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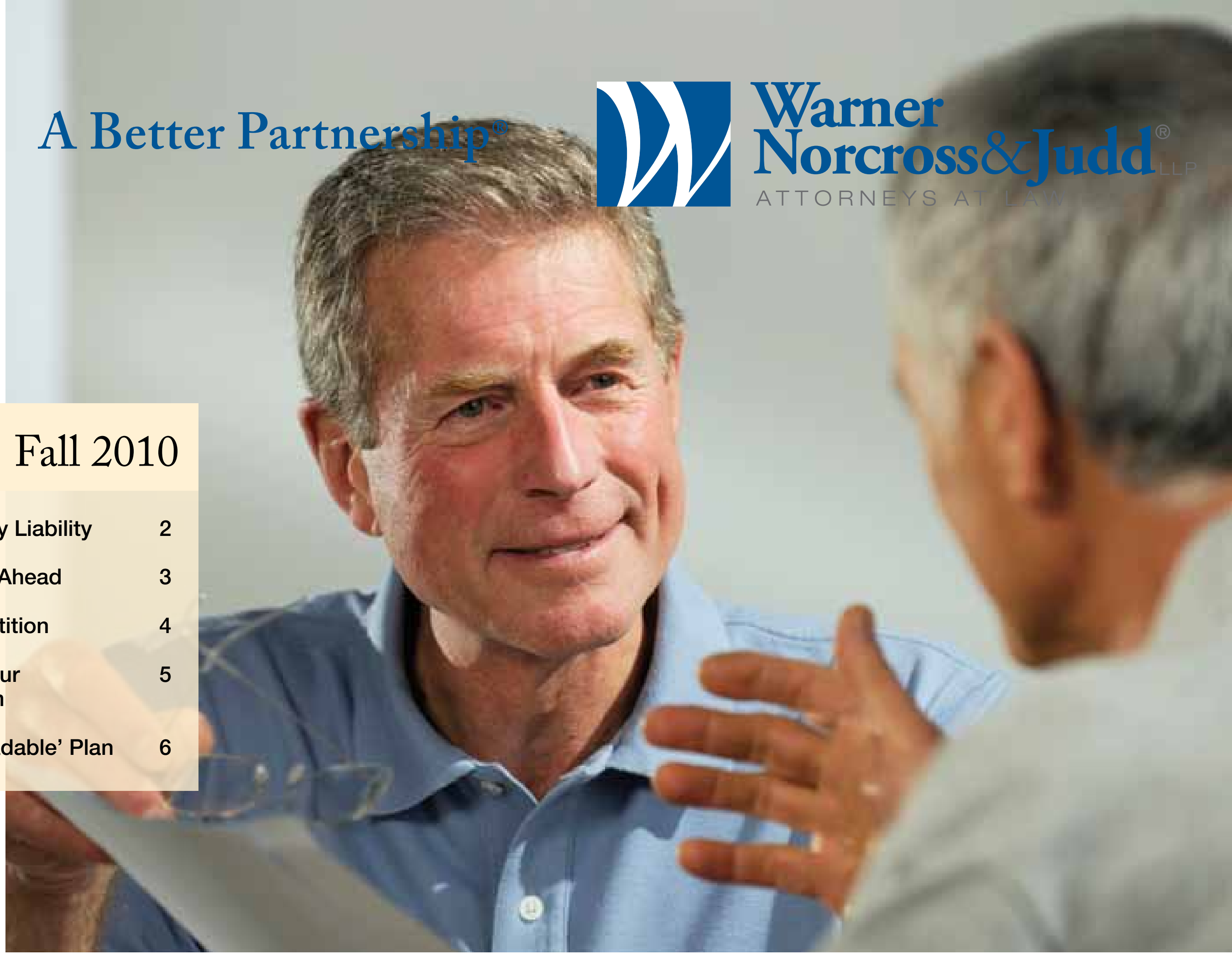

Fall 2010

Human Resources Newsletter

HR Focus

When Can You Discipline Employees for Off-Duty Misconduct?

