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Worth Covering: News, Tips, and Thoughts for Professional Liability Carriers

We are very pleased to provide you with the inaugural issue of our newsletter tailored to the professional liability insurance industry. The focus of this newsletter is: (i) to provide you with legal (and sometimes business) news, tips, and thoughts that are "worth covering" and (ii) is intended for those involved in providing coverage for companies and their officers and directors, i.e., insured parties often having financial "worth." We hope you enjoy the below and we welcome your comments and questions. Happy summer reading!

Viability of "Sexual Orientation" Discrimination Claims – Venue Driven?

More often than not, the choice of forum matters. In a recent decision out of the Fourth Circuit, *Hinton v. Virginia Union University*, 2016 U.S. Dist. LEXIS 60487 (E.D. Va. May 4, 2016), the United States District Court for the Eastern District of Virginia granted the Defendant University's motion to dismiss the Plaintiff's claim for discrimination in large part because, the Court held, "sexual orientation" is not a protected class under Title VII. Unfortunately for the Plaintiff, Virginia state law also does not prohibit "sexual orientation" discrimination and, thus, he could not plead a state law violation.

A different result would likely have occurred had the Plaintiff worked and/or suffered the alleged discrimination in New York. Although the Second Circuit also does not recognize "sexual orientation" as a protected class under Title VII, the New York City Human Rights Law (NYCHRL) explicitly prohibits discrimination and retaliation based on sexual orientation. See NYCHRL, Admin. Code § 8-107. Indeed, in *Roberts v UPS*, 115 F. Supp. 3d 344 (E.D.N.Y. 2015), Judge Weinstein of the Eastern District of New York upheld the jury's determination that UPS was liable under the NYCHRL for creating a hostile work environment and for retaliation based on the lesbian Plaintiff's sexual orientation. In so doing, the Court upheld the jury's award of $100,000 (compensatory and punitive damages combined), 115 F. Supp. 3d at *3, and very recently granted an additional award of $150,000 for attorneys' fees and costs. *Roberts v. UPS*, 2016 U.S. Dist. LEXIS 48040, *1, 2016 WL 1441318 (E.D.N.Y. April 6, 2016).

Faced with the reality that a particular venue will be better for one of the parties in these types of cases, ***companies should take the time to revisit the dispute resolution, forum selection, and choice of law clauses contained in their employee handbooks and employment and independent contractor agreements***.

Even more importantly, ***companies should consider implementing anti-harassment and anti-retaliation workplace training***, a low cost measure designed to nurture a supportive work environment and preempt such claims in the first place. – *Jonathan Evan Goldberg*

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Volume 1, Issue 1

www.fisherbroyles.com

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"Dear Prudence, Won't You Come Out to Play? Dear Prudence, Greet the ERISA Litigation of the Day…"

On the ERISA front, fees paid by plans seem to be the "hot" and current focus of class action lawyers. New cases are being filed regularly and many of them are settling in the millions of dollars! Incredibly, a recent complaint has alleged that the fees charged in connection with target-date funds made the plan "one of the most expensive large 401(k) plans in the country." *Johnson, et. al., v. Fujitsu Technology and Business of America, Inc., et. al.*, Case No.: 5:16-cv-03698-NC (U.S.D.C. N.D. Cal., 6/30/16).

As a result of these cases and the fear of litigation, certain plan sponsors have been spurred to convert their 401(k) plan investment options from "actively managed" funds to index funds, which in turn raises the question of whether fiduciaries of other plans are required to review and adopt this trend in order to meet their fiduciary duties and/or avoid fee lawsuits. Not so fast.

Remember that the DOL espoused the following standard in selecting a service provider: reasonable contract for services necessary for the operation of the plan for reasonable compensation. So aside from just benchmarking the fees, remember and that a comprehensive study should be made on the qualifications of the provider and the quality of the work product and then an analysis balancing the quality of services with the fees being charged in light of those services should be performed. *See DOL Information Letter to Theodore Konshak* (Dec. 1, 1997), https://www.dol.gov/ebsa/regs/ILs/il120197.html). Also, one should be mindful that a fiduciary's decision cannot be reviewed in hindsight. As such, when a fiduciary is making a comparative fee analysis, he or she should only be judged with whatever applicable information was available at the time the investment decision was being made.

