Second Quarter 2019

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

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Notes From Your Editors

Spring has sprung, bringing us an important new retirement development.

In 2015, the Internal Revenue Service (IRS) indicated an intention to severely restrict a plan sponsor’s ability to offer retirees in pay status single lump-sum distributions in lieu of ongoing monthly payments. The IRS recently announced that no such restrictions will be issued, and plan sponsors again have access to this very useful pension de-risking strategy. This *Quarterly Update* begins with an article about retiree lump-sum windows and how plan sponsors can use them to meet de-risking goals.

One topic that frequently comes up for employers is whether their employees will have enough funds saved for retirement. Although there may be a number of savings opportunities available to employees, health savings accounts are one of the more tax-favorable tools that can be used to help employees save more and be better prepared for retirement. We discuss how to best optimize these savings vehicles in this issue.

Plan sponsors often ask for help managing their retirement plans. Aon has developed two programs designed to transfer much of the day-to-day responsibilities from the plan sponsor to Aon. The first is an offer for Aon to accept fiduciary decision-making responsibilities for defined benefit and defined contribution (DC) plans as well as nonqualified plans. The second is a program to help manage DC plan responsibilities. For DC plans, the two programs can be combined, and a customized program can be developed to best meet a plan sponsor’s needs.

As reported last quarter, the retirement plan community is paying close attention to recent lawsuits filed against plan sponsors and fiduciaries of pension plans challenging the actuarial equivalence factors used for converting benefits into optional forms and for early retirement reductions. As expected, the defendants have filed motions to dismiss the complaint in each of the cases, but we haven’t seen the plaintiffs’ responses yet. We include a short update about these cases (and one new one that was just filed) and will continue to provide updates as the litigation continues.

We continue our focus on plans covered under Section 403(b) of the Internal Revenue Code (relating to plans of certain tax-exempt organizations). This issue contains an article discussing lawsuits brought against sponsors of these plans. We also discuss some recent fiduciary litigation and other interesting updates in the Quarterly Roundup, a regular feature of our publication.

If you have any questions or need any assistance with the topics covered, please contact the author of the article or Tom Meagher, our practice leader.

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Lump Sums for Retirees Back on the Table

by Cedy Jury and Tom Meagher

While employers have continued to search for ways to reduce financial risks associated with their defined benefit (DB) plans, a de-risking strategy has once again been made available by the Treasury Department and Internal Revenue Service (IRS). Specifically, the IRS has reversed course, placing retiree lump sums back on the table.

In early 2012, the IRS issued several private letter rulings (PLRs) permitting DB plans to allow retirees to elect to receive their monthly benefit payments in the form of a lump-sum payment without violating the required minimum distribution (RMD) rules of Section 401(a)(9) of the Internal Revenue Code (Code). These PLRs received a lot of attention among plan sponsors and continued to be issued over a period of years. In 2015, the IRS announced its intention to amend the RMD regulations to preclude the offering of lump-sum payments to retirees (other than in accordance with certain enumerated events, e.g., plan termination). That announcement effectively removed the payment of lump sums to retirees from the de-risking alternatives to be considered by plan sponsors.

> Retiree lump-sum window programs gained popularity as a pension de-risking strategy because, among other things, they allowed for additional retiree spending flexibility, administrative expense and PBGC savings, and potentially a balance sheet benefit.

On March 6, 2019, the IRS issued Notice 2019-18 indicating that it no longer intends to amend the RMD regulations. Moreover, until further notice, the IRS will not assert that a plan amendment providing for a retiree lump-sum window program will cause a plan to violate the RMD regulations. While the issues associated with the RMD rules appear to have been addressed by this guidance, the IRS did indicate an intention to continue to evaluate such programs under other provisions of the Code.

Retiree lump-sum window programs gained popularity as a pension de-risking strategy because, among other things, they allowed for additional retiree spending flexibility, administrative expense and PBGC savings, and potentially a balance sheet benefit. However, these programs transfer investment and longevity risk to retirees and introduce additional requirements for employers, including developing accurate data, defining the target population, and mitigating the impact of anti-selection (where unhealthy retirees elect the lump sum and leave the healthier—and more expensive—retirees in the plan).

