Employee Benefits
In Focus
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For Clients and Friends
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SECOND CIRCUIT JUSTIFIES SCOPE OF AUDIT IN NURSE FRINGE BENEFIT FUND CASE

On August 19, 2022, in a 2-1 decision, the Second Circuit majority held for the New York State Nurses Association Benefits Fund (the “Fund”), a multiemployer fringe benefit fund, finding that the scope of a 2016 audit was justified despite the employer’s, Nyack Hospital’s (“Nyack’s”), allegations that the audit request was overbroad. *See N.Y. State Nurses Ass’n Benefits Fund v. NYACK Hospital*, No. 20-378 (2d Cir. 2022).

The Fund appealed the district court order partially holding that the Fund was entitled to only the payroll records of registered nurses (“RNs”) and not to the records of other employees to learn whether these employees should have been categorized as plan beneficiaries. *N.Y. State Nurses Ass’n Benefits Fund v. Nyack Hosp.*, 2019 WL 4735355 (S.D.N.Y. Sept. 27, 2019). Nyack cross-appealed arguing that the district court’s decision was too broad because the Fund was only entitled to the records of RNs Nyack identified as members of the collective bargaining unit. Further, Nyack alleged that the Fund’s overbroad request was impermissible under the terms of its collective bargaining agreement with the New York State Nurses Association (“NYSNA”).

The Second Circuit found that the dispute boiled down to the Fund alleging that the scope of the audit was too narrow and Nyack alleging that it was too broad. Agreeing with the Fund, the Court held that the audit was too narrow. Using precedent in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) (“*Central States*”), the Court analyzed the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), governing plan’s audit authority, using a two-prong analysis. First, the Court analyzed whether the audit was contractually authorized by the Trust Agreement. Second, the Court analyzed whether the trustees of the Fund violated their fiduciary duties under ERISA in requesting an audit of the scope set out in their initial request which included a request for the records of all of Nyack’s employees.

Using the foregoing analysis, the Court decided that the burden of proving that the requested audit would be a breach of the Fund Trustees’ fiduciary duties, rested with Nyack and Nyack failed to meet that burden as Nyack did not present evidence showing “‘an effort by plan trustees to expand plan coverage beyond the class defined in the plans’ terms or to acquire information about the employers to advance union goals.’” (Quoting *Central States*, 472 U.S. at 571 n.12). Further, Nyack failed to present evidence that the alleged overbroad audit was “clearly wasteful of plan assets or unrelated to legitimate plan concerns.” (Quoting *Central States*, 472 U.S. at 571 n.12). Ultimately, the Court held that the audit was not overbroad and should have been permitted to proceed as the Fund was authorized to audit all payroll records of all Nyack's employees pursuant to the Fund's request.

LAWSUITS INVOLVING NORTHERN TRUST TARGET DATE FUNDS

A number of lawsuits against companies offering Northern Trust Fund's target date funds ("TDFs") have emerged over the past few years. Some of these companies such as Walgreen Co. have settled their lawsuits while other companies like Allstate and Northern Trust are engaged in pending litigation.

Walgreens Co.

In *Brown-Davis v. Walgreens Co.*, No. 1:19-cv-05392 (N.D. Ill. Mar. 16, 2020), Plaintiffs who are participants and beneficiaries of Walgreens Co.'s ("Walgreens") Profit-Sharing Retirement Plan (the "Plan") filed a lawsuit against their employer, Walgreens, due to its offering of Northern Trust TDFs in the Plan. Plaintiffs alleged that Defendant, Walgreens, retained these funds despite their poor performance, leading to major monetary losses to their profit sharing accounts. On March 16, 2020, the District Court granted in part and denied in part Walgreens' motion to dismiss. The court disagreed with Walgreens' argument that as a matter of law a fiduciary may circumvent a claim of imprudence "based on fund underperformance" if the fiduciary had offered plan participants various investment options. However, the Court agreed with Defendants that Plaintiffs did not have standing to sue regarding "funds in which they did not personally invest." Accordingly, the Court ordered that discovery proceed.

Subsequently, on June 29, 2021, the parties reached a settlement and requested that the Court stay proceedings. On February 16, 2022, the Court approved a $13.75 million settlement that provides, among other provisions, relief to a class of approximately 195,000 current and former participants in the Plan. The settlement also includes non-monetary relief consisting of removal of the Northern Trust TDFs from the Plan's investment options.

Allstate

Cutrone v. Allstate Corp. No. 1:20-cv-06463 (N.D. Ill. Sept. 28, 2021) is a class action lawsuit brought by Plaintiffs who are current and former Allstate employees who participated in the company's retirement plan. Defendants are Allstate and the committees that managed and administered the retirement plan. Plaintiffs alleged that Defendants breached their fiduciary duties and engaged in prohibited transactions by failing to timely remove poorly performing Northern Trust TDFs and by allowing two outside advisors to charge unreasonable fees. On September 28, 2021, the District Court found that Plaintiffs had demonstrated standing despite Defendants' arguments to the contrary in their motion to dismiss and ordered that Defendants answer the amended complaint.

