

Participant Data: A Retirement Plan Asset?

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In recent retirement plan litigation, plaintiffs' counsel attempted to make the novel argument that retirement plan participant data is a plan asset that should be afforded the same protections of ERISA that apply to other plan assets, such as monetary assets. While the argument has not yet succeeded in the courts, some settlements have included terms involving restrictions as to the use of plan data.

THE ERISA AMBIGUITY

Is plan data considered a plan asset under ERISA? Let us review the ERISA definition:

"29 CFR § 2510.3-101 - Definition of "plan assets" - plan investments.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that -

- (i) The entity is an operating company, or*
- (ii) Equity participation in the entity by benefit plan investors is not significant.*

Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan."

While the definition of plan assets clearly applies to investments and securities, it makes no specific reference to participant data. Additionally, this section of ERISA in its entirety, which includes several examples, makes no mention of the word "data," or even the word "participant".

THE PLAINTIFFS' ARGUMENT

Despite the lack of plan data in the ERISA definition, the argument has been made to consider plan data a plan asset. In *Harmon et al. v. Shell Oil Co. et al.*, an excessive fee lawsuit, the plaintiffs, led by the law firm of Schlichter, Bogard & Denton, states that the "personal and intimate details of the financial affairs and life events of Plan participants" make up a data set that should be regarded as a plan asset.

The consideration of plan data as a plan asset centers around the general argument that using participant data for non-plan purposes is a breach of fiduciary duty, since a fiduciary must act in the best interest of participants and beneficiaries. Thus, using data for any non-plan purposes is counter to that.

Plaintiffs' attorneys have made a number of specific legal arguments, including one focused on the notion that the common law, which pre-dated ERISA, defined "assets." The plaintiffs state that while plan assets are not specifically mentioned in the common law (or in ERISA), the law can be translated to mean that participant data is a plan asset under ERISA.

While it is somewhat perplexing as to how a common law definition, that may or may not be related, could mean that the language in ERISA, which makes no mention of data or even participants, can be construed to include participant data as a plan asset, the argument was made. [A piece by the National Association of Plan Advisors \(NAPA\)](#) provides further details on this argument.

WHAT PLAN SPONSORS NEED TO KNOW

Retirement plan sponsors should gain an understanding of how their plan's recordkeeper may be using data from their plan, and work with them to control its usage. Recordkeepers should not have free reign, particularly if the data is being used to market services, such as life insurance, that may compete with the plan sponsor's own benefits.

However, prohibiting the use of participant data for all non-retirement plan purposes may not be ideal. For example, data obtained from the plan could be used to customize employee financial wellness/independence programs, that, while not directly retirement-related, may ultimately help employees improve their ability to save for retirement.

While it is unclear whether these arguments will succeed in court, arguments such as this depict why plan sponsors should pay careful attention to retirement plan litigation. In the interim, plan sponsors should work with

outside retirement plan counsel well-versed in this area to make determinations as to their current use of plan data.

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For more information on our services, please contact **Mike Volo**, Senior Partner, at **781.997.1426** or **mvolo@cammackretirement.com**.

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