It is important for sponsors considering a retiree lump-sum window to build sufficient time to navigate these complexities and pay close attention to plan governance. Ensuring compliance with retiree and spousal consent rules, nondiscrimination testing, Code Section 417(e) lump-sum assumption provisions, and the terms of the plan and trust also require careful consideration and planning.

Making the choice between a lump sum and a lifetime monthly pension can be an important decision for a retiree. We recommend a robust communication campaign to help retirees fully understand the implications of any voluntary election. Some plan sponsors also provide financial advisors to help each retiree consider the impact of the offer on his or her financial situation.

A lump-sum offer to retirees is another strategy to reduce pension risk while providing retirees additional choice. Plan sponsors ultimately need to evaluate whether this is the right strategy for them and their retirees. Aon's multi-disciplinary team can help with every step of a retiree lump-sum window offer—from consideration and analysis to implementation.

Wealth and Health Savings

by Alex Bush and David Fairburn

Employers invest a lot of time, effort, and money to support their employees' retirement savings needs, and it's often not enough to prepare employees for retirement. Rather than working harder, both employers and employees could work smarter by strategically utilizing all retirement savings vehicles, including a defined contribution (DC) plan with pre-tax, after-tax, and Roth 401(k) features and Health Savings Accounts (HSAs). HSAs are tax-sheltered savings accounts available to employees enrolled in high-deductible health plans.

Motivating employees to start saving can be a challenge, but it is the critical first step. Even then, 81% of employees are projected to fall short of saving enough money for an adequate retirement. Aon has previously covered the topic of retirement readiness in the **Fourth Quarter 2018** issue of the *Quarterly Update*. When savings are projected to fall short, the most commonly recommended remedies, such as saving more, working longer, or spending less, can be difficult for employees. A better approach for employees is to take full advantage of all available vehicles to optimize savings outcomes.

While no savings vehicle is best for all employees, following a few simple guidelines can help maximize participants' retirement savings:

- **Maximize Employer Money.** Design plans to encourage employees to use vehicles that provide extra contributions toward their retirement.
  - Many DC plans encourage employees to save by offering a match on employee contributions and utilizing auto enrollment and escalation features.
  - Very few HSAs offer an employer match or utilize automation to drive savings.
- **Maximize Investment Returns.** Establish investment options and defaults to maximize returns within an employee's risk tolerance.
  - Many DC plans feature investment lineups designed to simplify employee decision-making while limiting fees and leakage.
  - HSAs are often not coordinated with an employer's DC plan and typically offer less sophisticated investment lineups and higher fees.
- **Maximize Tax Advantages.** Encourage employee decisions to minimize taxes, providing more money to the employee, now and in retirement.
  - Pre-tax DC savings and employer contributions (and the earnings on both) are taxed as ordinary income at distribution. Roth 401(k) and after-tax contributions are taxed in the year of contribution. Earnings on after-tax contributions are also taxed at distribution. All amounts that employees contribute to DC plans are subject to Social Security and Medicare taxes when earned.
  - HSAs have a "triple-tax advantage." In addition to contributions and earnings being free from ordinary income tax, distributions are tax-free if such distributions are used for qualified medical expenses. No Social Security or Medicare taxes are withheld from amounts contributed to HSAs.

Many factors influence what will be the most efficient savings vehicle for a person, including income, retirement savings levels, life expectancy, projected retirement expenditures (including health care), plan design, and taxes. No single answer will be the same for all employees since DC plans and HSAs have unique advantages that vary from person to person. For example, lower-income and middle-income employees who are far behind on retirement savings often benefit most by placing their entire savings into a DC plan on a pre-tax basis and ignoring other vehicles. Conversely, high-income and middle-income employees on track for retirement may benefit from a mix of HSA savings and DC plan savings on both a Roth 401(k) and pre-tax basis.

Next Steps for Plan Sponsors

- Review the design of your DC plan and HSA including savings options, employer contributions, default elections, and auto features.
- Evaluate how your investment lineup compares for your DC plan and HSA to make sure each have appropriate funds at reasonable fees and costs.
- Enable better decision-making by enhancing participant tools and communications.
- Consider your DC and HSA in the context of broader financial well-being programs, tools, and guidance.

