ST. PAUL TRAVELERS BOND

The ERISA Fiduciary Rules:

Your Duties, Responsibilities and Liabilities

By Baker & McKenzie for St. Paul Travelers Bond

In 1974, the Employee Retirement Income Security Act (ERISA) was enacted. Fiduciaries of employee benefit plans assumed new responsibilities relating to the management and administration of those plans. Under ERISA, fiduciaries may be personally liable for breach of certain responsibilities or duties imposed on them under the law.

ERISA created a new and specialized field of law. The complex issues developed by ERISA left interpretation of the legislation to the courts. Moreover, since the passage of the original law, Congress has enacted several important amendments. As expertise in this field becomes more refined and complexities in business affect employee benefit plans, we are seeing an increasing number of complicated lawsuits, including class action suits against employer sponsors of ERISA plans. Interpretation of benefit provisions, prudence in investment decision, plan changes and terminations caused by acquisitions and mergers, and use of employee stock ownership plans to finance or protect against takeovers are just some of the many issues currently subject to interpretation by the courts.

St. Paul Travelers Bond was the first domestic company to introduce Fiduciary Liability Insurance in response to the enactment of ERISA and the potential personal liability created by that legislation. St. Paul Travelers Bond has been the leading marketer for this protection, meeting the needs of plan fiduciaries of large and small corporations, labor organizations, trade associations, labor-management groups and even certain unique risks, such as governmental organizations.

ERISA establishes fiduciary requirements and restrictions. Knowledge of your responsibilities and duties under ERISA is essential. As a service to you, St. Paul Travelers Bond has commissioned the law firm of Baker & McKenzie to prepare this booklet discussing ERISA's fiduciary standards. For details concerning the St. Paul Travelers Bond products available for these exposures, we encourage you to contact a St. Paul Travelers Bond agent or broker.

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As a trustee of an employee benefit plan, you are a fiduciary who owes certain stringent obligations to the participants and beneficiaries of the plan that placed its trust in you. Service as a trustee is a high calling and demands great vigilance. More than sixty years ago, the famous Judge Cardozo described the difference between acting as a fiduciary and acting as a business person. He said:

> ***"Many forms of conduct permissible in a workday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate… Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."***

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA")

In some ways, the Employee Retirement Income Security Act of 1974 ("ERISA")[1] codified the existing law of trusts described by Judge Cardozo, and, in other ways, dramatically expanded the duties, responsibilities and liabilities of fiduciaries of employee benefit plans. Congress has continually changed the laws that govern the administration of employee benefit plans. In today's litigious society, more and more lawsuits are being brought against plan fiduciaries for failure to comply with ERISA's constantly changing provisions. These lawsuits subject the plan's fiduciaries to the expense and inconvenience of unwanted legal proceedings, which often result in personal liability and loss of personal assets.

ERISA's complex system of laws and regulations is not easy to understand because, in part, it is still evolving. St. Paul Travelers Bond has had this booklet prepared in order to highlight some of ERISA's current provisions regarding the duties, responsibilities and liabilities of plan fiduciaries. This booklet is a general discussion of the responsibility of fiduciaries under the laws and regulations of ERISA. It is not an overall solution applicable to seemingly similar individual problems, since slight changes in the facts might require completely different advice. Neither is this booklet intended to provide legal advice and the reader is cautioned not to attempt to solve individual problems on the basis of the information presented here. The reader is urged to consult attorneys to resolve any individual problems.

YOUR DUTIES AND RESPONSIBILITIES

Because ERISA imposes various duties, responsibilities and liabilities on fiduciaries of employee benefit plans, two questions first need to be answered: (1) What types of employee benefit plans are governed by ERISA? and (2) Who is a fiduciary of such plans?

What types of employee benefit plans are governed by ERISA?

ERISA was enacted in response to a perceived abuse — namely, that companies and others who sponsored employee benefit plans for the nation's workers were not keeping their promises to provide retirement benefits to their employees. Accordingly, Congress defined the term "employee benefit plan" broadly in order to subject as many plans as possible to ERISA's provisions.

In general, the laws and regulations of ERISA apply to any plan, fund or program that has been established or maintained by an employer, a group of employers, or an employee organization for the purpose of providing benefits to participants and beneficiaries of the plan. In particular, ERISA applies to any fund, plan or program that provides retirement income to employees, results in a deferral of income until the employee's termination of employment or beyond, or provides medical or life insurance or similar benefits.[2] A plan need not be funded or be in writing to bring it within the scope of ERISA. Courts have interpreted informal compensation arrangements as constituting employee benefit plans subject to ERISA. For example, an employer's programs to provide sick pay, vacation pay or severance pay have all been held to be ERISA-covered plans.[3]

Who is a plan fiduciary and how does one become a fiduciary?

As stated above, Congress desired to protect the participants and beneficiaries of employee benefit plans. Accordingly, Congress sought to impose fiduciary duties on those people responsible for managing the plans and investing plan assets.

As a general rule, you are a fiduciary of an employee benefit plan if any one of the following applies to you:

(a) You (or the position that you hold) are specifically identified in the written documents of a plan as a named fiduciary; or

(b) You manage the plans or its assets; or

(c) You have discretionary responsibility for the plan's administration.[4]

Whether a particular person or entity is a plan fiduciary under ERISA is a question frequently litigated in lawsuits.

For example, a court held that a trustee of a plan, solely by virtue of his position, was a fiduciary, even if he had abdicated much of his authority and responsibilities.[5]

In another case, a different court found that an individual was a fiduciary of an employee benefit plan since he exercised control over and disposed of plan assets, even though it was unclear whether he was actually authorized to do so.[6]

Typically, the fiduciaries of a plan are its sponsoring employer (or employers), the plan trustees, the plan administrator, all members of the plan administrative committee (if any), the investment manager (if any), all members of the investment committee (if any), and anyone else who also has discretion or control over the plan or the management or investment of its assets.

For instance, in a recent decision, a parent corporation was held to be a fiduciary based upon the manner in which the parent financed the subsidiary that sponsored a plan. The parent corporation devised a payroll system for the subsidiary by which employee contributions, i.e., ERISA plan assets, were not immediately segregated into a trust account. Rather, the employee contributions were used to operate the subsidiary and the trust was funded with equivalent sums received from the parent corporation. The court held that the parent corporation therefore exercised authority or control respecting management or disposition of plan assets and therefore was a fiduciary.[7]

Individual corporate officers can also be considered fiduciaries even if the language of the plan documents attempts to limit fiduciary responsibility solely to the corporation. This occurred in one case where the plan documents specifically stated that all duties of the corporation as fiduciary would be carried out by its directors, officers, and employees acting on behalf of the company and not as individual fiduciaries. Nevertheless, the court held the officers personally liable as plan fiduciaries for engaging in a prohibited transaction because of the broad remedial purpose of ERISA, which defines "fiduciary" in terms of an individual's functional role rather than his actual title.[8]

On the other hand, the United States Supreme Court decided that a health maintenance organization ("HMO") and the doctors who owned it were not fiduciaries with respect to their determinations as to whether particular

patients were eligible for certain care or whether certain treatments were covered by the HMO.[9]

In another instance, a federal court held that a benefits consulting firm was not a fiduciary, nor acting as such, when its only role in the transfer of assets from an acquired company's 401(k) plan into that of the acquiring company was to send out notices of the impending transfer.[10] (After a three-Judge panel of the Fifth Circuit Court of Appeals issued its decision in this matter, the Court granted rehearing en banc. This matter could be decided differently upon rehearing by the full panel.)

In another notable decision, it was held that the seller of a company was no longer a fiduciary after the execution of the sale and transfer of responsibility for plan assets to the buyer, despite the argument that its negotiation of the manner in which the plan funds were transferred rendered it a fiduciary after the sale.[11]

With respect to a multiemployer plan providing benefits to union members who work for different employers, a different federal law – the Taft-Hartley Act – requires that the employers who fund the plan and the union whose members it serves be equally represented in the administration of the plan.[12] Nevertheless, individuals who are considered fiduciaries of multiemployer plans can extend beyond those who sit on this balanced board of trustees.

For example, one court held that a high-ranking union official was a fiduciary of a multiemployer plan because the union official exercised authority over the assets of an employee benefit plan due to the considerable influence that he wielded over the local unions and the manner in which such locals used their plan assets.[13]

In another case, a court found that a stockbroker was a fiduciary of an employee benefits plan despite the absence of any grant of authority to him. The broker exercised discretionary control over the plan's assets by engaging in unauthorized activity in the plan's investment account. This behavior was sufficient to establish his fiduciary status.[14]

Parties have frequently litigated the issue of when investment advisors may be considered fiduciaries. In one case, an investment advisor had authority to negotiate the terms of certain guaranteed investment contracts in which the plan intended to invest, held itself out as having special expertise with regard to that particular investment and was relied upon by the plan representatives to secure the best deal for the plan. The advisor was not a fiduciary, however, because the employer had the ability to reject the advisor's investment proposals and the advisor had no power whatsoever to consummate any particular transaction on behalf of the plan.

In another case, an employee of an investment manager who had no actual control or discretionary authority in connection with a plan encouraged another employee of the investment manager, who did have such authority (and who was therefore a fiduciary), to invest pension funds in allegedly worthless investments. The second did invest and subsequently lost a great deal of money. The first employee was not a fiduciary, however, despite having "actively encouraged" a fiduciary to invest in the allegedly worthless investments.

However, a party may not be a fiduciary where it acts as a volunteer or Good

Samaritan. In one such case, a third party administrator informed the employer that it would discontinue providing its administrative services if the employer did not remedy alleged underfunding of the company's 401(k) plan. The third party administrator was subsequently sued, along with the employer, for damages relating to the alleged underfunding. The court noted that the third party administrator exercised no actual control or discretionary authority over the plan and therefore it could not be deemed a fiduciary under ERISA, even though it had acted on behalf of the plan participants in warning the employer about the underfunding.[17]

HOW MUST A FIDUCIARY ACT?

As a fiduciary of an employee benefit plan, you must operate the plan in accordance with ERISA's various provisions as well as regulations promulgated by the Internal Revenue Service and the United States Department of Labor (the "Department"). These laws and regulations are designed to protect the interests of the participants and beneficiaries of the plan. Obviously, you can only become knowledgeable about the statute and the government's regulations by reading them, having them available for reference, or having regular access to a knowledgeable attorney or other specialist. The key fiduciary standards can be summarized as follows:

(1) You must be careful that all activities performed and transactions executed on behalf of the plan are made for the exclusive purpose of providing benefits to plan participants, defraying the reasonable expenses of administering the plan, and avoiding unnecessary costs.

(2) You are required to exercise the same care, skill, and diligence that a prudent person familiar with the administration of employee benefit plans would exercise in managing similar affairs.

(3) You must make sure that the plan investments do not expose the plan to the risk of large losses. Usually this will require that the investments be well diversified.

(4) Finally, you must act in a manner that is consistent with the legal documents of the plan. If, however, you find that the legal documents of your plan are inconsistent with ERISA, you must follow the course of conduct set forth in the statute.

Unless you are careful, you may violate one of the above standards and become personally liable for the resulting losses. In certain circumstances, you can also be held liable for the breach of duty by one of your co-fiduciaries.

Seven Deadly Sins

St. Paul Travelers Bond's experience has shown that the "Seven Deadly Sins" of a plan fiduciary are as follows:

(1) Failing to disclose required information or making misleading representations to participants or beneficiaries;

(2) Failing to meet statutory funding requirements applicable to an employee pension plan;

(3) Failing to monitor the work done for the plan by service providers;

(4) Failing to recognize a conflict of interest when making a decision concerning the plan;

(5) Making imprudent investment decisions;

(6) Engaging in prohibited transactions; and

(7) Failing to meet regulatory and filing requirements.

The majority of these claims are brought by current or former participants (or their beneficiaries). If a claim affects the rights of more than one participant or beneficiary of a plan, it may often proceed as a class action whereby all similarly situated participants or beneficiaries assert the claim. Other fiduciaries and the Secretary of Labor may also commence litigation alleging a breach of fiduciary duty.[18] One case has held that the plaintiff in any such action can still prevail even if the breach of fiduciary duty resulted in no actual loss to the plan.[19]

These fiduciary standards are discussed in more detail below.

