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## **Special Report**

### **Attorneys Offer Strategies to Reduce Risk That They Will Become ERISA Fiduciaries**

**A**ttorneys who render legal services to employee benefit plans or plan fiduciaries generally can perform their job duties without the risk of being exposed to fiduciary liability under the Employee Retirement Income Security Act. However, there are actions that attorneys can take, often inadvertently, that could potentially give them de facto control over plans or plan assets, thereby exposing them to fiduciary status.

If an attorney engages in actions that make him or her an ERISA fiduciary, then the attorney's conduct relating to that plan are held to ERISA's high prudence standards, Stanley Baum, an attorney with the law firm Fellheimer & Eichen in Philadelphia, told BNA March 3. If an attorney engages in actions that do not meet those standards, ERISA creates a cause of action in federal court for a fiduciary breach. Put simply, "ERISA fiduciary status makes it significantly easier to sue the attorney for some purported wrongdoing," Baum said.

Attorney Stephen Rosenberg told BNA March 4 that attorneys who are pegged as ERISA fiduciaries are "targets" for plan participants, class action lawyers pursuing cases under ERISA, or plan sponsors, any of whom may be claiming a plan suffered losses because of their actions. "Short of actual malpractice, there would likely be no way to drag them in as a potential deep pocket to cover such losses unless they can be characterized as fiduciaries," he said. Rosenberg is a partner in the McCormack Firm in Boston and head of the firm's ERISA and insurance law practice.

ERISA defines "fiduciary" in functional terms of control and authority over a plan's management or administration, rather than in terms of a formal trusteeship.

Under Section 3(21)(A) of the federal statute, a person is a fiduciary with respect to a plan to the extent that he or she exercises any discretionary authority or control over the management of the plan or disposition of plan assets, or over the administration of a plan. In addition, a person will be a fiduciary to the extent that he or she renders investment advice for a fee or other compensation with respect to any money or property of a plan.

Under this definition, attorneys who perform their usual professional functions when representing employee benefit plans or entities involved with such plans ordinarily will not be considered fiduciaries. However, once attorneys engage in behavior that falls into one of the categories enumerated by Section 3(21)(A), they cross the line into fiduciary territory, opening themselves up to potential liability.

Although instances of attorneys becoming fiduciaries are rare, attorneys who spoke to BNA explained some situations in which ERISA attorneys can find themselves that would subject them to fiduciary status, and therefore fiduciary liability, and steps they can take to protect themselves from being held liable for fiduciary breaches.

#### **The Basics of Attorney Fiduciary Liability**

In June 1975, the Department of Labor issued an interpretive bulletin to resolve issues relating to the fiduciary liability of plan service providers, including attorneys, accountants, actuaries, and consultants who render services to employee benefit plans. In 29 C.F.R.

§ 2509.75-5(D-1), the Labor Department explained that service providers, including attorneys, are not fiduciaries to the plans they represent merely by virtue of rendering their services.

In the bulletin, however, the Labor Department explained four situations in which a service provider could become a fiduciary within the meaning of ERISA Section 3(21)(A). The Labor Department said a service provider, including attorneys, would become plan fiduciaries if they:

- exercise discretionary authority or control respecting the management of a plan;
- exercise authority or control respecting management or disposition of a plan's assets;
- render investment advice for a fee, direct or indirect, with respect to the assets of a plan, or have any authority or responsibility to do so; or
- have any discretionary authority or responsibility in the administration of a plan.

### Situations That Can Lead to Liability

According to attorneys interviewed by BNA, there are very few situations in which an attorney will find him or herself that can expose the attorney to ERISA fiduciary status and liability.

**“ERISA fiduciary status makes it significantly easier to sue the attorney for some purported wrongdoing.”**

STANLEY BAUM, FELLHEIMER & EICHEN

Attorney Rosenberg told BNA that there are two general circumstances in which an attorney can become a fiduciary. The first is when an attorney starts out in the traditional attorney-adviser role but then crosses into fiduciary territory by helping select investment options for ERISA plans or making actual decisions about what to do with plan assets. The second scenario is that the attorney never acted in the traditional lawyer role but instead was acting as a fiduciary from the very start.

Similarly, Philadelphia attorney Baum said there are two common actions that could expose attorneys to ERISA fiduciary liability. The first situation is when an attorney receives and is holding money that could reasonably be construed as belonging to an employee benefit plan.