Aon's consultants can help navigate the alternatives and develop strategies to fit your population. Please reach out and we'll help you get started.

Delegate Aon to Serve as the Administrative Fiduciary

by Hitz Burton and Tom Meagher

Sponsoring a tax-qualified or nonqualified retirement plan can be difficult—increasing numbers of regulations along with administrative complexity can require more than a full-time effort to keep a plan compliant. Retirement plans today require specific skills, many of which can only be gained through experience working with the plan and related operations. While plan sponsors have had to devote more and more time to overseeing their retirement plans and related administration, internal resources may continue to be challenged due to competing organizational priorities, turnover, lack of experience, plan complexity, and inadequate time to address new issues. These challenges can quickly overwhelm plan fiduciaries and benefit organizations charged with retirement plan responsibilities.

The need for expertise regarding retirement plan decisions and related administration has become increasingly important over the past few years. Litigation appears to be around almost every corner from "stock drop" and "stock rise" cases to litigation challenging early retirement windows, actuarial equivalence, and annuity buyouts. Regulators have also become increasingly aggressive in certain circumstances, including assessing penalties for various fiduciary breaches. As plan sponsors continue to evaluate their retirement plans and related administration, we are hearing increasing levels of concern from plan sponsors that they may not have the time or resources necessary to handle all of the day-to-day decisions that come with sponsoring a qualified or nonqualified retirement plan. Moreover, there is increasing concern that many of the plan-related decisions are fiduciary in nature, thus exposing plan fiduciaries to possible personal liability if they have been found to have breached their fiduciary duties to the plans or their participants.

In response to these issues, plan sponsors are increasingly turning to third-party resources to provide the expertise necessary to mitigate these risks. Plan sponsors and fiduciaries have already outsourced a number of responsibilities to third parties including plan administration, investments, and domestic relations orders, and they appear to be searching for additional decision-making support in this increasingly complex and litigious environment.

> As plan sponsors continue to evaluate their retirement plans and related administration, we are hearing increasing levels of concern from plan sponsors that they may not have the time or resources necessary to handle all of the day-to-day decisions that come with sponsoring a qualified or nonqualified retirement plan.

To address the inherent challenges and complexities involved in making fiduciary decisions for a retirement plan, Aon's new fiduciary decision-making service is designed to relieve plan sponsors and designated fiduciaries of many of the "plan administrator" day-to-day decision-making activities. To the extent that these decisions are assigned to Aon, Aon will be responsible, as the designated fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), for everything from maintaining a plan document that satisfies qualification requirements of the Internal Revenue Code (Code) to compliance with various reporting and disclosure requirements under ERISA—and many other decision-making services in between.

To assist clients interested in outsourcing fiduciary (and non-fiduciary) retirement plan responsibilities, Aon has staffed this service offer with a cross-functional team of compliance, administrative, recordkeeping, and investment specialists who are subject matter experts in their respective fields. The Aon team is available to provide plan sponsors and fiduciaries with a variety of services, including assuming responsibility for:

- All plan reporting and disclosure obligations (e.g., Form 5500 Annual Report, Annual Funding Notice, and Summary Plan Description);
- Plan document maintenance to ensure compliance with the qualification requirements of Code Section 401(a);
- Oversight and decision-making authority over the plan's formal ERISA claims and appeals process;
- Plan governance, including preparation and review of committee minutes, updates of committee charters and bylaws, and establishment of a fiduciary record for plan actions;
- Coordination of all investment activity between investment committee members and third parties, retention and evaluation of independent investment advisors, and periodic evaluation of investment fees; and
- Oversight over contracting with third parties and monitoring their performance against plan requirements.

If you are interested in discussing outsourcing some or all of the decision-making associated with one or more of the tax-qualified or nonqualified retirement plans you currently sponsor, please contact your Aon consultant.

