



Corporate and Plan Fiduciary Duty: Addressing COVID-19 Liability Risk

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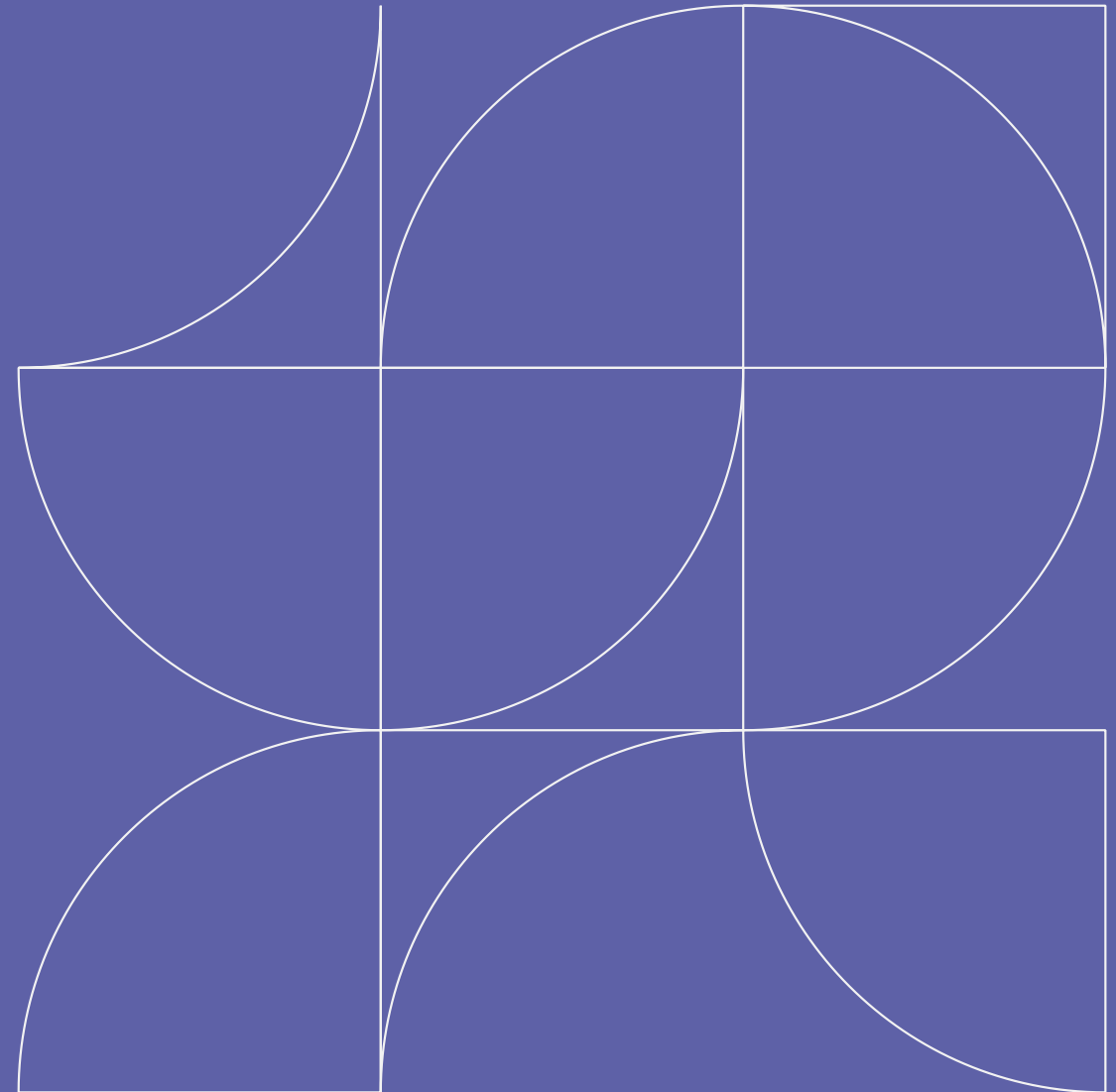
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Agenda

- 01** Board Duties and Considerations in the Time of COVID-19
- 02** ERISA Fiduciary Breaches
- 03** ERISA Fiduciary Duties and Covid-Related Plan Litigation
- 04** ERISA Class Action Litigation in the COVID Era
- 05** Plan Fiduciary Liability Insurance

Board Duties and Considerations in the Time of COVID-19

Tracee Davis



Board Duties



- Board members and officers' exercise of fiduciary duties of care, loyalty and good faith owed to their corporation and its shareholders are under greater pressure as a result of COVID-19. Some of those pressures include:
 - **Financial distress and Insolvency**
 - **Managing cybersecurity and data privacy**
 - **Business interruption and continuity**
 - **Relations with workforce**

Good Governance: More Important Now Than Ever



- Unprecedented times create novel and pressing legal issues.
- Fiduciary duties and good corporate governance remain unchanged.
- Cybersecurity and data privacy are largely under regulated and legislated. Acting in compliance with fiduciary duties of:
 - Duty of Care – Informed and deliberate decisions based on all material information reasonably available.
 - Duty of Loyalty – Action or inaction by independent and disinterested directors.
- Good faith, oversight and disclosure are the bedrock of good governance and being afforded the protection from liability under the business judgment rule.



COVID-19 – Cybersecurity Threat Landscape Common Attacks

- Wire Fraud / Wire Interception
 - Email spoofing, email account stealing, leaked credential use
- Ransomware
 - Cryptolocker, “porn-cam” exposure, etc.
- Internal Threats
 - Bad actors, bad configurations, bad oversight, bad policies and practices
- Phishing and Spearphishing
 - Attacker reconnaissance done, moves into execution

How do Threat Actors Attack?

- Sophisticated Phishing
 - Almost Always Guaranteed Entrance
- Lateral Movement Across the Enterprise
 - Impersonating a legitimate user

Cyber Threat Kill Chain





Recently Adopted Requirements and Guidance on Mitigating Risk

- **New York Department of Financial Services (“NYDFS”)**
 - March 10, 2020 Letter – Response plan required demonstrating preparedness to manage risk of disruption to services and operations and assessment of potential increased cyber-attacks and fraud.
- **Cybersecurity and Infrastructure Security Agency (“CISA”)**
 - March 13, 2020 Alert – Best practices to heighten security, avoiding coronavirus-related phishing and remote working.
- **Federal Trade Commission (“FTC”)**
 - March 18, 2020 Guidance – Best practices on securing home networks and best security practices while working remotely.

