Lessons from DOL Prosecutions/Litigation

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Purpose of Presentation

• ERISA Enforcement/Litigation
  – Review of recent litigation/prosecutions

• Lessons for Trustees and Providers
  – “What do we learn from these cases?”

• What the DOL is reviewing
Oversight authority extends to nearly 810,000 retirement plans, 2.3 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance.

- 2015 EBSA Enforcement Fact Sheet

In FY 2015, 136 cases were referred to Solicitor of Labor for litigation. Nationwide, 89 cases resulted in lawsuits filed.
EBSA Investigations led to the indictment of 61 persons for crimes related to Employee Benefit Plans in FY 2015

| Criminal Investigations Closed: 275 | Criminal Investigations Closed with Guilty Pleas or Convictions: 67 | Number of Individuals Indicted: 61 |
ERISA Enforcement

Civil Litigation

Violations applicable to pension/welfare plans

- Failing to operate prudently and for exclusive purpose of benefitting participants;
- Using plan assets to benefit related parties (fiduciaries);
- Failing to properly value assets at fair market value;
- Failing to properly select and monitor service providers.
Civil Litigation

Violations applicable to pension/welfare plans

• ERISA Section 510 Violation—Adverse action against an individual exercising his or her rights under the plan (e.g., fired, fined, or otherwise discriminated against);

• Failure to comply with ERISA Part 7 and the Affordable Care Act (welfare plans only).
ERISA Section 404

The Duty of the Fiduciary

• Must act with an “eye single” to the interests of the plan’s participants and beneficiaries
• Must avoid placing themselves in a position where their actions as officers or directors of a corporation will prevent their functioning with complete loyalty to participants. – 29 C.F.R. § 2550.408(c)
Prudence Standard

Fiduciary must act “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

Actions are compared against those of a hypothetical prudent person, limited to those factors and circumstances that a prudent person having similar duties and familiar with such matters would consider relevant. – 29 C.F.R. § 2550.404a-1(b)(1)
A fiduciary must:

- Act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carry out duties prudently; and
- Follow the plan documents (unless inconsistent with ERISA).

See, Donovan v. Bierwirth, 680 F.2d 263 (2nd Cir. 1982), cert denied, 459 U.S. 1069 (1982) (given that a fiduciary’s duties are the highest known to the law, a trustee is held to something stricter than the “morals of the market place”)

**Procedural Prudence**

**What do the Courts look at?**

- Focus on the conduct of the fiduciary; and
- The extent of the fiduciary’s diligent investigation and performance of acts consistent with the purpose of the plan.

**Investments**

29 C.F.R. § 2550.404a-1(b)(2) – “Appropriate consideration” includes a determination by the fiduciary that a particular investment or investment course of action is reasonably designed to further the purposes of the plan:

- Consider the risk of loss and the opportunity for gain associated with such investment
- The diversification of the investment portfolio
- The liquidity of the investment in relation to the liquidity needs of the plan, and
- The projected investment return in relation to the funding objectives of the plan.
Filed January 24, 2016 in the U.S. District Court for the District of Columbia:

**Allegations**

- Fiduciaries failed to loyally and prudently select the Fund’s service providers;
- Routinely ignored required procedures written in the Fund’s governing plan documents;
- Created conflicts of interest;
- Solicited and accepted gratuities from service providers;
- Lavish spending
Allegations

• Ignored specially hired consultant’s recommendation to hire a different investment consultant:
  
  – Record of hire not supported by any prudent analysis
    
    » Minutes of meeting disclosed that the Board discussed a personal relationship between Trustee and investment consultant representative
    
    » Minutes did not discuss the merits of hiring the consultant over any of the other candidates
What Do We Learn From This?

