“Actual Knowledge” - The Hottest ERISA Item of the New Year!

Client Advisories

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Under the Employee Retirement Income Security Act (ERISA), a retirement plan participant may file a breach of fiduciary duty claim against a plan fiduciary within 6 years from the date of the breach. If more than 6 years passes, they can no longer bring that claim. This is known as the statute of limitations (SOL). Furthermore, ERISA shortens the SOL to 3 years, if the defendant can prove the participant had “actual knowledge” of the underlying facts supporting a breach.

What constitutes “actual knowledge” is at issue before the U.S. Supreme Court in *Intel Corporate Investment Policy Committee v. Sulyma*. This case will determine what “actual knowledge” means for the purposes of ERISA’s SOL. We previewed the case here.

Sulyma, a former Intel employee, participated in two of the company’s sponsored individual account retirement plans. In 2011 and 2012, Intel issued disclosures through their website of various funds. Certain funds contained hedge fund and private equity investments. Five years later Sulyma brought a lawsuit in the District Court of Northern California claiming breach of fiduciary duty under ERISA by imprudently having these risky investments in the funds’ portfolio. Sulyma, however, professes that he never knew about the contents of the disclosures.

The District Court held that the 3-year limitations period applied, barring Sulyma’s claim, because it believed that the disclosures were made available to Sulyma in such a way that he could be responsible for knowing the underlying facts regarding the transaction that formed the basis of his complaint. It found that Sulyma’s review of the documents, without a more comprehensive understanding, was enough to satisfy the actual knowledge standard.

However, the 9th Circuit reversed, finding that actual knowledge required awareness of the essential nature of the breach. The 9th Circuit was persuaded by Congress’s removal in 1987 of the constructive knowledge standard that was previously in the statute. The court believed that action to be strong evidence of Congress’s intent to require the defendant to prove the plaintiff had actual knowledge of a breach.

Recently, oral arguments were held before the Supreme Court, where Intel argued that the participant should be deemed to have actual knowledge of the disclosures solely upon receipt of the information plan fiduciaries are required provide. Sulyma argued that actual knowledge requires more than just seeing or reading, but legitimate comprehension of the materials a participant received.

During oral arguments, a number of the Justices asked questions regarding whether it should be assumed that most people do not read disclosures provided to them about their investments. Justice Ginsburg stated, "I must say I don't read all these mailings that I get about my investments." If someone receives but does not read (or understand) the contents of the documents, how can that person be said to have "actual knowledge" of the contents? Under these circumstances, and Intel's argument, Justice Ginsburg suggested, the word "actual" would have no meaning or significance under the statute.

On the other hand, if the participants were held to have knowledge just because the disclosures were made available to them, then that would create a "constructive knowledge" standard, suggested Justice Kavanaugh, and would be inconsistent with Congress's decision to amend ERISA and explicitly repeal the constructive knowledge standard from the SOL.

Sulyma also faced some tough questions from the Court. For example, does willful blindness (one's explicit attempt to keep their head in the sand) impute actual knowledge to the participant? Additionally, what if the participant lies and says they never read the disclosures just to get the benefit of a longer SOL? It would be very difficult to prove otherwise. Another tough question was whether the statute required the participant to understand everything or most of what was stated in the disclosure. The Court wondered how any defendant could meet such a high burden of proof and added that Congress would not put in a shorter SOL if it would be impossible for defendants to meet that burden.

Interestingly, the arguments were void of any discussion as to the type of retirement plans involved. These plans are known as individual account plans or defined contribution plans, where the participant directs his or her investments. The ERISA statute itself requires that, in these type of plans, the participant exercise control over the assets in his or her account. In fact, many of the disclosures mandated by the government are to enable participants to have this "control" over their accounts. In passing the participant-directed disclosures, the DOL stated:

> When a plan assigns investment responsibilities to the plan's participants . . . , it is the view of [the government] that plan fiduciaries must take steps to ensure that participants . . . are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts.

See 75 Fed. Reg. 64,910 (Oct. 20, 2010).

With the conclusion of oral arguments, the plain text of the statute seems to favor Sulyma, but a majority of the district courts that have dealt with this issue previously followed Intel's view, so we will have to wait until spring to see how this turns out.

In the meantime, plan sponsors and fiduciaries can take the following actions:

- Review all your disclosures to participants ensuring they are drafted in a manner that the average and reasonable participant can understand intelligently; and
- Assess the level of participant education that is being provided and determine if it is enough to allow participant's to make informed decisions over their accounts.