Actuarial Equivalence Litigation—A Continuing Update

by Hitz Burton and Jennifer Ross Berrian

Four lawsuits were filed last December against large pension plans challenging the actuarial equivalence factors used for calculating optional forms of benefit or early retirement reduction factors. Motions to dismiss have been filed in all four cases. The motions include various arguments urging the courts to dismiss the claims. Some of the more interesting arguments include:

- The variation between the amount of benefits calculated under the plan's factors and the factors under Section 417(e)(3) of the Internal Revenue Code (Code) is less than 5% and is, therefore, reasonable;
- Congress could have specified the interest rate and mortality factors used to calculate early retirement benefits and optional payment forms but has not (unlike Congress' requirement to use specific factors for calculating lump sums as set forth in Code Section 417(e)(3));
- The mortality table used by the plan is listed in the definition of "standard mortality table" for nondiscrimination testing and thus is reasonable for optional form conversions; and
- A variety of procedural arguments under the Employee Retirement Income Security Act of 1974 (ERISA), including the application of ERISA's six-year statute of limitations and failure to exhaust the internal plan claims and appeals procedures.

The plaintiffs have yet to file responses to the defendants' motions to dismiss, and we do not expect any court rulings on these motions before this summer.

As we go to press, a fifth lawsuit has been filed with substantially similar allegations as the prior lawsuits. Given the economic incentives in place, we expect additional litigation in this area—at least until one or more of the earlier claims are dismissed.

We will continue to monitor developments in these cases as well as related litigation and will update you when developments arise. Please contact your Aon consultant for more information about these cases.

Managing Fiduciary Risk and Optimizing DC Plan Performance

by Alex Bush, Melissa Elbert, and Brian Pieper

Over the past few decades, the defined contribution (DC) plan has cemented its status as the American workers' primary retirement vehicle. The growth in importance of DC plans has increased the risks faced by plan fiduciaries as they find themselves under heightened scrutiny from participants, regulators and, most ominously, plaintiffs' attorneys.

Consequently, the most challenging issues facing plan sponsors and fiduciaries of DC plans are:

- **Fiduciary Risk.** Since 2016, more than 100 lawsuits have been filed against DC plan fiduciaries. The lawsuits primarily allege a breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, the alleged breaches occurred because the plan fiduciaries failed to have prudent processes and documentation in the selection of plan investment options and/or plan participants were charged excessive fees. In some cases, plan fiduciaries have been held personally responsible for damages, putting their personal assets at risk. Given the large pool of assets being managed by plan fiduciaries, it is likely litigation of this type will continue and may evolve into new types of claims.
- **Compliance and Operations Risk.** Heavy reliance on automation and outside vendors often puts distance between the plan sponsors and fiduciaries and their plans' operations. However, the responsibility for plan performance, including operational and technical compliance, remains with the plan sponsor and fiduciaries. As such, this distance can create a false sense of security.

  In addition, the elimination of the Internal Revenue Service (IRS) determination letter program for ongoing, individually designed plans means that plan sponsors can no longer regularly confirm the tax-qualification status of their plans. Therefore, plan sponsors must find new ways to ensure the qualification of their plans.
- **Competitiveness and Adequacy**. In our current economic climate, employers struggle to attract and retain the right talent. Competitive employers, seeking to retain talent, will assess their benefits, including their retirement programs, on a comparable basis.

To help plan sponsors navigate this new era of competitiveness and risk associated with their retirement programs, Aon created DC Manager—a customizable solution that helps plan sponsors understand

and address their responsibilities in a comprehensive manner. Through DC Manager, Aon provides a variety of services designed to assist plan fiduciaries in fulfilling their duties and managing their risk, including:

- **Review of Governance Processes.** Reviewing the charters of plan committees, the delegations of authority, and the governance aspects of the plan's investment policy statement to confirm governance is being conducted in accordance with documentation.
- **Fiduciary Oversight.** Coordinating quarterly meetings and agendas, taking meeting minutes, informing the committee of fiduciary updates, documenting decisions and follow-up items, developing a customized compliance calendar, and tracking project status.
- **Fiduciary Training.** Providing comprehensive fiduciary training to equip plan fiduciaries with an understanding of the laws governing their plan and their fiduciary duties to plan participants and beneficiaries.
- **Ongoing Vendor Management.** Confirming that vendors are fulfilling their contractual obligations (including monitoring whether any fee concessions should be imposed due to missed service milestones) and reviewing vendor metrics and education materials.
- **Fee Benchmarking.** Helping plan fiduciaries ensure that plan expenses are reasonable by utilizing comparisons that include both soft-dollar (e.g., revenue sharing) and direct-billed charges, reviewing current service agreements against best practices, and supporting contract renegotiation, as appropriate.

