Look Before you Leap:
Multiple Employer Plans now a Target of Fee Litigation
By: Evan Giller

Defined contribution plans continue to be the targets of litigation alleging that the plans have been mismanaged and that their fiduciaries have failed to meet their responsibilities, resulting in participants paying excess fees. Two recent cases introduced a variation on the typical fee litigation case, which has generally consisted of a suit by participants against a very large single employer plan. In the first week of May, the ADP Total Source Retirement Savings Plan, a professional employer organization multiple employer 401(k) plan, was the recipient of two suits, one brought by one of the participating employers in the plan and the other brought by participants.

First, some background. A “professional employer organization” (“PEO”) is an organization that enters into an agreement to provide various human resources services to a client employer with respect to certain of the client’s employees. The PEO performs employer functions such as payroll processing, tax filings, and employee benefits, among others. The client employer maintains employer control over the activities of the employees.

As part of its services, some PEOs maintain retirement plans that provide retirement benefits to the employees covered by the agreement. In order to comply with the requirements of the exclusive benefit rule, these plans are often established as multiple employer plans (MEPs), co-sponsored by the PEO and the client employers using the PEO’s services that choose to participate in the plan.

One very large PEO MEP is the ADP Total Source Retirement Savings Plan, sponsored by Automatic Data Processing (“ADP”) and its wholly owned subsidiary or business unit ADP TotalSource Group, Inc. According to the suits, as of the end of 2018 the ADP Plan had over $4 billion in assets and approximately 114,000 participants.
During the first week in May, two lawsuits were filed against the Plan, both seeking class action status. The first suit was brought by an employer that is a participating employer in the Plan, McCaffrey Financial Corp. This was quickly followed by a second suit, brought by two individual participants. Both complaints make substantially the same allegations, although while the first complaint takes 37 pages to state its case, the second complaint is over 150 pages long. Also named as defendants in the cases are NFP Advisors, Inc. (formerly 401(k) Advisors), the plan’s investment advisor, and the individual members of the plan’s fiduciary committee who at this point are not identified by name. The two participants are represented by the firm of Schlichter, Bogard & Denton, which has filed many similar suits against 401(k) and 403(b) retirement plans.

One of the interesting aspects of the case brought by McCaffrey Financial is that it is one of the employers that participates in the plan and as such it is a co-sponsor and co-fiduciary. It is suing in its capacity as a co-fiduciary.

The allegations made in the complaint will be familiar to anyone who has been following the fee litigation cases. The plaintiffs charge the ADP fiduciaries with various breaches of fiduciary duty and prohibited transactions, including:

- The fiduciaries failed to appropriately negotiate and monitor the plan’s recordkeeping agreement, resulting in excess recordkeeping fees. The plaintiffs claim that because the plan’s recordkeeping arrangement with Voya was asset based, there was a significant overpayment of fees as the plan’s assets grew and that the fiduciaries did not monitor this overpayment. As a result, the plan paid Voya substantially more in recordkeeping fees than was reasonable for a plan of that size.

With respect to the alleged failure of the fiduciaries to obtain fees commensurate with the size of the plan, the plaintiffs note that one of the selling points of joining the PEO MEP is that it allows a small employer to use the aggregate assets of the group of employers to “drive down costs”, among other efficiencies.

- The fiduciaries engaged in self-dealing with plan assets, a prohibited transaction, because ADP TotalSource Group, Inc., owned by ADP, received payments out of plan assets, and the amounts paid to it were “unreasonable and unnecessary” for the operation of the plan.

- The fiduciaries selected and retained investments that were imprudent based on their high fees and underperformance. This includes using higher cost share classes when lower cost classes of the same fund were available.

There are two additional claims, that are not as typical:

- The fiduciaries breached their responsibilities by allowing Voya and its affiliates to collect the participants’ confidential information for use in cross selling other Voya products. This allowed Voya to obtain significant excess compensation. The claim that fiduciaries are allowing confidential information to be used by service providers has appeared in some of the litigation against 403(b) plans.
• The fiduciaries breached their responsibilities by causing the plan to pay excessive managed account fees. The plan allowed Voya to choose one of its affiliates as the managed account provider without any competition, and the fiduciaries failed to monitor the fees that it was charging.

What are the implications of these suits to plan sponsors? First, of course, if you are a participating employer in the ADP plan, you will want to follow the progress of this litigation as you may be in the class of plaintiffs. In addition, if you are a participating employer in another PEO MEP, it would not be at all surprising to see similar lawsuits filed against other PEO plans, now that the idea for these suits has been introduced into the marketplace.

And, even if you have no connection with a PEO MEP, this suit is a good reminder of the types of claims that are being levied against single employer defined contribution plans, and that you want to be certain that you have taken the steps necessary to protect your plan from charges of a breach of fiduciary duties. If you are considering moving to a MEP or PEP, carefully and prudently evaluate any proposed contract and plan document before signing on the dotted line. See: 10 Questions to Ask Before Signing That New Service Agreement

If you have any questions about this article, please contact a Boutwell Fay attorney.

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**FAQ: Special Notice Requirement Under 403(b) Volume Submitter Plans**

Many sponsors of 403(b) plans have adopted pre-approved volume submitter plan documents in the last few years. If you are a 403(b) plan sponsor using such a document you need to be aware that in addition to all the familiar notices that you regularly distribute to your participants, there is an additional annual notice requirement that is not as well known. This is the notice that discloses the rules governing participants in 403(b) plans who control another employer maintaining a retirement plan.

CLICK HERE to read the full article
Firm News & Events:

Just in time for Halloween, join us for Spooky Plan Documents (Defined Contribution Plan Restatements) for the Western Pension & Benefit Council

Thursday, October 29, 2020
10:00 am to 11:40 pm PDT

Please join Sherrie Boutwell on Thursday, October 29, 2020 as she presents, “Spooky Documents-Defined Contribution Plan Restatements,” for the Western Pension & Benefits Council Orange County Chapter Luncheon. The webinar will be held from 10:00 am – 11:40 am (PDT). Sherrie will discuss how to navigate through the defined contribution restatement process that opened on June 30, 2020 and ends on July 31, 2022.

To receive a discount on registration please reply to attorneys@boutwellfay.com to receive a discount code to enter during registration.

Webinar Details and Registration

NAMWOLF 2020 Virtual Annual Meeting

Sherrie Boutwell attended the 2020 Virtual Annual Meeting of the National Association of Minority and Women Owned Counsel, which included educational sessions, a moving presentation by Senator Tammy Duckworth, and a rousing game of virtual Family Feud. Mark your calendars now for the NAMWOLF 2021 Driving Diversity & Leadership Conference which is currently scheduled to be held in San Antonio, Texas from February 27 – March 2, 2021. NAMWOLF meetings are always free to in-house counsel. More information is available at www.namwolf.org.