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The ERISA Class Action: Fever Pitch Anxiety

Employment and Labor

Litigation and Dispute Resolution



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The recent [flurry of 401\(k\) class actions](#) seems like a revival of the ERISA fee cases from the early 2000s. Smart, sophisticated plaintiffs' attorneys are filing new ERISA fiduciary breach class action claims with intriguing theories. The mere thought of [costly litigation](#) creates new levels of angst and anxiety among corporate benefits managers. Following are practical steps to help prepare for what may be an inevitable predicament for organizations with comprehensive retirement programs.

Confirm the existence of sound ERISA governance

There is no substitute for strong, *documented* ERISA governance processes. This includes a fiduciary committee structure right-sized for the company that meets regularly and has a rolling agenda that contains [ERISA-required fiduciary tasks](#) (not the least of which is vendor fee review). Then, annual fiduciary training should include current content complete with regulatory updates, plus claims and litigation trends.

Remain abreast of the market

[Needless to say, requesting plan vendor 408\(b\)\(2\) fee disclosures](#) is not enough. The fiduciary committee must review those disclosures and act based on the information presented. Even absent

fee increases, periodic market checks are imperative to confirm fees are consistent with those charged to similarly-sized plans (assets and participants) with similar plan features. Be aware that a vendor cannot (and would not) certify the reasonableness of its own fee. Use a third-party consultant to survey the market and maintain the documentation in plan files.

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Perform self-audits of plan documentation

Verbiage in the plan document should line up with information in the summary plan description and, as a safeguard for fee-based claims, information in the [404a-5 participant fee disclosure](#). Remember that oftentimes clear, concise, tightened plan language is more effective than all-encompassing verbose explanations. Work with your employee benefits attorney to arrive at the best protective language for your plan(s).

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Maintain an open internal communication channel

Although this can be hard due to the busy nature of corporate benefits departments, consistent communication touchpoints are vital. Crafty plaintiffs' firms may [solicit benefit plan participants](#) to serve as named class plaintiffs through social media and other semi-private avenues that make it difficult to stay ahead of potential claims. Open communication channels allow for discussion about this type of law firm outreach, general participant concerns, and possible risks. Take notice and address them.

Choose your law firm wisely

Upon receipt of a complaint, it may be easy simply to send the complaint to the law firm traditionally assisting with plan compliance matters or one already on the company's preferred firm list. Proceed with caution. Determine whether the [ERISA fiduciary policy](#) requires the carrier to select defense counsel or if the company may choose counsel. Interview more than one firm or, at a minimum, request responses to budget/proposal questions. Ask specific questions about resolution strategy. If the only approach contemplated is a litany of motions (or, arguably worse, the firm provides a near guarantee of success at the federal appellate circuit level), it may signal an inability to think strategically for creative resolutions. Remember most firms have glossy brochures showcasing litigation results. Consider engaging counsel with a common sense, practical proposal for resolving the litigation rather than a firm with high propensity to run up [legal fees that ultimately may not be covered](#) in their entirety by the ERISA fiduciary policy.

There is no foolproof way to escape ERISA litigation. With established strong governance processes, however, fiduciary breach litigation could prove less painful than anticipated. The key is launching

early sustainable offense rather than reacting haphazardly (with considerable expense) in defense.

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