Recently Adopted Guidance – cont'd



- **Financial Industry Regulatory Authority (“FINRA”)**

- March 26, 2020 Alert – Guidance on addressing increase vulnerability and securing customer and firm data from cyberattacks.

- **International Data Protection Authorities (“DPAs”)**

- Data Protection Authorities in Europe, Latin America and the APAC region have provided guidance on issues, for instance, protecting personal data while at the same time taking measures to prevent further spread of the virus, arising under applicable data privacy laws.

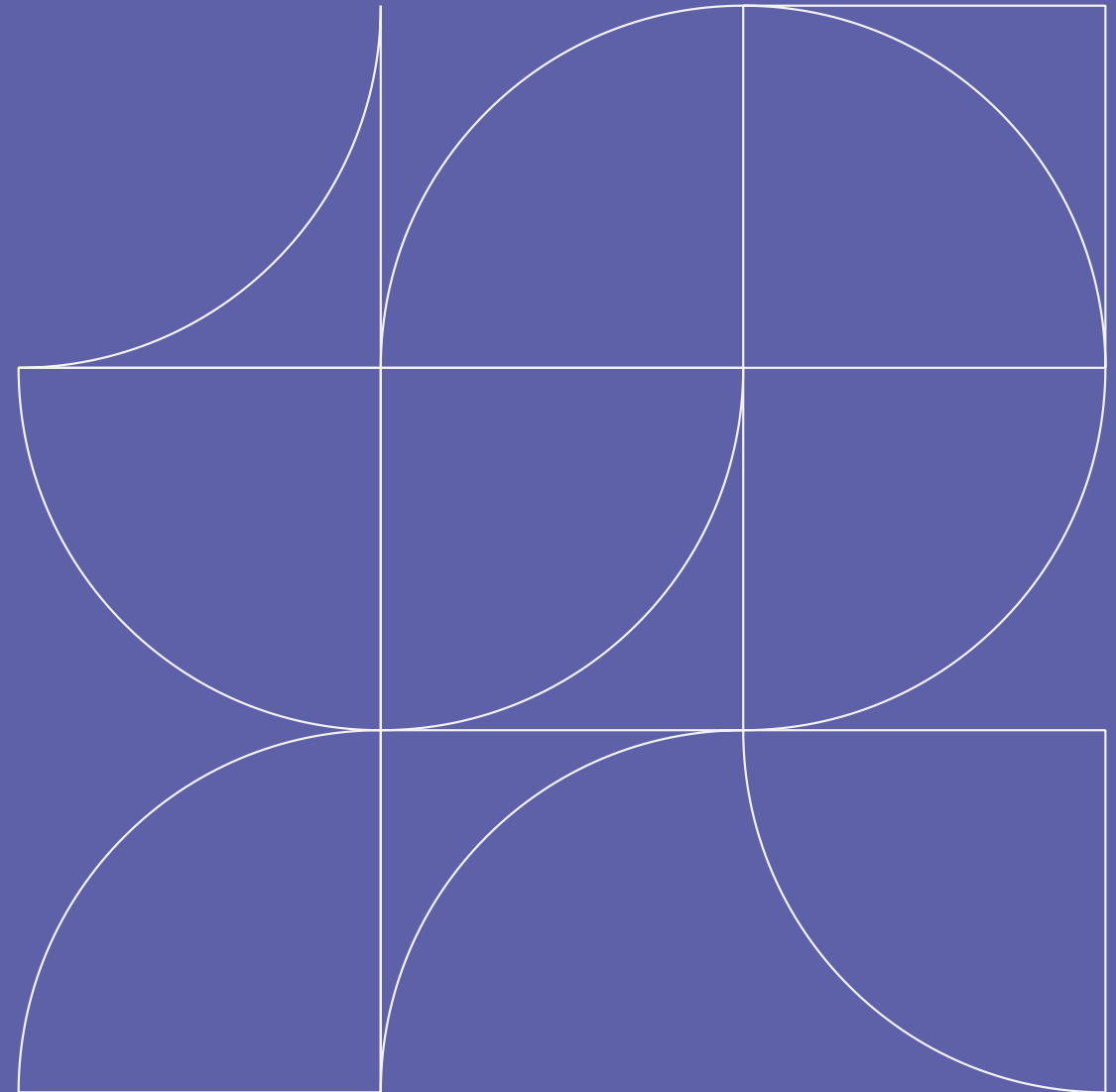
Key Takeaways



- **Be Proactive**
- **Rely on Experts**
- **Stay Current**

ERISA Fiduciary Breaches

Candace Quinn



Fiduciary Breaches

- Theft of participant retirement plan confidential personal information including financial data is significant target for identity theft and fraudulent transactions.
- Recent wave of ERISA (Employee Retirement Income Security Act) class action lawsuits allege fiduciary breaches involving cross-selling confidential participant personal data.
- Emerging ERISA litigation includes allegations of increased use of confidential participant plan data by record keepers for cross-marketing without participants' knowledge or approval (i.e. plan participants contact information, financial information, investment preferences, age, date of retirement, etc.).

Fiduciary Breaches

- ERISA does not specifically address if participant data is a plan asset protected under ERISA. (DOL, GAO Report).
- Allegations of breaches of ERISA fiduciary duties of loyalty and prudence for failing to safeguard confidential information.

A Key Focus of Settlements



- Several ERISA class action settlements.
- Recent decision and personal information of plan participants.
- In 2020, ERISA class actions filed continued.

What Can Plan Fiduciaries Do?



- No federal statute specifically addresses retirement plan cyber security obligations.
- ERISA (which was enacted in 1974) is silent on data protection in the form of electronic records.
- Plan fiduciaries have strict fiduciary duties and ERISA class action litigation challenges continue.