In addition to ongoing fiduciary assistance, DC Manager includes periodic reviews of critical plan functions to help ensure your plan is compliant and operating efficiently. We also provide plan design support to help you understand your competitive position and the retirement readiness of your employees. These supplemental services include:

- **Plan Document Review.** Analyzing documents for compliance with the IRS' required amendments list to help ensure they satisfy tax-qualification requirements and remain up-to-date.
- **Review Plan Operations.** Performing a targeted review of plan operations, focusing on operational areas with specific concerns and those that typically represent the greatest risk.
- **Retirement Readiness Study.** Helping plan sponsors understand expected employee outcomes and identifying retirement income adequacy by comparing projected needs and resources utilizing methodology from Aon's *The Real Deal: 2018 Retirement Income Adequacy at U.S. Plan Sponsors* study.
- **Plan Design Analysis.** Competitive benchmarking of your plan's cost and value using Aon's Benefit Index® tool to help you identify your competitive position compared to a hand-selected peer group.

DC Manager is a great approach and solution for DC plans. Please contact the authors or your Aon consultant to discuss how DC Manager can assist you.

Higher Education 403(b) Plan Litigation Update

by Diane Smola and Cynthia Zaleta

Peppered with claims unique to 403(b) plans, lawsuits in the higher education marketplace have become prevalent as plaintiffs' attorneys have followed a litigation recipe tested in the corporate 401(k) marketplace. In August 2016, Schlichter, Bogard & Denton, the plaintiffs' firm responsible for much of the 401(k) litigation, reset the litigation table to include prominent private universities and filed eight lawsuits alleging breach of fiduciary responsibilities. Other law firms quickly added to the mix, and as of March 15, 2019, at least 19 such lawsuits have been filed against universities. These lawsuits primarily focus on three areas: inappropriate or imprudent investment choices, excessive fees, and self-dealing.

- **Inappropriate or Imprudent Investment Choices.** Plaintiffs allege that too many investment choices resulted in participant confusion. Plaintiffs also identify investments that habitually underperform both their benchmarks and available alternatives as well as pinpoint the liquidity restrictions of a popular fixed annuity as being problematic. Plaintiffs allege that retaining these poor performing options substantially reduced participants' retirement assets.
- **Excessive Fees.** Plaintiffs allege that too many investment choices diluted the plan fiduciaries' ability to leverage scale to negotiate lower administrative and investment fees. In addition, using multiple recordkeepers, rather than a single recordkeeper, resulted in duplicative, excessive, and unreasonable fees for recordkeeping services. Further, plaintiffs assert a fiduciary breach as the plan fiduciaries failed to conduct a periodic, competitive bidding process to ensure reasonable recordkeeping fees were, and continued to be, paid by participants.
- **Self-Dealing.** Several lawsuits allege self-dealing by plan fiduciaries. Specifically, plaintiffs allege the fees paid by participants were used for the university's own benefit.

Evolution of 403(b) Landscape
In 1958 Congress added Section 403(b) to the Internal Revenue Code (Code). At that time, investments were limited to annuity contracts. With the passage of the Employee Retirement Income Security Act of

1974 (ERISA), Code Section 403(b) was amended to permit custodial accounts that could invest in mutual funds.

Department of Labor Regulations, which became effective in 1975, specified that the purchase of annuity contracts or establishment of custodial accounts were not subject to ERISA if, among other requirements, participation by a 403(b) plan participant is completely voluntary, and all rights under the contracts or accounts are enforceable solely by the participant. Additionally, employer involvement must be limited to allowing vendors to publicize their contracts/accounts, collecting employee contributions, and limiting funding products to afford employees reasonable choice in light of all relevant circumstances. At that time, many 403(b) plan sponsors interpreted the regulations to mean that multiple recordkeepers and investment lineups were preferred. The Internal Revenue Service issued new 403(b) regulations in July 2007, which imposed a written plan document requirement and various employer responsibilities. Since these regulations, there has been a renewed focus on overall compliance, including adherence to the requirements of ERISA.