Make decisions supported by prudent analysis and due diligence:

– RFP conducted? If not, how do you show that bias or conflict did not occur?
  » Document recusal in case of conflict

– Did you weigh the pros and cons of hiring?
  » Do the pros substantially outweigh the cons?
  » Even so, how significant is the “con” vs. all of the “pros”

Document the decision making process

• Keep all responses to RFP
• Take accurate minutes
• Review/revise contracts
ERISA Section 406(a)—Party in Interest Prohibited Transactions.

Absent certain exemptions, a fiduciary with respect to a plan shall not cause the plan to engage in a “party in interest” transaction, if he knows or should know that such transaction constitutes a direct or indirect:

• Sale, exchange or leasing of any property between the plan and a party in interest;
• Lending of money or other extension of credit between the plan and a party in interest;
• Furnishing of goods, services, or facilities between the plan and a party in interest;
• Transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
• Acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

Allegation of Imprudent and Improper Expenditures of Fund Assets

- Dinner paid for by the Fund featuring bottles of wine priced as high as $1,185, which included Trustee, six staff members and two service providers;
- Payment in excess of $90,000 for two Fund holiday parties;
- Retirement party for a fund employee;
- Quarterly meetings held at resort destinations.

Trust Agreement grants the Trustees the power and authority to pay “reasonable and necessary expenses.”
What Do We Learn From This?

- Do you have a policy that enumerates how plan assets may be spent?
- Who has the authority to approve expenses?
- Part of prudence is the ongoing duty to monitor
  - Be aware of your obligations under ERISA Section 405
Weinhagen Tire Co., Inc. 401(k) Plan

Date of Action: Sept. 27, 2016
Type of Action: Filing of Complaint

Allegations

An investigation by EBSA alleged that the company’s owner and the company withheld $35,363.86 from employee’s pay for voluntary contributions to the Weinhagen Tire Co. Inc. 401(k) Plan. Approximately $29,058 of those contributions were allegedly placed in the company’s corporate bank account and used for general operating expenses.

Resolution

Order Weinhagen and Weinhagen Tire Co. to restore to the plan all losses, including lost opportunity costs, resulting from fiduciary breaches for which they are liable and to pay reasonable fees and expenses incurred by an independent fiduciary in administering the plan.

• Remove the defendants from their positions as fiduciary and plan administrator to the Weinhagen Tire Co, 401(k) Plan.
• Enjoin the defendants from serving as a fiduciary or service provider to any ERISA-covered plan in the future.
• Appoint an independent fiduciary to administer the plan.
Bridgeport Health Care Center, Inc.
Retirement Plan

The Chairman of the Board of Bridgeport Health Care Center was

- sole Trustee;
- plan administrator;
- chief financial officer;
- chief operating officer;
- nursing home administrator; and
- the plan’s sole decision maker with check-signing and fund transfer authority.

EBSA found that at least $4 million in plan assets was allegedly diverted, directly or indirectly, to Bridgeport Health, to the Chairman and to a New York religious corporation that lists the Chairman as its president and trustee on its certificate of incorporation.

In October 2011, a promissory note worth $3.8 million, made payable to the plan, was executed on behalf of the religious corporation. The obligation to pay the note, the amount of which has represented more than 75 percent of the retirement plan’s assets, was extended to Sept. 30, 2016, without consideration.
Filed in the U.S. District Court for the District of Connecticut, EBSA’s lawsuit asks the court to:

• Remove the Chairman as plan fiduciary and appoint an independent fiduciary;

• Permanently enjoin the Chairman from serving as a fiduciary to any ERISA-covered plan;

• Require the defendants to undo the prohibited transactions and restore to the plan any losses incurred as a result of their fiduciary breaches, including lost earnings and appropriate interest;

• Require the defendants to perform an accounting of all plan transactions from Jan. 3, 2011 to the present;

• Permanently enjoin the Chairman and Bridgeport Health from future ERISA violations.
What Do We Learn From Weinhagen and Bridgeport?

Where is the oversight?