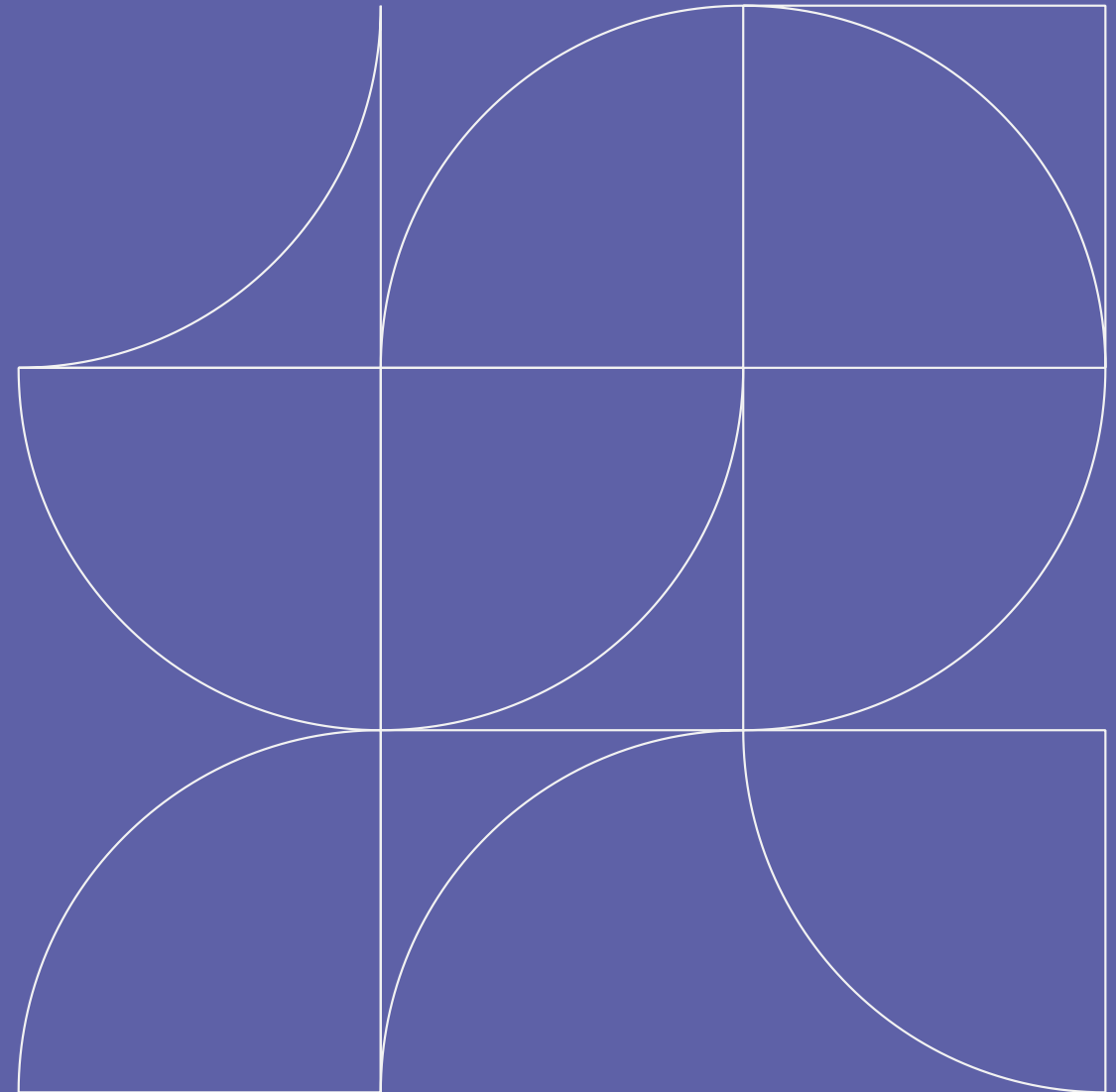
What Can Plan Fiduciaries Do?



- Fiduciary action steps to protect participant data and safeguard electronic access:
 - Be Educated. Safeguard confidential data. Mitigate risk of data breaches.
 - Negotiate Cybersecurity protection in service providers' contract.
 - Monitor Service Providers.
 - Determine if service provider(s) are cross-marketing participant data.
 - Limit use of participant(s) data for non-plan products and services.
- Understand internal risks of transmitting data.

ERISA Fiduciary Duties and Covid- Related Plan Litigation

Kathleen Cahill Slaughter





Potential Covid-Related ERISA Litigation

- Mistakes in offering continued medical coverage for furloughed workers
 - check with your Plan and Insurer
 - if self-insured, do you need to amend your Plan?
 - duty of loyalty – communicate clearly to the furloughed employees of any continued premium obligation
- Mistakes regarding COBRA notices
 - differences with furloughed vs. terminated employees
 - Need to review the Plan documents
 - continue other types of coverage, like life insurance, again check your plan benefits.



Potential Covid-Related ERISA Litigation

- Mass layoffs and furlough issues
 - Mistakes in Vesting of Retirement Benefits - IRS rule of 20%
 - Unionized employers contributing to a multiemployer pension plan – is there now withdrawal liability? Probably not. But check with an expert.
- Covid-19 disability claims
 - Employees at high risk for serious effects from Covid-19, i.e, immunocompromised, pre-existing serious health conditions like asthma or heart conditions, now can't risk it, may claim disability
 - Medical personnel developing severe mental health conditions. Again, check your Plan terms and verify your TPA is administering the Plan properly.

For more information on these topics, please visit Seyfarth's Blog on Employer Labor Relations, [here](#).



Potential ERISA Litigation Issues in COVID-19 and How to Mitigate Risk

- Employee Stock Ownership Plans (ESOPs)
- As ESOP fiduciaries you are responding to unprecedented market volatility and worry about a possible recession impacting your stock
- Remember the difference between your **SETTLOR** and **FIDUCIARY** duties.
 - Fiduciaries owe a duty to the ESOPs participants and beneficiaries.
 - Duty of Loyalty to put this group, and not the Company, first.
 - Duty of Honesty
 - Duty of Prudence