Exclusive benefit rule

As a fiduciary of an employee benefit plan, you have a duty of undivided loyalty to the plan, its participants and their beneficiaries. In enacting this "exclusive benefit rule," Congress attempted to address its concern about the misuse and mismanagement of plan assets.[20] This rule is often applied to situations where a fiduciary's decision regarding a plan's assets is perceived as having been tainted by his/her loyalty to the corporate sponsor or to an individual in the corporation.

In a recent decision, a corporation that was also the fiduciary of the company pension plan used plan assets as collateral for a loan to help finance a takeover by the company. The court found that the management's use of plan funds in this manner was for a purpose which did not benefit the plan and thus violated the exclusive benefit rule.[21]

In another case, a court found that the trustees of an employee stock ownership plan (ESOP) violated the exclusive benefit rule when they decided not to vote the majority of the ESOP shares in order to retain the current management slate of the company. The trustees did not undertake any intensive or independent investigation of their options to ensure that they acted in the best interest of the plan beneficiaries.[22]

Another court held, however, that where there was no fight over control of the employer, the incumbent directors' mere act of voting an ESOP's stock in their favor, to perpetuate their own incumbency, did not constitute a breach of their duties as fiduciaries.[23]

Under the exclusive benefit rule, you must act in a manner that benefits only the participants and beneficiaries of an employee benefit plan, defrays the reasonable expenses of administering the plan and avoids unnecessary costs.

Recently, a court found that an insurance company, acting as a plan's consultant and claims administrator, violated the exclusive benefit rule. The insurance company's president convinced the plan trustees to purchase whole life and universal life insurance for each plan participant. The trustees were unaware that this resulted in higher commissions paid to the president than the purchase of group life insurance, which was required by the plan documents. The president was required, among other things, to refund all the excess commissions, which were deemed to be an unreasonable expense in administering the plan.[24]

A party such as a third party plan administrator, however, may be able to

protect itself from incurring liability as a fiduciary by inserting language into its agreement with the plan that it has no authority to act as a fiduciary, provided that it did not act contrary to that provision.[25]

In another recent case, trustees of a multiemployer pension plan accepted below market consideration for a loan that the plan had made to a corporation closely tied to the union. Some of the plan trustees were in fact members of the corporation and union hierarchies. The court found that the trustees engaged in self-dealing and violated the exclusive benefit rule. They had engaged in both sides of the loan transaction and failed to sue on the note because they did not want to sue the corporation, which was an alter ego of the union.[26]

Moreover, under this rule, the participants and beneficiaries must be benefited in the manner intended under the employee benefit plan. One court held that the beneficiaries of a multiemployer pension plan stated a valid claim that the plan's trustees violated the exclusive benefit rule when they failed to collect monies owed to the fund by a multiemployer group. The trustees did this in order to protect the financial viability of the employers and to increase the likelihood of collective bargaining peace. The court found that the trustees were acting for the employers' benefit, to the detriment of the fund.[27]

In another decision concerning the exclusive benefit rule, the court held that a fiduciary violated ERISA when it refused for two years to provide a long-term disability benefits application to an employee who left her employment because she suffered from carpal tunnel syndrome and repeatedly advised the employee verbally that she did not qualify for such benefits.[28]

If persons other than participants and beneficiaries benefited by your actions as plan fiduciaries, such benefits must be merely *incidental* to the greater benefits that such participants and beneficiaries receive. For example, when you choose an investment advisor for the plan, the investment advisor will benefit because of the potential commissions or fees that he will earn. However, you must be careful to consider a number of investment advisors and to select a well-qualified, competent investment advisor who will make prudent investments for the plan, its participants and beneficiaries.

"Self-dealing" transactions and other conflicts of interest

The exclusive benefit rule is most often breached when a plan fiduciary engages in "self-dealing" transactions or other conflicts of interest. Obviously, you cannot act with undivided loyalty to the plan if you are engaged in a transaction that benefits you personally. For example, you cannot deal with the plan assets for your own benefit or account, or act on both sides of a transaction.

One court found that an investment advisory firm had violated the exclusive benefit rule when it invested significant portions of a plan's assets in companies in which the principals of the investment advisory firm had substantial equity interests.[29]

In another case, a high-ranking official negotiated for dental coverage as part of the collective bargaining agreement and then persuaded the local unions to use the services of a particular group of dentists. Previously, the official had set up a

corporation for the purpose of soliciting business for that dental group on a commission basis. The court thus held that the official violated his fiduciary duties.[30]

A union pension fund's claim against the plan fiduciaries was upheld because an investment firm and the trustee of the fund, as co-fiduciaries, failed to disclose that the fund's financial consultant, an employee of the investment firm, was also the stepson of the trustee.[31]

A fiduciary must not accept "kickbacks." Even receipt of an otherwise legitimate finder's fee or commission from a party that deals with the plan may constitute a prohibited self-dealing transaction. In one case, an investment management firm entered into agreements with various companies to raise capital in exchange for fees or commissions. The investment firm then immediately invested plan assets in these companies, which assets were (as a general rule) the only source of capital for such firms. As the investment firm also received a management fee from the plan for managing the plan assets, the court held that the firm had breached its fiduciary duties.[32]

Absent any evidence that the amount of compensation paid to an investment advisor was unreasonable, a plan that agreed to compensate the advisor on a contingent basis according to the performance of certain investments did not violate ERISA.[33]

Given the business environment of today, Congress recognized a need to create certain exceptions to the fiduciary rules set forth in ERISA. Accordingly, it is not "self-dealing" for you to be both an employee or officer of the sponsoring company and a plan fiduciary.[34] Moreover, the plan is allowed to compensate you for the services you render as a fiduciary, but only if you are not a full-time employee who otherwise receives a salary from the company.[35]

For example, the chairman of the board of trustees of an employee benefit plan could not retain the $200 monthly stipend that he had been receiving from the plan, since he was also a full-time employee of the sponsoring employer and received wages from the employer.[36]

In determining whether a fiduciary receives full-time pay from a company, the focus is not on the hours devoted to the job, but on the amount of payment received. The aim is to prevent double payment.

Regardless of whether you are an employee of the company, the plan may reimburse you for the reasonable and necessary expenses that you properly incur as a plan fiduciary without such reimbursement constituting "self-dealing." But such expenses must be properly documented.[37]

For example, the former trustee of a pension plan was entitled to reimbursement of his costs, including reasonable attorneys' fees, arising from his providing information and testifying in litigation concerning certain loans made by the plan. He had previously been paid several times upon submission of detailed expense statements and the plan was required to pay him the remaining balance of the expenses he had incurred.[38]

It is worth noting that you may be both a plan fiduciary and a plan participant. In such a case, you are permitted to receive any plan distributions to which you are entitled, but only so long as such distributions are computed and paid on the same basis as for

all the other participants and beneficiaries in the plan. The trustees of one plan violated this requirement because they were automatically credited with 40 hours per week whereas individual participants were only credited with the actual number of hours they worked.[39]

One of the greatest sources of liability for plan fiduciaries involves conflicts of interest. The potential for personal liability is especially large if you are both a plan fiduciary and an executive or owner of the sponsoring company. In such cases, your loyalty to and financial interest in the sponsoring company may be perceived as influencing your decisions on behalf of the plan. Any decisions that you may make are potentially subject to criticism as being primarily for the benefit of persons or entities other than the plan or its participants and beneficiaries, especially if your decision (however reasonable when made) results in a loss of plan assets. If, for example, you are the fiduciary of a plan during a hostile takeover battle, the inherent conflicts of interest that you will face as an executive and plan fiduciary will be difficult to reconcile, especially if you are responsible as plan fiduciary to vote the shares of employer stock held by the plan.

In one ruling, a court held that the trustees of an employee benefit plan (who were also officers of the “target” corporation in a hostile takeover) violated their duty of impartiality to all plan beneficiaries by (1) announcing a commitment to defeat the tender offer; (2) giving only casual attention to the plan during the takeover battle; (3) relying on the advice of their in-house counsel, who was intimately involved in the takeover battle, rather than on the guidance of an independent counsel; (4) failing to consider the possible effects that the takeover would have on the plan; and (5) rejecting the tender offer without having a sufficient financial or other justification.[40]

Another potential conflict of interest occurs when you are a shareholder of a family-owned corporation as well as a trustee of the corporation’s retirement plan, and you use the assets of the corporation’s retirement plan to advance the family’s interest in retaining control of the company.

In some cases, plan fiduciaries have been found to have breached their fiduciary duty although their decision regarding plan assets resulted in a profit to the plan. As an example, the fiduciaries of an employee benefit plan were held to have breached their fiduciary duties because they placed the plan assets at risk, at least in part, for their own personal gain (to aid in their own program of acquisitions), notwithstanding that the investment resulted in an extraordinary return of over 70 percent.[41]

On the other hand, an employer that encountered serious financial difficulty and, to keep the company afloat, applied money obtained from employee paycheck deductions, which should have been utilized to pay health insurance premiums, toward operating expenses did not breach its fiduciary duties. The court based its holding on the facts that all insurance premiums were subsequently paid in full by the employer, all employee health coverage was reinstated retroactively and there was no evidence that the employer acted with fraudulent intent, bad purpose or evil motive.[42]

In the above circumstances, challenges to your fiduciary conduct are extremely likely.

When faced with such situations, you should consult legal counsel and you may be required to appoint a truly independent fiduciary to make such decisions.

Prohibited transactions

ERISA sets forth certain prohibited transactions between the plan and a "party-in-interest."[43] If you engage in such transactions, or permit the plan to engage in such transactions, you could be held personally liable. A "party-in-interest" includes anyone who is a fiduciary or who qualifies as one of the following: (1) persons who provide services to the plan; (2) an employer whose employees are covered by the plan; (3) a union whose members are covered by the plan; and (4) certain direct and indirect owners, officers or partners of the above.[44] Unless the transaction is otherwise exempt under Section 408 of ERISA, you must not allow the sale, exchange or lease of any property between an employee benefit plan and a party-in-interest.

For example, one court held that the lease of property storage space between a partnership comprised of two of the trustees and an employee benefit plan was a prohibited transaction. The lease was merely an attempt by the trustees to transfer plan assets to their failing businesses.[46]

Moreover, as a general rule, you must not allow the lending of money or other extension of credit between the plan and a party-in-interest. There is, however, an important exemption to this prohibition. Under this exemption, a plan may loan plan assets to its participants, but only if the loan complies with certain very narrow requirements pertaining to the amount of the loan, the interest rate to be charged and the security retained by the plan.[47] Such loans to participants are prohibited when the plan documents do not permit them; ERISA allows for loans to participants, but only if loan provisions are set forth in the plan.[48]

Generally, ERISA bars an employer from contributing more than 10 percent of its total defined benefit assets in its own company's securities and/or real property.[49] Exemptions may sometimes be found, however. For example, however, in response to the severe underfunding of a company's pension plan, the Department of Labor in 1995 granted the company a "prohibited transaction exemption." The exemption allowed the company to contribute more than $6 billion of its Class E stock to its pension plan. The contributed stock constituted approximately 21 percent of the plan's total assets. The Department concluded that the stock contribution was consistent with ERISA's fiduciary requirements to act in the best interest of the participants and beneficiaries because it significantly reduced the plan's unfunded liabilities, had several protections built in (such as strict transfer rights), and because the reduction of underfunding would help avoid any further reduction in the company's credit rating, which would have been detrimental to plan participants and beneficiaries.[50]

Prudent person standard

As a plan fiduciary, you must always act with the same care, skill, prudence and diligence that a prudent businessperson familiar with such matters would exercise in managing similar affairs.[51] This rule, commonly referred to as the "prudent person rule," means that your actions will be compared against those of a hypothetical prudent person. For example, if you are responsible for investing the assets of

the plan, you must exercise the same care, skill, prudence and diligence that a prudent businessperson would exercise in making a plan investment. Investment decisions are often the basis for suits alleging violation of the prudent person standard.