by Louis C. Rabaut: **lrabaut@wnj.com**

Many would say that what an employee does on his own time is his own business. But this is not always true and the appropriate response to off-duty misconduct is not always clear-cut. Consider these cases:

- Two hourly employees leave work and head to the local watering hole. After a couple of beers, an argument begins and the two end up in a fight. Both are arrested and charged with disorderly conduct. Both make bail and show up for work the next day, black eyes and all. May the employer discharge the two employees because of the off-premises fight?
- The employer operates a day care. An employee is arrested and charged with criminal sexual conduct. The employee pleads not guilty and is released on bond. May the employer discharge the employee?
- A male employee does not like his female boss. The employee goes home after work and posts on his personal blog that his boss is a "witch" and that he will be looking for her on Halloween "riding her broom." May the employer discharge the employee?

Whether the employer may discipline or discharge an employee for off-duty misconduct depends on a number of factors.

WHO IS THE EMPLOYER?

A governmental employer faces significant restrictions when it comes to discipline for off-duty misconduct.

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Avoid Fiduciary Liability When Choosing the Class of 401(k) Funds

by Vernon Saper: **vsaper@wnj.com**

OK, you finally have the 401(k) plan running smoothly. You allow the participants to direct their own investments from a menu of mutual funds – some of the best funds on the market. In fact, you even hired an investment consultant to help you pick the funds. Your committee meets with the consultant periodically to be sure the menu is still good, and once in awhile you replace a low-performing fund with one promising a better performance. Nothing else for the committee to worry about, right? WRONG!

THE FIDUCIARY ISSUE

Not only do you need to be sure you're offering a good selection of funds for your employees, but also you need to be concerned with the expenses and fees being charged by the investment options. Well, that's not a problem, you say. In fact, the participants don't even have to worry about paying for the 401(k) plan. Instead, you have an arrangement with your recordkeeper and your consultant that neither of them invoice for their services at all. In effect, the 401(k) plan administration is "free." Oh, really? Doesn't cost a thing, huh? Your service providers are administering your plan out of the goodness of their hearts? Of course not.

Today, 401(k) service providers often receive payment from the investment funds offered to plan participants. For marketing the funds, the administration and investment firms receive "12b-1 fees" or revenue sharing. These fees are embedded in the expenses the funds charge for investment. The fees come off the top – before earnings are calculated and before plan participants receive a return on their investments.

As a member of the investment committee or other fiduciary for the 401(k) plan, are you aware of how this works? More importantly, are you aware that in many cases you could offer the identical investment fund with lower expenses and fees, thereby providing participants with higher returns?

THE TIBBLE CASE

A federal court recently held that an investment fiduciary must know if different classes of a particular fund are available, and must know the differences in expenses charged. Finally, the case held that unless there is a good reason for offering a class of a mutual fund with higher expenses, a fiduciary will be liable to the plan for the payment of excess expenses.

Tibble v. Edison International was decided following a three-day trial. It was one of many excess investment fee cases that have been brought since 2007 against large companies such as Boeing, Bechtel, Wal-Mart and Deere. Many of the cases have been dismissed by the courts, in favor of the employers, and others have been settled. More recently, several cases have survived summary judgment and will be tried, absent a settlement.

Notably, in the Wal-Mart case the Federal Eigth Circuit reversed a summary judgment in favor of the employer. It stated that the use of retail funds in that plan represented a failure of "effort, competence and loyalty." *Tibble* is the first to actually go to trial, and the results were not good for plan fiduciaries.

Tibble involved several mutual funds offered for investment under the Edison 401(k) Savings Plan, maintained by Southern California Edison Company. Some of the mutual funds were share classes charging higher expenses and fees (retail class), although the identical mutual funds were available to the plan at lower expenses and fees (institutional class).