Unfortunately, the ability for 403(b) plan fiduciaries to effect change remains encumbered. Individually-owned contracts, which are typically a staple in many 403(b) plans, require that certain proprietary investment options be maintained and open for ongoing deposits. Additionally, individually-owned contracts limit the plan fiduciaries' ability to map assets when an investment becomes imprudent. Plan fiduciaries may only make changes with respect to future contributions. Today, more than 40 years after the passage of ERISA, 403(b) plans are still precluded from investing in low-cost collective investment trusts.

Current Litigation Setting

Where do the 403(b) lawsuits stand as of March 15, 2019? Some cases have been fully dismissed. A majority are still pending, in whole or in part, with the primary focus on investment choices and fees. Finally, some cases have been settled or have been agreed to be settled with no admission of liability. Some of the interesting case notes, from our point of view, include:

- One university petitioned the Supreme Court to compel participants to accept arbitration rather than file ERISA class-action lawsuits. The Supreme Court denied this request.
- At least one case was voluntarily dismissed by the plaintiff with both parties agreeing to bear their own attorney fees and costs of litigation.
- In one pending settlement, the proposed agreement requires the plan sponsor to:
  - Hire an independent advisor to conduct an RFP;
  - Ease the ability of participants to transfer investments out of frozen annuity accounts;
  - Avoid the use of plan assets to pay salaries of employees who work on the plan;
  - Use reasonable efforts to further reduce recordkeeping fees; and
  - Notify participants if fees increase and why.

Closing

We predict that more lawsuits will be filed against colleges and universities that sponsor 403(b) retirement plans. As a result, we encourage 403(b) plan sponsors and fiduciaries to consider adopting sustainable practices in executing their oversight responsibilities. These include regular reviews of investment options and completing operational compliance and service reviews.

This article was also published in the Volume II 2019 issue of Connections.

Please see the applicable Disclosures and Disclaimers on page 11.

Quarterly Roundup of Other New Developments

By Teresa Kruse, Jan Raines, and Bridget Steinhart

The Mighty Mickey Mouse—Disney Prevails

Disney plan fiduciaries have prevailed on appeal against claims that they breached their fiduciary duty of prudence with respect to an investment option offered under the Disney Savings and Investment Plan. On March 1, 2019, the 9th Circuit Court of Appeals affirmed the district court's dismissal of the plaintiffs' amended complaint and the denial of leave to amend the amended complaint, effectively ending the litigation.

Plaintiffs alleged that offering the Sequoia Fund as one of many plan investment options violated the plan's investment policy. They also alleged that plan fiduciaries violated the fiduciary duty of prudence under the Employee Retirement Income Security Act of 1974 (ERISA) by retaining the Sequoia Fund as an investment option. The plaintiffs' basis for these claims was their assertion that the Sequoia Fund held over 30% of its portfolio in an artificially inflated stock and that Disney fiduciaries knew, or should have known, that the stock was overvalued and, therefore, the Sequoia Fund was no longer a prudent investment option. In their amended complaint, the plaintiffs claimed that plan fiduciaries never discovered Sequoia's shift from "conservative 'value' to risky 'growth' stocks" or communicated the same to participants.

The 9th Circuit cited three reasons for affirming the decisions of the district court: (i) "allegations based solely on publicly available information that a stock is excessively risky in light of its price do not state a claim for breach of the ERISA duty of prudence;" (ii) the non-diversified and risky nature of the Sequoia Fund was described in both the plan's summary plan description and the Fund's 2015 prospectus and terms such as “value” and “growth” cannot be used to draw “unreasonable inferences” as to investment strategy; and (iii) allowing plaintiffs a second opportunity to amend their complaint would be futile because plaintiffs' complaint cannot "be saved by any amendment." *Wilson v. Fid. Mgmt. Tr., No. 17-55726, 2019 BL 69493 (9th Cir. Mar. 1, 2019).*

Intel Asks Justices to Decide When the Clock Starts Running
Intel Corp. has petitioned the U.S. Supreme Court to resolve a circuit court split regarding the deadline by which plaintiffs can file lawsuits alleging fiduciary breach under ERISA. The statute of limitations under ERISA is the earlier of (i) six years after the act or omission constituting the breach or (ii) three years after the earliest date on which the plaintiff had actual knowledge of the breach. At issue is how to determine when a plaintiff has actual knowledge of a breach.

