Employee Benefits & Workers' Comp News

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Supreme Court Decision Increases Fiduciary Duties

In May, the Supreme Court issued its ruling in *Tibble v. Edison International*. The ruling went in favor of employees, which could make it easier for retirement plan participants to sue employers for using plans that charge excessive fees.

The case involved an employee group that claimed the administrators of Edison's retirement plan breached their fiduciary duties. Among their many fiduciary duties, plan sponsors must consider cost when choosing investment options for the plan. A group of employees sued Edison because the company's 401(k) plan offered plan participants retail-class mutual funds, when identical institution-class mutual funds were available at lower cost. As a result, Edison employees' savings did not grow as fast as they should have.

The district court where the case originated granted summary judgment for Edison. It reasoned that the plaintiffs' claim was time-barred under ERISA, the Employee Retirement Income Security Act. ERISA requires plan participants to file lawsuits for breach of fiduciary duties within six years of when the breach occurred. At question was whether fiduciaries have a duty to monitor investments on an ongoing basis, if the initial investment was made more than six years earlier.

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This Just In

Small employer marketplaces are coming to retirement benefits as well. To date, the states of Illinois and Washington have passed laws creating retirement plan marketplaces for small employers. Illinois' law, which went into effect on June 1, 2015, requires employers with 25 or more employees to participate. Employees fund their benefits with an automatic 3 percent payroll deduction contribution; they can opt out if they choose.

Washington's law allows more options. Employers with fewer than 100 employees can participate or not, at their option. The marketplace will offer a variety of individual investment vehicles, from IRA-based plans to life insurance programs. Employees will

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What *Tibble* Means for Employers

The Supreme Court agreed that plan fiduciaries have an ongoing responsibility to monitor plan fees and returns. This could open the door to more employee lawsuits against their employer for excessive retirement plan fees.

ERISA, the Employee Retirement Income Security Act, creates fiduciary responsibilities for any people or entities who exercise discretionary control or authority over plan management, assets or administration, or anyone who provides investment advice for compensation. Fiduciaries who fail to act in participants' best interests may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets.

Mistakes that can lead to fiduciary liability lawsuits include:

- Denial or change (especially reduction) of benefits
- Administrative error
- Improper advice or counsel
- Wrongful termination of a plan
- Failure to adequately fund a plan
- Conflict of interest
- Imprudent investment of assets or lack of investment diversity
- Imprudent choice of insurance company, mutual fund, or third-party service provider.

Avoiding Fiduciary Liability

To avoid fiduciary liability, establish a fiduciary committee and charge it with the following responsibilities:

- Review service providers' performance
- Read any reports they provide
- Check actual fees charged
- Ask about policies and practices (such as trading, investment turnover, and proxy voting)
- Follow up on participant complaints
- Analyze the plan's fees and expenses regularly. The law does not specify a permissible level of fees, but requires that they be "reasonable."
- Make sure each investment continues to fit the objectives outlined in the plan's investment policy statement and that it compares favorably to others in its asset class.
- Ensure your plan offers diversified investment options.
- Verify the plan provides required disclosures to participants, including **the summary plan description, an individual benefit statement (IBS), and a summary annual report (SAR)** to participants. Whenever the plan changes, participants must also receive a **summary of material modification (SMM)** notice. If a blackout period occurs, the plan must provide advance notice to employees that their right to direct investments, take loans or obtain distributions will be temporarily suspended.
- Ensure your plan makes required reportings to the federal government, including the Form 5500, Annual Return/Report of Employee Benefit Plan. The Form 5500 discloses information about the plan and its operation to the IRS, the U.S. Department of Labor, plan participants, and the public. Form 1099-R reports distributions (including rollovers) from a retirement plan. Plan administrators must give a copy to both the IRS and recipients of distributions from the plan during the year.
- Buy fiduciary liability insurance. This specialized coverage fills the gaps left by employee benefits liability (EBL) insurance and directors and officers (D&O) liability insurance. It protects plan sponsors from individual liability and the company from liability. It pays your attorney, court and settlement costs, and gives you access to expert defense.

For more information on your compliance responsibilities or fiduciary liability insurance, please contact us. ■

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pick the ones they want; employers can contribute but do not have to. Employers' sole obligation will be to handle payroll deduction and transmission of employee contributions.

The coming retirement crisis has caught the attention of legislators across the country. Employers of all sizes can offer retirement benefits at low cost. For more information, please contact us.