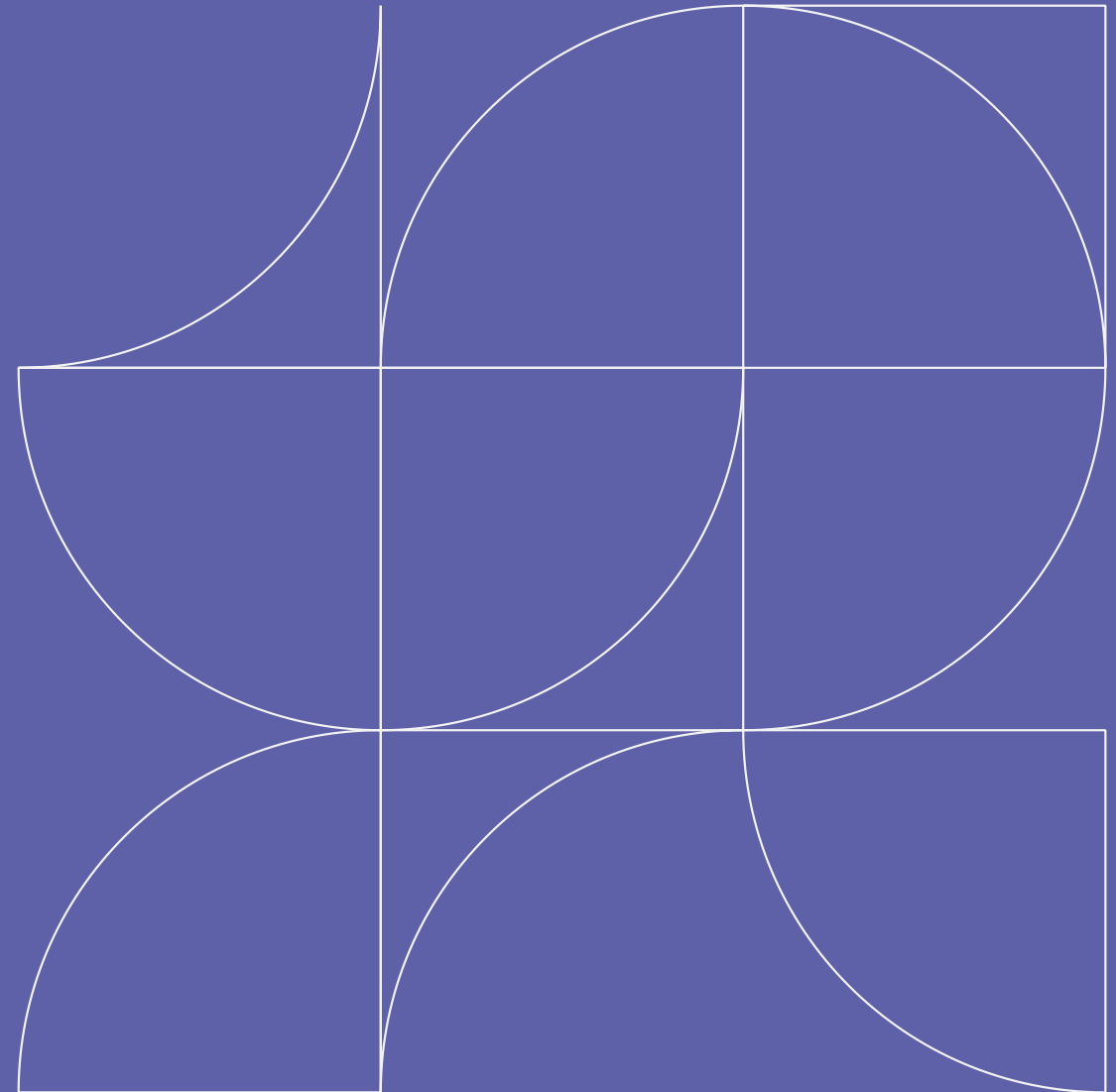
ESOP Fiduciary Considerations



- As a fiduciary of an ESOP
 - Discuss what you are going to do about your year-end valuation and whether to obtain an interim valuation?
 - Do other plan terms provide flexibility for responding to market crisis?
 - Delayed distribution
 - Installment payments
 - Review and make a plan regarding your communication obligations.
 - Anticipate questions and have a plan for accurate and timely responses
 - Decide whether or not you should communicate anything else
 - Document your prudent, objective decision making

ERISA Class Action Litigation in the COVID Era

Ada Dolph



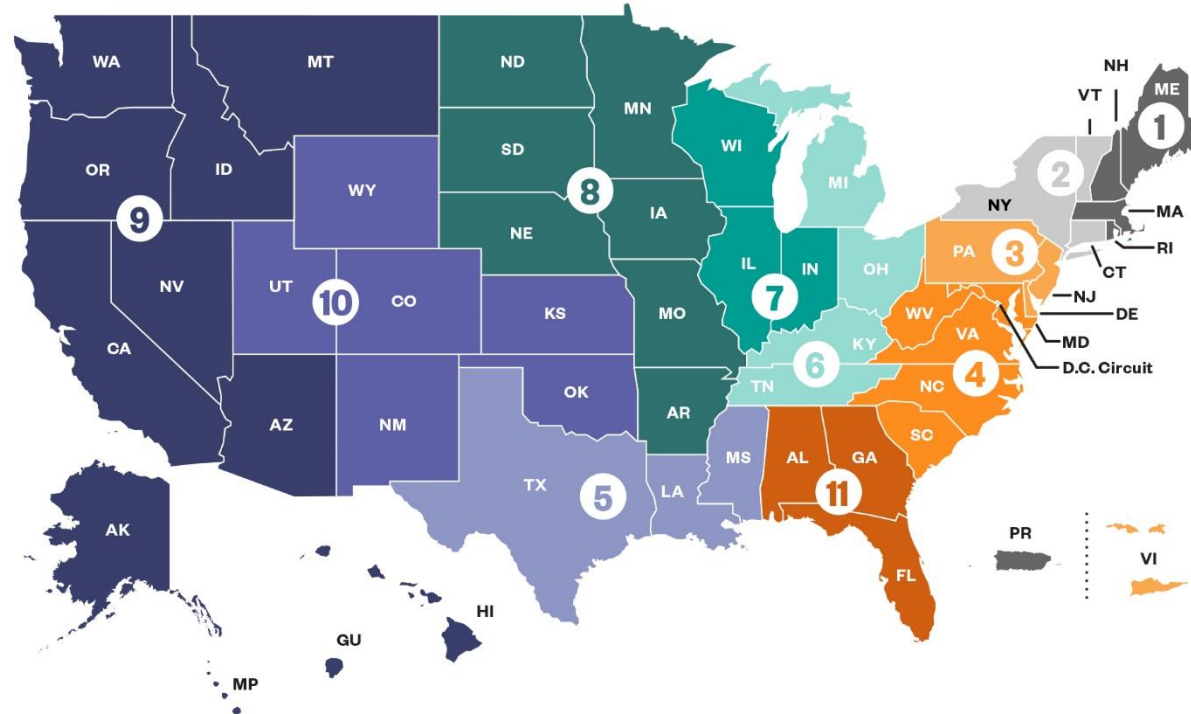


ERISA Class Certification Trends

- ERISA cases continued to focus on application of decisions of the U.S. Supreme Court, which refined the scope of potential liability and defenses.
- Once again, the *Wal-Mart* decision impacted the ERISA certification playing field, *i.e.*, more grounds to oppose class certification.
- Class certification motions have the best chance of denial in the context of ERISA welfare plans and ERISA defined contribution pension plans, where individualized issues of liability and damages are prevalent.
- Plaintiffs had a similar success rate in obtaining class certification in 2019 as in 2018, obtaining class certification in 11 of 17 attempts.