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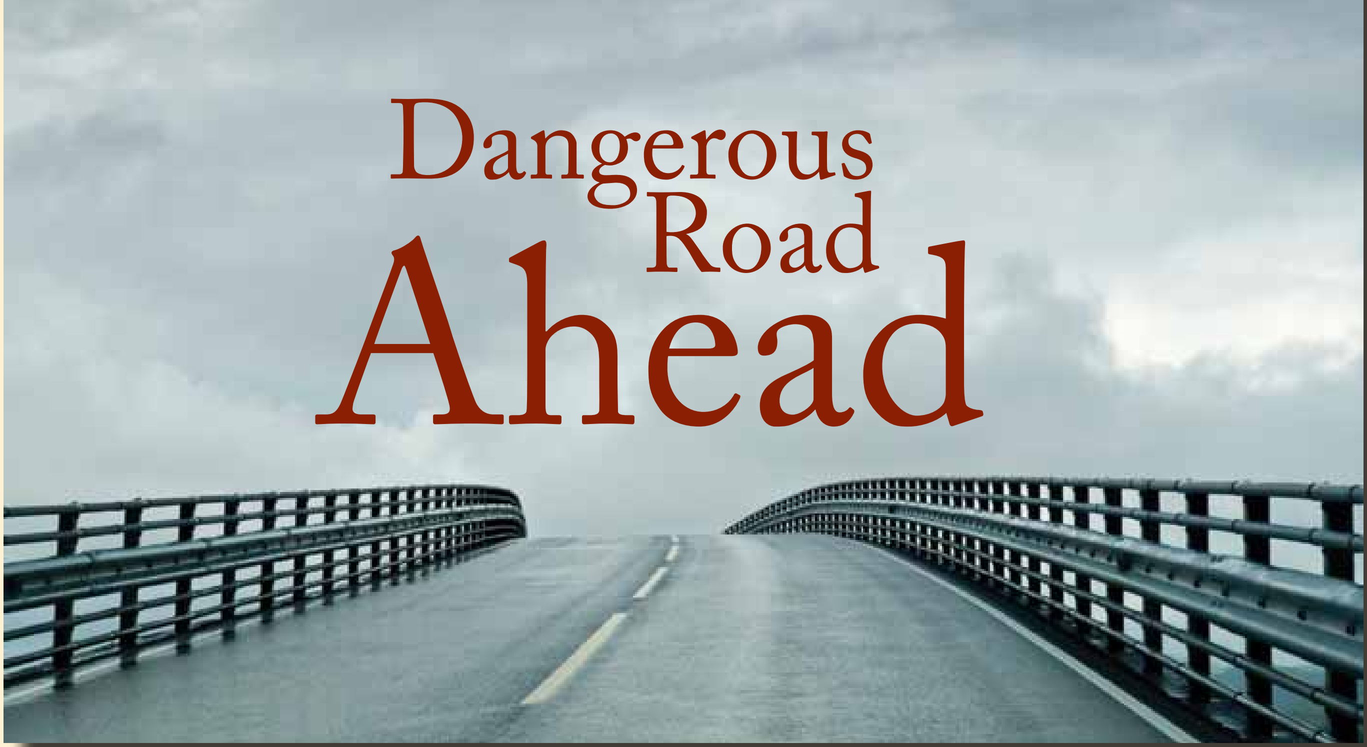
Dangerous Road Ahead



by Tara Kennedy: **tkennedy@wnj.com**

Technology makes our lives easier by allowing us to stay connected to the world around us. But, at what point does technology make life more dangerous? Lately, newspapers and magazines have been filled with articles about people who were injured because they were sending text messages to friends or using their cell phones to access the Internet while driving. One recent incident involved celebrity plastic surgeon Frank Ryan. According to the California Highway Patrol, Dr. Ryan died while "tweeting" about his dog.

HERE ARE SOME DISTURBING STATISTICS:

- 72% of adults use text messaging.
- 47% of adults who use text messaging say they have sent or read messages while driving, according to a Pew Research Center survey.
- 49% of adults said they have been in a car when the driver was sending or reading text messages, according to the Pew survey.
- 54% of workers who have smart phones – including 66% of sales workers and 59% of professional business services workers – have admitted to checking messages while driving, according to a CareerBuilder survey.
- Text messaging while driving increases the risk for an accident or driving-related problem by 23.2 times, according to a Virginia Tech Transportation Institute study.
- A person who sends a text message while driving at the speed of 35 mph will travel 25 feet before coming to a complete stop, compared to a distance of 4 feet for a drunk driver, also according to the Virginia Tech study.

