Benefits Alert
Legal developments affecting employee benefits

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# Much ado about nothing…or is it?

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Remember how much fun it used to be to receive mail? As a child, there was nothing quite like getting a care package at summer camp, or a postcard from a distant relative or pen pal to put a spring in your step. Life was good.

Not so anymore, as Yale Law School professor Ian Ayres apparently seeks to crush your cherished childhood memories. Recently, the good professor sent what could amount to thousands (if not tens of thousands) of anti-love letters to retirement plan sponsors informing each of them that they have "a potential high-cost plan." The basis for Professor Ayres' conclusion? An "empirical research study" grounded in data mined from Forms 5500 "filed with the Department of Labor in 2009 and BrightScope Inc." Ayres' condescendingly reminds plan sponsors that they have a fiduciary duty to act solely in the interests of plan participants, while simultaneously advising that he plans to publish the results of his study in the Spring of 2014 and make his findings available to various media sources, including the New York Times, the Wall Street Journal, and on Twitter with a separate hashtag for each company.

How delightful! Professor Ayres should not expect many dinner invitations from the plan sponsor community in the near future.

If you receive one of these letters, or receive a similar letter in the future, don't panic:

- **Study is based on dated information.** Professor Ayres' study is practically useless as a current barometer because it is based on dated plan information. As we mere mortals know, 2009 is a lifetime ago in the post-fee disclosure world in which we now live.
- **Form 5500 is not a comprehensive source for plan fees**. Forms 5500 are not regarded as a complete source of plan fee information. But don't just take our word for it. In the course of conducting his "empirical research study", the good professor might have taken some time to read the Government Office of Accountability's April 24, 2012 report

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acknowledging that "the Form 5500 was not intended to be a comprehensive database of plan fees."

- **Sponsors do not accurately report fees on form 5500s**. The GOA study also found that some sponsors face challenges in understanding the fees they and their participants are charged. As such, in those cases, amounts reported on Form 5500s were found to be incorrect.

- **Form 5500 does not account for fees directly paid by the plan sponsor**. Form 5500 data does not include plan fees and expenses paid directly by the plan sponsors.

- **Study does not evaluate various qualitative factors**. Professor Ayres' study is deeply flawed because it doesn't account for factors such as the complexity of plan design and operation, regional service provider rates, and the subjective quality of plan services, all of which must be considered under an analysis to determine fiduciary compliance under ERISA.

- **Ayres wrongly implies that high fees constitute a fiduciary breach.** ERISA does not require a plan to offer the lowest cost investments available, nor that they even fall within a particular range. It merely requires that those investments be selected with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. A high standard, to be sure, but to imply that offering expensive plan investments constitutes an ERISA breach bespeaks a gross misunderstanding of the statute. One would expect more from a tenured academic at one of the nation's premier law schools.

Although we obviously believe that this study is horribly flawed, we would be remiss not to point out that Professor Ayres' disclosure, based on 2009 plan data, may well provide an enterprising plaintiffs' attorney sufficient time under ERISA's statute of limitations to identify putative class members interested in shaking down their employers. We should also point out the possibility that Ayres' study might well attract the attention of our friends at the Department of Labor, raising the specter of a potential audit.

Fortunately, Ayres is providing plenty of advance warning of his intent to go public. Whether anything truly comes of it, only time will tell. For now, plan sponsors would be well-advised to take proactive steps to ward off any negative press:

- First, in line with the GOA findings, sponsors should view the Ayres' letter/study as a wake-up call to become better educated about the fee structures of their plans' investments and the totality of fees paid by both the plan and the employer for administrative and investment expenses.

- Second, sponsors should consider a positive communication campaign to plan participants, perhaps in conjunction with the next round of mandated fee disclosures, that:

    - Educates plan participants about the sponsor's fiduciary duties,
    - Highlights the many features of the plan and how it enables retirement savings,
    - Explains the various plan fees and costs associated with maintaining the plan, and
    - Emphasizes any cost saving measures and controls put in place under the plan.

If you have any questions about the impact of Ayers' letter, plan fees and fee structures, or compliance with ERISA's fiduciary duties, please contact a member of our employee benefits team or:

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