The second situation, which Baum said is the more common one, involves attorneys providing advice regarding employee benefit plans to smaller employers that do not know a lot about such plans. Baum said the advice alone does not result in the attorney having fiduciary status for ERISA purposes, but the attorney can be treated as having such status if, in the course of giving advice, the attorney becomes the person who makes decisions pertaining to either (1) the administration of the plan or (2) the investment or disposition of plan assets. This de facto control over the plan results in the attorney being treated as a fiduciary, he said.

Decisions pertaining to eligibility to participate, the entitlement or amount of benefits payable, or the interpretation of the plan's terms and provisions are ex-

amples of the administration of a plan that could lead to fiduciary status under ERISA, Baum said.

The determination of whether an attorney has exceeded the boundaries of his or her normal legal function is a fact-intensive inquiry. Given this fact-intensive nature, court decisions offer limited guidance on what activities will render an attorney a fiduciary.

**Actions Outside of Normal Lawyer Role.** Although attorneys have on occasion come under fire in lawsuits for alleged fiduciary breaches, court decisions involving attorney fiduciary liability are “scattered,” Brad Huss of Trucker Huss, San Francisco, told BNA March 3. However, some courts have recognized limited situations that may impose fiduciary status on attorneys. They include:

- accepting a settlement offer without approval from a client plan; and
- advising that plan assets could be transferred to attorneys to pay attorneys' fees and accepting payment of fees from plan assets if a plan does not authorize such use.

In *Iron Workers Local 25 Pension Fund v. Watson Wyatt and Co.*, 48 EBC 1051 (E.D. Mich. 2009) (213 PBD, 11/6/09; 36 BPR 2537, 11/10/09), the U.S. District Court for the Eastern District of Michigan said a law firm departed from its usual professional functions for a pension fund client and may have stepped into the role of an ERISA plan fiduciary when it entered into a settlement with the company that provided actuarial services to the fund.

In the opinion, the district court said, “An attorney with *carte blanche* authority to settle a case is more akin to a fiduciary with discretion over the clients assets, than an attorney performing the usual professional functions.”

Also, in *Rispler v. Sol Spitz Co.*, 40 EBC 2676 (E.D.N.Y. 2007) (111 PBD, 6/11/07; 34 BPR 1387, 6/12/07), the U.S. District Court for the Eastern District of New York said that attorneys may have become plan fiduciaries by advising a profit-sharing plan trustee that he could use plan assets to pay attorneys' fees, and accepting payment of their fees from the plan's assets.

The court said the attorneys in the case may have become fiduciaries if the transfer of the plan assets to them was unauthorized by the plan and thus they were holding plan assets.

The attorneys in both cases brought motions to dismiss the fiduciary breach claims against them. In *Rispler*, the court said that because the determination of whether a person is a fiduciary is fact-based, it cannot be decided in a motion to dismiss.

**Normal Attorney Duties.** One argument often made in court is that an attorney breached his or her fiduciary duties by giving advice that caused plan losses or opened a plan up to monetary penalties for being in violation of ERISA. Courts have rejected this argument as not exceeding the bounds of a normal attorney-client relationship.

According to Baum, these arguments fail in court because of the way the statute is set up. Under the statute, the only way that an attorney can have fiduciary status is to have de facto control over the plan, he said. However, any bad advice given once the attorney has become a fiduciary can result in a breach of fiduciary duty, Baum added.

For example, the U.S. District Court for the District of Columbia ruled in *Clark v. Feder Semo & Bard*, 634 F.Supp.2d 99, 47 EBC 2808 (D.D.C. 2009) (136 PBD, 7/20/09; 36 BPR 1716, 7/21/09) that a law firm was merely performing routine legal services for a pension plan by approving lump-sum distributions made to the plan sponsor's founding partner, which left the plan underfunded by more than \$1.1 million. A plan participant argued that the law firm should have known that the distributions violated Treasury Department regulations that prohibited large lump-sum distributions when a plan is underfunded.

The court said the law firm's actions were within the scope of its normal legal services for the plan, not fiduciary services that rose to the level of active management of the plan.

Similarly, the U.S. Court of Appeals for the Third Circuit said that an attorney who incorrectly advised a bank that a profit-sharing plan trustee's sale of property to the plan did not violate ERISA, which opened the plan up to back taxes and penalties, was not liable as a fiduciary (*Mellon Bank N.A. v. Levy*, 30 EBC 2522 (3d Cir. 2003) (152 PBD, 8/8/03; 30 BPR 1772, 8/12/03)). The court said the attorney was only performing his normal legal role. The court also noted that the attorney never controlled the decision to buy the property and did not actively advise the plan to proceed with the transaction.

