The Year in ERISA Litigation:

2024 Trends and What We're Watching in 2025

January 30, 2025

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ERISA litigation has rapidly expanded over the past few years, and 2024 was no exception. Defined contribution plan litigation picked up even more steam, defined benefit plan litigation took off, and health plan fiduciary breach claims were also on the rise. And the 2025 outlook is even busier.

What We Saw in 2024

Defined Benefit Plans: As Pension Risk Transfer Transactions Proliferated, So Did The Lawsuits

In 2024, plaintiffs took aim at plan fiduciaries involved in "pension risk transfer" transactions (PRTs), where employers purchase annuities to replace pension obligations. Last year 12 lawsuits were filed against nine employers and plan fiduciaries who selected private equity-backed annuities for their PRTs, alleging that risky investments rendered them unsafe. Plaintiffs argue that the plan fiduciaries failed to obtain the "safest annuity available" as described in the Department of Labor's (DOL) Interpretative Bulletin 95-1 (IB 95-1). Although these cases are new, there have been a record number of PRTs in recent years, so we expect there will be more coming. Because employers have good reasons to move forward with PRTs, even with the risk of litigation, we expect this trend to further ramp up in 2025.

Defined Contribution Plans: A Common Use Of Forfeited Funds Comes Under Attack

A new breed of lawsuit challenges the common, longstanding practice of using forfeited funds in

defined contribution plans, which arise from participants leaving the plan before their contributions are fully vested, to reduce employer contributions. Over 25 lawsuits have been filed so far, with plaintiffs alleging ERISA requires that forfeited funds be used only for plan expenses that otherwise would have been paid from plan assets, or be allocated to plan participants. Plan sponsors are staunchly defending their use of forfeitures as permissible by the IRS and DOL, and consistent with ERISA's fiduciary standards. Motions to dismiss have been filed in every case thus far. While six of those motions have been granted, leave to amend has been permitted in those matters, and two cases survived dismissal. As a result, numerous "copycat" lawsuits continue to be filed at a rapid pace, a trend that will continue until there is some judicial consensus about the viability of these claims.

Health Plan Litigation: Health Plan Fiduciaries Faced Increasing Scrutiny

In 2024, plaintiffs pivoted their attention to health plan fiduciaries with a focus on pharmacy benefit managers (PBMs) and prescription drug pricing, which remain a widespread source of frustration for plan participants.

- ***Participant v. Plan Litigation.*** Several class actions were brought by plan participants alleging fiduciary breaches relating to employer-provided health plans. Three lawsuits deal with PBMs. One alleges that a plan imprudently kept millions in PBM rebates instead of passing along funds to participants, and two allege fiduciary breaches through allowing participants to overpay for prescription drugs and failing to monitor the pricing and services offered by PBMs. Outside the PBM arena, two pending lawsuits allege fiduciary breaches through underpayment of out-of-network (OON) medical claims, improper processing of medical claims in general, and/or providing inadequate information about OON status and pricing. Motions to dismiss have been filed in all of these cases, and most decisions are still pending. Two PBM cases have largely been dismissed for lack of standing, one of which the Third Circuit affirmed, although amended complaints may be coming. In 2025, we will learn whether any of the plaintiffs in these participant-led claims can generate traction.

- ***Plan Sponsor v. Service Provider Litigation.*** Some plan sponsors stepped into the role of plaintiffs in 2024, suing the third party administrators (TPAs) responsible for administering their health plans. These plaintiffs allege that the TPAs are fiduciaries who breached their ERISA duties by failing to recover overpayments, improperly processing and overpaying claims, and failing to provide claims data when requested. This litigation has produced mixed results thus far, as some courts have found the TPAs were not acting as fiduciaries and several cases may be moved to arbitration proceedings. These allegations highlight the motivation some plan sponsors have to pursue claims against TPAs, which is fueled by frustration with their lack of control over their health plans and concerns about the cost of medical claims.

- ***Tobacco Surcharge Litigation.*** The most recent line of attack against health plan fiduciaries is challenging "tobacco surcharges," which stem from wellness programs designed to encourage employees to stop using tobacco products. Such programs are permitted by ERISA and DOL regulations so long as they comply with certain requirements. Plaintiffs allege that the

tobacco surcharge programs violate ERISA by failing to provide a reasonable alternative, failing to provide notice of the availability of a reasonable alternative, and imposing discriminating tobacco wellness programs. These cases are new and popular—at least 12 have been filed since September 2024. We expect robust motion to dismiss practice in response going into 2025.

Defined Contribution Fee Litigation Continues: ESG, New Theories, And An Ongoing Arbitration Debate

Traditional excessive fee and imprudent investment cases against defined contribution plan fiduciaries continued to be filed at a rapid pace, complicated by the continuing lack of a uniform pleading standard across jurisdictions. Not surprisingly, 2024 also saw a large number of settlements in these cases, and while most are for relatively small dollars, a handful continued to come in at significant amounts, including a recent $69 million settlement.

