive investment strategies
 - Mutual Funds vs. Collective trust funds vs. Separate Accounts
 - Exceeds median fees reported by the Investment Company Institute
 - Share class selection
 - Cheaper, similar options available
 - Untested or Underperforming funds

State of Litigation

- Since 2020:
 - Over **200** cases filed
 - Over **100** motion to dismiss decisions
 - **Dozens** of certified classes
 - **\$500+ million** in settlements with over **\$160 million** in attorneys' fees
 - Over a **dozen** appellate court decisions
 - **3** bench trials
 - **2** Supreme Court decisions
- In 2022:
 - **81** cases filed (**55** of **81** new cases filed by same three firms)
 - **59** motion to dismiss decisions (**21** granted, **21** denied, **17** granted in part)
 - **\$151+ million** in settlements with over **\$47 million** in fees

***Hughes v. Northwestern University*, 142 S. Ct. 737 (2022)**

- Plaintiffs asserted imprudence claim based on allegedly paying excessive recordkeeping fees and offering mutual funds with excessive management fees.
- Both the district court and Seventh Circuit dismissed the claims, holding that:
 - It is not imprudent to pay recordkeeping fees through revenue sharing.
 - The Plan’s wide array of investment options provided ample options for investments with lower costs, including plaintiffs’ preferred low-cost index funds.
- Supreme Court:
 - Vacated Seventh Circuit’s holding because the court erred in finding that investor choice was a complete defense to ERISA imprudence claims.
 - Stressed that on remand, the pleading standard for an ERISA imprudence claim under *Twombly* and *Iqbal* require courts to conduct the rigorous, context specific analysis applied in *Dudenhoeffer*, consider that fiduciaries have a range of reasonable options.

Initial Post-*Hughes* Analysis

- Defendants' view:
 - Narrow holding.
 - Not a blanket pass to discovery.
 - *Twombly* applies (abrogating *Sweda*).
 - Recognizes need for context specific, flexible standards.
- Plaintiffs' view:
 - Fiduciaries must independently monitor each investment (consistent with *Tibble*).
 - Does not establish a high bar to bringing claims *a la Dudenhoeffer*.

Hughes' Impact – Appellate Decisions

- ***Davis v. Salesforce.com***, 2022 WL 1055557 (9th Cir. Apr. 8, 2022)
 - Recognized defendants' multiple, plausible defenses but held that it was premature to dismiss the claims at the pleadings stage based on those defenses.
 - In a footnote, affirmed the district court's dismissal of the imprudence claim based on failing to consider passively managed investment options instead of active funds.
- ***Kong v. Trader Joe's Co.***, 2022 WL 1125667 (9th Cir. Apr. 15, 2022)
 - Held that the complaint plausibly alleged imprudence where defendants offered mutual funds with retail share classes featuring higher fees than institutional share classes of the same investments.
 - Defendants' argument that the judicially noticeable revenue-sharing agreement justified the more expensive choice was "unavailing at the pleading stage."

Hughes' Impact – Appellate Decisions (cont'd)

- ***Smith v. CommonSpirit Health***, 37 F.4th 1160 (6th Cir. 2022)
 - Affirmed dismissal of fee- and performance-based imprudence claims.
 - Explained that comparing actively and passively managed funds, without consideration for each fund's discrete objectives, "will not tell a fiduciary which is the more prudent long-term investment option."
 - "[T]hese claims require evidence that an investment was imprudent from the moment the administrator selected it, that the investment became imprudent over time, or that the investment was otherwise clearly unsuitable for the goals of the fund based on ongoing performance."
 - Plaintiffs failed to plead that recordkeeping and management fees were excessive relative to the services rendered.
- ***Forman v. TriHealth***, 40 F.4th 443 (6th Cir. 2022)
 - Relied on *CommonSpirit* in affirming the dismissal of claims based on passive vs. actively managed funds and plaintiffs' excessive recordkeeping fee claims.
 - Reversed the dismissal of plaintiffs' claim that the same investment strategy, the same management team, and the same investments were available to their retirement plan at lower costs.

Hughes' Impact – Appellate Decisions (cont'd)

- ***Albert v. Oshkosh Co.***, 47 F.4th 570 (7th Cir. 2022)
 - Plaintiffs failed to allege that the recordkeeping fees were excessive relative to the services rendered. Fiduciaries are not required to regularly solicit bids from service providers.
 - The Court dismissed plaintiffs' claim that plan should have offered more expensive share classes of mutual funds that paid rebates to realize a lower net fee, because there was no basis to believe that plan participants would have received the rebates.
 - Plans are not required to opt for cheaper, passively managed funds.
 - Plaintiffs did not offer a meaningful benchmark.
- ***Matousek v. MidAmerican Energy Co.***, 51 F.4th 274 (8th Cir. 2022)
 - Plaintiffs failed to plead a “meaningful benchmark.”
 - As to the excessive fee claims, plaintiffs failed to identify services received by comparably sized plans; they compared total fees to industry-wide averages of pure recordkeeping fees. But the plan at issue received additional services.
 - As to the imprudent investment claims, plaintiffs identified undefined “peer groups” for comparison and drew comparisons between investments with different strategies.