Whether an attorney has control over a plan's decision to engage in a transaction has been key in court decisions addressing an attorney's ERISA fiduciary liability.

## Best Practices to Limit Fiduciary Risk

One way attorneys can reduce their exposure to ERISA fiduciary liability is to ensure that the attorney's plan clients exercise good governance. Baum told BNA that attorneys can limit the risk of becoming a fiduciary liable for breaches by engaging in four best practices:

- The attorney should always start with the employer-client. The attorney should advise the employer-client to get into a best practices mode by identifying the fiduciaries of the plan and their agents, and taking steps to ensure that those are the persons who are making the decisions about the plan and plan assets. At the very least, the fiduciaries and their agents should be identified in writing. For example, they can be appointed in one or more board of director resolutions, and, where applicable, identified by name in the plan documents.

- Once the employer-client has identified the plan's fiduciaries and their agents, the attorney should provide his or her advice only to a fiduciary or agent. The attorney should also make sure that the fiduciary or agent makes the decisions pertaining to the administration of the plan and/or the management and disposition of the plan's assets.

- The attorney should not handle plan money. The attorney should not be a signatory on any trust or account that holds the assets of an employee benefit plan, nor should the attorney have the right to direct or actually direct the investment or disposition of plan assets. Also, if the attorney receives the proceeds of any settlement involving an employee benefit plan, the attorney should put those funds into an escrow account, not in the law firm's operating account, and leave those funds

there until any dispute as to the ultimate recipient is resolved.

- The attorney should check his or her malpractice liability insurance policy, to see if it covers liability for breach of duty committed by the attorney when acting as a fiduciary for ERISA purposes. The attorney should contact his or her insurance agent if there are any questions regarding the liability insurance.

Rosenberg added that attorneys should continuously self-administer their own checkpoints by asking themselves if the actions they are taking would be seen as operating within the decisionmaking authority traditionally held by plan sponsors and fiduciaries. Rosenberg said it is up to the attorney to make sure that he or she is consistently acting in the traditional, arms-length role of a legal adviser, and not crossing over into the key decisionmaking functions that traditionally belong to a plan's fiduciaries.

In addition, Rosenberg said that the attorney should take him or herself out of any final decision that would normally belong to the client.

## Nonfiduciary Liability

Another way that attorneys can potentially be held liable under ERISA is as a nonfiduciary "party-in-interest" who knowingly participated in another fiduciary's breach of duty in connection with an ERISA plan. Under ERISA Section 3(14)(B), any person who provides services to an employee benefit plan, including attorneys, are parties-in-interest.

Unlike a finding that an attorney is a fiduciary who is liable for losses to the plan in the event of a breach, relief against a nonfiduciary party-in-interest is limited to appropriate equitable relief. A nonfiduciary is also only liable for its knowing participation in a fiduciary's breach. A nonfiduciary's knowledge of a breach can be inferred from surrounding circumstances raising a reasonable inference of knowledge.

Two scenarios in which attorneys have incurred liability as a nonfiduciary party-in-interest are: (1) when an attorney knowingly participates in a breach by a plan fiduciary and receives plan assets, as payment for a fee or otherwise, as a result of the breach, and (2) when an attorney otherwise participates in a transaction specifically prohibited by ERISA Section 406 or tax code Section 4975.

Although proving that an attorney is a fiduciary may be harder than proving liability as a nonfiduciary party-in-interest, plaintiffs cannot necessarily rely on the nonfiduciary liability theory to get money back from an attorney as a party-in-interest because they must point to money in an attorney's possession that equitably belonged to them, which can sometimes be difficult to do, Baum told BNA.

Baum said that an attorney can protect him or herself from liability for knowing participation in a fiduciary breach by not taking a fee from the plan or otherwise out of plan assets. Instead, the attorney should take his or her fee directly from the client or the appropriate plan fiduciary, and then the client or fiduciary would be reimbursed for this payment from the plan or out of plan assets if the plan documents allow for it. In that situation, the attorney is not holding any plan assets, Baum explained.

If an attorney has to take a fee from a plan and is aware of where that fee is coming from, the attorney should obtain the relevant plan documents from the client and determine if the plan documents permit attor-

neys' fees to be paid from the plan or its assets, he added.

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