• Principles of the plans have too much authority with “too many hats”
• Avoid conflicts and duty of loyalty issues
  – Recommend dual signatories on transactions
  – Create a policy that addresses the discrete transaction v. the everyday administrative transaction
    • Who is making the decision regarding payment?
    • What mechanisms are in place regarding oversight?
    • Do you have a finance committee?
Enforcement Under The Affordable Care Act

Sierra Pacific Industries Health Benefits Plan

An EBSA investigation found problems with the following:

• Plan’s claims processing;
• Clarity of plan documents;
• The application of certain plan procedures for deciding claims;
• Plan was also not a “grandfathered” plan, was not exempt from certain ACA requirements and was required to comply with the law. As of Jan. 1, 2013, the plan relinquished its grandfathered status because changes were made to the plan.
In accordance with the settlement, the fiduciaries agreed to:

- Revise plan documents and internal procedures.
- Re-adjudicate past claims for preventive services, out-of-network emergency services, claims affected by an annual limit and pay claims in compliance with the ACA and ERISA.
- Submit to an independent review organization claims that were eligible for external review.
- Pay claims that had been left on hold for a long time.
- Comply with timelines for deciding claims as provided in the department’s claim regulation.
What Do We Learn From This?

Affordable Care Act compliance investigations are in full swing!

- May be litigated
- Check your compliance:
  - EBSA provides a Part 7 HIPAA/ACA compliance worksheet on its website for download
- Go through your plan with this worksheet to review compliance with ACA
- EBSA also focusing in on New Mental Health Parity and Addiction Equity Act
EBSA also conducts investigations of criminal violations regarding employee benefit plans such as embezzlement, kickbacks, and false statements under Title 18 of the U.S. Criminal Code.
Decision To Seek Criminal Action

- Egregiousness and magnitude of the violation;
- Desirability and likelihood of incarceration both as a deterrent and as a punishment;
- Whether the case involves a prior ERISA violator
Criminal Enforcement

Prosecution handled by U.S. Attorneys’ offices and may be assisted by:

- Employee Benefits Security Administration
- Office of the Inspector General
- United States Postal Service
- Internal Revenue Service—Criminal Investigation Division (CID)
Title 18 of the U.S. Criminal Code

Contains 3 Sections which address violations involving employee benefit plans:

1. Theft or Embezzlement (18 U.S.C. § 664);
2. False Statements/Concealment in relation to documents required by ERISA (18 U.S.C. § 1027);
Title 18 of the U.S. Criminal Code

Public Law 87-420 added these three new felonies to the Federal Criminal Code.

– Enacted March 20, 1962 (Pre-ERISA), amending and strengthening the *Welfare and Pension Plans Disclosure Act of 1958*

– Congress had uncovered numerous instances in which individuals, serving in a fiduciary capacity had blatantly abused their positions.
Congress sought to prevent dishonesty, looting and diversion of welfare and pension funds for the protection of those entitled to their benefits.

Language broader than the “companion” statute, 29 U.S.C. § 501(c) of the Labor Management Reporting and Disclosure Act

- This statute punishes the embezzlement and theft of labor union property

- Passed for a similar purpose and “should be given similar interpretation and be applied to similar types of conduct,” United States v. Andreen, 628 F.2d 1236, 1242 (9th Cir. 1980).
Three principal areas of difference:

- 664 applies to welfare or pension benefit plans or funds “connected therewith” as defined in the statute and regulations v. 501(c) which applies to “a labor organization”
- 664 expands the list of assets to specifically include “premiums” and “credits”
- 501(c) punishes only officers and persons employed by a labor organization but 664 applies to “any person.”
Who is “Any Person?”

Ask yourself, “Are you in a position to affect plan assets?”

– Not just plan trustees or fiduciaries;
– Plan Service Providers can be found in violation of Federal Law
Recent Cases Involving 18 U.S.C. § 664

The “Banana King”—Thomas Hoey, Jr.

