

Litigation – When Appropriate?

Confronted with this question, two fact-finding checklists are offered -- one for the plaintiff and one for the defendant. By following the checklist, the merits of proceeding with a lawsuit are seen.

Plaintiff Checklist

1. Ascertain exactly the benefits to which the client claims entitlement. Develop a preliminary conclusion as to whether the claims involve more than one plan.
2. Obtain the summary plan description (SPD) if the client has it. Otherwise, consider requesting the SPD from the employer. The summary plan description has much useful information about who the plan fiduciaries are, where the plan assets are held and what the appeal procedure is.
3. Determine whether the client has exhausted plan procedures. A summary plan description must identify these procedures.
4. Obtain a copy of the plan document from the client, from DOL or from the employer. A refusal to provide this information may constitute a separate wrong under Section 502(c)(1) of ERISA.
5. Determine whether any of the claimed benefits are outside the scope of ERISA preemption because the benefits are of the type not covered by ERISA or because they involve benefits mandated by state insurance law.
6. If the claimed benefits involve a public employee plan or a public employee insurance contract, determine the procedure and forums for presenting benefit claims.
7. Determine the limitation period for each claim and decide when it expires.
8. Identify all persons who may have obligations in connection with a plan, identifying all fiduciaries and all affiliates of a sponsoring employer with potential funding obligations.
9. Identify other potential plaintiffs on the same claim and evaluate potential joinder or class action approaches.
10. For all claims as to which exhaustion of administrative remedies has occurred, draft a complaint.
11. For any claims as to which exhaustion has not occurred, file the necessary claim in the appropriate forum.
12. Decide whether to file the complaint in federal or state court and where.
13. Decide what discovery should be sought.
14. Consider at least the following legal theories under ERISA:
 - a. The plan has failed to disclose information as required by ERISA Section 105 and Section 502(c).
 - b. The plan failed to apply the plan language or a plan provision. A deferential arbitrary and capricious standard applies only to the unambiguous plan

language, which specifies the plan administrator is authorized to interpret plan language; otherwise courts construe plan language de novo.

- c. The plan administrator arbitrarily and capriciously interpreted ambiguous plan language under an express grant of authority. This theory imposes a heavier burden on the plaintiff than the immediately preceding theory.
- d. The plan administrator applied a plan provision that factually conflicts with a statutory requirement under ERISA.
- e. The plan administrator interpreted a plan provision so as to conflict with a statutory requirement under ERISA.
- f. The plan administrator amended the plan so as to conflict with a statutory requirement under ERISA, for example, so as to cause forfeiture of vested benefits.
- g. The plan fiduciary has violated fiduciary obligations with respect to management of plan assets and these violations have caused loss to the claimant.
- h. A plan fiduciary failed to disclose information to participants necessary for participants to make informed decisions pertinent to realizing their rights under the plan or apart from the plan.
- i. The plan sponsor failed to comply with the structural requirements of ERISA. The problem with this theory is that it is hard to prove significant damages.

Defendant Checklist

1. Identify as clearly as possible the specific benefits claimed by the plaintiff.
2. Identify the source of the right claimed to receive each type of benefit (e.g., a plan, an informal promise, or ERISA itself).
3. Determine if the defendant had obligations connected with the right claimed and identify the source of that obligation. Decide if the obligation asserted involved making contributions, paying benefits, or both.
4. Characterize the plaintiff's theory as to how the defendant breached the obligation to pay benefits or to make contributions.
5. Determine whether, as to each type of benefit claimed, the defendant agrees that the plaintiff has the right to receive those benefits.
6. Determine whether, as to each type of benefit claimed, the defendant agrees on the source of the right to receive benefits asserted by the plaintiff.
7. As to any type of benefit for which the defendant agrees with the plaintiff's contentions in the preceding two paragraphs, determine why the defendant believes that no breach of the obligation by the defendant was involved. At least the following possibilities should be considered:
 - a. The plaintiff misconstrued the obligation.
 - b. A condition precedent to defendant's obligation has not occurred.

- c. A condition subsequent to defendant's obligation has occurred.
 - d. The obligation asserted by the plaintiff has been overridden by other legal authority; for example, an apparent contractual obligation has been superseded by a provision of ERISA.
 - e. Although the defendant admits that a breach asserted by the plaintiff occurred, the damages claimed by the plaintiff are in excess of those permitted by law.
 - f. Even if the plaintiff is correct as to the breach of legal duty asserted, the legal theory for recovery does not exist, for example, because it has been preempted by ERISA.
 - g. Even if the breach of duty occurred and the legal theory asserted by the plaintiff is viable, the plaintiff is in the wrong forum because the plaintiff has not exhausted administrative or contractual remedies.
 - h. Even if the breach of duty occurred and the legal theory asserted by the plaintiff is viable, the plaintiff is in the wrong forum because the jurisdiction of the forum has been preempted by state or federal law.
 - i. Regardless of the merits of the plaintiff's legal theory and the suitability of the forum, a statute of limitations has run.
8. Determine if a class action is likely because the controversy involves a large group of plan participants or beneficiaries with similar claims. Determine the defendant's position on certifying the proposed class. The defendant may desire class action treatment in order to resolve a controversy once and for all and bind all potential claimants.
9. Consider whether other parties, on either side, should be joined to the litigation.