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ERISA/Employee Benefits/Litigation/Executive Compensation

Initially enacted in 1974 to overhaul the federal laws governing employee benefit plans, the Employee Retirement Income Security Act, commonly referred to as ERISA, has been amended on a regular basis to meet the changing retirement and healthcare needs of employees and their families. Staying current with all these changes is no easy matter for America's employers, plan fiduciaries, and service providers. Administered by three separate federal agencies—the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation—the technical rules of ERISA pose a formidable compliance challenge.

Steptoe & Johnson LLP's Employee Benefits practice has been providing plan sponsors, fiduciaries, and service providers with effective representation related to ERISA matters for nearly four decades. Long recognized as a leader in the field, it recently received No. 1 rankings in the area of National ERISA Litigation in *Chambers 2011 USA, America's Leading Business Lawyers*, a position which it has enjoyed since *Chambers* began ranking firms in this category in 2005. In addition, the firm has enjoyed high rankings from both *Chambers* and *The Legal 500* in DC Employee Benefits and Executive Compensation.

Steptoe has a very broad range of experience in issues that relate to employee benefit plans. We represent plans, plan sponsors, plan fiduciaries, actuaries, and other plan consultants, banks, insurers, investment entities, and trade associations that focus on ERISA issues. Our clients include the largest public pension plan in the nation, as well as the public employee pension plans of several states and a range of smaller counties and municipalities across the country. Our counsel also extends to corporations updating their plans or filing with the IRS.

Litigation Defense

One of only four firms to receive a No. 1 ranking in National ERISA Litigation in *Chambers 2011 USA, America's Leading Business Lawyers*, Steptoe has long had one of the nation's premier ERISA litigation practices, led by Paul Ondrasik, a nationally recognized ERISA litigator. The firm has litigated cases involving issues from the simple benefit claim dispute to the most significant and complex matters under ERISA and related statutes. Significant cases involve such matters as fiduciary responsibility, prohibited transactions, retiree medical obligations, and ERISA's preemption of state law. We regularly submit *amicus* briefs to the Supreme Court on behalf of our clients in connection with employee benefit issues being submitted for the Court's review.

Our substantial litigation experience not only assures our clients effective representation in the event of court action, but also enables us to bring practical consideration to bear, particularly with respect to the avoidance of potential liability and exposure, in providing advice and counsel on planning matters.

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Employer Securities Litigation

In recent years, there has been an increasing number of lawsuits that charge breach of ERISA fiduciary duty in connection with the offering of employer securities as an investment option in 401(k) plans and other individual account plans. These suits generally are brought in tandem with more traditional securities fraud actions involving the employer plan sponsor's stock. The ERISA actions typically allege that the plan sponsor and the plan fiduciaries knew or should have known that the employer's stock was no longer a prudent investment option for the plan, and that under such circumstances, they breach ERISA's fiduciary responsibility provisions by continuing to permit investment in such securities (either by participants or through employer matching contributions); by failing to liquidate the plan's holdings of employer securities; by failing to eliminate restrictions on the ability of participants to dispose of such stock; and by failing to disclose information concerning the financial difficulties faced by the plan sponsor.

As a result of its extensive experience in this area, the firm is intimately familiar with the issues involved in the employer stock area, both from a litigation defense and a plan administration standpoint.

Title I (Fiduciary Matters)

The firm regularly provides advice and counsel to clients on fiduciary and prohibited transaction issues arising under Title I of ERISA. We have experience guiding financial institutions that provide services to ERISA plans, such as banks and brokerage firms, through the complex and technical prohibited transaction rules. We represent clients on such matters before the US Department of Labor in connection with audits and special investigations involving market timing, use of affiliated products, cross trading, employer stock issues, receipt of fees, etc. Under the direction of the former Executive Assistant to the Solicitor of Labor and Special Counsel at the Pension Benefit Guaranty Corporation, our practice helps clients with legal issues that include securing prohibited transaction exemptions and representing clients before the IRS concerning excise tax issues. We analyze complicated financial transactions and suggest structuring solutions that could comply with ERISA and the Code, and provide advice regarding product characteristics and compensation.

Tax Matters

In addition to our extensive litigation capabilities, we have significant experience helping ERISA plan sponsors establish, administer, and maintain qualified retirement and other benefit plans. For example, in the last few years we have assisted a number of clients in restructuring their retirement plan programs, including converting traditional defined benefit plans to cash balance-type plans and using spin-offs to recover surplus pension assets. Our

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practice is also heavily focused on helping clients with day-to-day advice on tax matters relating to retirement plans.