**When:** July 25, 2016

**What:** Sentenced to 7 years in prison for embezzling $750,000 from his company’s profit sharing plan;

- Transferred money from the Plan to his Company’s corporate accounts and then unlawfully used the money to—
  - Purchase hundreds of thousands of produce for the Company
  - Pay for hundreds of thousands of Hoey’s personal expenses
Plan money also used to pay for automobile insurance on personal luxury vehicles;

– Personal expenses including international travel for Hoey and his family, including limousine services and hotels in Manhattan.

In addition to the sentencing, ordered to pay $650,936.20 in restitution, $763,000 in forfeiture, and a $400 special assessment.
What Do We Learn From This?

Very little distinction between this case and *Perez v. Roach*

- One civil and one criminal
- Decision to take action weighs heavily on facts and circumstances and, to some extent, the subjectivity of the investigation
  - Doctrine of “scienter” is considered
Whoever, in any document required by Title I of ERISA to be published, or kept as part of the records of any employee welfare benefit plan or pension plan, or certified to the administrator of any such plan –

- Makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact,
- The disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness,
- Any report required by such title to be published or any information required by such title to be certified,
- Shall be fined under this title, or imprisoned not more than 5 years, or both
18 U.S.C. § 1027

- Violator is not limited to plan officials or employees
- Has been used successfully because of its broad range of application in regard to documentation required by ERISA
- Most prosecutions involve the falsification of plan records supporting the plan’s Form 5500 annual report
- Other documents include:
  - Plan Document, summary plan description, and modification to those documents as required by section 101(a) and (b) of ERISA
  - Information required to be certified to the administrator by plan service providers and sponsors as required by section 103(a) of ERISA
Owner of Philadelphia Pension Planning Corp., sentenced to 15 months in prison and three years supervised release:

- Ordered to pay $715,228.79 to the Bustleton Landscaping Co. Inc. Profit Sharing Plan for making a false statement on 5500;
- TPA pleaded guilty to filing false statement;
- Admitted she prepared, executed and authorized the Form 5500 for the profit sharing plan;
- Falsely stating that plan held $797,373 in assets at the beginning of the year, when plan actually held less due to losses she knowingly concealed.

– U.S. v. Ryan
What Do We Learn From This?

Most cases involving the falsification of reports involve 18 U.S.C. § 1027 as an additional offense

• Typically trying to hide an embezzlement under 18 U.S.C. § 664;
• When you sign on the dotted line, make sure that you know what you are signing;
• You are certifying that the 5500 is “true and correct”;
• Make sure that you understand the report and if you do not, ask.

- Known as the “anti-kickback” statute
  - Intended to reach a broad class of persons who are connected with the operation of employee benefit plans.

**Elements of Proof**

1. The jurisdictional entity related to the bribery or graft is an employee benefit plan subject to Title I of ERISA;

2. Recipient of a bribe or graft must be a person specifically described in section 1954(1)-(4)
Elements of Proof

RECIPIENT of the bribe or graft can be:

– Administrator, officer, trustee . . . agent, employee of any employee welfare benefit plan or pension plan; or

– Officer, counsel, agent, or employee of an employer or an employer whose employees are covered by such plan; or

– Person who, or an officer, counsel, agent or employee of an organization which, provides benefit plan services . . . receives or agrees to receive or solicits any:

  • Fee, kickback, commission, gift, loan, money, or thing of value because of or with the intent to be influenced with respect to . . . matter concerning such plan

  • Shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually performed.
Elements of Proof

The GIVER of the bribe or graft may be any person; and is not required to hold a position affiliated with the covered plan as described in section 1954(1)-(4)
What is a “Thing of Value?”

– Not limited to tangible property, but includes intangible things of value

It is enough if the item received was regarded as a benefit by the recipient, whether or not other might have taken a different view of its value.”  