Summary Judgment Opinions

- Motions Granted
 - *Falberg v. Goldman Sachs*, 2022 WL 4280634 (S.D.N.Y. Sept. 14, 2022)
 - Appeal filed, briefing ongoing.
 - *Pizarro v. Home Depot, Inc.*, ___ F.Supp.3d ___ (N.D. Ga. Sept. 30, 2022)
 - Appeal filed, briefing ongoing.
- Motions Granted in Part
 - *Vellali v. Yale Univ.*, 2022 WL 13684612 (D. Conn. Oct. 21, 2022)
 - Set for trial; motion to strike jury demand remains pending.
- Motions Denied
 - *Garthwait v. Eversource Energy*, 2022 WL 3019633 (D. Conn. July 29, 2022)
 - Settled on the eve of trial; motion to strike jury demand granted in part.
 - *Lauderdale v. NFP Ret., Inc.*, 2022 WL 17259050 (C.D. Cal. Nov. 17, 2022)
 - Trial scheduled for March 21, 2023

Challenges to BlackRock Life Path Target Date Index Funds

- Plaintiffs alleged that the funds were “significantly worse performing than many of the mutual fund alternatives offered by [other target date fund providers],” and further alleged that the plan fiduciaries chased the low fees associated with these funds without regard to whether they performed well.
- Defendants filed motions to dismiss, arguing:
 - Supreme Court ruled that prudence is flexible and context-specific.
 - Courts “must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.”
 - Here, plaintiffs did nothing more than advance allegations of short-term, modest underperformance and, moreover, the performance was frequently better than the plaintiffs’ alleged comparator funds.
- Four trade organizations banded together to submit an amicus brief in support of the plan sponsors and fiduciaries: American Benefits Council, the ERISA Industry Committee, American Retirement Association, and the Committee on Investment of Employee Benefit Assets.
 - This case translates into a request for a declaration that a fund suite is *per se* imprudent if it underperforms other funds, without regard to its fees, risk profile, or rating among market analysts.
 - A finding that plaintiffs sufficiently alleged imprudence would subject every plan that does not select the best fund in each asset category to costly litigation.

Overview of DOL Cybersecurity Guidance

Grocery workers union pension plan hit by ransomware attack

Nov 17, 2016, 7:28am CST

INDUSTRIES & TAGS [Retailing](#), [Cybersecurity](#)

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Angela Mueller
Reporter
St. Louis Business Journal

The pension plan for a local grocery workers union has been the victim of a ransomware attack.

United Food and Commercial Workers Local 655 Food Employers Joint Pension Plan provided notice to plan participants that it was hit by an attack on or around July 21 and that the security of personal information of current and

Health Plan Email Phishing Attack Exposes Student PHI

A Microsoft Office 365 email phishing attack exposed students' PHI.



Source: Getty Images

By Lisa Gentes-Hunt

Anthem to pay nearly \$40 million to settle data breach probe by U.S. states

By Reuters Staff

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(Reuters) - Anthem Inc said on Wednesday it would pay \$39.5 million as part of a settlement with U.S. states attorneys general following an investigation into a massive cyber-attack at the company in 2015.

Participant Sues Recordkeeper for Data Breach

BY NEVIN E. ADAMS, JD | DECEMBER 15, 2021

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LITIGATION



UPDATED DEC. 20, 2021

With cybersecurity of increasing concern to plan fiduciaries, participants—and regulators—a participant has sued his plan's recordkeeper for breach of an implied contract to keep his data secure—as well as a breach of fiduciary obligation.

The suit was brought by one Eric Giannini "on behalf of individual retirement fund plan participants who used Transamerica's services and had their sensitive PII accessed by unauthorized parties because of a lapse in network security in or around June of 2017." Alleging "failure to exercise reasonable care to protect and

Officials investigate breach of retirement accounts

By John Kass and William Lee - Contact Reporters
Chicago Tribune

JUNE 10, 2016, 10:06 PM

Officials with insurance and financial services giant Nationwide are working with city and federal officials to learn how the retirement accounts of 91 municipal

Lawsuit Claims Impostor Fooled Abbott Labs into Distribution

According to the lawsuit, an unknown user accessed the plaintiff's stock plan account by exploiting the "forgot password" option and impersonating the plaintiff over the course of several phone calls.