The *Intel* class action lawsuit concerned hedge fund investment holdings in two of Intel’s retirement plans and allegedly inadequate fund disclosure. Even though the plaintiff received lots of information about plan investments when he began participating in the plan, the 9th Circuit held that the limitations period did not begin until the plaintiff was “actually aware of the facts constituting the breach.” Merely claiming that those facts were available to the plaintiff was not sufficient to constitute actual knowledge according to the 9th Circuit. (The 9th Circuit noted, in order for the plaintiff to be found to have actual knowledge to cause the statute of limitations to begin to run, the plaintiff was required to have actual knowledge both that the investments occurred, and that they were imprudent.) Other courts have held that the limitations period begins to run when the plaintiff has constructive knowledge of a breach (e.g., being in receipt of documentation that would alert the person to a breach).

Recently, the 6th, 7th, and 11th Circuits have used a similar standard as the 9th Circuit’s for “actual knowledge.” Conversely, the 3rd and 5th Circuits have interpreted “actual knowledge” as being satisfied when a plaintiff has constructive knowledge of the claim. Intel, in its petition to the Supreme Court, indicates that “no amount of disclosure by plan fiduciaries can ensure that plan participants will possess ‘actual knowledge’ of the facts disclosed by the plan, enabling virtually every plaintiff to get past a motion for summary judgment,” and potentially discourage timely participant review of disclosure materials.

We are following this case and will provide updates as they are available. *Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069 (9th Cir. 2018), petition for cert. filed Feb. 26, 2019.*

ConAgra “Reinterpretation” of Compensation Definition
A former high-level ConAgra employee filed a class action lawsuit against the plan sponsor and fiduciaries of the ConAgra Brands Retirement Income Savings Plan regarding the “reinterpretation” of the plan’s definition of compensation applied when determining whether elective deferrals and matching contributions should have been made following termination of employment. The plaintiff was terminated as part of a reduction in force on April 1, 2016 and was paid a management incentive bonus on or about July 15, 2016 (which would have been paid even if he had continued employment).

The lawsuit relates to the plan’s definition of “compensation,” specifically whether certain post-severance bonus payments are includible in eligible compensation for the purpose of making elective deferrals and receiving the corresponding match. According to the lawsuit, the plan document defined compensation to include payments made by the later of (i) 2½ months after severance of employment or (ii) the end of the calendar year that includes the date of severance, if the compensation received would have been paid to the participant while still employed. However, no deferrals were deducted from the plaintiff’s bonus and no corresponding match was made on his behalf.

The plaintiff exhausted the plan’s claims procedures, receiving denials to both his initial claim and appeal. The denial letters were based upon an administrative reinterpretation of the plan’s definition of compensation. The letters claimed that due to a reinterpretation of who constitutes an eligible employee under the plan, only bonus payments made within 2½ months of severance were included in plan compensation. The denial letters acknowledged that the definition of compensation in the plan had not been amended but claimed that a plan amendment was not required.

It is important to remember that interpretation of the plan document is a key fiduciary duty. ERISA requires fiduciaries to act “in accordance with the documents and instruments governing the plan” as long as they are consistent with ERISA. It is also critical to document all plan provision interpretations, either in meeting minutes of the fiduciary committee (if also the plan administrator) or in an administrative procedures document, and to apply these interpretations consistently to all similar matters. It is also important to understand when a plan provision is subject to “administrative reinterpretation” and when changing the meaning of a provision requires a plan amendment. When there are challenges regarding the definition of compensation or any administrative interpretations, fiduciaries should seek expert advice for assistance.

This case is still in the beginning stages, and the defendants may have valid defenses to the plaintiff’s claims. We will monitor future developments. *Carlson v. ConAgra Brands, Case No. 1:18-cv-8323 (N.D. Ill. Dec. 19, 2018)*.