For example, a court found that trustees of a pension fund acted imprudently in respect to a real estate purchase when they (1) failed to obtain any valuation or appraisal, (2) failed to participate in any negotiations of the purchase price (which turned out to be grossly inflated) and (3) failed to ascertain that the seller of the building had received a loan from the pension plan for the purchase of the same building ten months earlier.[52]

On the other hand, a loss to plan assets based upon an imprudent investment does not always result in liability. In a recent decision, a court held that because a plan had a $683 million surplus, the loss of a $20 million investment caused by the bankruptcy of a hedge fund company did not allow the plan participants to sue the fiduciaries under ERISA.[53]

In a recent case, former trustees of a union retirement plan adopted an automatic cost of living adjustment that increased the plan's payouts so greatly that the plan would soon terminate for failure to meet minimum statutory funding requirements. The trustees had relied on the recommendation of the plan's actuary. The court found that the trustees breached the prudent person rule by not properly assuring themselves that the actuary was competent and that the actuary had based his recommendations upon accurate and current information.[54]

If you are responsible for selecting other plan consultants, trustees, advisors or fiduciaries, you will be held to the same standard of prudence in making that selection. For instance, you must avoid selecting friends, acquaintances or colleagues solely on the basis of their relationship to you.

For example, a trustee violated this prudent person rule although he had known the investment manager for approximately three years and had questioned him as to his firm's investment philosophy. The trustee failed to consider various factors that a prudent selection of an investment manager requires, such as (1) evaluating a person's qualifications (experience, education, registration, business reputation, client references); (2) ascertaining the reasonableness of fees; (3) reviewing documents reflecting the relationship to be entered into; and (4) ensuring that adequate, periodic accounting would be forthcoming in the future.[55] Moreover, you must not select an investment advisor merely because he or she can give back related or unrelated work, or can steer business opportunities back to you or the sponsoring company.

A fiduciary must adhere to the prudent person standard not only in selecting plan consultants, but also in assisting those consultants and providing all relevant available information. In a recent decision, fiduciaries that retained an independent appraiser to determine the fair market value of certain securities that an employee stock option plan proposed to purchase violated the prudent person standard because they failed to provide the appraiser with all information relevant to his appraisal. Rather than requesting the appraiser to determine the value of the holding company shares that the plan proposed to purchase, the fiduciaries requested a determination of the value of the holding company's subsidiary (which was the

holding company's principal asset). Without the appraiser's assistance, the fiduciaries then utilized the figure provided by the appraiser to assign a value to the shares of the holding company. The court held that this was an inappropriate method to determine the price that the plan should pay for the shares.[56]

If a fiduciary exercises all due care in selecting an outside professional, it may be able to insulate itself from liability even where the professional engages in criminal activity. In one case, an investment manager hired an "introducing broker" (a broker who acts as an intermediary between the plan and the "executing broker" who executes trades on the plan's behalf) who was found to have paid kickbacks to one of the plan's trustees. Noting that the kickbacks did not diminish the return on the plan's investments, the court held that the trustees had no remedy against the investment manager for breach of its fiduciary duties. The court found that the investment manager could have "hired a choir of heavenly angels" as its introducing brokers and the plan would not have received a better deal from its executing broker.[57]

Diversification

As a plan fiduciary, you must make sure that the plan investments minimize the risk of large losses. Normally this will mean that the investments are properly diversified. In other words, you should not invest all (or substantially all) of the plan assets in relatively few securities or other investments, unless the assets underlying those investments themselves are adequately diversified. Moreover, you should not invest all (or substantially all) of the plan assets in a type of investment that would unreasonably increase the risk of a large loss to the plan, such as the securities of one particular industry, or the securities of industries or real property located in one geographical region.

For example, in one case, a court held that investing 85 percent of the plan assets in real estate mortgages in a single geographical location violated the diversification rule.[58]

In another ruling, a court held that investing 70 percent of plan assets in 30-year U.S. treasury bonds violated the diversification rule because the trustee did not adequately investigate the fund's cash flow requirements and subjected it to potentially large losses.[59]

Similarly, an investment advisor violated the diversification rule by investing 30 percent of a plan's assets in "inverse floaters," an investment whose return is inversely related to prevailing market rates on residential real estate mortgages, in a fund whose plan dictated only "conservative" investments.[60]

But a plan fiduciary cannot always escape liability by diversifying the plan's assets. Section 404(a)(1)(C) of ERISA makes this clear when it states that a fiduciary must diversify the investments so as to minimize the risk of large losses, "unless under the circumstances it is clearly prudent not to do so." Consider the following examples where courts determined that non-diversification was prudent.

In one situation, a court found that it was not imprudent for the successor trustees to refrain from diversifying the investments of an employee benefit plan. The original trustees of a trade union's plan had loaned over 95 percent of the plan's assets to a corporation that had been formed to construct the headquarters of the union, which the court found to have constituted a violation of those trustees' fiduciary duties. The court, however,

found that the plan would have suffered greater losses had the successor trustees divested the plan of the loan as opposed to persuading the corporation to make such payments as were possible.[61]

Similarly, investment of nearly 80 percent of plan assets in residential real estate mortgages, most secured by properties in a single county, was likewise found to be prudent. The trustee did not breach his fiduciary duty because the court found that the loan-to-value ratios were low, the loans were five-year balloon mortgages, the payment histories of the borrowers were good, the trustee had knowledge of the local market, and the return on the investments was substantial. This provided convincing evidence to the court that the plan did not face the risk of large losses due to non-diversification.[62]

A fiduciary must conduct its own independent investigation; simply establishing that numerous other investors have invested in a particular instrument or with a particular investment advisor may not, by itself, demonstrate that it acted prudently. One court held that the "mere" fact that 90 other "sophisticated" investors chose to invest with a particular advisor, without more, was unpersuasive in support of the employer's argument that it acted as a prudent fiduciary.[63]

A fiduciary's duty to diversify plan investments is not measured by hard and fast rules or formulas. Congress has stated that the degree of investment concentration that would violate the diversification requirement cannot be stated as a certain specific percentage, because a prudent fiduciary must consider the facts and circumstances of each case. The factors to be considered include: (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds, or shares of stock or otherwise; (5) distribution as to geographical location; (6) distributions as to industries; and (7) the dates of maturity.[64]

For example, a recent decision held that the placement of over $1 billion in plan assets into 90-day treasury bills, to facilitate the transfer of those assets pursuant to the sale of the employer, did not violate the diversification requirement.[65]

These examples illustrate the critical focus to be whether the plan's investments will provide the financial resources necessary to carry out the plan's purposes without subjecting it to a potentially large loss. The latter danger typically occurs when those investments are highly concentrated in very few securities or properties. However, there are exceptions to this general rule. Do not simply rely upon the advice of the plan's investment advisor. You have a duty to investigate the basis for his opinions to make sure the plan's goals are furthered by the investment strategy employed.

Monitoring of outside professionals

Fiduciaries who do not have sufficient experience and familiarity with a particular matter must undertake a careful and impartial investigation in order to meet ERISA's prudence requirements. In conducting that investigation, fiduciaries may retain independent, outside experts when appropriate. However, the fiduciaries will be found liable if they do not properly monitor the expert's work.

In a recent case, trustees of a plan accepted the plan actuary's recommendations to

change the formula for the plan's cost of living adjustment without investigating the actuarial assumptions he made, resulting in a significant loss to the plan. The court found the trustees liable for failing to properly monitor the actuary's work.[66]

Another case reaffirmed the principle that even when a fiduciary properly delegates some of his duties to another party, he retains an obligation to monitor and oversee the activities of his delegate. In that case, the plaintiff properly stated a claim for breach of fiduciary duty for the failure of the health plan trustees to actively monitor the activities of an insurance claims agent, who later became the plan administrator, regarding timely payment of insurance premiums and using plan funds for his own benefit.[67]

This concept is consistent with Section 405 of ERISA, which provides that a fiduciary can be held liable for the acts or omissions of his delegate if he has knowledge of a breach of fiduciary duty by the latter. A fiduciary must always be prepared to reassume a delegated fiduciary duty when it becomes apparent that the party responsible for performing the duty has breached its obligation. In another case, a court held that the trustees of an employee stock ownership plan violated their duties to the plan when they rarely or never met with the appraiser that they had retained to establish the value of certain securities that the plan proposed to purchase and had no idea how the plan established the price that it ultimately paid for the shares.[68]

You must also exercise care when delegating the authority to vote proxies for shares owned by the plan. In 1994, the Department issued an interpretive bulletin[69] setting forth its position on the duties of employee benefit plan trustees in this respect. The responsibility for voting proxies lies exclusively with the plan trustees except (1) where the trustee is subject to the direction of a named fiduciary, or (2) where a named fiduciary delegates the power to manage, acquire or dispose of the assets to one or more investment managers.

A breach of fiduciary duty would therefore result where an investment manager is assigned the authority to vote proxies of the plan-owned stock, but the named fiduciary or other third party tells him how to vote the proxies. If an investment management agreement indicates that the investment manager is not required to, but is not precluded from, voting proxies, the investment manager has the exclusive fiduciary responsibility for voting the proxies. The fiduciary who appoints an investment manager has a duty to periodically monitor his activities in managing plan assets, including decisions on proxy voting.

The Department's Bulletin also reiterated that fiduciaries must act prudently and not subordinate the interests of participants and beneficiaries to unrelated interests. Prudence requires a fiduciary to consider factors affecting the value of the plan's investment in proxy voting. In terms of proxy voting of shares of foreign corporations, the Department recognized that the cost of voting foreign shares could exceed any expected benefit, due to regulations and corporate practices in foreign countries. Thus, ERISA requires the plan fiduciary to weigh the costs and benefits of voting foreign securities and to decide whether voting is prudent and in the interests of the plan participants and beneficiaries.

Directed trustees

The recent ERISA litigation over decline in the value of employer stock offered as an investment option in defined contribution plans has called into question the role of the "directed trustee." While directed trustees have argued that ERISA allows them to follow the direction of the plan benefits committee, so long as such direction is not contrary to ERISA (*see* Section 403(a)(1)), and without independent evaluation of the legality and appropriateness of those directions, the *Enron* litigation brought this presumption into question. The district court in *Enron* held, in considering the directed trustee's imposition of a blackout period and in the context of a motion to dismiss, that a directed trustee is an ERISA fiduciary and has a duty to supervise and investigate the directions it receives from the plan's named fiduciary when the directed trustee "has some reason to know" that the directions may conflict with ERISA or the terms of the plan.[70] The court found that a directed trustee has a duty to stay informed as to the financial condition of the employer company in order to determine whether employer stock is a prudent investment.[71]

Similarly, in the WorldCom, Inc. ERISA litigation, the district court found in rulings on motions to dismiss that Merrill Lynch, a directed trustee, may be liable as an ERISA fiduciary to the extent that it is alleged to have followed instructions to invest employee funds in WorldCom stock when a prudent trustee would know that WorldCom's decision to continue to offer its own stock to its employees as an investment option was imprudent.[72]

While these decisions leave open the question as to how far the directed trustee's obligations may extend, and while these issues have yet to fully and finally be resolved at the appellate level, directed trustees should expect an increased incidence of claims, and should seek advice from legal counsel where appropriate.[73]

Communications to plan participants

Recent case law has evolved to impose on a plan administrator a fiduciary duty not to materially mislead plan participants regarding the availability of future plan benefits. ERISA is violated in these cases when employers breach their fiduciary duty to act "solely in the interests of the participants and beneficiaries."[74] (*See also* discussion herein in Section entitled, "Defined Contribution Plans and Company Stock" with regard to duties to disclose information.)