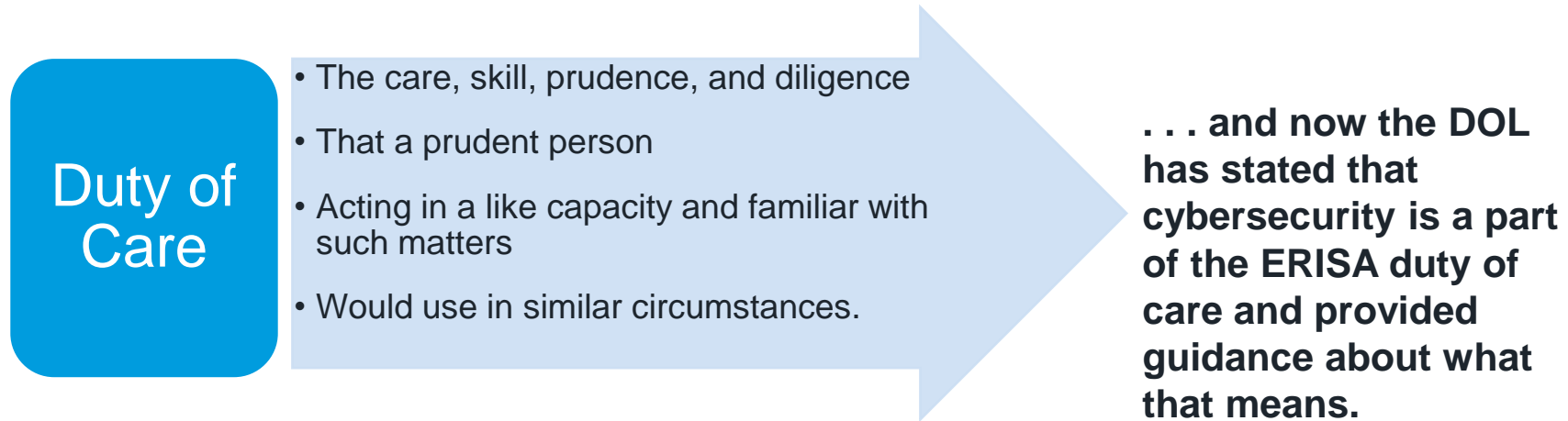
Reported by JOHN MANGANARO

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Litigation filed under the Employee Retirement Income Security Act (ERISA) tends to focus on the alleged fiduciary breaches of employers, but a new complaint in Illinois also names Alight Solutions in its role as a service provider.

Prior to the New DOL Rules in April 2021 . . .

- There was limited guidance as to what plan fiduciaries were required to do because HIPAA only applied to health plans and state laws were inconsistent.
- It was unclear whether there is some general ERISA fiduciary requirement and, if so, what it required.



April 2021: DOL Issues Guidance in Three Parts

1. [Tips for Hiring a Service Provider with Strong Cybersecurity Practices](#): Six tips for fiduciaries when they select service providers.
2. [Cybersecurity Program Best Practices](#): Twelve best practices for plan service providers (and the fiduciaries selecting them).
3. [Online Security Tips for Participants and Beneficiaries](#): List of steps participants can take to reduce the risk of fraud or loss.

DOL guidance is not “binding” per se, but it tells us DOL’s expectations when it audits plans

Tips for Hiring Service Providers

- Ask if provider has insurance covering cybersecurity and identity theft.
- Ask if provider has had past security breaches.
 - What happened? How did the provider respond?
- Contractual requirements to consider:
 - Comply with standards.
 - Avoid limitations of liability for security breaches.
 - Conduct third-party audit.
 - Keep information private and prevent unauthorized use or disclosure.
 - Notify upon breach and cooperate in investigations and remediation.
 - Comply with record retention, destruction, privacy and information security laws.
 - Require insurance (errors and omissions, cyberliability, crime).

Cybersecurity Program Best Practices

DOL language is geared toward service providers, but likely applies to plans that maintain their own internal information technology systems.

- Develop a formal, documented cybersecurity program.

Data governance and classification	Vendor management	Risk assessment
Access controls and identity management	Vulnerability and patch management	Consistent use of multi-factor authentication
Asset management	Systems operations	Incident response
Configuration management	Data disposal	Data privacy
Business continuity and disaster recovery	Physical security and environmental controls	Annual cybersecurity awareness training
System, application and network security and monitoring	Systems and application development and performance	Encryption of sensitive data in transmission and at rest

Cybersecurity Program Best Practices (cont'd)

- Conduct annual risk assessments.
- Define information security roles/responsibilities.
- Conduct annual third-party audit of security controls (including penetration testing).
- Implement strong access control procedures (quarterly review of who can access information, use of multifactor authentication, unauthorized activity detection and monitoring).
- Facilitate third-party reviews of cloud and other providers.
 - Consider contractual provisions regarding access control and multifactor authentication, encryption, notification of cyber-events.
- Provide cybersecurity awareness training.
- Develop secure system development life cycle (SDLC) program (secure development in-house, testing externally developed software).
- Create business continuity, disaster recovery, and incident response plans.
- Encrypt sensitive data (stored and in transit).
- Implement strong technical controls consistent with best practices (updates, patches, data backup).
- Appropriately respond to any cybersecurity incidents.