*United States v. Ostrander*, 999 F.2d 27 (2d Cir. 1993)
ACA added ERISA Section 519, 29 U.S.C. § 1149

Prohibits false statements or representations in the sale or marketing of employee benefits by multi employer welfare arrangements, including regarding:

(1) The financial condition or solvency of such plan or arrangement;

(2) The benefits provided by such plan or arrangement;

(3) The regulatory status of such plan or other arrangement under any Federal or State law governing collective bargaining, labor management relations, or intern union affairs; or

(4) Exemption from state regulatory authority.

Penalty found in 29 U.S.C. § 1131: imprisonment of “not more than 10 years” or fined under title 18, or both.
Best Practices To Address What DOL Is Reviewing  
www.dol.gov/ebsa/compliance_assistance.html

Conduct a self-audit.

The following documents and policies may be requested by EBSA auditor. Make sure you have them and that they are up to date.

- Plan document and/or trust agreement, with all amendments;
- IRS determination letter;
- Signed adoption agreement;
- Fidelity bond and fiduciary liability insurance policies;
- Signed Form 5500 annual reports, with all attachments and audited financial statements;
- List of plan fiduciaries, including phone numbers, addresses, dates of appointment;
Have all policies and procedures been updated, as applicable, within the last three (3) years?

- Is there a **written** Investment Policy?
- Is there a **written** Collection Policy?
- If relevant, is there a written expense allocation agreement?
  - Have there been any major changes to the operational/administrative structure that would warrant a new allocation agreement?
- Are updated market value/real estate studies completed?
Best Practices (continued)

• Is there a written expense policy for travel and administrative expenses?
  Receipts
  – Coach vs. First Class
  – Alcohol

• Have internal controls been established?
  – Are cash receipts accounted for?
  – Are travel reimbursements appropriately documented?
  – Is payroll properly processed?
  – Is access limited to those with the “need to know”?

• Are all necessary Fund documents maintained?
  – Document Retention Policy? For how long must you keep documentation?
• Are Board of Trustee meeting/committee minutes being kept?
  – Do minutes reflect attendees (i.e., trustees present/is there a quorum?)
  – Are minutes signed?
  – Do minutes reflect approval of expenses by trustees?

• Are financial goals being met?
  – Did the Fund’s expenditures come in below revenues?
  – Were the Fund’s investment goals met?
Best Practices (continued)

• Are other policies/agreements maintained and up-to-date?
  – Conflict of Interest policy
  – Disaster recovery plan
  – Whistleblower policy
  – Credit Card policy
  – Automobile policy, if applicable
  – Cost-Sharing Agreement
  – Social media policies
  – Professional retainer agreements
  – Non-discrimination policy
  – Business Associate Agreement (welfare funds)
  – Employee Handbook
  – Computer/iPad policy
• There is a fine line between what constitutes a civil litigation and a criminal prosecution
  – (“Scienter” plays a key role but be wary of the aggressive investigator)
• Maintain your plan through documented policies and procedures
• Conduct self-audits (See, for example, Compliance Assistance page on EBSA website, Health Benefits Laws Self-Compliance Tools).
• Monitor, monitor, monitor! You must monitor fiduciaries and service providers. It is not enough to rely on their expertise.
• Maintain awareness of what your co-fiduciaries are doing
• Document, Document, Document!
2017 Educational Programs
General Topics

63rd Annual Employee Benefits Conference
October 22-25, 2017
Las Vegas, Nevada
www.ifebp.org/usannual

Fraud Prevention Institute for Employee Benefit Plans
July 17-18, 2017
Chicago, Illinois
www.ifebp.org/fraudprevention

Trustees and Administrators Institutes
February 20-22, 2017
Lake Buena Vista (Orlando), Florida
June 26-28, 2017
San Diego, California
www.ifebp.org/trusteesadministrators

Collection Procedures Institute
November 15-16, 2017
Santa Monica, California
www.ifebp.org/collections

Related Reading
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