

**Strategic Uses of EBSA Disclosure Guidance and ERISA Case Law**

Presented by  
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**ERISA Title I Disclosure Requirements**

- ◆ Automatic – SPDs, SARs, SMMs, blackout notices, 204(h) notices.
- ◆ On request – documents under which the plan is established and operated – plan document, trust document, service agreements, insurance contracts.
- ◆ As a matter of fiduciary prudence.

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**Disclosures in SPD**

- ◆ SPDs must be “written in a manner calculated to be understood by the average plan participant” and contain information about the plan’s governance that is “sufficiently accurate and comprehensive to reasonably appraise such participants and beneficiaries of their rights and obligations under the plan.” 29 U.S.C. § 1022(a).
- ◆ A plan’s claims procedure is not “reasonable” if not in the plan’s SPD. 29 CFR 2560.503-1(b)(2).

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### Other Available Plan Information

- ♦ EBSA Guidance – some plan documents not routinely available – minutes of trustees' meeting.
- ♦ Form 5500
- ♦ Form 990 -- for benefit plans of non-profit organizations and for plans funded by a VEBA as described in the Tax Code.

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### Remedies for Procedural Violations in Benefit Claims Cases

- ♦ *Halo v. Yale Health Plan, Director of Benefits & Records Yale University*, 819 F.3d 42, 45 (2d Cir. 2016) (adopting *de novo* review for all procedural violations, not just blown deadlines).
- ♦ *McConnell v. Am. Gen. Life Ins. Co.*, No. 19-0174-WS-MU, 2020 WL 292193 (S.D. Ala. Jan. 21, 2020) (*de novo* review applied where plan failed to provide claimant with new evidence after appeal submission).

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### Participant Legal Remedies

Participants have two alternatives:

ERISA 502(a)(1)(b) - monetary relief for benefits owed, or to enforce the terms of the Plan

ERISA 502(a)(3) – to enjoin any act or practice or obtain other equitable relief for violations of Title I or the terms of the plan.

NB – most state law remedies are preempted, but with exceptions such as state insurance laws, or generally applicable criminal laws.

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### Statutory Penalty for Failure to Provide Documents

- ♦ For routine disclosure failures -enforced at the discretion of a court under ERISA 502(c)(1) – \$ 100 a day penalty.
- ♦ *Kwan v. Andalex Grp. LLC*, 737 F.3d 834 (2d Cir. 2013) (penalties under 502(c)(1) are not imposed when a plaintiff has failed to demonstrate that his rights were harmed or otherwise prejudiced by the delay in his receipt of the information).
- ♦ *Crotty v. Cook*, 121 F.3d 541 (9th Cir. 1997) oral request for SPD sufficient to trigger the 502(c)(1) penalty).

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### When is Failure to Disclose a Fiduciary Breach?

- ♦ Historically, disclosure violations treated as statutory violations, not fiduciary violations.
- ♦ *Ackerman v. Warnaco, Inc.*, 55 F. 3d. 117 (3d Cir. 1995)(ERISA 502(a)(3) remedies are generally not available for violations of ERISA's reporting and disclosure requirements "except" where the plaintiff can demonstrate the presence of extraordinary circumstances).

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### Duty to Disclose Evolves

- ♦ *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F 3d 1292 (3d Cir.1993) (a direct action for breach of fiduciary duty as "other appropriate equitable relief" under ERISA 502(a)(3)(B)).
- The widow of plan participant brought action against plan and employer, alleging breach of fiduciary duty under ERISA.
- ♦ The Court of Appeals held that direct action by ERISA plan participant or beneficiary for breach of fiduciary duty of plan administrator exists for failure to disclose material plan information.

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### Origins of Fiduciary Duty to Disclose

- ♦ *Varity Corp. v. Howe*, 516 U.S. 489, (1996) clarified that when an employer speaks in the capacity of a fiduciary, there is a duty to speak truthfully and completely even if ERISA did not require those communications.
- ♦ However, the Court did not reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.

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### Duty to Inform is Fiduciary Duty

- ♦ *Jordan v Federal Express Corporation*, 116 F.3d 1005 (3<sup>rd</sup> Cir. 1997).
- ♦ Third Circuit - We evaluate fiduciary duty to inform claims differently from violations of ERISA's reporting and disclosure requirements.
- ♦ Plan administrator failure to notify participant of the irrevocability of his retirement benefit election and joint annuitant designation presents a cognizable 502(a)(3) claim. Case remanded to determine if the administrator's failure to describe the irrevocability of participant's retirement selection constituted a material omission and a breach of its duty to exercise "care, skill, prudence and diligence."

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### Evolving Fiduciary Duty to Inform/Disclose

- ♦ *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997) (holding that a plan administrator has a fiduciary duty to disclose all material facts affecting a plan participant's health care interests, including financial incentives that might discourage a treating physician from providing essential referrals for covered conditions), *cert. denied*, 522 U.S. 914 (1997).
- ♦ *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (ERISA fiduciary has some obligation to disclose nonpublic "inside" information to plan participants making investment choices in employer stock).