Supreme Court Okays Health Insurance Subsidies

In late June, the Supreme Court issued its decision in *King v. Burwell*. The case challenged the legality of subsidies in federally run or federally facilitated health insurance exchanges. The Court ruled the subsidies could stand, a decision that probably saved the exchanges in 34 states from a "death spiral."

The Court Case

The plaintiffs questioned the legality of the healthcare subsidies created by the Affordable Care Act in states that have an exchange run by or facilitated by the federal government. Had the ruling gone the other way, it would have eliminated subsidies in those 34 states.

The Importance of *King v. Burwell*

The Affordable Care Act makes subsidies available to people who buy health plans on an "Exchange established by the State." Based on those five words, the plaintiffs in *King v. Burwell* challenged the legality of subsidies in states without a state-established insurance exchange. The Act makes no provision for subsidies in federally established exchanges. Only 13 states and the District of Columbia have state-established insurance exchanges. The others have either a federally supported state-based program, a transitional partnership program or a federally facilitated marketplace.

If the Supreme Court had ruled in favor of the plaintiffs, the ruling would have eliminated subsidies in states where the federal government is involved in the marketplaces.

The Importance of Subsidies

According to the Kaiser Family Foundation, "People receiving subsidies make up 87% of those who have signed up for coverage for 2015 in states using the federal marketplace." If the Supreme Court had ruled against subsidies in federal exchanges, costs would have gone up dramatically for people who buy their coverage in them. Many would likely drop their coverage.

When that happens in an insurance market, something called a "death spiral" occurs. Only the sickest people—those most likely to use their coverage—keep their insurance. In a working health insurance system, healthy people effectively subsidize rates for less healthy people. When the healthy ones leave the plan, the insurer's costs go up. Soon, insurance costs so much that only the unhealthiest of people—those most likely to use it—will buy it. Eventually insurance becomes so costly that nobody can afford it.

Now that the *King* decision is settled, employers can focus on complying with other aspects of the Affordable Care Act. For more information, please contact us.

Employers' Liability

Workers' comp policies usually include a special section for employers' liability. What additional coverages does it provide and why do you need them?

Your workers' compensation policy covers the costs associated with an employee's work-related injury or occupational disease. It pays for the worker's medical costs, rehabilitation costs, lost wages and any settlement for permanent disability.

The fundamental premise of workers' comp is that employers agree to take responsibility for work-related injuries whether or not the injury was the employer's fault. In return, the employee gives up his or her right to sue for damages. Workers' comp is designed to be "no-fault" and the "exclusive remedy" for work-related illness and injury. Nonetheless, over the years employees have sued for damages, some of which fall outside of workers' comp coverage.

The employers' liability section of the workers' comp policy adds coverage for these types of claims. Without this coverage, employers would have a significant coverage gap, because commercial general liability policies specifically exclude coverage for work-related injury and disease.

Employers' liability is a common law or tort liability, and insurance companies handle those types of claims in the same way they adjust general liability claims, including managing and paying for defense.

Since states do not require employers' liability insurance, you do not have it unless your workers' compensation policy explicitly states it includes this coverage in a separate section. Unlike workers' comp, employers' liability has a defined limit of liability, starting at $100,000 per injury.

When Coverage Applies

Insurance authority IRMI cites several examples of when employers' liability coverage applies:

- Wrongful death: The family of a deceased worker may file a common-law claim seeking damages in addition to the death benefit paid by workers' comp.
- Consequential bodily injury: A family member may file a lawsuit for his or her own injury (for instance, a heart attack) that was caused by learning about or dealing with the injured employee.
- Loss of consortium: The spouse of an injured worker may sue for loss of consortium, which means the spouse has lost the services — such as sexual relations or the ability to do household chores — of his or her spouse. Damages can be awarded even if the spouse is receiving disability payments.
- Third-party liability: If an employee is injured while using equipment that malfunctioned, he or she may sue the manufacturer of the equipment for negligence. The manufacturer may in turn sue the employee's company to recover damages. Depending on the specifics of the claim, either the employers' liability or a general liability policy can provide coverage.
- Employees excluded from workers' comp: In some states, seasonal and temporary workers can be excluded from workers' comp. In other states some small employers do not have to buy comp. In those

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situations, an employers' liability policy can provide protection from employee lawsuits for bodily injury and illness.