The U.S. Supreme Court has held that an employer breached its fiduciary duty to participants in a self-funded welfare benefit plan by knowingly and intentionally encouraging the participants to transfer their employment (and health coverage) to a newly formed subsidiary that the employer knew lacked the assets to fund the plan. The subsidiary ended up in receivership and the employees lost their benefits. The Court found that the affirmative act of making intentional representations at a meeting concerning the future of plan benefits constituted exercising discretionary authority respecting a plan's management or administration, and the employer was therefore deemed to have acted in a fiduciary capacity under ERISA.[75]

The issue of when a fiduciary is required to disclose benefit change information has been heavily litigated in recent years. In one decision, the court held that because the

employer allegedly assured plan beneficiaries that it had ruled out plan changes for the immediate future, when in fact it had not, it had breached its duty of loyalty. The misrepresentations by the employer induced employees to retire before enhanced benefits were offered.[76] At least one court announced that even where a fiduciary is giving "serious consideration" to benefit changes, it is under no obligation to advise participants of such consideration, unless a participant inquires about possible changes, or to provide updated information to participants, unless the fiduciaries previously volunteered to do so.[77] Another court held similarly that a fiduciary may not actively mislead employees about whether changes are being seriously considered, but absent such misrepresentation, a fiduciary may not be held liable for failing to disclose that changes to the plan are under "serious consideration."[78] The factors for determining when plan changes may be considered to have been under "serious consideration" include (1) whether there has been a specific proposal, (2) whether implementation of the proposal has been discussed and (3) whether the proposal has been considered by the relevant managers.[79]

Another court ruled that serious consideration of a change in plan benefits does not exist until (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. The court found that until these three factors are present, misrepresentations regarding whether there was serious consideration of a change in plan benefits cannot be material and thus cannot constitute a breach of fiduciary duty.[80]

The duty to communicate truthfully to plan participants also applies to a trustee's resignation. In one situation, a trustee of the employer's pension plan resigned and appointed the plan administrator as successor trustee, turning over the plan's assets to him. The successor trustee promptly converted these assets to his own use and dissipated them. In a suit filed by a plan participant, the court held that the trustee violated his fiduciary duties under ERISA by:

> (1) Transferring the plan funds to the successor knowing that the employer was failing financially, had not made plan contributions in two years and that the successor was neglecting his duties as plan administrator;
>
> (2) Resigning without notifying the plan beneficiaries that the employer was delinquent in its contributions; and
>
> (3) Failing to notify beneficiaries he had resigned and had transferred the plan assets.[81]

In a related vein, employers have grappled with the problem of defining when communications by them constitute investment advice triggering fiduciary responsibility and potential liability as plan sponsors to the plan participants. In particular, the proliferation of participant-directed individual account pension plans, or 401(k) plans, whereby employees are directing the investment of their plan assets, have raised fears among employers that assisting employees in investment education could constitute "investment advice" under ERISA and give rise to further fiduciary liability.

To assist plan sponsors and providers, the Department issued a bulletin to give guidance on these new concerns. The Department suggested that one would be giving

investment advice if it made recommendations on the advisability of investing, purchasing, or selling securities or other property.

Information not considered to be "investment advice" by the Department includes:

(1) Information relating to the benefits of plan participation, the benefits of increasing plan contributions, and terms and operation of the plan.

2) Information regarding general investment concepts such as diversification, tax deferral, and the relationship between risk and return.

(3) Information on the investment alternatives under the plan, including descriptions of investment objectives.

(4) Interactive materials such as software and worksheets that provide a plan participant with information to estimate future retirement income needs and assess the impact of different asset allocations on retirement income.[82]

Participants have some duty to exercise care and diligence in understanding their benefits. One court has held that a fiduciary did not breach its duties by failing to disclose the length of time permitted after a participant's termination to convert his group life insurance policy into an individual policy. The participant sold his rights under the group life insurance policy to a viatical settlement company. The settlement company failed to timely convert the policy and therefore was barred from obtaining the proceeds when the participant died. The settlement company alleged that the fiduciaries breached their duties by failing to provide adequate information as to the time allowed for conversion. The court rejected this claim, holding that the settlement company had received adequate information from the fiduciary, such that if the settlement company had exercised reasonable care and diligence, it would have known about the conversion deadline.[83]

The duty to properly disclose information to plan participants also extends to information about a participant's qualification, or disqualification, for plan benefits. For example, in a recent case, an employer breached its fiduciary duty to a participant by failing to disclose to him information about what would happen to his pension eligibility if he remained on long term disability for more than two years. After the participant had been receiving disability payments for two years, the employer terminated his employment. The effect of the termination was that the participant narrowly failed to reach a level of "continuous service" that would have entitled him to a larger pension. Nearly eight years after the employee became disabled, he qualified to begin receiving his pension. At that time, the employer advised him, for the first time, that he had been terminated six years earlier. Because he had not reached fifteen years of continuous service, as he thought he did, he qualified for a lesser pension than he would have otherwise. Because the employer failed to disclose this possible consequence to the employee at the time he stopped working and began receiving disability payments, the court held that the employer breached its duty to communicate to the employee.[84]

Adherence to the plan documents

Finally, as a plan fiduciary, you must act in a manner that is consistent with the legal

documents of the plan. Note, however, that if the legal documents of an employee benefit plan are inconsistent with ERISA in any way, the law's provisions control and must be followed. Where the trustees of a union pension fund raised benefit levels consistent with the plan's governing documents, they were still liable for breach of fiduciary duty because those benefit levels were not permitted under ERISA.[85]

FIDUCIARY LIABILITY FOR DIFFERENT INVESTMENT VEHICLES

Generally, ERISA holds fiduciaries who commit breaches of duty liable for resulting losses. Section 404(c) of ERISA provides a statutory exception to fiduciary liability for participant-directed investments. If a plan and the plan transaction in question satisfy §404(c) and the applicable regulations, fiduciaries are not liable for any loss or breach which results from a participant's exercise of control over the assets in his or her individual account. In recent litigation, plaintiffs have argued that the ERISA §404(c) defense does not apply when participants do not have sufficient information to exercise control over their investments.[86]

In another case, an employer invested plan assets in guaranteed investment contracts (GICs) issued by an insurer. A GIC is an agreement with an insurance company by which the purchaser of the GIC is entitled to the repayment of the purchase price plus a stated amount of interest at the maturity date specified in the GIC. A GIC is not a marketable commodity and cannot be redeemed prior to maturity except in limited circumstances or at substantial penalty as specified in the GIC. The GIC is guaranteed only by the insurance company.

In this particular case, the insurance company collapsed, resulting in pension plan losses to employees who had maintained individual pension accounts through the employer. The employees sued. The employer's position at trial was that even if it failed to satisfy ERISA's duties of prudence and diversification in the first instance by purchasing the GICs for the plan, the losses allegedly sustained in the case resulted from the control each plaintiff exercised in contributing his or her assets in GIC-dominated funds.

Rejecting the employer's Section 404(c) defense, the court found that it was a contested factual issue whether the plan participants exercised control of their assets. The court ruled that for the employer to prevail under Section 404(c), the plans it sponsored would have to provide information sufficient for participants to understand and assess:

(1) the control the plans permitted a participant to exercise and the financial consequences he or she assumed by exercising that control;

(2) the rights that ERISA provided to participants and the obligations that the Act imposed upon fiduciaries;

(3) the plans' terms and operating procedures;

(4) the alternative funds the plans offered;

(5) the investments in which each fund placed its assets;

(6) the financial condition and performance of the investments; and,

(7) developments which materially affected the financial status of the investments.

The court found that the employer did not satisfy this burden to show that this necessary information was provided to plan participants. It also determined that the evidence showed the participants were severely restricted in transferring out of the GIC funds, further negating the employer's contention that the participants had "control" over their assets.[87]

Insurer insolvency

As previously discussed, liability can attach when a fiduciary invests assets of the plan in insurance company products where the insurance company subsequently becomes insolvent. In the ERISA setting, there has been a fair amount of litigation alleging breaches of fiduciary duties where plan assets have been used to purchase GICs issued by insurance companies and the insurance companies go into liquidation. But the overall standards for judging the fiduciary's behavior are no different with this type of investment than any other.

For example, in one case, the court relied upon the prudent person standard to determine whether the trustees were liable for the plan's losses in such a situation. It noted that this was an objective test based upon the information available to the fiduciary at the time the investment was made and it was improper to assess liability based upon the ultimate result.[88]

However, a plan trustee will violate its fiduciary duties of prudence and diversification when it invests too large a portion of plan assets in an insurer's GICs and only a percentage of them are paid when the insurance company goes into receivership.[89]

Economically targeted investments

Economically targeted investments, or ETIs, are qualified plan asset investments that are made not only for the benefit of plan participants and beneficiaries but also to serve some broader economic interest, such as low income housing or other concerns of the local, regional, or national economies. The Department has issued guidelines encouraging pension fund managers to invest in ETIs.[90]

However, investment in ETIs, which have been described as a type of social investing, does not relieve a plan trustee of its ERISA fiduciary duties. One investing plan assets must do so for the exclusive benefit of plan participants. Therefore, a fiduciary's primary concerns should focus on return on investment and adequate diversification. When investing in ETIs, the fiduciary must demonstrate to plan participants and beneficiaries that social objectives were not considered ahead of their financial interests.[91]

Cash balance plans

Several recent lawsuits have involved cash balance pension plans, which are essentially defined benefit plans structured similarly to defined contribution plans: employer contributions are made to the plan but are segregated in hypothetical "virtual" accounts for each participant. The value of each participant's benefit is tracked separately, and returns to the virtual account are based, depending on how the plan is set up, either on a guaranteed rate of interest or on the performance of various investment options chosen by the participant.

Often, the lawsuits relating to cash balance plans do not involve allegations of breach of fiduciary duty. Instead, the plans themselves have been challenged as being age-discriminatory. In one much-publicized and important case, a federal district court held that the company's cash balance plan was age-discriminatory on its face, since the value of the company's pension contribution, when expressed in terms of the size of an annuity the individual account would represent at normal retirement age, was greater (because of the time value of money) for younger employees than for older ones.[92] (The case is now on appeal, and the result of this closely-watched appeal may have a significant impact on the future of cash balance plans.)

Other courts have disagreed with this conclusion. For instance, in a different case, the court found that cash balance plans are not inherently age-discriminatory, reasoning that, first, ERISA's age-discrimination provisions were intended to protect a worker's benefits after the worker reached normal retirement age, and further that the hypothetical value of an age-65 annuity was a misleading method of comparison. Instead, because cash balance plans are structured as individual accounts, the better measure of benefits is the year-to-year increase in individual accounts.[93] Fiduciaries of cash balance plans should be aware of this issue, as lawsuits such as these may become more frequent in the future.

ESOPs

An ESOP, or employee stock ownership plan, is an ERISA plan that invests primarily in "qualifying employer securities" which typically are shares of stock in the employer creating the plan. ERISA Section 407(d)(6)(a). ESOPs are meant to function as an employee retirement benefit plan and as a technique of corporate finance that encourages employee ownership. ESOPs are not designed to guarantee retirement benefits and they place employee retirement assets at a much greater risk than the typical diversified ERISA plan.

There are specific exemptions in ERISA that pertain to one's fiduciary duties regarding ESOPs. Section 404(a)(1)(c) exempts ESOP fiduciaries from ERISA's duties to diversify the investments of the plan. In interpreting this exception within the broader context of ERISA's mandates to fiduciaries to act to safeguard the interests of participants in employee benefit plans, a court recently ruled that an ESOP fiduciary who invests all plan assets in employer stock is entitled to a presumption that it acted consistently with ERISA. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by doing so. To show this, the plaintiff must prove that continuing to invest in the employer's securities deflated or substantially impaired the accomplishment of the purposes of the retirement plan. When there is a danger that this might occur, the fiduciary has an affirmative duty to impartially investigate other options for investing the plan's assets.[94]

Another court, however, recently suggested that this enhanced standard of prudence for fiduciaries supervising plans that offer investment in company stock is difficult to reconcile with ERISA's statutory language, which exempts ESOP trustees from the prudence requirement to the extent that it requires diversification.[95]

In another case, the fiduciaries of an ESOP failed to make an immediate distribution, under the terms of the plan, of plaintiffs'

ESOP shares after the sale of the division of the company to another corporation. The stock plunged from $50 per share to $10 per share in 18 months. The court found that the fiduciaries did not breach their fiduciary duties to diversify or liquidate the ESOP funds immediately after the sale of the division. The defendants were able to present evidence that the stock fluctuated significantly during the period in question and that several investment advisors recommended holding the stock. In light of the fiduciaries' evidence, the participants' allegations of imprudence in continuing to hold the stock were insufficient to rebut the presumption of reasonableness of the decisions by ESOP fiduciaries not to diversify the plan's investments. In order to prevail, plaintiffs would have had to show a causal link between (i) the fiduciaries' failure to investigate and evaluate the merits of their investment decision, and (ii) financial harm suffered by the plan.[96]

In another ruling, trustees of an ESOP, in response to various tender offers, voted the shares of the ESOP in proportion to how the ESOP participants voted their shares. Only 10 percent of the ESOP stock was owned by plan participants, however. These shares were "allocated shares." Ninety percent of the shares were owned by the ESOP as unallocated shares. The court held that allowing present participants of the ESOP to act as named fiduciaries of unallocated shares is contrary to ERISA. The court found it impossible to ensure that present participants would make decisions that are in the best interest of all participants who would benefit from the plan in the future. Therefore, the court found that the trustees of the ESOP had a duty to exercise independent judgment in voting the unallocated shares of the ESOP and could not rely on the instructions of the plan participants.[97]

You should be aware that prudent person rules do apply to ESOPs. For example, before purchasing or selling certain assets (such as stocks or other securities of a closely held corporation), a plan fiduciary may be required to obtain an independent appraisal regarding the fair market value of such assets.

