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Employers Must Review ERISA Disclosures and Notices

In light of increasingly remote work arrangements caused by COVID-19, employers should be diligent in reviewing and implementing notice and disclosure practices for their employee benefit plans. We have witnessed an uptick in litigation surrounding various notices, particularly Qualified Default Investment Alternative ("QDIA") and Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") notices. This client alert highlights how deficient notices can provoke lawsuits, class actions, large settlements, and statutory penalties.

Overly Complex Disclosures May Not Convey "Actual" Knowledge

In a recent Supreme Court case, *Intel v. Sulyma*, Intel distributed annual disclosures and QDIA notices to all participants in Intel's 401(k) plan in a timely fashion. However, Mr. Sulyma (a plan participant) asserted that he lacked actual knowledge that his retirement plan money had been allocated to hedge funds and private equity investments, as was disclosed in Intel's disclosures. He alleged that Intel breached its fiduciary duties in allocating his 401(k) account to hedge funds and private equity investments.

Intel sought to dismiss the lawsuit based on the three-year statute of limitations for ERISA fiduciary breaches. However, the three-year period is only applicable when a participant has actual knowledge of a fiduciary violation. Mr. Sulyma said he did not have knowledge even though Intel timely disclosed the investment strategy. The lack of knowledge occurred, in part, because the disclosures were not easily accessible (documents were uploaded to an online benefits portal) and were confusing. Moreover, Mr. Sulyma simply did not read some of the notices.

After five years of litigation, the Supreme Court held that Mr. Sulyma's claim was timely because actual knowledge is not based on what a person should have known, only what he did know. The Supreme Court recognizes that the actual knowledge standard could decrease the amount of cases that fall under the shorter three-year statute of limitations period for ERISA fiduciary breach claims, but the statute's language nevertheless requires "actual knowledge."

With more carefully drafted disclosures, Intel may have avoided this lawsuit because the notices could have provided actual knowledge to Mr. Sulyma about the plan's investments. Consequently, Mr. Sulyma would have been subject to the shorter three-year statute of limitations for actual knowledge of a fiduciary breach.

TAKEAWAY: Delivering boilerplate ERISA notices and disclosures alone is not enough. It is essential that the notices and disclosures are written in a way that actually provides readers with knowledge of the contents of the notice. This requires clearly worded notices that are digestible for average plan participants.

The Rise of COBRA Notice Class Actions

One of many devastating economic effects of COVID-19 is that employers have had to reduce hours and terminate the employment of millions of employees. Often these actions trigger an employee's right to elect continued coverage under the employer's health plan, as required by COBRA. In addition, COBRA requires health plan administrators to apprise individuals of COBRA coverage options when they initially enroll in the plan (a "General Notice") and after a qualifying event (an "Election Notice"). Recent class action litigation highlights the need, now more than ever, for employers to take a close look at their COBRA notices and processes.

Why are adequate and timely COBRA notices important for employers?

Over the last few years, COBRA notice deficiencies have provoked a rapidly growing number of class action lawsuits. The proposed class actions have affected major employers including Best Buy, Lockheed Martin, Lowe's, Nestle, Target and Walmart. The complaints primarily assert that Election Notices were deficient because they:

- Contained incomplete instructions on how to elect COBRA or how to contact the plan administrator;
- Used overly complicated language that is not understood by the average participant;
- Dissuaded individuals from electing COBRA and directed them to the healthcare marketplace or a catchall phone number; and/or
- Were not timely provided.

Many of these lawsuits have culminated in substantial monetary settlements, which could have been avoided if the defendants had utilized the Department of Labor's model notices and/or reviewed their notice procedures. In addition to potential class action liability, employers face penalties of up to $110 a day for delayed COBRA notices and an excise tax of $100 per day for COBRA non-compliance under the U.S. Tax Code.

TAKEAWAYS:

If you administer COBRA **internally**:

- Use the Department of Labor's model COBRA notices or notices that have been reviewed and approved by legal counsel. The Department's notices were recently updated and can be found here.
- Confirm that your COBRA notice system is updated and equipped to distribute all notices in a timely manner.

If you **outsource** COBRA to a third-party administrator:

- Confirm that the third-party administrator is using the Department of Labor's updated model notices.
- Verify that COBRA notices correctly identify the third-party administrator.
- Review your contract with your COBRA vendor to ensure you will not be liable if notice deficiencies arise.

If you have any questions about ERISA disclosures and notices, please contact a member of the Kutak Rock Employee Benefits Practice Group.

Contacts

John E. Schembari	Omaha	(402) 231-8886	John.Schembari@KutakRock.com
Michelle M. Ueding	Omaha	(402) 661-8613	Michelle.Ueding@KutakRock.com
William C. McCartney	Irvine	(949) 852-5052	William.McCartney@KutakRock.com
P. Brian Bartels	Omaha	(402) 231-8897	P.Brian.Bartels@KutakRock.com
Cindy L. Davis	Minneapolis	(612) 334-5000	Cindy.Davis@KutakRock.com
Alexis L. Pappas	Omaha	(402) 661-8646	Alexis.Pappas@KutakRock.com
Ruth C. Marcott	Minneapolis	(612) 334-5044	Ruth.Marcott@KutakRock.com
Amanda R. Cefalu	Minneapolis	(612) 334-5000	Amanda.Cefalu@KutakRock.com
Jeffrey J. McGuire	Omaha	(402) 661-8647	Jeffrey.McGuire@KutakRock.com
Sevawn Foster Holt	Little Rock	(501) 975-3120	Sevawn.Holt@KutakRock.com
Nathan T. Boone	Minneapolis	(612) 334-5014	Nathan.Boone@KutakRock.com
Daniel C. Wasson	Omaha	(402) 346-6000	Daniel.Wasson@KutakRock.com
John J. Westerhaus	Omaha	(402) 231-8830	John.Westerhaus@KutakRock.com

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