We play significant roles in employer-initiated compliance reviews of benefit plans, regularly representing clients before the IRS in order to obtain compliance statements for plan corrections. In fact, while with the Treasury Department, one of our attorneys was instrumental in developing the current generation of IRS corrections programs.

We regularly represent clients before the Department of Labor on requests for advisory opinions and information letters as well as on prohibited transaction exemption requests. Our attorneys also actively represent clients at all administrative levels before the IRS and the Treasury Department with respect to new or evolving matters of law to help shape policy. In addition, we have been extensively involved in crafting new products or approaches in welfare benefit areas and ESOPs. We also have assisted clients in developing sophisticated and novel nonqualified deferred compensation programs.

Title IV (Plan Termination and Withdrawal Liability Matters)

Steptoe provides counsel and advice regarding pension plan terminations and multi-employer and so-called Taft-Hartley Act plans operating under Title IV of ERISA. We excel at taking clients through the termination or withdrawal process and working to minimize liability related to such events. Led by the former General Counsel and former Special Counsel at the Pension Benefit Guaranty Corporation, the practice has obtained favorable rulings and settlements in all areas under Title IV of ERISA. For example, we represent employers who have assessments levied against them when they exit or leave a pension plan because of plant closure, de-certification, or sale of the business. In addition, we have advised clients on the relationship between the bankruptcy laws and ERISA, taking an active role in troubled company work-out situations.

Transactions

Our ERISA practice regularly provides relevant advice in mergers and acquisitions, including issues relating to funded plans and unfunded retiree health costs.

Legislation

Our attorneys have extensive experience in legislative lobbying and in keeping our clients abreast of legislative issues and initiatives in the ERISA field. A substantial part of the practice is based in Washington, and Steptoe partners have prior legislative experience as senior staff with Congressional committees and as Treasury Department counsel.

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Representative Matters

- From the very inception of ERISA employer stock of litigation, Steptoe has been a leader in the defense of these matters. The firm has had lead defense roles in such high-profile cases as *Tittle v. Enron Corp.* (*In re Enron Corp. Sec. Derivative & ERISA Litig.*), *In re Dynegy, Inc. ERISA Litigation*, *In re Williams Companies ERISA Litigation*, and *In re Qwest Savings and Retirement Plan Litigation*, and has defended class actions raising these issues in the energy, automotive, retail, and insurance industries.
- *In Re Honda of America Mfg. Inc. ERISA Fees Litigation*, C.A. 2:08-cv-1059 GLF-TPK (S.D. Ohio)—We represented Honda of America Mfg. Inc., and several individual defendants in a putative class action brought against those defendants and Merrill Lynch Bank & Trust Co., alleging that defendants breached their ERISA fiduciary duties by choosing investment options for its 401(k) plan that charged excessive fees; failing to inform participants of material information concerning the fees associated with the investment options and engaging in prohibited transactions. The case was dismissed on Steptoe's motion. In addition to this case, Steptoe successfully represented another Honda subsidiary and alleged plan fiduciaries in a putative class action alleging very similar claims with respect to a separate 401(k) plan. *Duck v. Honda Manufacturing of Alabama, LLC*, 1:08-cv-02304-RRA (N.D. Ala.) The case was dismissed on Steptoe's motion.
- *Flanigan, et al. v. General Electric Co., et al.*, 242 F.3d 78 (2d Cir. 2001)—We successfully defended a major defense contractor in this class action that arose from Lockheed Martin's (then Martin Marietta) acquisition of GE's Aerospace businesses. This was a complex corporate transaction in which approximately 30,000 GE employees became employees of Martin and more than \$1 billion was transferred from the GE Pension Plan to a new Martin Plan. Among the issues involved in the case were the disclosure obligations of ERISA fiduciaries, the prudence of certain pension plan investments pending closing of the transaction, questions pertaining to the transfer of assets and liabilities from one pension plan to another, and issues involving post-transaction benefit changes. The district court ultimately resolved all issues in the defendants' favor on motions to dismiss and for summary judgment. Its decision was affirmed in all respects by the court of appeals, and the Supreme Court thereafter denied the plaintiffs' petition for certiorari.

