

2024

BUSINESS IN 2023

WEEKLY WEBINAR SERIES

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Introduction



Kristen E. Smith

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TODAY'S AGENDA

Kristen Smith – (12:00PM-12:10PM)

- Intros / Agenda

John Godsoe – (12:10PM-12:20PM)

- ERISA Fiduciary Responsibilities and ESG (Environmental, Social, and Governance)

Suba Viswanathan – (12:20PM-12:30PM)

- Compensability of Travel Time

Jackson Somes – (12:30PM-12:40PM)

- SCOTUS: Students Do Not Have to Exhaust IDEA Process to Pursue Monetary Damages

Dori Bailey – (12:40PM-12:45PM)

- Recent Bank Failures and the Basics of FDIC Insurance

Kristen Smith – (12:45PM)

- Wrap Up

ERISA Fiduciary Responsibilities and ESG



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What is ESG?

- ESG is the term commonly used to describe environmental, social, and governance factors that can be used to evaluate a company or an investment's sustainability
 - Environmental
 - Carbon emissions
 - Social
 - Human rights record
 - Governance
 - Diversity of Board Members

ESG In the News

- President Biden recently vetoed a bill that sought to void a 2022 DOL Rule allowing retirement plan fiduciaries greater flexibility to consider the financial benefits of investing in funds that consider climate change and other ESG factors
- A 25-state coalition sued the DOL in Texas seeking to overturn the 2022 DOL rule
- Numerous states have passed laws prohibiting use of ESG factors in investment decisions related to state operated plans

2022 DOL Rule

- Supersedes 2020 DOL Rule issued under President Trump
 - Generally required fiduciaries to select investments based solely on “pecuniary factors”
 - Prohibited QDIA to include a non-pecuniary objective
- 2022 DOL Rule
 - Risk/return analysis may include ESG factors
 - Removed “pecuniary factors” language
 - Added language that arguably provides fiduciaries with greater flexibility under the “tie-breaker” rule
 - Eliminated the QDIA prohibition
 - Clarified participant preferences may be considered

Practical Considerations

- 2022 DOL Rule continues to allow a plan fiduciary to consider ESG factors as part of risk/return analysis
 - Be wary of “Trump Rule” versus “Biden Rule” mentality
- Analyze funds under fiduciary process
 - IPS
 - Memorialize investment decisions
 - Prudent process
- Evaluation litigation risks
 - Why are you considering adding a fund or making a change?

Compensability of Travel Time



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Ordinary Commuting Time

- Ordinary travel between home and work is not compensable
- Reporting to fixed location vs. different job sites
 - *Kavanagh v. Grand Union Company, Inc.* (2nd Cir. 2000)
- Emergency or call-out situation
 - Time spent traveling between home and work may be compensable if the employee is required to travel a substantial distance to perform emergency work outside of regular work hours

Travel on a Special One-Day Assignment

- Time spent traveling on a special one-day assignment outside the geographical area where the employee regularly works is compensable if there is no overnight stay
- Example:
 - An employee is regularly employed in Syracuse, but is required to travel to Buffalo for a special one-day assignment
 - The employee leaves home at 6:00 a.m. and arrives back home at 7:00 p.m.
 - All time from 6:00 a.m. to 7:00 p.m. is compensable, excluding the employee's regular 30-minute unpaid meal period

Travel From One Work Site to Another

- Travel from one job site or customer location to another is always compensable
- It is permissible to pay different rates for travel vs. regular job duties
 - Need to ensure compliance with minimum wage
 - Time records must specify how many hours worked at each hourly rate
 - Overtime must be computed at one and one-half times the blended hourly rate or one and one-half times the higher hourly rate

Out of Town Travel Requiring an Overnight Stay

- All out of town travel that keeps an employee away from home overnight is compensable during the hours that correspond to the employee's regular work day, regardless of whether the travel occurs on a regular work day
- Example:
 - An employee regularly works 9:00 a.m. to 5:00 p.m. on Monday through Friday
 - Out of town travel between 9:00 a.m. to 5:00 p.m. is always compensable even if the travel occurs on Saturday or Sunday

Out of Town Travel Requiring an Overnight Stay (cont.)

- Out of town travel outside an employee's regular work hours
 - Compensable if the employee drives
 - Not compensable if the employee is a passenger in an airplane, train, bus, or car
- Example:
 - Employee regularly works in New York City 9:00 a.m. to 5:00 p.m. Monday through Friday
 - Employee flies from New York City to Raleigh on an 8:00 a.m. flight on Wednesday and arrives in Raleigh at 10:00 a.m.
 - 8:00 a.m. to 9:00 a.m. not compensable; 9:00 a.m. to 10:00 a.m. compensable

SCOTUS: Students Do Not Have to Exhaust IDEA Process to Pursue Monetary Damages



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IDEA vs. ADA

- **Individuals with Disabilities in Education Act (IDEA)**
 - Guarantees that students with disabilities are provided with a Free Appropriate Public Education (FAPE) that is tailored to the individual's needs
 - IDEA Administrative Procedures: (1) Hearing; (2) Appeal to State Education Agency
- **Americans with Disabilities Act (ADA)**
 - Prohibits discrimination against individuals with disabilities
 - *Employment, transportation, public accommodations, access to gov't programs, etc*

Perez v. Sturgis Public Schools – Background

- Perez, a deaf student, attended Michigan's Sturgis Public Schools for 11 years
 - Told he was not eligible to receive a high school diploma
 - Filed administrative complaint that the school district violated the Individuals with Disabilities Education Act (IDEA)
 - The parties settled the administrative action, granting all of Perez's requested equitable relief
 - Perez then filed a federal lawsuit seeking compensatory damages (money) under the Americans with Disabilities Act (ADA)

Statute in Dispute – Section 1415(I) of the IDEA

- “Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under. . . [the ADA], except that before the filing of a civil action under such laws seeking relief that is also available under” the IDEA, the administrative procedures under the IDEA must first be exhausted

Perez v. Sturgis Public Schools – Arguments

- **The District:** Under Section 1415(l) of the IDEA, a plaintiff must exhaust administrative remedies before bringing a suit in court that seeks relief for the same “underlying harm” that IDEA addresses
- **Perez:** IDEA’s requirement that a plaintiff first exhaust administrative remedies applies only if pursuing a remedy that IDEA also offers

The Court Sides with Perez

- ***Holding***: Perez's federal claim may move forward because it seeks relief (i.e. monetary damages) that are not an available remedy under the IDEA

Perez v. Sturgis Public Schools – Consequences

- **Opens up potential liability for schools**
 - Holding applies to all states – not just Michigan
 - Could encourage parents to file claims for monetary damages in special education disputes
 - May increase efforts from families to include money damages as part of settlements for IDEA disputes

Recent Bank Failures and the Basics of FDIC Insurance



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Your Questions



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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
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