

Supreme Court Ruling Allows Employees To Sue For 401(k) Losses



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In a February 20, 2008 decision, the Supreme Court ruled that employees can sue to recover losses, resulting from a fiduciary breach, to their individual 401(k) accounts. Prior to this decision, the prevailing legal opinion was that ERISA did not provide any remedy for plan participants to seek recourse for losses to their individual accounts. Virtually all ERISA attorneys agree that *LaRue vs. Dewolff, Boberg & Associates, Inc.* (No. 06-856) will lead to a spate of litigation by individual 401(k) participants against their employers.

What's Behind the News

The case was brought in 2004 by an employee, James LaRue, of a consulting firm that apparently administered its own 401(k) plan. Mr. LaRue lost \$150,000 in profits because his instructions to move his investment from one mutual fund to another were ignored.

While no one disputed that ERISA imposed fiduciary responsibilities on employers/sponsors of retirement plans, the language in this 1974 statute was very unclear as to whether the responsibility extended beyond the well being of the plan as a whole and also encompassed the mishandling of individual accounts.

The uncertainty was due primarily to a 1985 Supreme Court decision in which the Justices ruled against allowing lawsuits by individual participants in defined benefit plans. While the LaRue decision does not provide a distinct and separate remedy under ERISA for losses to individual accounts, Justice Stevens writes that ERISA "does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."

The door to individual litigation opens at a time when approximately 70 million individuals hold about \$3 trillion in 401(k) investments and the economy is in/entering a recession.

What's the Potential Impact?

In addition to the virtual certainty of increased litigation against them by individual plan participants, employers should also expect their Fiduciary Liability insurers to provide much greater underwriting scrutiny upon renewal. While insurers have not yet staked out definitive plans of action, we expect that they are likely to respond with some combination of the following: higher retentions (deductibles); higher premiums; lower limits; restricted coverage terms; more comprehensive questions about oversight and documentation; and, a more time consuming underwriting process. It would not surprise us if some insurers attempt to leverage their underwriting of Fiduciary Liability insurance with other Executive Risk policies which they deem to have a more predictable loss outlook.

William Gallagher Associates, a leading provider of insurance brokerage, risk management and employee benefits services to firms with complex risks, within industries that include high technology, life sciences, financial risks, healthcare services, energy, and environmental services. WGA has offices in Boston, MA; New York, NY; Hartford, CT; Princeton, NJ; Columbia, MD; Atlanta, GA; and Paris France.

What Steps Can You Take?

All of us need to stay informed as the litigation, and claim, impact of the LaRue decision evolves. For starters, companies should consider taking the following steps:

1. Every company that has a 401(k) plan should have a written "Investment Policy Statement" that documents the investment funds selection process, the annual investment review process, and the fiduciary due diligence process.

WGA has a generic 'Investment Policy Statement' for 401(k) clients. We can also assist companies in drafting their own statements. As part of the annual plan review, WGA conducts a Fiduciary Checklist audit which, among other line-items, includes:

- Plan Committee minutes of this meeting (e.g. date, time, who was in attendance, what was decided)
- Annual Fund Monitoring Exercise (due diligence)
- Investment Policy Statement (review)

2. Ensure that you have a third-party serving as a "Full Service" Administrator and Plan Fiduciary.

3. Pay attention to your Fiduciary Liability insurance and start the renewal process well ahead of the expiration date. Like Directors' & Officers' Liability Insurance, Fiduciary Liability is on a Claims-Made basis and requires bespoke coverage to meet your company's specific needs.

For more information regarding the 401(k) and/or Fiduciary Liability insurance implications of this new development as well as the services we can provide to you and your company, please contact your WGA Account Executive.