Analysis Of ERISA Certification Decisions

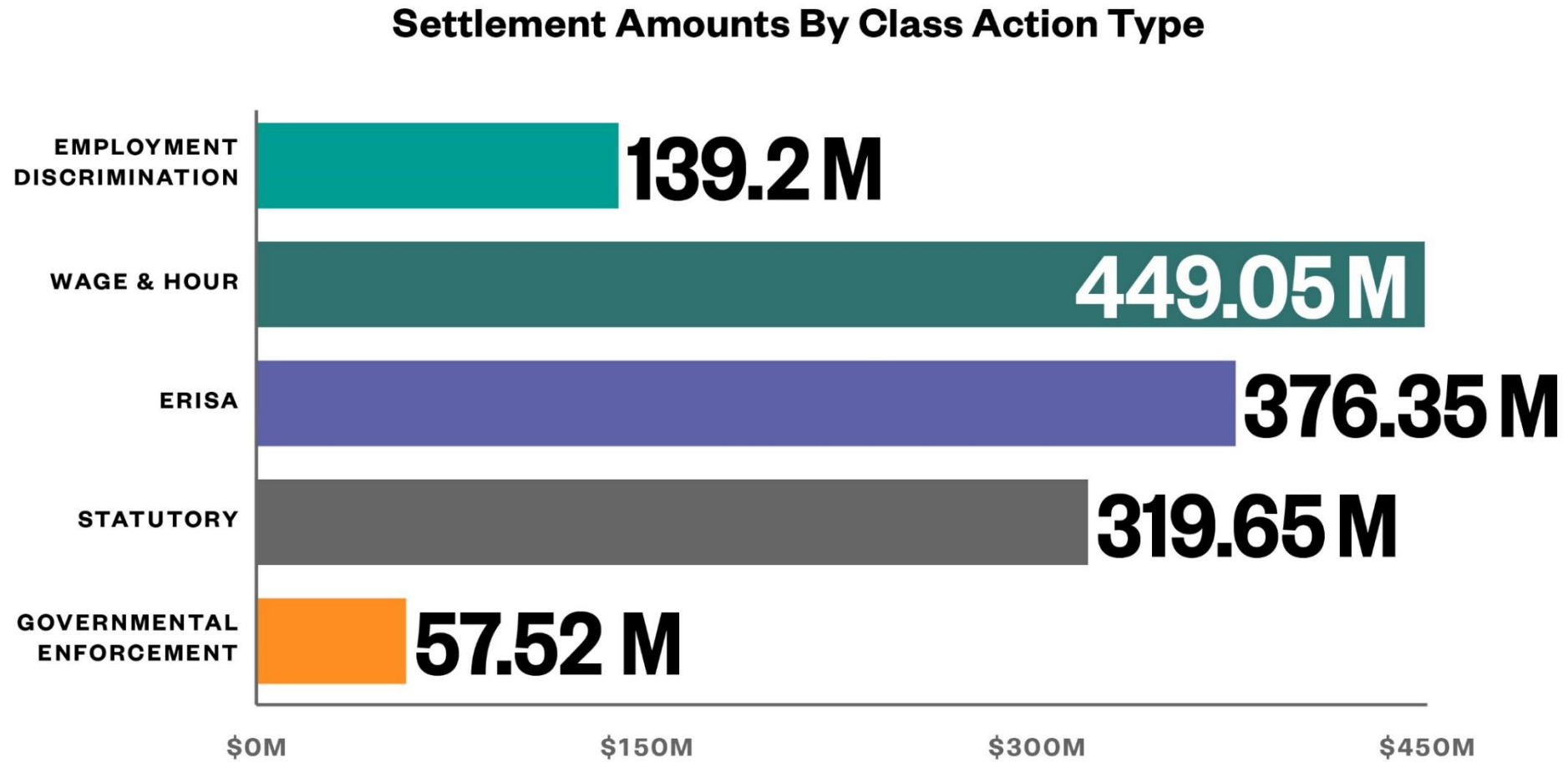
U.S. Courts Of Appeal – Analysis Of ERISA Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims	EEOC
Certification Motions Granted	0	4	2	0	0	0	0	0	5	0	0	0	0	0
Certification Motions Denied	0	0	0	2	0	1	1	0	2	0	0	0	0	0