Many state and federal legislators have decided to take action against this problem. In Michigan, it is against the law for drivers to read, write or send text messages while they drive. Specifically, House Bill 4394 states "a person shall not read, manually type, or send a text message on a wireless 2-way communication device that is located in the person's hand or . . . lap . . . while operating a motor vehicle that is moving on a highway or street in this state." Drivers who violate the law will receive a $100 fine for the first offense, a $200 fine for subsequent violations and points on their driving records.

The U.S. Department of Transportation (DOT) while partnering with the Occupational Safety and Health Administration (OSHA) announced a rule that commercial bus and truck drivers will be prohibited from sending text messages while driving, and train operators will be barred from using cell phones and other electronic devices while on the job.

Within the DOT, the Federal Motor Carrier Safety Administration (FMCSA) has prepared a final rule that will allow the FMCSA to fine drivers up to $2,750 and motor carriers up to $11,000 for violations. Additionally, states would be required to disqualify commercial licenses for 60 days for drivers who violate the rule twice within three years and 120 days for drivers who violate the rule three times within three years.

Secretary of Labor Hilda Solis stated the reasoning: "OSHA is clear, employers must provide a workplace free of serious recognized hazards. It is imperative that employers eliminate financial incentives that encourage workers to text while driving."

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Hiring the Competition

by Gregory Kilby: **gkilby@wnj.com**

It is not a secret that you need look no further than your competition when you're seeking to hire a perfectly qualified employee. Your competitors' employees already know the business. Their learning curve is short.

But what happens if you actually decide to hire someone from a competing business? Although adding a highly qualified new member to your team can boost the bottom line, it also can become a legal nightmare if you are careless in the hiring process. While there may always be some risk, there are steps you can take to minimize or even avoid litigation.

First, find out whether the potential employee is subject to any restrictive covenants, including non-compete, non-solicit or confidentiality agreements. Ask the candidate about the likelihood of your competitor suing to enforce the restrictions. If the agreements are in writing, ask for a copy and give your lawyer a call to see if they are enforceable.

Of all post-employment obligations, courts are most likely to enforce those that prohibit disclosure of a previous employer's confidential information and trade secrets.

If the agreements are enforceable, consider how, and if, the new employee can perform the duties of the new position while abiding by the terms of the agreement, to the extent they are reasonable. If compliance is not feasible, consider modifying job responsibilities during the term of the restrictions. Ways to do this include screening the candidate from a particular line of business or placing the candidate outside the area of geographic restriction. With the candidate's permission, you also might consider calling the competitor and asking for an exemption.

Even if the candidate is not subject to non-compete, non-solicit or confidentiality agreements that would affect his or her duties with your company, you still need to protect your company from claims that you are attempting to steal your competitor's trade secrets. Of all post-employment obligations, courts are most likely to enforce those that prohibit disclosure of a previous employer's confidential information and trade secrets. You should take reasonable steps to prevent an overlap of responsibility between an employee's old and new positions that might result in the disclosure of such information. And you should document your efforts.

Here are some additional steps you can take to reduce the risk of a lawsuit:

- Do not pay above market rates: a high signing bonus or salary increase may look like payment for confidential information rather than payment for skills;
- Require an agreement not to use or disclose confidential information from former employers;
- Warn employees – in writing – not to bring, disclose or use a former employer's confidential information. Be clear that failure to adhere to this requirement may result in termination;
- Require disclosure of inventions or discoveries made prior to a new employee's employment (in a way that does not disclose trade secrets of a former employer);
- Minimize the new employee's role in recruiting or hiring others from his or her former employer;
- Screen all employees assigned to design and develop new products, processes or services for past access to competitors' secrets;
- Monitor computer use and e-mail traffic to ensure there are no uploads or transmissions of outside information in the first months of employment; and
- Create and maintain a virtual "wall" between those assigned to analyze competitive services, processes and products and those formerly employed by competitors.

