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Court Grants Preliminary Approval to Settlement of Wal-Mart 401(k) Fee Lawsuit

On December 5, 2011, the United States District Court for the Western District of Missouri granted preliminary approval to a proposed settlement of the Wal-Mart 401(k) fee lawsuit (*Braden v. Wal-Mart Stores, Inc.*, 6:08-cv-03109-GAF (W.D. Mo.)). As discussed below, under the proposed settlement, the defendants will pay a total of \$13,500,000. The settlement also describes several potential changes to the plan's investment options, investment education programs, and participant disclosures.

Background

In March 2008, Jeremy Braden, a participant in the Wal-Mart Stores, Inc. 401(k) and Profit Sharing Plan ("Plan"), filed a class action lawsuit alleging that Wal-Mart and certain employees violated their fiduciary duties by selecting retail mutual funds as investment options, rather than lower-fee institutional class funds. He further alleged that the Wal-Mart defendants breached their duties by failing to disclose certain fund expense and revenue-sharing information.

In October 2008, the district court granted the defendants' motion to dismiss, finding that Braden failed to allege sufficient facts showing that the Plan's selection of investment options was flawed. Specifically, the court stated that the defendants could have chosen the allegedly more expensive funds "for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility."

On November 25, 2009, the Eighth Circuit Court of Appeals vacated the district court's decision and remanded the case to the district court. The Eighth Circuit ruled that, from the facts pled—*e.g.*, that defendants selected retail shares of mutual funds when the plan could have obtained less expensive institutional shares—it was reasonable to infer that the selection process was flawed. Further, the Eighth Circuit held that a plan fiduciary has a duty to disclose material information and that a reasonable trier of fact could find that the fund expense and revenue sharing information was material.

In July 2010, Braden filed an amended complaint that added Merrill Lynch, the Plan's recordkeeper and investment consultant, as a defendant. The plaintiff alleged that Merrill Lynch was a plan fiduciary by limiting available plan investment options and that Merrill Lynch breached its fiduciary duty by offering funds based on the amount of revenue sharing that would be received.

The Proposed Settlement

The proposed settlement is on behalf all participants who had Plan investments any time between July 1, 1997 to December 2, 2011. The settlement class also includes the beneficiaries, alternate payees, representatives and successors-in-interest of these participants.

Under the proposed settlement, the defendants will pay \$13,500,000. Of this total, Wal-Mart agreed to contribute \$3,500,000. Merrill Lynch agreed to contribute \$10,000,000 from amounts held within the Plan's forfeiture suspense account. The settlement amount initially will be reduced by (a) the cost of providing notice of the settlement to the class members, (b) attorneys' fees in an amount not to exceed 30% of the total settlement, plus costs and expenses, (c) a \$20,000 case contribution award to Braden, and (d) any associated taxes.

Because of the relatively small losses alleged to have been experienced by the individual Plan participants and the large number of participants, the parties agreed that it would be cost-prohibitive to distribute the remaining settlement proceeds to the class members. Instead, the settlement provides that the amount remaining after payment of (a)-(d) above will be used to reduce future Plan expenses and administrative fees that otherwise would be charged to individual Plan accounts.

The proposed settlement also provides for several forms of injunctive relief, which would require the Retirement Plan Committee for the Plan over the next two years to:

- continue to retain an investment consultant who has acknowledged ERISA fiduciary status in writing, and to review the consultant annually for conflicts of interest;
- continue to make available web-based investment education resources to Plan participants;
- continue an ongoing process to eliminate from the Plan investment options funds that are retail mutual funds, funds that pay 12b-1 fees, and funds that provide revenue sharing or similar fees to any party in interest, including the Plan's trustee or recordkeeper;
- consider adding more passively managed funds as investment options; and
- comply with the DOL's participant disclosure regulation and, in those materials, provide links to certain DOL and SEC websites on fees.

A fairness hearing is scheduled for March 7, 2012, during which the court will consider (a) whether the class may be certified for purposes of the settlement; (b) any objections to the settlement; (c) the proposed \$20,000 case contribution award to the plaintiff, and (c) whether the settlement otherwise is fair, reasonable, and adequate. The court also is expected to consider class counsel's application for an award of attorneys' fees and reimbursement of expenses. Following the fairness hearing, the court will decide whether to grant final approval to the settlement and dismissing the case with prejudice.

Observations

This is the fifth class settlement in a 401(k) fee lawsuit and the amount is in the range of the other settlements (\$13.7- \$18.5 million). The settlements in some of the other 401(k) fee cases similarly call for changes to the plan's investments and administrative practices. Such non-monetary relief also is a common feature in settlements of other types of other ERISA lawsuits, like company stock litigation.

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