LABOR AND EMPLOYMENT LAW UPDATE

IT'S STILL OPEN SEASON ON ERISA FIDUCIARIES AND THE HUNTERS HAVE A NEW WEAPON!

This firm's October 2007 Labor and Employment Law Update ("It's Open Season on ERISA Fiduciaries! Are you an Unsuspecting Target?") warned of the potential liability of an ERISA fiduciary, which includes personal liability for an individual fiduciary. On February 20, 2008, the U.S. Supreme Court in *LaRue v. DeWolff, Boberg & Associates* confirmed the breadth of this potential liability under defined contribution retirement plans, such as 401(k) plans, 403(b) plans, employee stock ownership plans (ESOPs) and profit sharing plans.

Under a defined contribution plan, an employee elects to defer and invest a part of his salary for retirement. The contribution amount is fixed, but the retirement benefit is not. The amount of a retirement benefit is influenced by such factors as employee income, administrative expenses and investment gains and losses.

The dominance of defined contribution plans as the retirement plan of choice for employers is undeniable. Today, 50 million U.S. workers have $2.7 trillion dollars invested in 401(k) plans alone.

CLASS-WIDE RELIEF: Historically, fiduciary liability suits by participants in defined contribution retirement plans generally sought only class-wide relief. Typical class actions included:

EMPLOYER STOCK DROP: After a drop in the value of an employer's stock, suit is brought by a class of participants in (1) an ESOP plan, or (2) a 401(k) plan which includes employer stock as an investment option.

FEES AND EXPENSES: A class of participants in a 401(k) plan sues a fiduciary for allegedly (1) failing to disclose fees and expenses associated with certain investment options, or (2) unreasonable administrative fees and expenses.

IMPRUDENT SELECTION: A class of plan participants in a 401(k) plan sues a fiduciary for allegedly not acting prudently when selecting investments, products and services for the plan.

INDIVIDUAL RELIEF: Recently, fiduciary liability suits have been filed by participants in defined contribution retirement plans seeking only individual relief. Typical individual actions include:

MISMANAGEMENT OF INDIVIDUAL ACCOUNT: A fiduciary is alleged to have impaired the participant's individual account by allegedly (1) failing to follow investment directions, or (2) offering imprudent investment options.

CLASS CLAIMS: Many of the claims which were previously made in suits seeking class-wide relief, such as stock drop and excessive fees, are now being made in individual suits.

NEW QUESTIONS: Fiduciary liability suits by participants in defined contribution plans seeking only individual relief created new questions for the courts, not the least of which was whether such suits could even be brought. Inconsistent answers to these questions brought them before the U.S. Supreme Court in *LaRue*, a suit by a former participant in a 401(k) plan who sought individual relief in the amount of $150,000 for the alleged mismanagement by a plan fiduciary of his individual account.

1. CAN A FIDUCIARY BE SUED FOR ALLEGED MISCONDUCT WHICH IMPAIRED THE VALUE OF A SINGLE PARTICIPANT'S INDIVIDUAL ACCOUNT?

Yes, but only to the extent the participant seeks to be made whole under the plan for losses resulting from the alleged fiduciary misconduct; other relief, such as consequential damages, is not recoverable. In reaching this conclusion, the Court rejected the argument, which had been accepted by the lower courts, that such liability would discourage employers from adopting defined contribution plans.

2. CAN A FIDUCIARY BE SUED BY A FORMER PLAN PARTICIPANT?

Yes. As long as the claim relates to benefits under a plan, the claim may be brought by a former participant who has cashed out his defined contribution plan.

3. IS A SUIT ALLEGING IMPAIRED VALUE OF PLAN ASSETS IN AN INDIVIDUAL ACCOUNT A BENEFITS CLAIM OR FIDUCIARY LIABILITY CLAIM?

The Court seemingly answered that such a suit is a fiduciary liability claim, but a concurring opinion by Justices Roberts and Kennedy left open the possibility that this question could be revisited by the Court. If the suit is a fiduciary liability claim, this means that (1) a participant generally need not exhaust plan remedies before filing suit, and (2) the fiduciary, not the plan, is personally responsible for the loss in the participant's individual account.

PRACTICAL IMPACT: The Supreme Court's confirmation that fiduciary liability suits can seek individual relief opens the door for suits:

* by law firms who are ill equipped to prosecute class actions;
* regarding smaller plans as to which a class action may not be feasible;
* by former plan participants, possibly in conjunction with other employment-related claims; and
* with respect to claims which may be unique to one, but not all, current plan participants.

MINIMIZATION OF LIABILITY: As set forth in the October 2007 Labor and Employment Law Update, education which dispels the myths and urban legends subscribed to by fiduciaries is the first step to minimizing the risks associated with ERISA fiduciary liability. Second and third steps can include procedural tools, such as written policies, regular meetings and oversight protocols, and risk management tools, such as indemnification agreements and ERISA fiduciary liability insurance.

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