In short, following these types of procedures will go a long way toward reducing your company's risk of facing litigation when hiring from a competitor.

Take a Close Look at Your wellness program

by April Goff: **agoff@wnj.com**

About 70% of employers offer wellness programs, according to *The Wall Street Journal.* Of those, 64% offer incentives for participation, including cash, gift cards or group health plan premium discounts. Open enrollment season may be the prime time to take a close look at what your company is doing with respect to wellness programs. In addition to increasing the health of employees (and thereby limiting medical costs), there are other positive, though less tangible, returns, which include better workforce morale and lower absenteeism.

Most wellness programs offer some mix of the following options:

- Risk identification tools such as detailed health risk assessments and biometric screenings for body mass index, blood pressure and cholesterol levels
- Behavior modification programs including group or personalized health coaching, tobacco cessation, weight loss/management, nutrition and diet, exercise and workplace competitions/contests
- Educational programs such as employer-sponsored health fairs and seminars and online health and dietary resources
- Changes at the workplace that encourage healthier living such as providing different food options in the cafeteria and vending machines and reconfiguring workspaces to encourage employees to walk more or take the stairs

Wellness programs may be run in-house or through third-party vendors. Regardless of the structure, the programs are unlikely to provide a return on your investment unless they are effectively communicated to employees and become a part of your company's culture. There are many statutory schemes that overlap when it comes to wellness programs, and we encourage you to consult with counsel on this issue.

A BOOST FROM HEALTH CARE REFORM

The Patient Protection and Affordable Care Act (PPACA), commonly referred to as health care reform, encourages employers to develop wellness programs. One of its most notable provisions is mandated coverage of certain preventive services for non-grandfathered group health plans. Under these rules, required preventive services must be provided to participants without co-payments or deductibles. This overlaps with the benefits offered by many traditional wellness programs. PPACA also increases the maximum incentives employers may offer those who meet certain targets in wellness programs from 20% up to 30% in 2014. PPACA also sets aside $200 million in grants over five years for small companies to start wellness programs.

If you intend for your group health plan to be grandfathered under health care reform, we caution that you carefully review whether changes to your wellness incentives may jeopardize that status. Changes that cause an increase in employee cost or significantly reduce benefits may cause your plan to lose grandfathered status. For example, if your plan previously imposed a 10% tobacco-use surcharge on participants, and you increase that penalty to 20%, the change would cause your plan to lose grandfathered status. Also, if your wellness program bases a reward on the satisfaction of a standard related to a health factor, your program must meet additional requirements.

GINA

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits plans and insurers from requesting or requiring that an individual undergo a "genetic test" prior to or in connection with enrollment in a group health plan. Most biometric screening used in conjunction with a wellness program does not fall within the term, as defined.

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The Billion Dollar 'Readable' Plan

by Heidi A. Lyon: **hlyon@wnj.com**

Why can't the plan document be more "readable"?

This is the question clients and service providers often ask us when expressing their distaste for the technical jargon and formatting we use in benefit plan documents.

Contrary to what it may seem, there is no conspiracy by ERISA attorneys to prevent anyone else from interpreting what benefit plans say. We actually do want clients to understand their plans.

And, we'll often respond that we put this language in plan documents because the IRS requires it or because it provides important protections to clients. However, a recent participant lawsuit against Verizon offers an example of another, and an arguably more compelling, answer: accuracy.

When the retirement plan document for a company that Verizon would later acquire was amended and restated, a drafting error increased the amount of benefits being promised under the terms of the plan document by about $1.67 billion. The error was not repeated in any other communication or benefit statement and the affected plan participants did not rely on the erroneous language in determining their benefits.

But, a plan participant noticed the drafting error and filed a claim requesting the calculation of her benefits under the erroneous terms of the plan document. Her claim and appeal were denied, citing the drafting error, and she sued Verizon (the plan administrator) on behalf of all affected plan participants to enforce the plan document's written terms.

