

CLIENT ACTION Bulletin

Employee Benefits

Rulings from the U.S. Supreme Court: Fiduciaries, ACA, and Union Fees

SUMMARY The U.S. Supreme Court in late June decided three cases that while apparently narrow in scope, may be of broad interest to employers. The cases involve: standards for fiduciaries in ERISA-covered retirement plans with employer stock as an investment option; the Affordable Care Act's (ACA) requirement that certain preventive healthcare benefits – which include coverage for contraceptives – be provided at no cost to group health plan participants; and the required payment of union fees by certain state workers under a state law.

DISCUSSION **Decision #1: Retirement Plan Fiduciary Presumption of Prudence**

In a unanimous decision, the Court held that fiduciaries of an ERISA-qualified retirement plan that includes employer stock as an investment option are not entitled to any special “presumption of prudence” in the investment decisions made by the plan administrator (*Fifth Third Bancorp v. Dudenhoeffer* (No. 12-751, 6/25/2014)). The ruling, which overturned a 2012 decision by the U.S. Court of Appeals for the Sixth Circuit, held that the fiduciaries in this case are subject to the same duty of prudence that generally applies to fiduciaries under ERISA.

Fifth Third Bancorp sponsored a 401(k) defined contribution plan that included employer stock in an employee stock ownership plan (ESOP) among its 20 investment options. The company matched participants' deferrals, placing the amounts in Fifth Third Stock Fund, which invested primarily in publicly traded company shares. Participants could direct that those amounts be moved to other investments. The participants – facing a 74% decline in value in the ESOP – claimed that the company faced increasing risks due to its participation in the subprime loan housing market, and thus, the fiduciaries should have removed the company stock as an investment option.

The “presumption of prudence” that appellate courts had long applied assumed that fiduciaries act prudently when company stock is included as an investment in an ERISA-covered retirement plan. Thus, the lower courts held that the presumption generally protects employer stock plan fiduciaries from liability for declining stock prices. Unlike the other appellate courts, however, the Sixth Circuit held that this presumption is not available at the motion-to-dismiss (pleading) stage.

The Supreme Court remanded the case, directing the Sixth Circuit to reconsider whether the participants stated a claim under precedents established by the high court. The Court said that a fiduciary's conduct should be evaluated in the context of publicly available information and that fiduciaries cannot be found imprudent for failing to buy or sell stock in violation of insider-trading securities laws. In addition, the high court said that a complaint must plausibly allege an alternative action that the defendant could have taken when plaintiffs state a claim for fiduciary imprudence.

The ruling offers limited guidance for fiduciaries of company stock-based investments in retirement plans and calls into question some normal practices for ESOPs. Regarding the former, for example, a review of plan documents and procedures may be wise, focusing on terms that require employer stock investments unless the company faces serious financial difficulties, because a fiduciary no longer may rely on a special presumption of prudence or on plan terms if prudence would dictate otherwise. Consideration of the use of an independent fiduciary and a review of language used to communicate and educate participants about stock investments and diversification also would be advisable. Regarding ESOPs, particularly stand-alone plans that offer no participant direction, the Court's rejected arguments that fiduciaries are permitted to take into account “nonpecuniary” interests such as employee ownership, as well as their reliance on plan documents that called specifically for investment in employer stock. Thus, if such an investment is imprudent, the plan document directive must be ignored.

Decision #2: The ACA and Contraceptive Coverage

The high court ruled that closely held for-profit corporations are entitled to an exemption from the ACA's contraceptive coverage mandate (*Burwell v. Hobby Lobby Stores, Inc.* (No.13-354) and *Conestoga Wood Specialties Corp. v. Burwell* (No. 13-356), 6/30/2014). The 5-4 decision in the consolidated cases allows a for-profit closely held company to deny its employees the contraceptives they are otherwise entitled to under the ACA, based on the religious objections of the companies' owners.

Both companies had sued for relief from the ACA's mandate that companies cover minimum essential benefits – i.e., Food and Drug Administration-approved forms of contraception, including emergency contraceptives – without cost for female employees under the employer-provided group health plans. They claimed that the requirement violated their religious liberty under the 1993 Religious Freedom Restoration Act (RFRA), which requires the narrow tailoring of laws that substantially burden the exercise of religion.

The decision applied the RFRA's rules to closely held for-profit corporations. According to the Court, the government failed to show that the mandate is the "least restrictive" means to advance its interest in guaranteeing cost-free access to birth control. The majority of the justices pointed out that the RFRA requires the government to provide closely-held corporate objectors the same accommodation provided to nonprofit religious objectors. The Court was clear to note that the ruling applies only to the contraceptive mandate, not to other insurance mandates such as for blood transfusions or vaccinations. In addition, the Court emphasized that the ruling provides no shield for employers that might cloak illegal discrimination as a religious practice.

The ruling immediately raised questions for supporters and opponents alike. For example, whether it can apply to non-closely held for-profit companies or to "sincerely held" religious objections to other ACA coverage requirements (e.g., immunizations) remains uncertain. In addition, the Court granted an emergency injunction three days later to allow a Christian college in Illinois not to complete a federal opt-out form to avoid having to provide contraceptives, pending an appeal of a lower federal court decision that required the college to comply with the mandate (*Wheaton College v. Burwell* (No. 13A1284, order issued 7/3/2014)). **Subsequently**, the Labor Department posted a "Frequently Asked Question" online, requiring ERISA-covered plans to disclose relevant coverage information. It states that summary plan descriptions must include "the extent to which preventive services (which includes contraceptive services) are covered" and that plans reducing or eliminating contraceptive coverage services after providing them must disclose the changes within 60 days.

Decision #3: Union Fees

The Court ruled 5-4 that public sector unions may not collect fees from certain workers who object to being affiliated with a union (*Harris v. Quinn* (No. 11-681 (6/30/2014))). The court held that Illinois may not compel healthcare workers, hired as "personal assistants" by Medicaid-covered clients, to accept and financially support a union as their exclusive representative for bargaining with the state on their compensation paid under Medicaid. The Court distinguished the service providers as "partial public employees" from full-fledged public employees, pointing out that the recipients of services control most aspects of the employment relationship, including the hiring, firing, training, supervising, and disciplining of personal assistants. Other than compensating the personal assistants, the state's involvement in employment matters was minimal, the Court noted, adding that the personal assistants do not enjoy most of the rights and benefits that inure to state employees, and are not indemnified by the state for claims against them arising from actions taken during the course of their employment.

The ruling's impact will be felt by certain unions, which might have more difficulty recruiting and/or maintaining dues-paying members in certain sectors, as well as those governmental employers in situations similar to those in the instant case, which may have to consider approaching workforce management issues (e.g., increased supervision of home-health aides) differently than they have in the past.

ACTION

Employers need to be aware that additional litigation is likely to further clarify the application of the Court's rulings.

For additional information about any of the Court's decisions, please contact your Milliman consultant.