Total: 11 Granted / 6 Denied

Settlement Amounts By Class Action Type



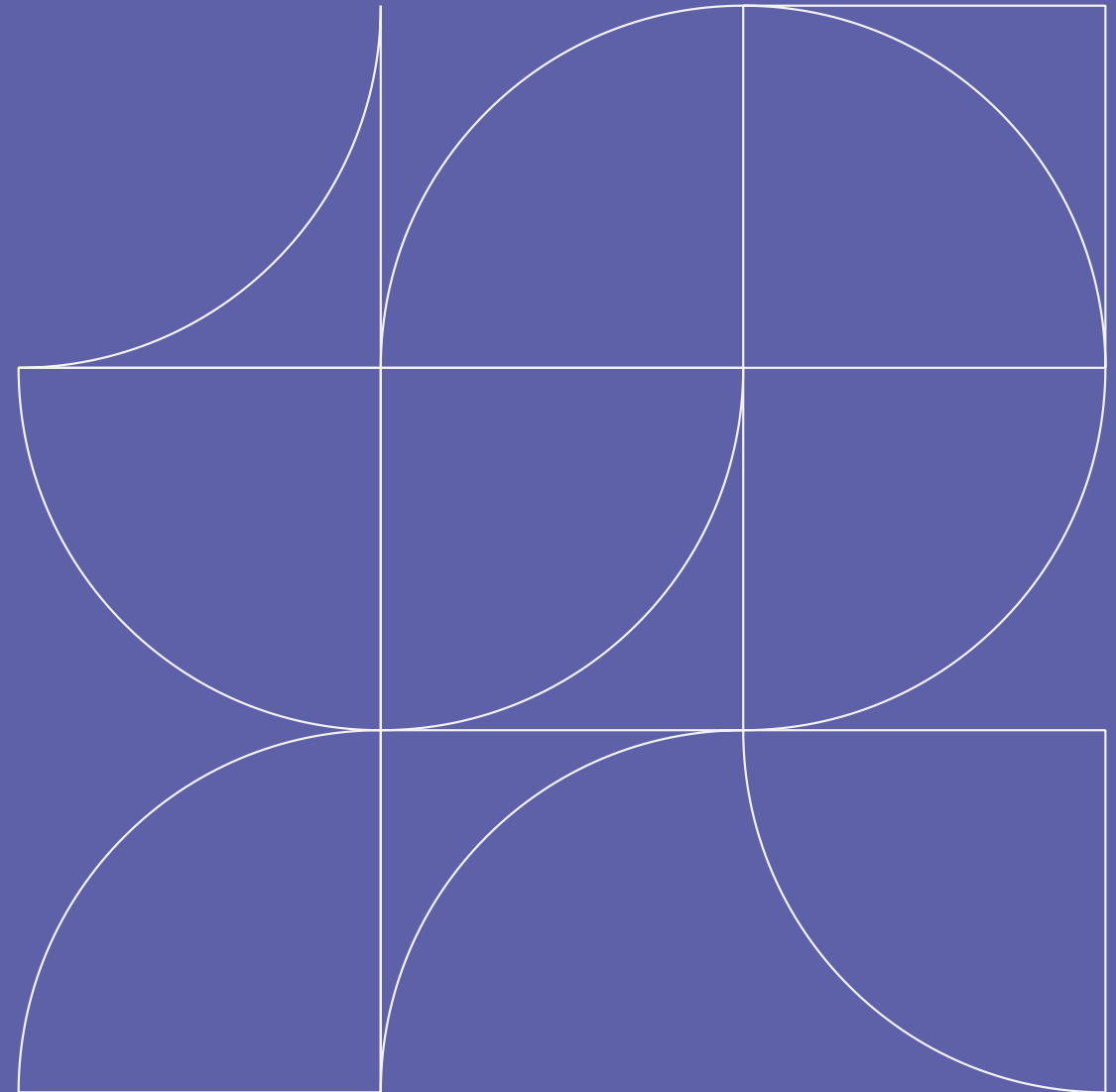


Leading ERISA Class Action Settlements

- Top 10 settlements totaled \$376.35 million, an increase from 2018, when the total was \$313.4 million, but far below the 2017 total of \$927.8 million.
- The largest ERISA settlement in 2019 concerned the use of company accounts as a vehicle to distribute ERISA plan life insurance benefits and settled for \$80 million.
- Second largest was a \$75 million settlement of a claim involving a large financial institution and affiliates' investment in allegedly risky securities within stable value funds.
- Half of the top ten settlements involved 401(k) and 403(b) plan fee claims, with settlements totaling \$100 million for these cases.

Anticipated Battlegrounds

Ada Dolph



Stock Drop Litigation Trends

- Historically, in times of market volatility, there is an increase in securities litigation and the companion ERISA litigation.
- In 2014, the Supreme Court established tougher pleading standards in *Fifth-Third v. Dudenhoeffer*, which held that where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.
- The types of claims that we anticipate seeing are:
 - The company was in poor financial condition and faced poor long-term prospects and should have removed/limited participant investment in the company stock fund.
 - The company's committee members were aware of certain information that should have been disclosed to participants.



401(k) Fee Litigation Trends



- Standard claims include:
 - Too-high recordkeeping fees;
 - Too-high investment fees; and
 - Increasing focus on target date funds because no required guide path.
- Bolder claims include:
 - Improper to offer investment options affiliated with the recordkeeper;
 - Improper to offer an actively managed option when a passively managed option, like an index fund, is available;
 - Improper to have recordkeeping fees paid on a percentage of assets basis; and
 - Improper to allow a recordkeeper to have access to participant data, like account balances, and addresses, for marketing purposes.

401(k) Fee Litigation Trends



- Seeing many more firms jump into ERISA litigation and a targeting of smaller plans.
- Expect to see continued increases in the number of ERISA fee litigation.
- One lawyer referred to this as a “cottage industry” for the plaintiff’s bar.
- Courts are increasingly unlikely to grant early motions dismissing the claims. The plaintiff’s goal is to survive a motion to dismiss and then subject the defendant to a costly and extensive discovery process which drives many of these settlements.

Mortality Table Litigation

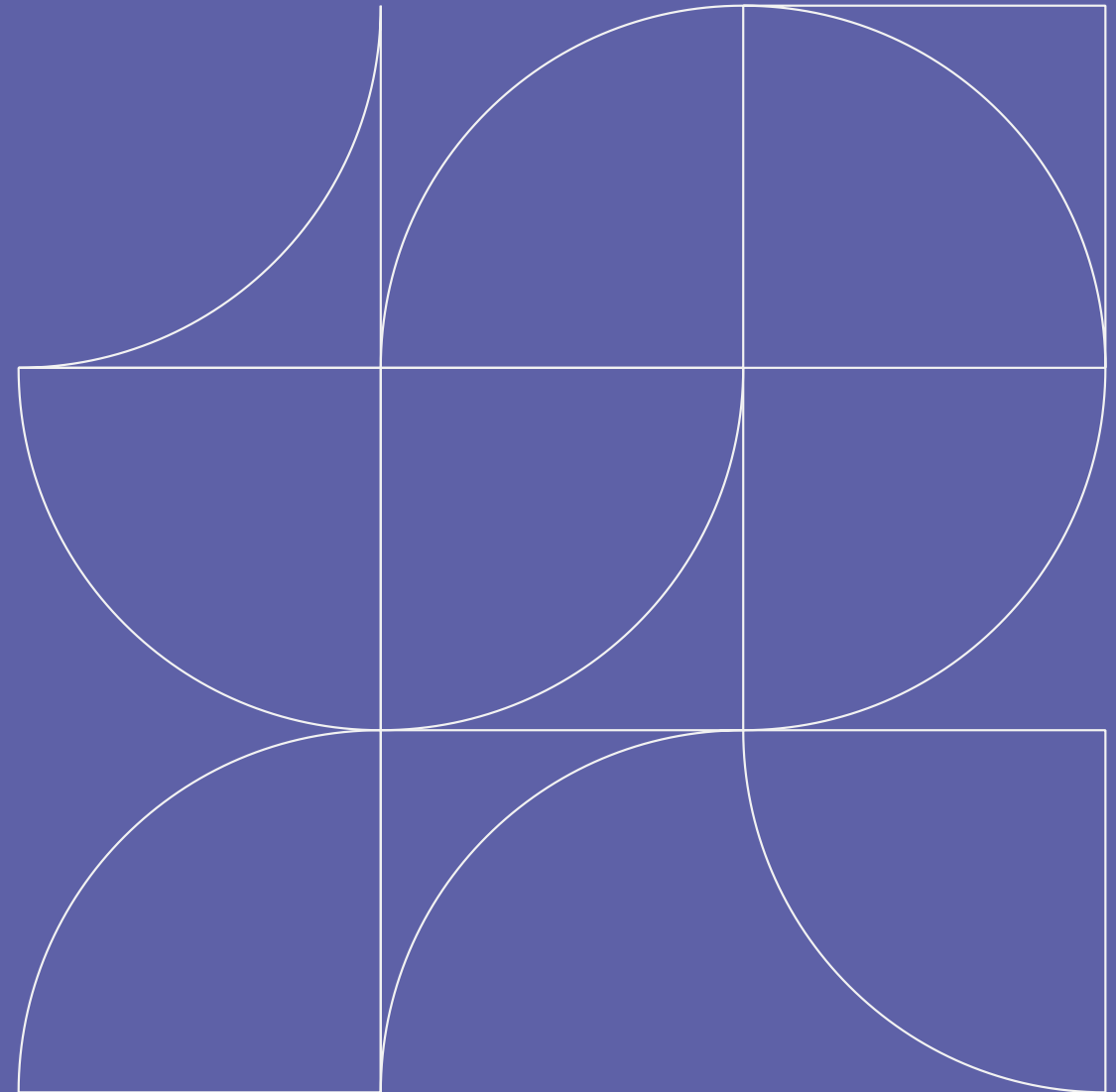
- Claims include that the plan uses unreasonable interest (discount) and mortality conversion factors to convert a participant's single life annuity into another form of benefit, allegedly causing an illegal reduction in benefits.
- Decisions denying motions to dismiss have:
 - rejected the argument that if a mortality table was reasonable at the time of adoption, then its use would always be reasonable;
 - determined that the Revenue Code regulation which requires a pension plan to specify its actuarial assumptions in the plan in a way that precludes employer discretion did not preclude the plan from amending its actuarial assumptions to bring them up to date;
 - rejected the defendants' argument that the Retirement Equity Act of 1984 added a requirement to ERISA that the interest rate used to calculate the present value of lump-sum distributions be no greater than the interest rate used by the Pension Benefit Guaranty Corporation to calculate lump sums; and
 - held that the anti-cutback rule does not prohibit an amendment that changes a plan's actuarial assumptions.