The lower court that heard the case held that the plan abused its discretion in ignoring the drafting error because federal law requires plans to be enforced exactly as written. However, it also noted Verizon could request permission to reform the plan document to eliminate the erroneous language if Verizon could prove there had been an error and that reformation would produce a fair and equitable result. Verizon filed a claim for reformation and the court found in its favor, so it will not be forced to pay an extra $1.67 billion in unintended benefits. This decision was recently affirmed on appeal.

What's significant about this case, aside from the shocking amount of money at stake, is how the error occurred in the first place. It was the result of the plan administrator's in-house counsel revising a draft of the plan document in an attempt to make it easier to read. The drafting error involved just a few words and wasn't reviewed by outside counsel. It was only noticed when the participant filed a claim for benefits based on the erroneous language.

The participant argued that it was "profound negligence" to entrust a single in-house attorney with revising a critical provision in a multibillion dollar retirement plan without review by another expert. The court responded, "It is baffling that a major corporation would not invest greater resources to ensure accuracy in the drafting of such an important document."

The court further observed that if any participants had relied on the drafting error or the company had not been able to provide such overwhelming documentary evidence of its intent, Verizon could have lost the case. Even with these facts, the result could have been different in another court because the case law on reforming a plan document to correct an error varies in other jurisdictions.

While Verizon was fortunate to escape a catastrophic outcome in this case, it only did so after years of litigation (which was likely very costly) and risk to the tax qualification of its plan. Regardless of what occurs in litigation like this, the IRS can penalize a plan for failing to follow its written terms. The IRS has refused to approve the defense that a plan document shouldn't

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A public sector employee enjoys a number of constitutional rights with respect to his governmental employer. These include the right of association and free speech. These constitutional rights generally do not apply to private sector employees.

A governmental employee stands up at a public forum and says his employer, the local county, is wasting tax dollars and the voters should do something about it. A private sector employee working for a gun manufacturer stands up at a public rally and says that all gun manufacturers should be put out of business. The local county will face a serious legal challenge if it discharges its employee. But the gun manufacturer may face no legitimate legal challenge.

IS THE EMPLOYEE AT WILL?

An at-will employee may be discharged at any time, with or without cause. In general, if an employer does not like an employee's off-duty activities, the employer may proceed with an at-will termination.

Who isn't at will? Unionized employees aren't at-will employees and may only be discharged for cause. Most arbitrators will not uphold a discharge of a union-represented employee for off-duty misconduct unless the employer can show a significant connection to the employment.

> A public sector employee enjoys the right of association and free speech. This does not apply to private sector employees.

In *Baker Hughes, Inc.*, arbitrator Barry J. Baroni faced such an issue. An hourly, union-represented employee was upset by information his German-national plant manager presented at an employee meeting. The hourly employee then wrote derogatory comments about the manager on his "MySpace" page, even making a specific reference to Hitler.

The employee was fired for violating its antiharassment policy. The union grieved, arguing that "harassment violations only apply on company premises." Arbitrator Baroni upheld the termination and ruled that the employee's conduct constituted insubordination. He noted:

> "[A]rbitrators have consistently upheld management's right to discharge an employee for verbal abuse, or threatening behavior toward a co-worker or a supervisor, away from the plant, when there is a 'sufficient [n]exus' or connection to the workplace."

He also noted that "arbitrators have long recognized that insubordinate off-duty language directed at a supervisor can have long-lasting and harmful effects in the workplace."

OTHER CONSIDERATIONS

The law protects certain off-duty activities by employees. These include advocating unionization, filing a workers' compensation claim and whistle-blowing (e.g., reporting the employer to OSHA or another governmental agency).

Existing policies also may play a role. A policy statement that an employee's activities on his own time are his own business seriously limits the employer's right to take action. Alternatively, a statement on expected professionalism – both on and off duty – may significantly increase an employer's position. Other important policy statements may prohibit fraternization with subordinates, use of unlawful substances and off-duty illegal conduct.

Employers should tread carefully in regard to the issue of discipline for off-duty misconduct. An analysis of all of the factors is wise. In the end, perhaps the most important question is: How does this conduct affect the employer?