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- *California Ironworkers Field Pension Trust, et al. v. Loomis, Sayles & Company, L.P., et al.*, 259 F.3d 1036 (9th Cir. 2001)—We successfully represented the defendant investment management firm in an action brought by several related Taft-Hartley funds asserting breach of fiduciary duty claims in connection with certain mortgage derivative investments. Defense of the matter included a 12-day bench trial before the US District Court for the Central District of California and a subsequent appeal to the Ninth Circuit.
- *Glanton v. Advance PCC, Inc.* 465 F.3d 1123 (9th Cir 2006)—We succeeded in having a putative class action brought by participants against a leading pharmacy benefits manager alleging fiduciary breach claims dismissed for lack of constitutional standing. The Ninth Circuit affirmed the district court; dismissed. The Supreme Court subsequently denied certiorari in the case in 2007.
- *UNAKA Co., Inc. v. Newman*, 2005 US Dist. LEXIS (E.D. Tenn. 2005) —Following a month-long trial, we successfully defended the fiduciaries of a profit-sharing plan against liability in an action charging breach of fiduciary duty in their handling of the plan’s company stock holdings.
- *Mulder v. AdvancePCS Health Systems, Inc.* (D.N.J.)—We successfully defended a leading pharmacy benefits management firm in a class action, charging violations of ERISA's fiduciary responsibility provisions in the development and management of prescription drug benefit programs for ERISA plans. The district court entered summary judgment for the defendants and its decision was not appealed.
- *Albrecht, et al. v. Committee on Employee Benefits of the Federal Reserve Employee Benefits System, et al.*, 357 F.3d 47 (D.C. Cir. 2004) —We successfully represented the defendants in a putative class action charging breach of fiduciary duty in the failure to eliminate a mandatory employee contribution feature in an over-funded defined benefit pension plan. That action was dismissed by the district court on our motion, and its ruling was affirmed in all respects by the Court of Appeals.
- *Adkins v. B.P. Amoco, et al.* (C.D. Cal.) – We successfully obtained summary judgment for the defendants in a putative class action brought by contingent workers claiming that they were “common law” employees of the company and thus entitled to plan benefits.

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- *Lambert v. American Express Financial Corp., et al.* (D. Minn.)—We served as co-lead counsel for the defendant and a number of related entities in this class action brought by former American Express financial advisors who claimed that they were wrongfully denied benefits due to their classification as independent contractors rather than employees. The matter ultimately settled.
- *Keach v. US Trust Co., N.A.*, (C.D. Ill.)—We successfully defended an ESOP valuation firm in a class action brought against a number of defendants by ESOP plan participants. The action charged that the defendants breached ERISA fiduciary duties in connection with an ESOP's acquisition of employer stock in a closely held corporation. Our client was dismissed from that action based on our motion for summary judgment.
- *In re Masters, Mates and Pilots Pension Plan and IRAP Litigation* (S.D.N.Y.)—We served as lead counsel for the defendant Taft-Hartley pension plans in a complex, multi-party action brought by the Department of Labor and two plaintiff classes involving significant investment-related issues under ERISA's fiduciary responsibility provisions, and third-party claims against the plans' former counsel, auditor, and custodial bank. The matter was ultimately settled.
- *Reich v. Sangiacomo* (N.D. Cal.)—We represented the defendant fiduciaries of the ESOP of a major West Coast waste management firm in an action brought by the Department of Labor. The case involved alleged violations of ERISA's fiduciary responsibility provisions in connection with a complex transaction in which the ESOP acquired all of the company's stock in a leveraged buyout and then was subsequently merged into the ESOP of a second company. The matter was ultimately settled.
- *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 US 134 (1985)—We successfully represented the petitioner before the Supreme Court in a leading ERISA case holding that punitive and extracontractual damages are not available under ERISA's fiduciary responsibility provisions or generally under ERISA's civil enforcement scheme.
- *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41 (1987)—We successfully represented the petitioner before the Supreme Court in a landmark ERISA preemption decision holding that ERISA preempts the state tort of "bad faith" and provides the exclusive means for redressing benefit claim matters.

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Noteworthy

- Ranked in *Chambers USA 2010-2011: America's Leading Business Lawyers*; Employee Benefits & Executive Compensation (Nationwide)
- Received a #1 Ranking in *Chambers USA 2005-2011: America's Leading Business Lawyers*; ERISA Litigation (Nationwide)
- Ranked in *Chambers USA 2005-2011: America's Leading Business Lawyers*; Employee Benefits & Executive Compensation (District of Columbia)
- Ranked in *Legal 500 US 2010-2011*; Labor & Employment: ERISA Litigation
- One of only four firms to receive a No. 1 ranking in National ERISA Litigation in *Chambers USA 2011, America's Leading Business Lawyers*, and the 2010 edition of *The Legal 500*.