Monopolistic States

In states that have monopolistic state workers' comp funds (North Dakota, Ohio, Washington and Wyoming), employers need to purchase a separate employers' liability policy. Organizations headquartered in other states but that have offices in these states need to buy an endorsement to their employers' liability policy to avoid having a coverage gap for employees in those states.

Not Employment Practices Liability

Employers' liability should not be confused with employment practices liability (EPL) insurance, which protects companies from employee claims that their legal rights have been violated. EPL protects an organization when employees file claims for wrongful termination, sexual harassment and discrimination. It does not cover bodily injury.

Some employers that have not bought EPL insurance attempt to use their employers' liability to provide coverage for EPL claims. According to IRMI, they have not been successful in most cases. Even when states define workers' comp "injury" to include mental injury, the broader workers' compensation definition does not necessarily transfer to the employers' liability portion of the policy.

If you have any questions about your employers' liability coverage — and how it complements your workers' comp coverage — please give us a call. ■

Employee = Paid. Intern = Unpaid (maybe)

A legitimate internship is primarily a learning experience for the intern, not an opportunity for employers to gain cheap or temporary labor. The U.S. Department of Labor lists the circumstances under which an intern can work at a for-profit organization's internship or training program for no pay:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship, and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If the internship meets all these criteria above, an employment relationship does not exist under the Fair Labor Standards Act (FLSA). Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. Some employers (or schools) pay interns a stipend for living expenses or lodging during their internship. As long as the internship is a training position or otherwise meets the Department of Labor's standards of a bona fide internship, a stipend will not count as wages and does not create an employment relationship.

If your intern is paid minimum wage or more, or if the job is primarily for the benefit of the employer, then beware… your intern could meet the legal definition of employee. The FLSA requires all employees to receive the benefits of employment, including at least minimum wage and other job protections, such as workers' compensation.

State workers' compensation laws generally require employers to provide workers' compensation coverage to any employee. However, if your organization is a nonprofit or governmental department, you might have interns that qualify as volunteers. Workers' compensation policies automatically cover employees; they might not cover volunteers. Buying volunteer accident coverage would cover a volunteer's medical expenses if he or she was injured on the job.

Since interns are often young and relatively inexperienced, they have a higher potential for injury. To avoid problems, make sure the education they receive includes basic safety training.

What Other Laws Apply to Interns?

Federal job discrimination laws that apply to employees and job applicants would not apply to individuals whose positions meet the Department of Labor's criteria for unpaid internships. These people are not considered employees, so federal employment laws would not apply. However, some states, including Oregon and New York, have laws that specifically protect interns from job-related harassment and discrimination. If your paid interns qualify as regular employees, federal and state non-discrimination laws in hiring and supervision will apply. As a matter of good business sense, though, employers should avoid discriminatory actions against unpaid interns as well as employees.

Any employment relationship can create risk exposures. If you have any "nontraditional" employees, such as interns, volunteers or leased employees, make sure you have the appropriate insurance coverage. For more information, please contact us. ■

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Safety Quiz for Office Workers

Although office workers face few life-threatening occupational injuries, they can suffer from work-related repetitive strain disorders and other ergonomic injuries. The following quiz can help you spot ergonomic problems before they lead to injury.

1. I have to look up to see my computer screen when seated.
2. I can read text on my screen without leaning my head, neck or trunk backward or forward.
3. I see glare on my computer screen.
4. My mouse or trackball fits my hand well and is easy to operate.
5. I need to stretch my arms to reach my keyboard and/or input device (mouse or trackball).
6. My elbows are bent, forearms parallel to the floor, when I type or use the mouse.
7. My wrists rest on a rounded, padded wrist rest OR I can type comfortably, keeping my wrists straight, without a wrist rest.
8. Any documents I need to look at while typing are resting flat on my desk.
9. I use a headset when I need to use the telephone and computer at the same time.
10. I can sit close to the keyboard, with feet flat on the floor, while working at my computer.

If your employees answered "yes" or "not applicable" to Questions 2, 4, 6, 7, 9 and 10, and "no"s or "not applicable" to Questions 1, 3, 5 and 8, congratulations! You have a very ergonomics-friendly workplace and your office workers will likely experience few problems with work-related musculoskeletal disorders or eyestrain. Any "no" answers on Questions 2, 4, 5, 7, 9 or 10 indicate problems. Most can be corrected easily—please contact us for more information. ▪

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The Insurance 411 — What you need to know about insurance

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