And new issues continue to evolve. In one of the most closely-watched cases of 2024, the Northern District of Texas found American Airlines 401(k) plan fiduciaries had breached their duty of loyalty by allowing their investment manager to pursue a strategy overly focused on environmental, social, and governance (ESG) issues without requiring evidentiary analysis or support for the strategy. The judge, however, found no breach of the duty of prudence, as there was no evidence that a prudent fiduciary would have taken a different action. The court noted the investment manager had a heavy influence on American as it was one of their largest shareholders. And given American's hefty consumption of fossil fuels, the judge concluded they felt compelled to follow their manager's ESG goals and thus put their corporate interest above their fiduciary duties. The decision also highlighted that the largest investment managers had similar ESG focuses and strategies, seemingly inviting further litigation against plans who use these managers.

Additionally, stable value funds and guaranteed interest accounts took center stage in a number of new complaints. These low risk funds are intended to offer stability and limited volatility by providing a guaranteed return on principal and interest. Plaintiffs are increasingly taking aim at these funds, arguing they were imprudent investments because the returns were lower than similar products, or that fiduciaries failed to negotiate for higher crediting rates. Because companies often move in and out of stable value fund products at various times, creating mixed results for participants depending on the timing and status of the economy, it is likely that similar fiduciary breach lawsuits will follow.

The enforceability of mandatory arbitration and class action waiver provisions, which require participants to bring any plan dispute on an individual basis in arbitration and not on behalf of a class, representative, or collective action, remained a hot topic in 2024. Since 2019, when the Ninth Circuit found an arbitration and class action waiver provision enforceable, the Second, Third, Sixth, Seventh and Tenth Circuits have all found such provisions unenforceable. Most of these circuits have interpreted ERISA as providing participants with a statutory right to pursue monetary relief for fiduciary breaches on a plan-wide basis. Notwithstanding the circuit split, the Supreme Court has refused to take up the issue several times, and so it will continue to be litigated in the lower courts.

What We're Watching in 2025

Biden Regulations on the Chopping Block: Impact of the Trump Administration and the *Loper-Bright* Decision

The Trump administration is expected to roll back at least two Biden-era DOL regulations that focused on employee benefits—the fiduciary rule and ESG rule. The DOL's fiduciary rule expanded the definition of fiduciary to subject a broader range of situations to ERISA's fiduciary duties, including many one-time rollover transactions from a group retirement plan to an IRA or annuity. The rule has already been blocked by two Texas federal courts, and the DOL has appealed. The Trump administration may not pursue the appeal or may attempt to issue new regulations. The Trump administration is similarly likely to roll back Biden's 2022 ESG rule, which replaced Trump's 2020 rule. Biden's 2022 rule relaxed restraints on fiduciaries' ability to consider ESG factors when choosing retirement plan investments. The ball is back in Trump's court, and it is likely he will take some action.

The Supreme Court's *Loper-Bright* decision rejecting the *Chevron* doctrine also may impact the viability of Biden's fiduciary and ESG rules. If courts no longer defer to agency interpretations of ambiguous statutes, litigation defenses based on the DOL's fiduciary, ESG, and other regulations may be harder to prove.

ERISA Pleading Standards In The Supreme Court Spotlight

The Supreme Court will take up a circuit split over what a plan participant is required to allege to establish that the arrangement between a plan and a service provider constitutes a prohibited transaction under ERISA. The Eighth and Ninth Circuits require only allegations of the existence of an arrangement, while the Second, Third, Seventh and Tenth Circuits require additional allegations of self-dealing or unreasonable compensation. ERISA litigators are closely watching this case, as the result could either open the flood gates for or temper the filing of prohibited transaction claims.

Plaintiffs Push For ERISA Jury Trials

While most attempts by plaintiffs to seek a jury trial in ERISA matters have failed, a few district courts within the Second Circuit have permitted them for fiduciary breach claims, finding that plaintiffs sought monetary legal (rather than equitable) relief. In one of these lawsuits involving Yale, a jury found defendants breached their fiduciary duties but awarded no damages because there was no harm. The Yale plaintiffs are appealing, and the plan fiduciaries are cross-appealing arguing that if the court issues a new trial, it should be a bench trial. ERISA litigators are keeping an eye on this case to see if plaintiffs' jury trial theory has the potential to spread to other circuits.

Willkie's ERISA litigation practice is a team of high-impact trial lawyers who approach the high-stakes, complex, technical world of ERISA litigation with creativity and pragmatism. We find innovative ways to resolve disputes on the best possible terms for our clients, avoiding litigation when it is possible and winning when it is not. If you have any questions, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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Date of Publication: January 2025