Online Security Tips for Participants

- Topics to cover:

Monitoring online account	Strong and unique passwords
Multi-factor authentication	Keeping information current
Closing unused accounts	Risks of free wi-fi
Phishing awareness	Anti-virus
Reporting identity theft	

Preparation for DOL Audit

- DOL audit inquiry:
 - “Furnish all documents relating to any cybersecurity or information security programs that apply to the data of the Plan, whether those programs are applied by the sponsor of the Plan or by any service provider of the Plan.”
- Interviews with organization IT/other personnel regarding plan cybersecurity practices.
- Questions have focused on:
 - Where plan data resides, with whom, and the security measures in place.
 - How data is sent within and outside of the organization.
 - Disaster recovery programs and mitigation efforts in place in case of breach.

***Walsh v. Alight Solutions*, 44 F.4th 716 (7th Cir. 2022)**

- DOL investigation into whether cybersecurity breaches resulted in unauthorized distributions from ERISA plan accounts, the adequacy of Alight's cybersecurity safeguards, and whether Alight was liable.
- DOL issued a subpoena. Alight refused to produce many documents and heavily redacted others.
- DOL obtained a subpoena enforcement order (Illinois District Court)
- Alight appealed to the Seventh Circuit.
- The Seventh Circuit affirmed district court's enforcement order:
 - "whether or not Alight is a fiduciary does not affect the department's investigatory authority"
 - DOL's investigative authority extends to any person, or any suspicion of a violation.
 - Rejected Alight's request for a protective order to not produce documents or to produce them redacted.
 - Held that while the information is sensitive, Alight has not shown how disclosure to the DOL would result in information being revealed to a third party.
- In July 2022, the district court approved a confidentiality protective order limiting the use of information obtained in the investigation by federal and state agencies.

Key Takeaways

- DOL issued first-of-its-kind cybersecurity guidance in April 2021.
- The guidance applies to both pension and health and welfare plans.
- DOL is focused on cybersecurity and questions appearing in DOL audits.
- The DOL guidance constitutes best practices.

COBRA Notice Litigation Update

Legal Standards/Framework

- COBRA permits employees and their dependents to extend health coverage under an employer's group health plan when coverage would otherwise be lost due to termination of employment or other "qualifying events."
- Under the relevant regulations, the employer's notice to employees of COBRA coverage must:
 - Be "written in a manner calculated to be understood by the average plan participant."
 - Include certain information such as a mailing address for payments, an explanation of how to enroll, and a physical form to elect coverage.
- The DOL provides and periodically updates a model COBRA notice.

COBRA Litigation Trends

- Following the DOL's issuance of a model COBRA notice in 2020:
 - Several lawsuits filed against large companies alleging that their COBRA notices differed from the model notice
 - Ten new lawsuits in 2022.
 - Many lawsuits are filed in federal district courts in Florida and brought by the same few plaintiffs' firms.
- Common allegations include that:
 - Boilerplate warnings confuse and scare recipients from electing continuation coverage.
 - The notice did not identify the plan administrator (often when a third-party administrator is involved). However, the regulation requires only that the notice include the contact information for "the party responsible under the plan for the administration of continuation coverage benefits."
- Many decisions reject defendants' arguments that fraud warning allegations fail to state a claim under Rule 12(b)(6), holding such arguments are merit-based and thus premature. *Blessinger v. Wells Fargo & Co.*, 2023 WL 145449 (M.D. Fla. Jan. 10, 2023).
- An emerging trend has been to dismiss notice-related allegations for lack of standing. *Gallardo v. IEH Corp.*, 2022 WL 4646514 (E.D.N.Y. Oct. 1, 2022) (holding plaintiff did not suffer injury-in-fact where she did not allege that she declined continuation coverage).

Settlements

- Many of the COBRA class actions are settled quickly, with defense costs often exceeding the potential settlements.
 - Motions to dismiss are frequently denied despite some modest successes.
 - Driven by potential recovery of attorneys' fees.
- Settlements range from \$137,000 to \$1.6 million, with classes ranging from 50 to 19,000 members.
- Barring a few outliers, this has resulted in recoveries between \$13 and \$20 per class member.

Questions?

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