In one case, an ESOP plan sold stock to a fiduciary of the ESOP based on a price determined by a valuator. The valuator had severely discounted the value of the stock, however. The court found that the fiduciaries had a duty to seek a second valuation because they had relied on an obviously flawed appraisal to set the purchase price. The fiduciaries had an obligation to question the valuator's methodology.[98]

The law continues to evolve on the manner in which the standard of prudence is to be applied to a fiduciary's decisions to invest in company stock in the ESOP context. The general trend, to the extent one can be discerned, is that a fiduciary is required to follow the terms of a plan regarding investment in company stock, since the fiduciary duty owed is to deliver the benefits due rather than to try to maximize benefits under the plan.[99] Only under unusual circumstances, such as the impending collapse of the company, might there be a heightened standard of prudence imposed on ESOP fiduciaries.[100]

Defined contribution plans and company stock

The recent focus on alleged corporate accounting improprieties has raised

heightened concerns for fiduciaries as to their obligations with regard to defined contribution or "individual account" ("401(k)") plans that that offer employer stock as an investment option.

As stock prices swing, as companies face bankruptcy, and as shareholders and participants face investment losses, the courts have seen not only a flurry of securities class actions suits brought by shareholders against directors and officers, but an explosion of "companion" ERISA class action suits alleging breach of fiduciary duty in conjunction with the employer stock option. Such cases present opportunities for the courts to further define the scope of fiduciary liability and the notion of who is a fiduciary. These suits blur the lines as to "who may recover what from whom" under the laws of ERISA, raising questions as to whether such suits may be brought by individual plaintiffs "on behalf of" the plan, and whether the plaintiffs may be entitled to money damages to replace investment losses or whether rights to recovery should be limited to equitable relief.[101]

Generally, these suits are brought by participants and beneficiaries who have selected the employer stock investment option and who have alleged that they have suffered losses tied to the sponsor's financial results.[102] Plaintiffs in such cases often allege that the plan fiduciaries did not provide adequate information upon which the participants could make their investment decisions by failing to disclose the adverse financial condition of the employer, and the resultant threat to the plan assets. Plaintiffs may further allege that the fiduciaries violated their duties of prudence by failing to remove employer stock as an option when faced with the declining financial condition of the company. In some cases, it is alleged that the fiduciaries affirmatively misrepresented the financial condition of the company by encouraging investment in the employer stock option, while being fully aware of the failing financial condition of the company, or, in cases involving the most serious allegations, by making false statements in securities filings which were referred to by reference in plan documents.

Although it is too early to predict the manner in which these issues will be resolved in the appellate courts, certain guiding principles seem to have emerged for fiduciaries of plans offering employer stock as an investment option. First, fiduciaries must be ever mindful of the duty to diversify. Plaintiffs have alleged that the duty to diversify plan investments is heightened due to the undiversified nature of employer stock funds. While Congress has not limited the level of participant investment in an employer stock option of a 401(k) as it has with regard to other types of plans, courts may scrutinize the fiduciaries' actions in diversification in the face of a decline in the financial status of an employer sponsor. For example, the district court in the highly-publicized Enron decision, at the pleading stage, read the terms of the Enron Savings Plan to impose a contractual duty to diversify on the plan's fiduciaries.[103]

In a similar vein, plaintiffs typically allege that fiduciaries failed to take action in light of the deteriorating financial health of the employer by failing to warn participants of the threat to the plan assets; failing to eliminate the employer stock fund as an investment option; and/or failing to liquidate the employer stock fund before a price decline. For example, plaintiffs may allege

that fiduciaries concealed information regarding the company's declining condition and actively misled participants to continue their investments in the employer stock option. In such cases, plaintiffs have often sued directors and officers in a fiduciary capacity, where such directors and officers were not named as plan fiduciaries, in an effort to argue that the information available to these defendants should have allowed them to conclude that a threat to the plan assets was present and that they owed a duty to disclose such information to participants and beneficiaries. Plaintiffs may allege that such fiduciaries were in a conflict of interest and that, if they could not fulfill their obligations to participants without violating securities laws precluding disclosure of certain information, they should have hired independent fiduciaries to address the employer stock fund issues.[104]

Again, such allegations raise far-reaching issues as to who is a fiduciary, as to when an officer or director acts in a fiduciary capacity or with discretionary authority, and as to where a director or officer's loyalties must lie. In the *Enron* action, the Department of Labor argued that insiders may avoid securities trading violations by refraining from trading but by disclosing adverse information, or by eliminating an employer stock option or match. In ruling on certain motions to dismiss, the district court found that the individual directors and officers who acted with respect to the plan on behalf of a corporate fiduciary were ERISA fiduciaries, and that these officers and directors could have acted consistently with regard to their duties under ERISA and the securities laws by either disclosing to participants and beneficiaries, earlier than Enron did, the non-public information causing Enron's collapse, or by causing the plan to stop investing in Enron stock.[106] Even when they do not sit on plan committees, directors and officers are often named in employer stock litigation if they appoint committee members, which, it is argued, entails a continuing duty to monitor.[107]

In addition, this wave of litigation has brought to the forefront allegations that plan structural problems, such as imposition of so-called "blackout" periods, have contributed to breaches of fiduciary duty. The structure of plan requirements for employer matching and other structural elements of a plan may also be attacked.

Fiduciaries must be aware of the rules imposed by the Sarbanes-Oxley Act and related regulations in this regard. The Department of Labor and the Securities Exchange Commission have published coordinated final regulations addressing notices and restrictions required in connection with blackout periods in individual account retirement plans, and plans maintained by both private and public companies may be affected.[108]

It is not possible to predict what effect the current flurry of ERISA fiduciary litigation will have on the scope of fiduciary liability. As always, the duties of prudence, loyalty and candor are at issue. Although plaintiffs may have filed these ERISA actions in an effort to avoid certain restrictions on the scope of shareholder securities litigation, the courts have thus far used such actions to define the evolving scope of fiduciary obligations in the wake of highly-publicized allegations of corporate malfeasance. The fiduciary must be keenly aware of the trends by the courts to expand fiduciary liability as it relates to plans providing employer stock as an investment option, and to anticipate such fiduciary claims whenever faced with significant stock

declines. A fiduciary would be well-served to study the lessons playing out in the early stages of this new wave of litigation.

DOWNSIZING AND ELIMINATION OF BENEFITS

The Supreme Court has addressed the issue of liability for termination of health care benefits in a case involving an employer who maintained a health benefit plan for its retirees. The employer later closed a plant and eliminated retirement medical benefits for all active and retired employees from that facility. The employer's governing plan documents reserved the right of the company to, at any time, or from "time to time," modify or amend any or all provisions of the plan. The Supreme Court found that this general reservation of rights clause to amend the plan was sufficient to satisfy ERISA's requirements. On remand, the lower court entered judgment in favor of the employer based on the plan's reservation of rights clause.[109]

To protect themselves from liability in these situations, employers should follow these guidelines: 1) an employer must ensure that all plan documents comply with ERISA's requirement that the plan specify a procedure for amendment and clearly specify who has the authority to amend the plan; 2) if the employer intends to amend, modify, or terminate the employees' benefits, it must amend the plan's documents formally, following the procedure set forth in those documents; and 3) the employer who amends or terminates a plan must also comply with all ERISA disclosure requirements, such as issuance of a revised Summary Plan Description under Section 104(b) of the statute. In this regard, health and welfare benefit plans are governed by the same ERISA requirements applicable to retirement plans. The governing health and welfare benefit plan documents should contain the same amendment and termination provisions found in the employer's retirement plan documents.

Plan termination

As discussed in the foregoing, the Supreme Court has held that employers cannot be sued solely for making the decision to amend or terminate a plan since they are not acting as fiduciaries when doing so.

An earlier lower court case is entirely consistent with this line of reasoning. Beneficiaries of a terminated pension plan, while conceding that their employer did not breach any fiduciary duties in deciding to terminate the plan, claimed that the plan sponsor acted imprudently and without due regard for the beneficiaries' interests in choosing annuity providers to pay the plan's remaining liabilities after termination. The court held that plaintiffs had properly stated a cause of action for violation of the duty of loyalty and care imposed upon plan fiduciaries by Section 404(a) of ERISA.[110]

Another subsequent decision reached the same result. The beneficiary of a union local's health and welfare fund was denied medical benefits when the fund was terminated without satisfying its outstanding obligations. The termination occurred when the fund, after experiencing substantial financial difficulties for several years, decided to merge into a larger fund which, while offering to provide health coverage prospectively for all members of the defunct fund, disclaimed any liability for claims in existence prior to the

merger. This included the claim of the plaintiff, who had previously submitted his claim for reimbursement for substantial medical expenses incurred in connection with a kidney transplant.

The court ruled that while the decision to terminate the fund did not involve any fiduciary duties under ERISA, plan trustees are subject to those duties in making post-termination implementation decisions. Plaintiff properly alleged a breach of the fiduciary duties of care and loyalty in the carrying out of the decision to terminate. Additionally, plaintiff asserted a valid claim for violation of the trustees' common law duty of impartiality, which requires all beneficiaries to be treated the same.[111]

Finally, if there is a surplus in the plan as of the date of termination, the disposition of that surplus depends upon how it arose. If it is not attributable to employee contributions, then the employees have no contractual or statutory right to receive it.[112] But if employee contributions did contribute to the creation of a surplus, the employer cannot use it solely for his own benefit.[113] Obviously, as with the other issues addressed here, plan trustees should seek advice of legal counsel when faced with questions concerning disposition of a plan surplus.