For example, a particular mutual fund may offer Class A, Class B or institutional shares. The investments in all classes will be identical, but each class will have a different expense structure. Class A might be a retail class and charge a load or commission when the fund is purchased, but no fee when it is sold. Class B may be another retail class with no load when it is purchased, but with a 12b-1 fee payable to the plan recordkeeper. Finally, an institutional class might be offered with no load and no 12b-1 fee, but it may require a minimum dollar amount for investment.

In *Tibble*, several of the mutual funds were retail classes. A part of the fees charged by those funds was used to compensate the plan administrator. The plan's investment committee did not review other classes available for the same mutual fund. Instead, they took the recommendation of their consultant and never inquired about the fees. The mutual funds in question also offered institutional classes with lower expenses. The committee could not show any credible reason why the higher expense retail classes were selected. Accordingly, the Court found the fiduciaries liable to the plan for the excess expenses paid for the retail classes. In addition, the fiduciaries were liable for the loss of "investment opportunity" on the excess fees the participants paid.

Interestingly, there was a minimum amount necessary to utilize the institutional classes, which the plan would not have met when the funds were first added to the investment menu. However, evidence produced at trial indicated the minimum would have been waived if only someone had asked. But no one asked for the waiver.

The Court found the fiduciaries breached their ERISA duty of prudence. It was imprudent for the committee to offer the retail class of mutual funds with higher expenses, when the identical funds could have been made available to plan participants at a lower expense, and when no good reason was presented for using the more costly retail class.

HOW DOES THIS AFFECT YOU?

So what does this mean for your plan? First, *Tibble* does not hold that offering a retail class of a mutual fund is always a violation of ERISA. Instead, the Court held that plan fiduciaries need to show a legitimate reason for using a retail class with a higher expense. In *Tibble*, the fiduciaries were unable to do so.

Second, a lower court case is normally not considered as precedent for future cases. On the other hand, it does give an idea of what one judge thought of this set of facts. A representative of a large national administration firm recently said to me, "This ruling will turn the entire 401(k) industry upside down." Perhaps that is correct. There is no question that the trend (and the law) is toward more and better disclosure of fees and expenses to the plan participants. The *Tibble* case fits right into that trend.

Third, in *Tibble* the committee argued that they relied on their consultant's recommendations on what class of the funds to offer. However, the Court ruled that the committee still had the duty to ask about the various classes of a particular fund and the expenses of each class, regardless of whether the consultant discussed the issue.

It remains to be seen if the *Tibble* case will indeed turn the 401(k) industry "upside down." At present, the case has not been appealed. If it is appealed and the decision is upheld, the precedent will be established, at least in the Federal Ninth Circuit, which covers California.

No matter what future courts do with the *Tibble* case, it is clear the U.S. Department of Labor (DOL) agrees with the decision. The DOL has been filing Friend of the Court briefs in several investment fee cases.

For example, in an excess fee class action brought against the Unisys Corporation Savings Plan, the DOL favorably cites the *Tibble* case: "In light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes."

A federal court recently held that an investment fiduciary must know if different classes of a particular fund are available, and must know the differences in expenses charged.

DOES IT REALLY MATTER?

Several clients have commented: "We just use the higher fees of the retail class to pay the administration firm, so if we start to use the institutional class, we'll have to charge the plan directly for the administration expenses. What's the difference? Either way the plan pays the fees." One difference could be what participants have been told. Do they think the employer is paying the expenses or do they understand they are paying the expenses by receiving a lower return? Here's another difference:

> Assume two participants have $25,000 accounts in a 401(k) plan. Participant A is invested in several retail class mutual funds that pay revenue-sharing fees to the plan administrator. Participant B is totally invested in a money market fund, which pays no revenue sharing fees. So Participant A is paying plan administration expenses, but Participant B is not. On the other hand, if administration expenses were charged to the plan as a whole, and allocated based on account balances, both Participants A and B would be paying the same portion of plan expenses. Which of these alternatives is more fair and reasonable? Each plan will need to answer that question. As a plan fiduciary, you should clearly understand the results of how the expenses are being paid and be sure plan participants also understand the process.