Given the uncertain "fee litigation" landscape, potential red flags to watch out for when assessing the risk associated with plans include:

- **Change in investment options and no change or update of the plan's investment policy statement;**
- **No RFP issued in 5 or more years of the plan's investment provider;**
- **No analysis of the investment returns and no comparable fee analysis;**
- **Revenue sharing formula or methodology is vague; and**
- **No proper or adequate documentation of a fiduciaries' deliberation process.**

Further, letting the fees be the driving force in the selection of an investment option may potentially run afoul of the ERISA prudence rule itself. The DOL has clearly stated many times that the lowest bidder is not necessarily the best. Under ERISA's prudence standard, in adopting the modern portfolio theory, investments should not be viewed in insolation, but in the aggregate and whether the entire portfolio made an adequate return. *See Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313 (5th Circuit 1999).

Therefore, the primary analysis that must be made is whether the investment options are prudent and amount of fees being charged in those investments is only one of the factors to consider. Fiduciaries of a plan considering solely index funds (with lower fees) must also consider the rates of return and whether those rates are appropriate for a retirement vehicle. – *José M. Jara*

The "Yates" of Hell: DOJ's New Policy Threatens Individual Liability for Directors and Officers

On September 9, 2015, the Department of Justice ("DOJ") announced that going forward, investigations regarding alleged corporate wrongdoing will also focus on the conduct of the individual directors and officers. The new policy -- which threatens personal liability and jail for individuals in the hope of deterring future corporate wrongdoing -- is outlined in a memorandum authored by Deputy Attorney General Sally Quillian Yates. See https://www.justice.gov/dag/file/769036/download). See also FisherBroyles Alert by Brian Dickerson and Nicole

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Waid at https://www.fisherbroyles.com/us-department-of-justice-ready-to-impose-civil-and-criminal-penalties-on-corporate-execs/). The "Yates Memo," as it has come to be known, sets forth six guidelines for all future investigations and prosecutions involving corporate matters:

1. To qualify for any cooperation credit, corporations must provide to the [DOJ] all relevant facts relating to the individuals responsible for the misconduct;
2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
4. Absent extraordinary circumstances or approved departmental policy, the [DOJ] will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
5. [DOJ] attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

While some regional U.S. Attorneys' Offices were already proceeding accordingly, the Yates Memo seeks to standardize practices nationwide.

One of the immediate effects of the Yates Memo is that directors and officers are demanding separate, independent counsel to represent them from the beginning of the investigation to ensure that their rights and liberty are considered and protected. Having multiple law firms involved in such investigations -- one representing the corporation and others representing the individuals -- naturally raises two significant issues: (i) potential conflicts of interest and (ii) significantly increased legal fees.

The corporate and individual targets of DOJ investigations, as well as their carriers, should seek to identify lawyers who are not only competent and experienced in securities law, but also have a thorough understanding of the criminal justice system and the DOJ's handling of white collar cases.

With respect to conflicts of interest, if a corporation wishes to "come clean" and reduce potential fines, it may be in the corporation's best interest to provide the DOJ with early and complete disclosure of "all facts related to that misconduct" and to "identify all individuals involved," even at the peril of its directors and officers. On the other hand, the directors and officers may be best served by not providing any information to the DOJ, as it could end up exposing them to additional charges. It is always a difficult tightrope to walk when deciding which strategy will help or hurt a case. With respect to legal costs, it goes without saying that legal representation can in such matters be very expensive, especially where multiple law firms are involved.

That said, both corporations, as well as the directors and officers, must be represented by competent and experienced attorneys who are familiar with DOJ investigations and prosecutions in order to properly navigate these dangerous waters. One wrong move by inexperienced counsel could have devastating consequences for both the corporation as well as the individuals involved. For example, there have been instances where attorneys have been too generous with information, without first seeking proper protections for their clients, which results in more serious charges being filed. Contrarily, being unnecessarily combative can lead prosecutors into thinking that the client has more to hide than they actually do. – *Tim Parlatore*

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