Early retirement

The Supreme Court has also ruled that a corporation does not breach its ERISA fiduciary duties by conditioning the payment of enhanced benefits for early retirement on employees' releases of employment-related claims against the employer. The Court rejected the plan participant's argument that requiring employees to sign releases of all employment-related claims is a prohibited transaction because the plan's surplus funds were diverted to purchase releases benefiting the corporation. The Court held that the payment of benefits pursuant to an amended plan, regardless of what the plan requires of employers in return for those benefits, does not constitute a prohibited transaction.[114]

Another recent case also held that the plan's trustees could be liable for breach of fiduciary duty when, in amending the company's pension plan, they violated a specific requirement contained elsewhere in ERISA. In this case, amendments were adopted which reduced or eliminated an employee's ability to participate in early retirement benefits. The court ruled that these were "accrued benefits" of retired employees which had vested so that they could not be reduced under Section 204(g) of ERISA, the so-called anti-cutback rule.[115]

An employee fired shortly before he was to become eligible for early retirement can bring a claim under Section 510 of ERISA, which forbids adverse action by an employer "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Early retirement benefits are protected by Section 510. If the employer did in fact fire the employee for the purpose of denying him these benefits, it would have violated ERISA.[116]

Managing plans with large numbers of retirees

In a recent case, a company issued new plan documents setting forth how it would administer its retirees' medical benefits in the future. The plan had been changed because of the growing costs and administrative needs of the medical plan as larger numbers of retirees

became eligible for the plan. The medical benefits plan had for some 25 years been relatively static. The new plan inserted a reservation of rights clause allowing the company to amend or terminate benefits. The company did eliminate one of their retirees' most significant benefits. The court ruled that the retirees stated a claim for breach of fiduciary duty against the employer because the company had not issued new summary plan descriptions (SPD) when it altered its plan. The retirees relied on old SPDs that did not have the same reservation of rights clause that would have notified the retirees of changes in the plan documents.[117]

Withdrawal from multiemployer pension plan

Under the Multiemployer Pension Plan Amendments Act passed by Congress in 1980 as an amendment to ERISA, when an employer withdraws from a multiemployer pension plan, it must pay its proportionate share of all unfunded vested employee benefits. The purpose of this is to compensate the plan for benefits it will have to pay out to that employer's employees to the extent their benefits had already vested at the time of withdrawal. Under Sections 4201-4225 of ERISA, when an employer withdraws, the plan's sponsor will calculate and assess the amount of the withdrawal liability under the formula specified in these sections of the statute.[118]

Contingent employees

As benefits and personnel "overhead" costs have risen and workforce needs have become variable, employers have increased their use of independent contractors and leased employees. Recent case law has addressed whether such "contingent" workers are entitled to ERISA benefits. Such litigation may arise when employees are terminated and transferred to employee leasing companies or independent contractor status ("payroll flipping"). Contingent worker plaintiffs typically bring action under ERISA Section 510, claiming that they were terminated to frustrate vesting or benefits eligibility, or that they are "common law" employees and that their exclusion from plan benefits is in violation of the plan and/or a breach of fiduciary duty. Such litigation may often be filed as class action litigation and may be expensive to defend.

It is important that plan drafters and administrators understand these potential liabilities when attempting to classify employees in a manner to limit plan coverage. For instance, in one case, an employer had executed agreements with certain workers that it treated as independent contractors, which agreements clearly indicated that the independent contractors were not eligible for benefits under the employer's ERISA and non-ERISA benefit plans. However, following an Internal Revenue Service inquiry, it was determined that the independent contractors were actually employees of the company within the meaning of the Internal Revenue Code.[119] The employees then sought to participate in the employer's benefit plans. The court determined that Internal Revenue Code and ERISA definitions for "employee" were both based on the common law definition, and therefore determined that the employees were eligible participants in the plans since the plans were expressly applicable with regard to "any common law employee… who is on the United States payroll" of the company. The court's decision on this issue was also later extended to apply to temporary

employees, where the temporary employees fit the common law definition of employee.[120] While not all courts have agreed that the reclassification of employees should negate an agreement indicating that employees are not entitled to benefits,[121] employers should remain aware of the possibility that employee reclassification may impact who is eligible under an ERISA plan. On the issue of whether an individual is an "employee," courts will examine a number of factors with the primary focus on whether the "employer" has the "right to control the manner and means by which the product is accomplished."[122]

However, even where an individual is classified as an employee, such a classification is not always determinative as to whether the employee will be entitled to benefits under an ERISA plan. Employers are not required to make their ERISA plans available to all common law employees, and the only limitation ERISA places on employers is that it forbids plans to "deny participation in an ERISA plan to an employee on the basis of age or length of service if he is at least twenty-one years of age and has completed one year of service."[123] Employers may therefore limit certain classifications of employees from receiving benefits. For this reason, those employers that use independent contractors, "leased" employees, or other classes of contingent employees that they intend to exclude from coverage under their benefit plans should include express restrictions in the plan language to indicate that such employees are not to be provided with benefits.[124] Employers should be specific in defining the classes of employees that they do not intend to be provided with benefits, and should not rely solely on definitions used by the Internal Revenue Service since reclassification of the employees might remove the employees from the scope of such definitions.[125] Employers should also consider including plan language to indicate that in the event that the workers' status changes so that they are reclassified as common law employees, no benefits will be provided retroactively to such reclassified employees.[126] At least one court has found that such a provision excluded benefits for a temporary employee who sought coverage by claiming that she was actually a common law employee of the company that used her services.[127] It may be worth noting that, if an employer misclassifies employees as independent contractors, the employer could be forced to correct the misclassification by making a contribution to the plan on behalf of the employees excluded from a defined contribution plan or to provide benefit accruals for the employees excluded from a defined benefit plan. This could arise as a result of an audit or if the employer identified the mistake and elected to self-correct.

Employers should consider drafting any waivers with regard to ERISA plan benefits to clearly indicate that benefits are waived in the event that workers are later determined to be common law employees. As with so many other issues that could potentially give rise to ERISA liability, it is important to retain legal counsel's advice in this regard.

THE SCOPE OF YOUR LIABILITY AS A PLAN FIDUCIARY

If you as a plan fiduciary breach any of the duties or responsibilities described above, or any of ERISA's other requirements regarding reporting and disclosure, you

may be held personally liable for any resulting loss to the plan. Section 409(a) of ERISA provides that a fiduciary who breaches any duty is liable (1) to make good to the plan any losses resulting from each such breach; (2) to restore to the plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary; and (3) for such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

In one example, after finding various breaches of fiduciary duty by the plan trustees in connection with a participant's purchase of the employer's stock, a court ruled that the participant was entitled to the amount he paid for stock plus a reasonable rate of return for alternative investments he could have made in the employee benefit plan. He was also awarded prejudgment interest and attorney's fees.[128]

In another case, a court awarded the plan restitution from the fiduciary for all losses it suffered, including prejudgment interest, reflecting the amount the fund would have realized had the fiduciary breaches not occurred.[129]

In addition, if you are found to have violated a fiduciary responsibility or duty, you may be subject to other equitable or remedial sanctions, such as removal as plan fiduciary and the imposition of civil penalties (discussed in the next section).

One court enjoined a plan accountant from ever serving as a fiduciary of any employee benefit plan covered by ERISA, or from ever acting as a service provider to any ERISA plan. The accountant had engaged in a series of complex financial transactions in which he had a personal interest, which ultimately led to the plan's demise.[130]

Another court permanently enjoined various individuals and their insurance companies from serving as fiduciaries or service providers to any ERISA plan because of their improper sale of insurance policies to a union fund, in violation of the plan documents, for the purpose of secretly obtaining increased sales commissions.[133]

Furthermore, if you engage in self-dealing or similar transactions, you may also be required to return to the plan any profits that you made with respect to such transactions.

One court ruled that a fiduciary violated the prohibition against self-dealing by indirectly accepting placement commissions. Even though the placement commissions were paid by a third party, the court required the fiduciary to disgorge to the plan all commissions that the fiduciary's corporation had received.[132]

With respect to retirement plans that are qualified plans under the Internal Revenue Code, if you as a plan fiduciary engage in a prohibited transaction, you could additionally be required to pay substantial excise taxes. A cumulative excise tax of 15 percent of the amount involved in the prohibited transaction will be levied on you as a party-in-interest for each year that the prohibited transaction is not undone or reversed. This excise tax may eventually become 100 percent of the amount involved if the prohibited transaction is not corrected.[133]

Civil penalties

Sections 502(i) and (l) of ERISA provide for the imposition of civil penalties for violations of fiduciary duties.

Under the former, where the fiduciary has engaged in a prohibited transaction as defined by Section 406 of the statute, the party-in-interest on the other side of the transaction can be assessed a penalty up to 5 percent of the amount of each transaction. If the transaction is not corrected within ninety (90) days after notification from the Department, the penalty can be as high as 100 percent of the amount of the transaction. The Department has discretion whether or not to assess this type of penalty.

Subsection 502(l) is different, because it mandates that civil penalties be assessed where the fiduciary has committed any breach of its duties to the plan participants or has knowingly participated in such a breach of any other person. The penalty equals 20 percent of the amount either (i) recovered in a settlement with the fiduciary or (ii) which a court orders the fiduciary (or other party) to pay to the plan or its participants.

However, the Department is given the authority to waive or reduce a penalty under 502(l) if it determines that the fiduciary (or other person) acted reasonably and in good faith, or the fiduciary (or other person) cannot reasonably be expected to restore all losses to the plan without severe financial hardship absent a waiver or reduction of the penalty.

Liabilities of co-fiduciaries

Not only can you be held personally liable for your own failure to comply with the fiduciary responsibility rules, but in some instances you can also be held personally liable for the failure of a co-fiduciary. Even if you carefully and prudently delegate a part of your responsibilities to another, you can be held liable for his failure (or breach) if:

(1) you knowingly participate in his breach or help to conceal it,

(2) because of your breach, another fiduciary also breaches his fiduciary duties, or

(3) you have knowledge of a breach of a co-fiduciary and fail to take reasonable steps, under the circumstances, to correct it.[134]

For example, a fiduciary of an ESOP, who was also a director of the employer, took no action to prevent the plan from purchasing stock from co-fiduciaries at greatly inflated prices. A court found that because he failed to take reasonable steps to remedy the breaches of his co-fiduciaries, he was jointly and severally liable to the pension plan.[135] In another case, a company director was found liable for his co-fiduciaries' violations of various sections of ERISA which had begun before he became a formal fiduciary. He knew the illegal conduct had been occurring before he was elected a director and failed to remedy the breaches after his election.[136]

Disputes between trustees

Section 502(a)(2) of ERISA authorizes a fiduciary to bring a civil action for appropriate relief against another fiduciary who has violated ERISA. In a recent case, current trustees of a retirement plan brought suit under Section 502(a)(2) and sought damages in the amount of $14 million to restore to the plan losses incurred in connection with the former trustees' imprudent recommendation of a plan amendment. The court found the current trustees' damage claim proper under ERISA.[137]

Required pension plan contributions

Section 302 of ERISA contains the minimum funding requirements which pension plans must meet so they can satisfy their payment obligations to plan participants. The plan documents may contain funding requirements above the statutory minimum, in which case they would govern. However, according to one recent case, if at any time the plan becomes overfunded, the employer need not continue making contributions, provided that the plan documents do not require otherwise.[138]

The failure to contribute the amount required by the plan documents is an ERISA violation. No matter how small the delinquency, Section 502 of ERISA provides that in any case where a judgment is entered for the plan to collect the unpaid contributions, the court is required to add interest on the award, liquidated damages (or additional interest, if greater), costs and attorneys' fees. In one situation where the employer was $11.00 short in its contributions, the court awarded audit fees of $1,449.90 plus another $6,158.25 for plaintiff's attorney's fees.[139]

Unlike the general rule discussed earlier regarding the liability of corporate officers for breach of fiduciary duty, the officers of an employer are not personally liable for delinquent fund payments solely because of their status as officers. A plan participant must prove all required elements of the legal doctrine known as piercing the corporate veil in order to create individual liability against corporate officers, shareholders and/or board members for plan contributions.[140]

Prohibition of exculpatory clauses

When Congress enacted ERISA, it considered it to be against public policy to allow a plan to contain a provision relieving a fiduciary from any liability or responsibility. Accordingly, such clauses or provisions are automatically void.[141]

Although Congress prohibited exculpatory clauses, you are not prohibited from purchasing insurance to cover any liability exposure for negligence. Either you can purchase liability insurance for your own account, or the plan can purchase insurance to cover all of its fiduciaries. If plan assets are used to purchase the insurance, the policy must permit recourse by the insurer against you as fiduciary in the case of your breach of duty. Further, the employer can purchase insurance to cover you. No recourse is required if you or the employer purchases the insurance.[142]

Fidelity bonds

To protect the participants and beneficiaries from dishonest fiduciaries, ERISA requires every plan to bond any fiduciary and all other persons who handle plan assets.[143]

The fidelity bonds are not intended to insure or indemnify a fiduciary for any claims of dishonesty made against him personally. You should independently determine the appropriate amount of this fidelity bond; the minimum amount required by ERISA generally is not sufficient to fully protect the plan against a dishonest fiduciary.

