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Supreme Court Rules Six Year Statute of Limitations Applies to More ERISA Lawsuits

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On February 26, 2020, the United States Supreme Court issued a decision in the closely watched *Intel Corp. Investment Policy Committee et al. v. Sulyma* case, making it more difficult for employers to seek early dismissal of class actions brought by participants in their retirement plans by narrowing the circumstances where a shorter three-year statute of limitations will apply instead of the standard six-year period. The decision may add further momentum to the ongoing wave of fiduciary breach class actions that have already resulted in hundreds of millions of dollars in settlements from plan sponsors. The decision is also noteworthy because it will allow the lower courts to assess the underlying question of whether Intel acted prudently when it decided to include alternative investments (such as hedge funds and private equity funds) in its plans.

The Court unanimously held disclosures provided to retirement plan participants are not enough to establish "actual knowledge," triggering the three-year statute of limitations, unless defendants can also show that plaintiffs actually received and read the disclosures.

Under Section 1113(2) of the Employee Retirement Income Security Act of 1974 (ERISA), plaintiffs alleging a fiduciary breach by their retirement plan sponsor have six years to bring a claim unless the defendant can demonstrate that the plaintiff had "actual knowledge" of the breach or violation, in which case that time is cut in half to three years.

In *Intel*, the plaintiff, a former employee at Intel, sued the administrators of Intel's retirement plans, alleging that they had breached their fiduciary duties by over investing in certain alternative assets (such as hedge funds and private equity) that underperformed other options on a fee-adjusted basis. Intel countered that, because Sulyma had received plan disclosures more than three years prior to bringing the suit regarding the plan's investments, his action should have been barred under the shorter, three-year limitations period. However, Sulyma testified that he did not remember reading any of the disclosures, and had thus been unaware that his money was invested in the alternative assets that were underperforming. The District Court granted summary judgment to the defendants. But the Ninth Circuit reversed, reasoning that Sulyma's testimony created a factual dispute about when he gained "actual knowledge" of the investments at issue.

At the Supreme Court, Intel argued that workers possess "actual knowledge"—a term that is not defined in the statute—from the time they are given financial disclosure documents that contain the relevant information, whether or not they actually read those documents. The Court unanimously rejected Intel's argument and instead relied on a plain meaning interpretation of "actual knowledge," holding that, "to have 'actual knowledge' of a piece of information, one must in fact be aware of it." The Court reasoned that in contrast to other sections of ERISA that apply a constructive knowledge standard for the triggering of the limitations period (e.g., "the earliest date on which the plaintiff acquired or *should have acquired* actual knowledge"), Congress refrained from such terminology when drafting Section 1113(2). Accordingly, the Court held, Section 1113(2) requires more than mere disclosure alone.

The Court was careful to note that nothing in its decision should be read to foreclose any of the "usual ways" defendants might prove "actual knowledge," including through inferences and circumstantial evidence (such as electronic evidence that a plaintiff had accessed and downloaded disclosure documents). Moreover, the Court added, plaintiffs cannot avoid gaining "actual knowledge" through willful blindness, and whenever a plaintiff's denial of knowledge is "blatantly contradicted by the record," district courts need not accept that version of the facts when ruling on a motion for summary

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judgment. What constitutes willful blindness in this context, particularly where the plaintiff received disclosures but failed to read them, will likely be fertile grounds for future litigation. Employers and recordkeepers will need to make decisions about how they will document that plan participants have reviewed disclosure, including whether to require some action to acknowledge the disclosure was read and understood.

Now that the Supreme Court has rendered its decision in *Intel*, the case will proceed on the merits in the District Court. The case will be important for employers to continue to watch, because the underlying question of whether a retirement plan sponsor can be held liable for breach of fiduciary duty for including alternative investment strategies like hedge funds or private equity funds in a plan's investment menu may now be litigated for the first time. Moreover, the *Intel* decision may usher in a new wave of class action suits in jurisdictions that had previously followed a more sponsor-friendly concept of "actual knowledge," particularly in the Second, Third, Fifth, Seventh and Eleventh Circuits.

If you would like to discuss the impact that the Supreme Court's decision in this case may have on any aspect of your business, or if you have other questions about 401(k) litigation risk mitigation, please reach out to Benefits/ERISA partner Josh Lichtenstein, litigation & enforcement partner Dan Ward or benefits principal David Kirchner.

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