The Latest Fee Fiasco
FMR LLC, the parent company of Fidelity Investments, is facing allegations that it has been charging secret and unauthorized mutual fund fees and that the mutual funds have, in many cases, been passing those fees on to plan investors. This has led to retirement investor litigation along with investigations by the Department of Labor and the Commonwealth of Massachusetts.

A participant in the T-Mobile USA, Inc. 401(k) Retirement Savings Plan sued FMR and related entities (collectively, Fidelity) alleging kickbacks and secret payments. Fidelity is alleged to have secretly charged mutual funds an annual fee described as an “infrastructure fee.” The fee is purportedly used to offset the costs for Fidelity to maintain other asset managers’ funds on their FundsNetwork platform. Fidelity alleges that the charge has been fully disclosed and has publicly stated that it has informed 20,000 clients about this fee.

It appears as if Fidelity describes the concept of the infrastructure fee within the footnotes of its disclosures, not as a specific dollar amount applicable to each plan. In view of this recent development, Aon is reviewing whether this fee is a growing industry change. As we learn more about the investigations, the lawsuit, and the industry usage of this type of fee, we will update our clients. *Wong v. Fidelity Mgmt. & Res. Co. et al., No. 1:19-cv-10335 (D. Mass. Feb. 21, 2019)*.

Fee Litigation Settlements—Show Me the Money, or Not?
As retirement plan litigation continues to move through the courts, we are seeing more settlements being reached in advance of trial. However, the settlements are no longer just about money; depending on settlement negotiations between the parties some now require plan fiduciaries to:

- Retain an independent fiduciary who will be charged with discretionary decision-making authority affecting the plan investments, including proprietary options, mutual funds, separate accounts, and collective trust funds (*Moreno v. Deutsche Bank*)
- Add a nonproprietary target-date fund and increase company match for a specified period of time (*Cryer v. Franklin Res.*)

Creating and maintaining a good governance structure and process is an important way to meet fiduciary responsibilities. Our Aon consultants are available to help review your processes, provide fiduciary training, and develop an annual fiduciary checklist. *Moreno v. Deutsche Bank Americas Holding Corp., No. 1:15-cv-09936 (S.D.N.Y. Aug. 14, 2018); Cryer v. Franklin Res., No. 4:16-cv-04265-CW (N.D. Cal. Mar. 15, 2019*).

Retirement Plan Litigation
Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans. Defined contribution plan cases generally fall into the following three areas: inappropriate or imprudent investment choices, excessive fees, and self-dealing. Recently several cases involving financial institutions and universities have been dismissed (in full or in part) or settled, including:

- Financial Institutions
  - *Moreno v. Deutsche Bank*—Case settled for $21.9 million and other remedies
  - *Cryer v. Franklin Res.*—Case settled for $13.8 million and other remedies
  - *Schapker v. Waddell & Reed*—Case settled for $4.9 million
  - Correction. In the First Quarter 2019 issue, we reported *Rozo v. Principal* settled for $3 million. This should be noted as a case fully dismissed. *Rozo v. Principal, No. 4:14-cv-00463-JAJ (S.D. Iowa Sept. 12, 2018)*
- Universities
  - *Short v. Brown Univ.*—Case settled for $3.5 million
  - *Clark v. Duke Univ.*—Case settled for $10.6 million and other remedies
  - *Cassell v. Vanderbilt Univ.*—Case settled through mediation; settlement to be made public shortly

Plan sponsors seeking to reduce their litigation risk liability use a variety of strategies including increasing the number of passive funds in their plans and implementing better fee transparency. *Moreno v. Deutsche Bank Americas Holding Corp.; Cryer v. Franklin Res.; Schapker v. Waddell & Reed Fin., Inc., No. 2:17-cv-02365 (D. Kan. Nov. 19, 2018); Short v. Brown Univ., No. 1:17-cv-00318 (D.R.I. Mar. 11, 2019); Clark v. Duke Univ., No. 1:16-cv-01044 (M.D.N.C. Jan. 16, 2019); Cassell v. Vanderbilt Univ., No. 3:16-cv-02086 (M.D. Tenn. Feb. 25, 2019).*

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