Liabilities of non-fiduciaries

The Supreme Court has held that ERISA does not authorize suits for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. In that case plan participants sued a non-fiduciary, the pension plan's actuary, who failed to change the plan's actuarial

assumptions to take into account early retirements, causing the plan to be funded inadequately and eventually to be terminated. The Supreme Court ruled that the actuary was not liable for losses that the benefit plan suffered as a result of the fiduciary's breach (the failure to properly fund the plan). But the Court did not specifically address whether non-fiduciaries could ever be sued for relief other than monetary damages for a plan's losses, such as restitution or an injunction.[144]

Many subsequent decisions have denied plan participants the right to bring any cause of action for non-fiduciaries' participation in a fiduciary breach, no matter what the remedy sought.[145] However, other cases have permitted the Secretary of Labor to sue non-fiduciaries for participation in transactions prohibited by Section 406(a) of ERISA.[146]

MINIMIZING YOUR EXPOSURE TO LITIGATION AND PERSONAL LIABILITY

There are certain practical steps that you can take to minimize your exposure to litigation and personal liability. First, we recommend that you become educated as to your duties, responsibilities and liabilities as a plan fiduciary. This booklet is only a start. You must also become intimately familiar with the written plan documents and with ERISA's laws and regulations.

Second, we recommend that you solicit the aid and advice of other (or former) plan fiduciaries and trustees, and competent actuaries, consultants or attorneys who are familiar with ERISA. It is important that you allow yourself sufficient time and staff support in order to properly administer the plan and to exercise independent judgment. Your other commitments may hinder your ability to give adequate or timely attention to the plan or may cloud your judgment because of conflicts of interest. If so, you should consider appointing independent fiduciaries.

Adhere to corporate governance principles. Be careful in appointing Boards and Committees and periodically monitor such appointments.

Where appropriate, we recommend that you attend seminars and other courses which discuss ERISA's framework, especially since the legal environment that governs employee benefit plans constantly changes. In addition, in light of current ERISA litigation, you may have a duty to exercise on behalf of participants rights they may possess under the securities laws, and you may need to understand the fundamentals of such laws, if applicable.

The Summary Plan Description is an important document and can be used to channel questions and to authorize a spokesperson for the plan. You should utilize the SPD in this fashion and ensure that it is accurate and updated. Make sure that participants' informational requests are addressed timely and accurately.

Be certain that you adhere to a prudent fiduciary process. It is important that any delegated duties be clearly set forth in writing and that any such duties be delegated to capable individuals. Moreover, we recommend that you periodically review this delegation of authority in order to determine whether it is still prudent to continue to delegate a portion of your responsibilities to such individual or entity, especially with respect to an investment manager.

With regard to disclosure of information, you must understand not only what types of disclosures are specifically required by the statute, but also what duties you might owe under ERISA to disclose information that no participant has requested and that might not be specifically required by ERISA, especially in light of the developing caselaw. Be aware that courts may read disclosure obligations into plan asset and investment issues. Make sure that any disclosures that are made are timely, and are accurate. This is true not only with respect to pension plans, but also with respect to welfare plans subject to ERISA. In fact, welfare plans are the source of most ERISA litigation concerning disclosure obligations.

With regard to the investment of plan assets, you should clearly define investment guidelines (including those related to company stock) and the respective discretionary authorities of the investment manager and the other plan fiduciaries. This delineation should be set forth in writing and acknowledged by each party. Be cognizant of the risks associated with fiduciaries with “insider knowledge” where company stock is concerned. You should understand that directed trustees may have a duty to independently evaluate your directives.

Understand that ERISA Section 404(c) may only provide limited protection, and only if a plan is designed and administered to meets its regulations.

You should be aware of the liabilities that may arise with regard to the termination and limitation of benefits, including severance, exit windows, and retiree benefit claims and understand the law regarding the manner in which contingent employees’ benefit determinations may be made.

Finally, as a plan fiduciary, you should carefully avoid all non-exempt prohibited transactions.

In making these decisions, of course, it is always recommended that you obtain competent, expert legal advice.

ABOUT THE AUTHORS

Baker & McKenzie is one of the world's largest law firms with more than 69 offices in 38 countries on six continents. With more than 3,200 attorneys, Baker & McKenzie is able to provide local, regional and international expertise at offices in major business and commercial centers around the world. Currently, Baker & McKenzie has the following offices:

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END NOTES

[1] 29 U.S.C. § 1001 et seq.

[2] See 29 U.S.C. §§ 1002(1) through 1002(6).

[3] Robinson v. Linomaz, 58 F.3d 365 (8th Cir. 1995); Franchise Tax Board v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982), vacated on other grounds, 463 U.S. 1 (1983); Shahid v. Ford Motor Co., 76 F.3d 1404 (6th Cir. 1996).

[4] 29 U.S.C. § 1002(21)(A). See also In re WorldCom Inc. ERISA Litigation, 263 F. Supp. 2d (S.D.N.Y. 2003), in which the court held that for a company officer or director to be considered a fiduciary, he or she must (i) have been appointed as a fiduciary for the fiduciary conduct at issue, or (ii) have exercised discretionary authority or control over the fiduciary conduct at issue.

[5] Reich v. Hosking, 20 E.B.C. 1090, No. 94-CV-10363, 1996 U.S. Dist. LEXIS 5975 (E.D. Mich. 1996).

[6] Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988).

[7] Bannistor v. Ullman, 287 F.3d 394 (5th Cir. 2002).

[8] Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1994).

[9] Pegram v. Herdrich, 530 U.S. 211 (2000).

[10] Milofsky v. American Airlines Inc., 404 F. 3d 338 (5th Cir. 2005), reh'g en banc granted and opinion vacated pending reh'g, No. 03-11087 (5th Cir. July 19, 2005).

[11] Flanigan v. General Electric Co., 242 F.3d 78 (2d Cir. 2001) (see note 65).

[12] 29 U.S.C. § 186.

[13] Brock v. Hendershott, 840 F.2d 339 (6th Cir. 1988).

[14] Olson v. E.F. Hutton & Co., Inc., 957 F.2d 622 (8th Cir. 1992); see also Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Associates, Inc., 237 F.3d 270 (3d Cir. 2001), where the court held that a third party administrator with no authority over plan funds was a fiduciary because it improperly began depositing a portion of plan contributions into its own account instead of into the designated trust.

[15] Capital Creation Co. v. Metropolitan Life Ins., No. 90-cv-1322, 1992 U.S. Dist. LEXIS 13295 (N.D. Ohio, Aug. 26, 1992).

[16] Blevins Screw Prods., Inc. v. Prudential Bache Securities, Inc., 835 F. Supp. 984 (E.D. Mich. 1993).

[17] CSA 401(k) Plan v. Pension Professionals, Inc., 195 F.3d 1135 (9th Cir. 1999).

[18] 29 U.S.C. § 1132(a).

[19] New York State Teamsters Council Health and Hospital Fund v. Estate of De Perna, 816 F. Supp. 138 (N.D.N.Y. 1993).

[20] 29 U.S.C. § 1104(a)(1)(A)(i).

[21] Kayes, 51 F.3d 1449 (see note 8).

[22] Newton v. Van Otterloo, 756 F. Supp. 1121 (N.D. Ind. 1991).

[23] Grindstaff v. Green, 133 F.3d 416 (6th Cir. 1998).

[24] Reich v. Lancaster, 55 F.3d 1034 (5th Cir. 1995).

[25] CSA 401(k) Plan, 195 F.3d 1135 (see note 17).

[26] Reich v. Compton, 57 F.3d 270 (3d Cir. 1995).

[27] Gruby v. Brady, 838 F. Supp. 820 (S.D.N.Y. 1993).

[28] Hamilton v. Allen-Bradley Co., 244 F.3d 819 (11th Cir. 2001).

[29] Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987).

[30] Brock, 840 F.2d 339 (see note 13).

[31] International Brotherhood of Painters and Allied Trade Union and Industry Pension Fund v. Duval, 925 F. Supp. 815 (D.D.C. 1996).

[32] Lowen, 829 F.2d 1209 (see note 29).

[33] Harley v. Minnesota Mining and Mfg. Co., 284 F.3d 901 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003).

[34] 29 U.S.C. § 1108(c)(3).

[35] 29 U.S.C. § 1108(c)(2).

[36] McLaughlin v. Rowley, 698 F. Supp. 1333 (N.D. Tex. 1988).

[37] 29 U.S.C. § 1108(c)(2).

[38] Duffey v. Central States, Southeast and Southwest Areas Pension Fund, 829 F.2d 627 (7th Cir. 1987).

[39] Donovan v. Dougherty, 550 F. Supp. 390 (S.D. Ala. 1982).

[40] Donovan v. Bierwirth, 538 F. Supp. 463 (E.D.N.Y. 1981), aff'd and modified, 680 F.2d 263 (2d Cir. 1982).

[41] Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984).

[42] Mira v. Nuclear Measurements Corp., 107 F.3d 466 (7th Cir. 1997).

[43] 29 U.S.C. § 1106(a).

[44] 29 U.S.C. § 1002(14).

[45] 29 U.S.C. § 1106(a)(1)(A).

[46] Pension Ben. Guar. Corp. v. Greene, 570 F. Supp. 1483 (W.D. Pa. 1983), aff'd without op., 727 F.2d 1100 (3rd Cir. 1984).

[47] 29 U.S.C. § 1108(b)(1).

[48] Hosking, 20 E.B.C. 1095 (see note 5).

[49] 29 U.S.C. § 1107(a).

[50] Prohibited Transaction Exemption No. 95-25, published at 60 Fed. Reg. 14005.

[51] 29 U.S.C. § 1104(a)(1)(B).

[52] U.S. v. Mason Tenders Dist. Counsel of Greater New York, 909 F. Supp. 882 (S.D.N.Y. 1995).

[53] Harley, 284 F.3d 901 (see notes 33 and 63).

[54] Scardelletti v. Bobo, 897 F. Supp. 913 (D. Md. 1995).

[55] Whitfield v. Cohen, 682 F. Supp. 188 (S.D.N.Y. 1988).

[56] Chao v. Hall Holding Co., Inc., 285 F.3d 415 (6th Cir. 2002), cert. denied, 537 U.S. 1168 (2003).

[57] Wsol v. Fiduciary Management Associates, Inc., 266 F.3d 654 (7th Cir. 2001).

[58] Brock v. Citizens Bank of Clovis, 841 F.2d 344 (10th Cir. 1988).

[59] GIW Ind., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729 (11th Cir. 1990).

[60] California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036 (9th Cir. 2001).

[61] Davidson v. Cook, 567 F. Supp. 225 (E.D. Va. 1983), aff'd, 734 F.2d 10 (4th Cir. 1984).

[62] Reich v. King, 867 F. Supp. 341 (D. Md. 1994); see also, Metzler v. Graham, 112 F.3d 207 (5th Cir. 1997) (investment of 63% of plan assets in real estate did not contravene diversification requirement where the property was appraised at substantially higher value than purchase price, since such an investment provided a hedge against inflation, the plan contained sufficient cash assets to satisfy anticipated needs for the next 20 years, and the average age of plan participant was only 37 years old).

[63] Harley, 284 F.3d 901 (see notes 33 and 53).

[64] Meinhardt v. Unisys Corp., 74 F.3d 420 (3d Cir. 1996).

[65] Flanigan, 242 F.3d 78 (see note 11).

[66] Scardelletti, 897 F. Supp. 913 (see note 54).

[67] Jackson v. Truck Drivers Union Local 42 Health and Welfare Fund, 933 F. Supp. 1124 (D. Mass. 1996).

[68] Hall Holding Co., 285 F.3d 415 (see note 55).

[69] Codified at 29 C.F.R. § 2509.94-2.

[70] In Re Enron Corporation Securities Derivative & ERISA Litigation ("Tittle v. Enron Corp."), 284 F. Supp. 2d 511 (S.D. Tex. 2003). It should be noted that, in the Enron action, there was a factual dispute as to whether Northern Trust was a directed trustee.

[71] Id.

[72] In Re WorldCom, Inc. ERISA Litigation, 263 F. Supp. 2d 745 (see note 4); see also, generally, Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004); LaLonde v. Textron, Inc., 270 F. Supp. 272 (D.R.I. 2003).

