

No Good Deed Goes Unpunished.

When Employees Sue Employers Over Alleged Defects in the Company 401(k) Plan

By: Jeffrey M. Koonankeil, Encore Fiduciary

What is Excessive Fee Litigation?

Excessive Fee Litigation involves a class action lawsuit filed by a participant in a company's 401(k) plan in which a plan participant(s) alleges that the fiduciaries of the 401(k) plan breached their fiduciary duties under The Employee Retirement Income Security Act ("ERISA"). The participant alleges that the fiduciary committed a breach if the fiduciary caused the 401(k) plan to experience, for the most part, one or more of the following: 1) excessive record keeping fees; 2) underperforming investment options; 3) excessive investment fees; 4) the wrong share classes for a particular mutual fund; and 5) the use of proprietary funds in the plan.

The first excessive fee cases started to appear in 2006 but only infrequently. The exception to this rule was in 2016 when there was a wave of excessive fee class action lawsuits brought against the 403(b) plans of several universities and colleges. All that changed in 2020, when a rash of class action cases of this type were filed. At first, the lawsuits were filed against 401(k) plans with \$1 billion or more in plan assets with thousands of employees but, over time, the plaintiffs' bar has gone after plans with less than \$1 billion in plan assets including some class actions filed against plans with less than \$100 million in plan assets and less than 1,000 participants.

Is My Organization a Target?

The restaurant and retail industry is not immune from this litigation. Below is a list of restaurant and retail organizations that have been sued in class action excessive fee lawsuits:

DeMoulas Super Markets, Walgreens, H.E. Butt Grocery Company, Autozone, Trader Joe's Company, Costco, L Brands (Bath & Body Works, Inc.), Seaworld Parks & Entertainment, Advance Auto, The Kroger Co., Hy-Vee Grocery Store, Davita, Inc., 99 Cents Store, O'Reilly Automotive, Bed, Bath & Beyond, Southeastern Grocers (Winn-Dixie, Harveys), Whole Foods Market, Inc., and Whataburger Restaurants, LLC.

Is Excessive Fee Litigation Expensive?

The simple answer is yes. Defense costs for Excessive Fee class action lawsuits are several million dollars to defend through trial. The costs are high because courts throughout the United States routinely deny defendants' motions to dismiss with the success of motions for summary judgment not faring much better. To file an effective motion for summary judgment and/or get a case into a reasonable settlement posture requires the retention of experts to opine on the process the fiduciaries use to oversee and manage the plan and determine what the damages model should be if there is in fact any

liability exposure. The cost of experts routinely runs into the millions of dollars. The failure to dispose of the actions in motion practice leads to settlements in the low to mid-seven figures with some cases settling for as high as \$60 million dollars.

What Can My Organization Do to Protect Itself?

Under ERISA, a fiduciary must discharge his or her duties solely in the interests of the plan participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries while defraying reasonable expenses all while acting with prudence in executing their duties. The fiduciary can do this by retaining advisors to help them evaluate and even pick the plan's investment options. The fiduciary can also do this by diligently reviewing the information provided to him or her by their advisors during the regularly scheduled plan investment committee meetings and making sure to put out requests for proposals on a regular basis for plan vendors, such as recordkeepers. Another very important thing a fiduciary can do is to make sure that the plan secures robust Fiduciary Liability insurance coverage from a reputable and knowledgeable insurance carrier. Such an insurance policy provides defense and indemnity coverage for the excessive fee class action lawsuits described above.

Conclusion

The plaintiff's bar is now filing lawsuits against all plans regardless of their size or quality for the obvious reason that they make a lot of money in doing so, even when the cases they bring lack merit. Defending even the most specious of lawsuits is very expensive and any company with a 401(k) plan should put themselves in the best position by following a prudent process when overseeing their company's 401(k) plan and by securing fiduciary liability insurance to protect them from the serious financial exposure of these lawsuits.

Jeffrey M. Koonankeil

Chief Claims Officer

Encore Fiduciary

jkoonankeil@encorefiduciary.com