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Supreme Court Clarifies Constructive Knowledge Not Enough for ERISA Three-year Statute of Limitations

In a recent US Supreme Court case, *Intel Corporation Investment Policy Committee v. Sulyma* (No. 18-1116, (U.S. Feb. 26, 2020)), the court put to rest the notion that actual knowledge means constructive knowledge when ERISA fiduciaries are delivering retirement plan investment information and other required employee benefit plan disclosures to plan participants under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

ERISA Statute of Limitations (SOL)

The issue arises under the tangled wording of the SOL found within ERISA. ERISA requires a plaintiff to file a breach complaint on the earlier of (1) six years from the (a) ERISA breach or (b) the last date on which the fiduciary could have cured the breach; or (2) three years after the earliest date the plaintiff had actual knowledge of the breach. Clearly, the second SOL acts to accelerate the SOL and removes the ERISA fiduciary from any potential breach claim in the event that it is proven that the plaintiff had actual knowledge of the act causing the alleged breach.

Over the past several years, ERISA plan fiduciaries, administrators and record-keepers have grown falsely comfortable with providing voluminous employee benefit plan materials in the form of glossy print summary plan descriptions, investment plan summaries and prospectuses that would rival a JCPenney catalogue. By doing so, they were relying on the mere delivery of these important benefit plan materials as imputing actual knowledge onto each plan participant. Therein lies the rub.

Retirement Plan Disclosures Equate to Actual Knowledge, Correct?

Intel employee Chris Sulyma challenged this notion after his short-tenured position with Intel ended after the recession in 2012. However, during his employment, Intel's retirement plan investment policy committee attempted to chase higher investment returns after the recession by directing the investment of Intel's retirement plan assets into alternative investments via hedge funds, private equity funds and commodities that contained higher investment fees. Sulyma held retirement plan assets in the retirement plans that were affected by the Intel committee's investment fund changes. The investment fund changes caused Sulyma's funds to lag behind other Intel retirement plan investment offerings, including the index funds that were offered.

On cue, Sulyma filed suit in 2015, within the ERISA six-year SOL; however, his claim was brought more than three years after the Intel retirement plan fiduciaries made several investment disclosures to him. Further, the record showed that Sulyma received multiple emails, statutory notices on the retirement plan record-keeping platform, and summary plan descriptions all describing the nature of the alternative investments, including the fee structure and underlying investment returns.

However, Sulyma argued he could not remember if he received the disclosures, and was unaware that he had invested in the alternative investments.

Constructive Knowledge Not Enough

Throwing a blow to ERISA fiduciaries and their third-party record-keepers, the Supreme Court affirmed the Ninth Circuit's holding that actual knowledge does not mean constructive knowledge. The court reviewed the *Black's Law* definition of "actual knowledge" and reasoned that the definition "signals that the plaintiff's knowledge must be more than 'potential, possible, virtual, conceivable, theoretical, hypothetical or nominal.'" The court further held that Congress acts intentionally and purposefully when it includes or excludes particular language in a statute, and ERISA's disclosure regime is meant to "ensure that a participant knows exactly where she stands with respect to the retirement plan." As such, ERISA fiduciaries are now required to ensure their plan participants have actual knowledge of retirement plan changes that may cause an ERISA fiduciary breach.

Probable Result of Sulyma for ERISA Fiduciaries

It is important to note that the *Sulyma* holding will not eliminate the notion that benefit plan disclosures are now irrelevant. In fact, ERISA fiduciaries should continue their current processes for complying with ERISA's disclosure requirements. The practical effect of the *Sulyma* holding is that the ERISA SOL, for all intents and purposes, will expand from three to six years because of the challenges around proving actual knowledge. However, it may be beneficial for ERISA fiduciaries to contemplate an enhanced disclosure process for fiduciary matters such as issues concerning investments and fees.

Also, query whether the *Sulyma* holding may expand into other areas of benefits law, such as health and welfare, and the problematic fees relating to broker commissions. It may behoove an ERISA fiduciary to develop a form of substantiation when disclosing such fiduciary matters to plan participants, and require participants to acknowledge their understanding of such changes in order to create a record of actual knowledge and start the clock ticking on the much shorter three-year ERISA SOL.

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