STEPS TO CONSIDER

What should your investment committee do now?

- Investigate to find out whether your investment menu has retail or institutional classes of mutual funds.
- If your plan is using higher fee retail classes, ask your adviser to justify the decision. If the justification seems reasonable, be sure you and the plan participants understand how fees are paid and by whom. If the justification does not seem reasonable, consider using a lower expense class.
- If you are told you cannot use an institutional class of a particular mutual fund because of a minimum investment requirement, be sure you or your adviser asks for a waiver of the minimum. Even if the answer is 'no,' you will have evidence that you asked.
- Document everything you do. *Tibble* is another in a long line of cases that makes it clear it is the process by which fiduciaries make decisions that determines whether they were prudent, not necessarily the results of those decisions. Be sure to follow a reasonable process, and be sure to document each step along the way.

In conclusion, 401(k) plan fiduciaries should always take appropriate steps to keep plan expenses as low as reasonably possible. If they determine that higher fees are reasonable in a particular situation, they should document the process used to reach that decision.

As Warner Norcross & Judd enhances its sustainable business initiative in 2010, we invite you to participate in your own little way. If you would prefer to receive our newsletters in an electronic PDF format instead of a paper version, please contact Gena Rinckey at grinckey@wnj.com and we will be happy to make that change. Thanks in advance for joining us in this important mission.

GINA also prohibits a group health plan sponsor from requesting an individual's "genetic information" in connection with or prior to enrollment in the plan. "Genetic information" includes the results of genetic tests, but also may be any information regarding the "manifestation of a disease or disorder in an individual's family members." In plain terms, that means the plan can't ask any questions about a family's health history, such as whether anyone has diabetes, heart disease or certain cancers.

In addition to increasing the health of employees (and thereby limiting medical costs), there are other positive, though less tangible, returns, which include better workforce morale and lower absenteeism.

If your wellness program uses biometric screening or a health risk assessment, we should discuss whether additional steps are necessary to ensure compliance with the law. Additionally, if you administer your own wellness program, we should discuss the additional safeguards necessary under GINA.

Employers who offer financial incentives to encourage higher employee participation may inadvertently run afoul of the Americans with Disabilities Act (ADA) if participation is not deemed to be "voluntary." Proposed regulations state that a wellness program is voluntary as long as an employer does not require participation and does not penalize nonparticipating employees. The Equal Employment Opportunity Commission (EEOC) has requested comments regarding this issue, but has not yet issued final regulations. We caution that the EEOC issued two informal discussion letters on the topic last year that discourage the use of monetary incentives. With creative structuring, however, you can still provide participants with incentives to participate.

CONCLUSION

To ensure that your wellness program is legally compliant and is reaching your specific goals, please consult with legal counsel. Any of the Employee Benefits attorneys at Warner Norcross & Judd will be happy to assist you in developing a strategic plan, including structuring or revamping programs, developing effective communications and monitoring progress.

Dangerous Road continued

So, what does this mean for you? It means that you may be liable if one of your employees sends a work-related text message or e-mail while driving. In Michigan, an employer may be held liable for the negligence of its employees, agents and contractors – even when the employer did not act negligently. Generally, it applies when an employee is acting within the scope of employment or for the benefit of the employer.

So, what can you do? You can update your policy to specifically address texting and e-mailing while driving and warn employees of its dangers. While it may be easier or more convenient to allow employees to continue to text and drive at the same time, it is a better practice to put an end to it – before an accident occurs.

be interpreted as written where the written terms are the result of a drafting error, and it has shown it will penalize plans even if a minor drafting error is the cause of such a failure.

Although we are constantly evaluating how to improve our plan documents and make them easier to understand, the Verizon case offers a billion examples why we prioritize accuracy over readability when we draft plan documents. And, in the end, an easy-to-read description of the benefits a plan provides is the purpose of another document – the summary plan description.

Please feel free to contact a Warner Norcross & Judd LLP Employee Benefits attorney with any questions you may have about your plan documents or for more information on what you can do to ensure they are in order.

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