COBRA Litigation

- Claim is that either the company or, more typically, the service provider was not using the DOL model notice and that it resulted in certain former employees not electing for benefits.
- Typical problems with COBRA notices include failure to:
 - be written in a manner calculated to be understood by the average plan participant (too small font sizes, etc.)
 - identify the plan administrator but instead has people calling a vendor contact number or email
 - explain that a legal guardian may elect continuation coverage on behalf of a minor child, or a minor child who may later become a qualified beneficiary
 - explain the termination date along with an explanation of the maximum period of coverage and events that might cause early termination
 - thoroughly explain the election process, instead referring individual to a separate website
 - include an address to which payments should be sent
- Plaintiffs in each case sought class certification, damages and of course the daily statutory penalties which could add up quickly in a class case.

Plan Fiduciary Liability Insurance

Rhonda Prussack





Coverage Under the Policy

- **What were fiduciary liability policies designed to cover?**
 - Personal liability of plan fiduciaries
- **Insuring Agreement**
 - The Insurer shall pay **Loss** as a result of a **Claim** made against an **Insured** for a **Wrongful Act**

Significant Policy Terms



- **Loss** - Amounts an Insured is legally obligated to pay as a result of a Claim, including damages, settlements, judgments, and defense costs
- **Claim** - Demands against the Insured for monetary or non-monetary relief, civil or criminal proceedings, and investigations
- **Insured** - Insured Persons, Plan Sponsor, Plans
- **Wrongful Act** - Breaches of fiduciary duty under Employee Benefit Law, errors and omissions in Administration

Significant Policy Terms



- Not covered:
- Benefits
- Third parties
- Typical Exclusions
 - Conduct
 - Prior notice
 - Pending or prior litigation
 - Discrimination
 - Failure to fund
- Other Insurance

Underwriting Considerations



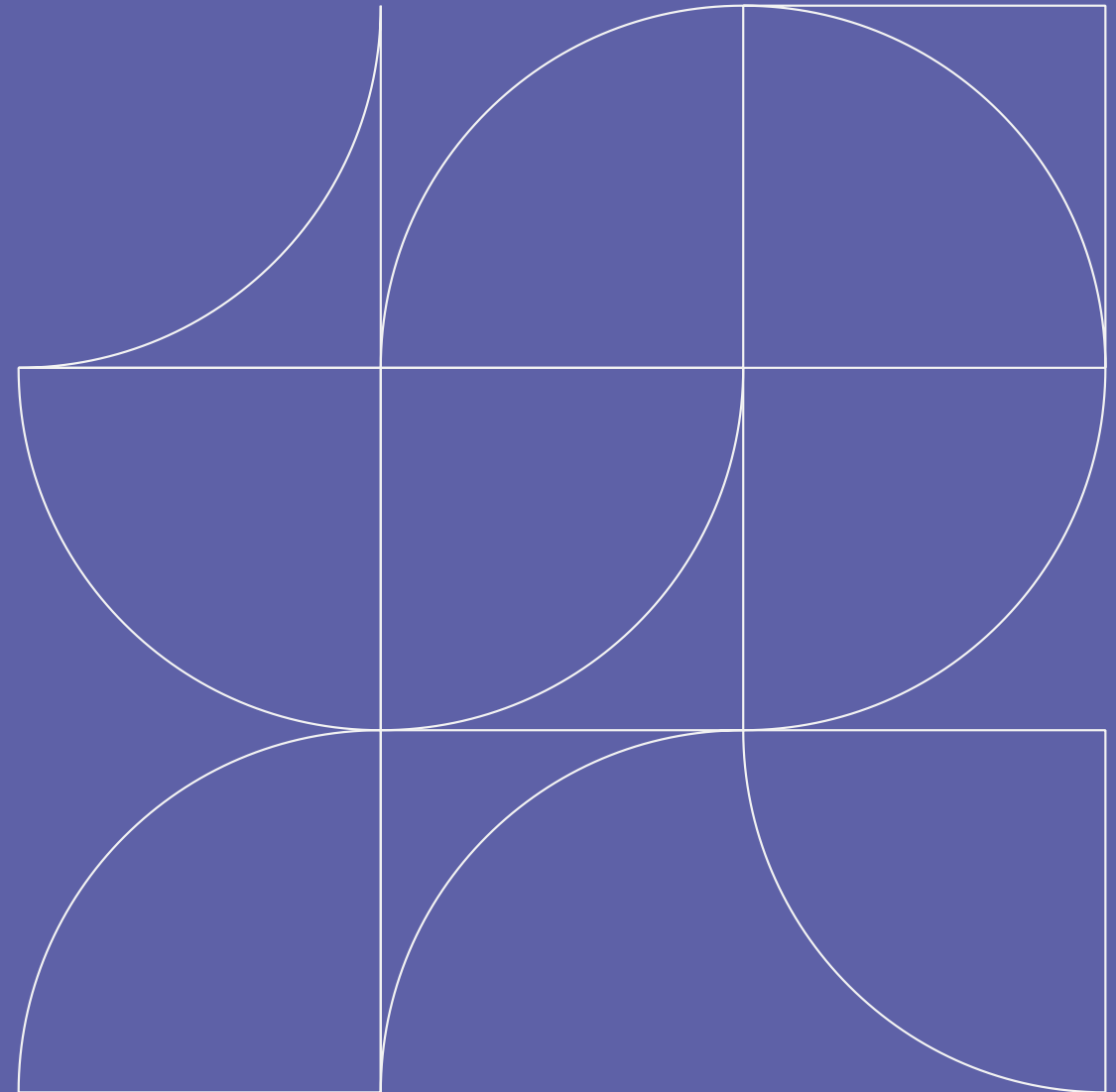
- Types of plans
- Size of plans
- Prior claims
- Fiduciary practices and processes
 - Investment selection
 - Selection and monitoring of third party service providers
 - Fiduciary process