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### Limited Fiduciary Duty to Disclose Early Retirement Window

- ♦ *Binns v. Exxon*, 220 F. 3d 1042 (9<sup>th</sup> Cir. 2000) holding that when a plan participant inquires about potential plan changes, an employer-fiduciary has a duty to provide complete and truthful information about any such changes then under serious consideration.
- ♦ In the absence of an employee inquiry, however, the employer-fiduciary does not have an affirmative duty to volunteer information about any changes prior to their final adoption.
- ♦ We further hold that an employer does not have a duty to follow up with an employee if, subsequent to the employee's inquiry, the proposed changes reach the serious consideration stage, unless the employer agrees to do so.

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### Who is Responsible -- Functional Fiduciaries

- ♦ *Gill v Bausch & Lomb Supplemental Retirement Income Plan*, 1 F.Supp.3d 72( W.D. N.Y. 2014) - Employer's human resources personnel acted as unauthorized plan fiduciaries.
- ♦ In *re Derogatis* 904 F.3d 174 (2d Cir. 2018) (communications by plan personnel constituted fiduciary conduct).

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### Will Disclosure Violations that Cause Injury not Remediable under 502(a)(1)(B) be Cognizable Fiduciary Claims under ERISA 502(a)(3) ?

- ♦ *Manuel v Turner*, 905 F.3d 859 (5<sup>th</sup> Cir. 2018). The participant asserted disclosure and claims regulations violations with his claim for benefits, and raised both 502(a)(1)(b) and 502(a)(3) claims. Fifth Circuit ruled as to the benefit claims violations that ERISA 502(a)(1)(b) provides the remedy, and arbitrary and capricious review is appropriate, but remanded the SPD violations for consideration under 502(a)(3).
- ♦ The Court of Appeals also held:
  - that the Insurance Company's structural conflict should be considered in arbitrary and capricious review; and
  - the Insurance Company was a "person" against an ERISA 510 claim may be brought.
- ♦ In *re Derogatis*, 904 F.3d 174 (2nd Cir. 2018) (affirms *de novo* review decision on the 502(a)(1)(b) claim because plan violated the claims/SPD regulations, but remands the 502(a)(3) claim to the district court).

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### Single Participant Disclosure Cases

- ◆ *Dawson-Murdock v Nat'l Counseling Grp., Inc.*, ---F.3d ---, 2019 WL 3308535 (4th Cir. 2019)
- ◆ The Court of Appeals allowed a beneficiary to sue deceased husband's employer as the plan administrator for fiduciary breach because of its vice president's statements regarding her claim for insurance benefits.
- ◆ Plan administrator acts in a fiduciary capacity when it conveys (or fails to convey) material information to a plan participant concerning the retention of eligibility for a benefit plan when that administrator is aware that the participant wishes to maintain his participation in that plan.

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### ERISA's Statute of Limitations for Breach of Fiduciary Duty – Actual Knowledge

- ◆ *Sulyma v. Intel Corp. Committee*, 909 F.3d 1069 (9th Cir. 2018)(pending before the Supreme Court).
- ◆ ERISA Section 413 gives plaintiffs a maximum of 6 years from the end of the fiduciary breach to bring suit.
- ◆ where plaintiffs acquire "*actual knowledge*" of the breach, Section 413 shortens the maximum 6-year period to 3 years from when plaintiffs acquired "actual knowledge."
- ◆ In re *Sulyma*, the Ninth Circuit clarified that an employee must be actually aware of the facts of the breach and not merely in possession of materials from which the employee could have discovered the breach.

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### Participant Representation DOL Information Letter 02/27/2019

- ◆ Three cautions for plans on the right of participant or beneficiary to name an authorized representative for claims processing.
  - Plan SPD and Claims Procedures must include the right to have an authorized representative;
  - Plan may provide all notices to both, but *must* provide all notices to the authorized representative for the specific aspect covered by the authorization; and
  - Plan is required to comply with the specifics of the authorization, and for subsequent aspects, must insure that all notices are provided to the participant or beneficiary.

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### Standing Based on ERISA Disclosure Violations

- ♦ In *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3<sup>rd</sup> Cir. 2003) (beneficiaries of a welfare plan had standing under Section 502(a)(3) to seek injunctive relief to remedy a breach of fiduciary duty— a failure to comply with ERISA's reporting and disclosure requirements.
- ♦ *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 609-610 (6<sup>th</sup> Cir. 2007), see also *Central States et al v. Merck-Medco*, 433 F.3d 181, 199-200 (2<sup>nd</sup> Cir. 2005).

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### Disclosure in Recoupment Cases

- ♦ *Northcutt v. General Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031, 1036-1037 (7<sup>th</sup> Cir. 2006) (Plan's ability to recoup mistakenly made overpayments to a participant turns strongly on the fact that the plan in question clearly set out the plan's right to recoup the overpayments in the plan's governing document.)

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Questions?

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