Plaintiff's complaint was answered and the parties are currently engaged in discovery; a joint status report is due by September 23, 2022.

Northern Trust

In *Conlon v. The Northern Trust Company et al,* 1:21-cv-02940 (N.D. Ill. 2022), Plaintiffs, six beneficiaries of the Northern Trust Company Thrift-Incentive Plan (the "Plan"), brought a class action suit alleging that Defendants who sponsor, manage and administer the Plan ("Defendants") breached the Employee Retirement Income Security Act of 1974, as amended ("ERISA") by failing to exercise prudence and loyalty in selecting and monitoring the Plan's investment options. Further, Plaintiffs alleged that Defendants failed to remove underperforming funds from the Plan or to negotiate reasonable fees. As a result, the monetary value of Plaintiffs' retirement accounts was less valuable than had Defendants complied with their ERISA fiduciary duties. On August 5, 2022, the U.S. District Court for the Northern District of Illinois denied Defendant's motion to dismiss Plaintiff's complaint.

In their complaint, Plaintiffs alleged that the Northern Trust Focus Target Retirement Trusts (the "Focus Funds") were the only target date retirement investing options in the Plan and have been since 2013 despite there being better performing TDFs at the same or lesser cost available. Moreover, the Focus Funds were the default investment option for Plan participants who did not choose a different investment option. Plaintiffs alleged that by keeping the poorly performing funds as the default investment option, the Defendants "followed no prudent management process" costing the Plan millions of dollars since 2015. Further, Defendants' "lack of proper fiduciary process" extended to their monitoring of the Plan's investment management and recordkeeping fees as they failed, according to the complaint, to exercise their "tremendous leverage to obtain superior investment products and services" as one of the largest defined contribution plans in the nation with over $2.7 billion in assets under management and over 12,000 participants.

Plaintiffs alleged that a breach of duty can be inferred because Defendants profited directly or indirectly from the exorbitant fees paid by the Plan participants to Defendants' proprietary funds. In fact, the Plan paid an average of $2 million in annual fees or $160 per participant since 2015 even though a standard recordkeeping fee for a similar plan should be around $14-$21 per participant. Accordingly, the Court held that the offering of the Focus Funds as default funds represented a self-interested failure to diversify investment options and that allowing the continuation of such conflicted transactions (including the paying of unreasonable fees) amounted to a breach of fiduciary duty and a violation of ERISA's prohibited transaction rules.

SURPRISE BILLING FINAL RULES AND FAQs

On August 19, 2022, the U.S. Departments of Health and Human Services, Labor, and the Treasury (collectively, the "Departments") published final rules entitled "Requirements Related to Surprise Billing; Final Rules" that finalized provisions related to the No Surprises Act ("NSA"), along with a set of Frequently Asked Questions ("FAQs"). The NSA was enacted as part of the Consolidated Appropriations Act, 2021 ("CAA") on December 28, 2020 and provides safeguards against surprise billing by limiting out-of-network cost sharing and banning balance billing.

The U.S. Department of Labor has announced that the purpose of the final rules is to create transparency in the medical claims payment processes and to clarify the process to resolve disputes between providers and health insurers. Under the final rules, "balance billing" refers to when an out-of-network provider bills patients for the difference between (1) the amount the provider charges and (2) the amount the plan or issuer pays and any cost sharing amount collected from the patient such as a copayment, coinsurance, or "amounts paid toward a deductible."

The final rules follow the July and October 2021 interim final rules providing, among other provisions, safeguards for consumers against exorbitant out-of-pocket costs that are the result of surprise billing and a federal independent dispute resolution ("IDR") process. The IDR is a process to be used by entities like nonparticipating providers or facilities, nonparticipating providers of air ambulance services, and plans or issuers in the group and individual markets to resolve out-of-network rates for relevant services when a billing dispute cannot be settled prior to engaging in the IDR process.

The final rules respond to *Texas Medical Association, et al. v. United States Department of Health and Human Services, et al.,* No. 6:21-cv-425 (E.D. Tex. Feb. 23, 2022) ("*Texas Medical Association*") and *LifeNet, Inc. v. United States Department of Health and Human Services, et al.,* No. 6:22-cv-162 (E.D. Tex. July 26, 2022) ("*LifeNet*"), where the United States District Court for the Eastern District of Texas vacated portions of the October 2021 interim final rules.

Specifically, with respect to provisions of the July 2021 interim final rules, the final rules address information that group health plans and health insurance issuers that offer group or individual health insurance coverage are required to share about the qualifying payment amount ("QPA"). Typically, the QPA is the median contracted rate for specific services in a specific geographic region for a specific market. Further, with respect to certain provisions of the October 2021 interim final rules, the final rules address specific requirements having to do with "consideration of information when a certified IDR entity makes a payment determination under the Federal IDR process."

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