How Much Insurance to Buy



- Types of plans
- Types of activity
- Financial strength of the plan sponsor
- Advice of insurance professional

Presenter Bios





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- Kathleen is the Co-Chair of the Firm's ERISA Litigation Practice Group and a partner in our San Francisco office. Kathleen counsels compensation and benefit committees and Human Resources management regarding fiduciary duties, the administration of benefit plans and health care laws. She has handled a wide range of ERISA matters in court and in arbitration, including individual pension and welfare benefit claims, severance pay claims, executive compensation disputes, class action claims regarding plan design, and class action claims regarding plan administration and fiduciary responsibility. Kathleen also advises trustees of multiemployer benefit funds on all issues including welfare and pension plan design and administration, investment of plan assets, the qualification of state domestic relations orders, drafting plan documents and general compliance with ERISA, the Internal Revenue Code, federal labor law, and other laws affecting welfare and pension funds.
- Kathleen has represented Plans and Trustees in multiple federal courts when sued for breach of fiduciary duty; including cases appealed to the Ninth Circuit. Kathleen also works with a number of Plan administrators using lessons learned from her ERISA litigation experience to provide fiduciary training and ways to reduce litigation exposure. She is a frequent contributor to Seyfarth's Health Care Reform Management Alerts and ERISA litigation blogs.



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Tracee's clients are involved in business disputes requiring litigation or arbitration. They are also engaged in business activities that involve the risk of litigation. Tracee advocates and mediates on her clients' behalf, and provides preventative legal advice and risk assessments to help her clients minimize their exposure to litigation.

Tracee combines her extensive understanding of a wide spectrum of law with an insider's approach to find and help implement practical, cost-efficient solutions to the most complex legal issues. Tracee worked for seven years as an attorney in the New York State Court system, researching and drafting decisions on a wide spectrum of commercial and noncommercial, substantive, and procedural legal issues. She presided over settlement conferences and discovery disputes and managed a docket of more than 400 cases. Prior to joining Seyfarth, Tracee handled class action defense and other commercial litigation for large institutional clients. Furthermore, Tracee is a Certified Information Privacy Professional. Because of Tracee's unique background and experience, she knows what judges expect and how to speak to them in terms that produce results.

Tracee loves working with her Seyfarth colleagues on handling disputes, appearing in court or in arbitration, and making the necessary pivots to deliver tangible results. She is an impeccable leader with savvy business acumen, resilience, and high ethical standards to produce client satisfaction and results.



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Ada represents clients in a wide range of labor and employment matters, with an emphasis on ERISA, whistleblower and employment discrimination claims. She is a co-lead of the firm's Whistleblower team and a member of the ERISA & Employee Benefits practice group and Health Care Fraud & Provider Billing litigation team.

Ada regularly counsels a wide variety of clients, including in the health care, airline, retail, manufacturing, consumer product, and supply-chain industries, regarding compliance with and claims brought under Title VII, ADA, Section 1981, ADEA, the Railway Labor Act (RLA), AIR21, the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), and their state law counterparts.

She has defended matters brought in local, state, and federal agencies (including the EEOC and OSHA), and state and federal courts across the country. Ada also counsels clients in all aspects of reductions in force (RIF), including selection, statistical analysis, group release agreements, and defense of any claims that may result.



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Candace has extensive tax and legal experience in employee benefits and executive compensation, representing for-profit and not-for-profit entities. Her practice focuses on domestic and cross-border regulatory and operational qualified and nonqualified plan compliance, M&A due diligence on EC/EB plans and arrangements, executive compensation plan design, fiduciary standards, best practice corporate governance, internal controls, as well as the Internal Revenue Code, the Employee Retirement Income Security Act (ERISA), Dodd-Frank, legal and tax matters concerning qualified and nonqualified retirement plans, and ERISA and tax litigation support.

Candace has counseled clients on tax, ERISA, fiduciary duty standards, and corporate governance under the Sarbanes-Oxley Act. She has conducted extensive due diligence operational compliance reviews of qualified retirement plans and governmental and tax-sheltered annuity plans (including integrating third-party administration and vendor agreements) and transactional reviews for mergers, acquisitions and divestitures; represented plan sponsors regarding plan corrections to the IRS and Department of Labor for compliance; counseled clients in audits, managed tax controversies and resolutions; and obtained IRS recognition of tax-exempt status for numerous organizations.

Candace is highly knowledgeable in renewable energy project finance, including structuring, tax equity advisory, renewable energy advisory on credits and incentives, and M&A renewable energy tax due diligence. Her clients have included multinational and domestic corporations, partnerships, joint ventures, boards of directors, tax exempt, and not-for-profit entities in the areas of manufacturing, finance, banking, energy and utilities, technology, health care and life sciences, insurance, real estate, higher education, and philanthropy.



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Rhonda has been with BHSI for the last five of her twenty-nine years in the insurance industry. During her career, Ms. Prussack has developed and brought to market state-of-the-art policy forms and innovative coverages for corporations, organized labor, municipalities, and not-for-profits. She also oversees pricing, profitability, and underwriting of fiduciary and employment practices liability insurance products.

Early in her career, Rhonda had roles at Dean Witter, Johnson & Higgins, and the New York City Employees' Retirement System. She has written articles for and been quoted in many publications and is a frequent speaker at ERISA, employment practices, and executive liability seminars around the U.S. and Canada.

She received her B.A. from Brooklyn College and is based in New York.



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www.seyfarth.com/returntobusiness

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