[73] See also Department of Labor Field Assistance Bulletin No. 2004-03 (December 17, 2004), "Fiduciary Responsibilities of Directed Trustees."

[74] 29 U.S.C. § 1104(a).

[75] Varity v. Howe, 516 U.S. 489 (1996).

[76] Ballone v. Eastman Kodak Co., 109 F.3d 117 (2d Cir. 1997).

[77] Bins v. Exxon, 220 F.3d 1042 (9th Cir. 2000). In Matthews v. Chevron Corp., 362 F. 3d 1172 (9th Cir. 2004), the court elaborated on what constitutes "serious consideration" of changes to a plan, holding that the lack of a specific proposal to implement changes under discussion meant that management's preparations were still in the preliminary stages of gathering information and evaluating options, and fell short of "serious consideration."

[78] Harrison v. UAW, 174 F. Supp. 2d 551 (E.D. Mich. 2001).

[79] Winkel v. Kennecott Holdings Corp., 25 E.B.C. 1911, Nos. 99-4114, 99-4124, 99-4150, 2001 U.S. App. LEXIS 402 (10th Cir. Jan. 10, 2001).

[80] Fischer v. Philadelphia Elec. Co., 96 F.3d 1533 (3d Cir. 1996).

[81] Ream v. Frey, 107 F.3d 147 (3d Cir. 1997).

[82] Interpretive Bulletin, 96-1, 61 Fed. Reg. 29585 (June 11, 1996).

[83] Neuma Inc. v. E.I. DuPont de Nemours and Co., 133 F. Supp. 2d 1082 (N.D. Ill. 2001).

[84] Harte v. Bethlehem Steel Corporation, 214 F.3d 446 (3d Cir. 2000).

[85] Gruby, 838 F. Supp. 820 (see note 27).

[86] Enron, 284 F. Supp. 2d 511 (see notes 70, 102, 103, 105).

[87] Meinhardt, 74 F.3d 420 (see note 64).

[88] Id.

[89] Bruner v. Boatmen's Trust Co., 918 F. Supp. 1347 (E.D. Mo. 1996).

[90] Interpretive Bulletin, 94-1, 59 Fed. Reg. 32606 (June 23, 1994).

[91] Id.

[92] Cooper v. IBM Personal Pension Plan, 274 F. Supp. 2d 1010 (S.D. Ill. 2003).

[93] Tootle v. Arinc Inc., 222 F.R.D. 88 (D. Md. 2004), citing Eaton v. Onan Corp., 117 F. Supp. 2d 812 (S.D. Ill. 2000).

[94] Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995). The DOL and IRS regulations permit a 401(k) plan to offer an employer stock fund and designate it as an ESOP under certain circumstances. See 29 CFR 2550.407(d)-6(a)(4); Treas. Reg. § 54.4975-11(a)(5). At least one court has ruled that the fiduciary of a 401(k) plan with an ESOP component can be entitled to the presumption of reasonableness with regard to any alleged failure to diversify. In re Duke Energy ERISA Litigation, 282 F. Supp. 2d 786 (W.D.N.C. 2003). However, the Third Circuit recently stated in dicta that the so-called "Moench presumption" is only available as a defense to an ESOP claim. In re Schering-Plough Corp. ERISA Litigation, No. 04-3073, 2005 U.S. App. LEXIS 17613 (3rd Cir. Aug. 19, 2005), amended by 2005 U.S. App. LEXIS 19826 (Sept. 15, 2005).

[95] Wright v. Oregon Metallurgical Corp., 222 F. Supp. 2d 1224 (D. Oregon 2002), aff'd, 360 F. 3d 1090 (9th Cir. 2004).

[96] Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995).

[97] Herman v. NationsBank Trust Co., 126 F.3d 1354 (11th Cir. 1997).

[98] Howard v. Shay, 100 F.3d 1484 (9th Cir. 1996).

[99] Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (see note 72).

[100] Steinman v. Hicks, 352 F. 3d 1101 (7th Cir. 2003) (summary judgment for fiduciaries affirmed; alleged failure to diversify); see also, generally, Akers v. Palmer, 71 F.3d 226 (6th Cir. 1995)

(summary judgment affirmed for defendants; alleged breach of fiduciary duty regarding funding of ESOP where shares purchased at discount and valued at fair market value in ESOP); Armstrong v. Amsted Industries, Inc., 2004 WL 1745774 (N.D. Ill. July 30, 2004) (defendant's motion for summary judgment granted; hostile takeover alleged to have affected repurchase obligations); Canale v. Yegen, 782 F. Supp. 963 (D.N.J. 1997) (defendants' motion for summary judgment granted in part, denied in part; allegations of fraud regarding insurance subsidiary owned by ESOP); Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) (reversal of judgment for defendants; ESOP purchased shares based on outdated valuation report); Eckelkamp v. Beste, 315 F.3d 863 (8th Cir. 2002) (summary judgment affirmed for defendants; executives allegedly received excessive compensation); Herman v. Mercantile Bank, N.A., 143 F.3d 419 (8th Cir. 1998) (judgment affirmed for defendant; ESOP sold stock to company executive then repurchased; company later files bankruptcy petition); Husvar v. Rapoport, 337 F.3d 603 (6th Cir. 2003) (judgment reversed and case remanded; executives alleged to have received excessive compensation); Kuper v. Quantum Chemical Corp., 838 F. Supp. 342 (S.D. Ohio 1993), aff'd, 66 F.3d 1447 (6th Cir. 1995) (summary judgment for defendants granted; alleged failure to divest due to spin-off); Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) (summary judgment in favor of defendants affirmed in part, reversed in part; alleged manipulation of share prices and dividends regarding purchase and sale of ESOP shares); Reich v. Valley National Bank of Arizona, 837 F. Supp. 1259 (S.D.N.Y. 1993) (Department of Labor's motion for summary judgment granted and defendants' motion denied; alleged failure to conduct independent investigation when using ESOP's leveraged buy-out); Thompson v. Avondale, 29 E.B.C. 2865, No. 99-3439, 2003 U.S. Dist. LEXIS 2318 (E.D. La. February 14, 2003) (judgment for defendants after trial; trustees allegedly lowered investment in company to eliminate potential union influence).

[101] See, e.g., In re Schering-Plough Corp. ERISA Litigation, No. 04-3073, 2005 U.S. App. LEXIS 19826 (Sept. 15, 2005) (see note 94) (401(k) participants have standing to assert claims for losses under 502(a)(2) of ERISA).

[102] While the matter of In Re Enron Corporation Securities Derivative & ERISA Litigation, 284 F. Supp. 511 (see notes 70, 86, 103) is discussed herein as an illustrative example, a number of district courts have now addressed alleged breach of fiduciary duty in administering 401(k) plans allowing or requiring investment in company stock. These decisions at the pleading stages provide some guidance as to how the courts may interpret the duties of prudence and candor in the "stock drop" context. Certain of these decisions also involved ESOP plans or components. See, generally, Crowley v. Corning, Inc., 234 F. Supp. 222 (W.D.N.Y. 2002), aff'd on motion to amend, No. 02-cv-6172, 2004 U.S. Dist. LEXIS 758 (W.D.N.Y. Jan. 14, 2004) (motion to dismiss granted; alleged false statements in SEC filings regarding expected earnings; In re Duke Energy ERISA Litigation, 282 F. Supp. 2d 786 (see note 94) (motion to dismiss granted; disclosure of round-trip trading; employer match was invested in ESOP but could be reinvested); In re Dynegy, Inc. ERISA Litigation, 309 F. Supp. 2d 861 (S.D. Tex. 2004) (motions to dismiss denied; restated financials and disclosure of round-trip trading; employer match was invested in company stock fund (only) for portion of class period; directors and officers sold company stock during lockdown period); In re Electronic Data Systems ERISA Litigation ("EDS"), 305 F. Supp. 2d 658 (E.D. Tex. 2004) (motions to dismiss denied; employer stock fund was ESOP in 401(k) plan; earnings warning); Hull v. Policy Management Systems Corp., No. 3:00-778-17, 2001 U.S. Dist. LEXIS 22343 (D.S.C. Feb. 9, 2001) (motions to dismiss granted; employer match controlled by plan committee; negative earnings disclosure); In re IKON Office Solutions, Inc. Securities Litigation ("Whetman"), 86 F. Supp. 481 2d (E.D. Penn. 2000) (motion to dismiss denied; alleged fraudulent disclosures); Kling v. Fidelity Management Trust Co., 270 F. Supp. 2d 121 (D. Mass. 2003) (motions to dismiss denied; alleged accounting improprieties; restated earnings and bankruptcy); LaLonde v. Textron, Inc., 270 F. Supp. 2d 272 (D.R.I. 2003), aff'd in part, rev'd in part, 369 F.3d 1 (1st Cir. 2004) (motion to dismiss granted; employer match and 50% of employee contributions went to ESOP) McKesson HBOC Inc. ERISA Litigation, 29 E.B.C. 1229, No. C00-20030, 2002 U.S. Dist. LEXIS 19473 (N.D. Cal. Sept. 30, 2002) (motion to dismiss granted; merger of plans followed by announcement of accounting improprieties and restatement of financials); Rankin v. Rots ("Kmart"), 278 F. Supp. 2d 853 (E.D. Mich. 2003) (motions to dismiss denied; employer matches into ESOP fund; bankruptcy); In re Williams Companies ERISA Litigation, 271 F. Supp. 2d 1328 (N.D. Okla. 2003); 31 E.B.C. 1870; 2003 U.S. Dist. LEXIS 25042 (N.D. Okla. Oct. 27, 2003) (motions to dismiss granted in part and denied in part; employer match in company stock; alleged failure to disclose spin-off; securities violations); In re WorldCom, Inc. ERISA Litigation, 263 F. Supp. 2d 745 (see note 4) (motions to dismiss granted in part and denied in part; restatement of financials and bankruptcy; company pled guilty to securities fraud); Wright v. Oregon Metallurgical Corp. (see note 94), (motion to dismiss granted; allegedly failure to diversify out of merged company's stock).

[103] In re Enron, 284 F. Supp. 2d 511 (see notes 70, 86, 100, 103, 105).

[104] Jepson v. Tyco Int'l Ltd., No. 1:02cv5947, S.D.N.Y. See also In re WorldCom Inc. ERISA Litigation, 263 F. Supp. 2d 745 (see note 4), where the court suggested that there may be an ERISA fiduciary duty in connection with the dissemination of company SEC filings as required by Department of Labor regulations where company stock is an investment option. A variation of this theory is set forth in In re Dynegy Inc. ERISA Litigation, 309 F. Supp. 2d (see note 102). Therein, a statement in a plan prospectus, encouraging participants considering the company stock fund to "carefully review" the company's SEC filings, was found to go beyond the formal requirement of dissemination (which did not involve fiduciary discretion), thus giving rise to a fiduciary obligation not to communicate information that materially misrepresented the company's financial condition.

[105] In re Enron, 284 F. Supp. 2d 511 (see note 70). Some courts have allowed such breach of loyalty claims to proceed beyond the motion to dismiss stage where allegations are made of adverse interests (see, e.g., In re Electronic Data Systems ERISA Litigation ("EDS"), 305 F. Supp. 2d 658 (see note 102); Cokenour v. Household International, Inc., 32 E.B.C. 1783; No. 02-C-7921, 2004 U.S. Dist. LEXIS 5286 (N.D. Ill. March 30, 2004); Mill v. Bellsouth Corp., 313 F. Supp. 2d 1361 (N.D. Ga. 2004)), while other courts have rejected such claims on the pleadings on the basis that ERISA allows fiduciaries to maintain interests adverse to the plan. In re Dynegy, Inc. ERISA Litigation, 309 F. Supp. 2d 861 (see note 102); In re WorldCom Inc. ERISA Litigation, 263 F. Supp. 2d 745 (see note 4).

[106] Id.; see also McKesson, 29 E.B.C. 1229 (see note 102); Hull, 2001 U.S. Dist. LEXIS 22343 (see note 102); Cokenour v. Household International, Inc., E.B.C. 1783 (see note 105).

[107] Courts have yet not defined the manner in which appointment of a fiduciary incorporates a duty to monitor appointees. See, e.g., Leigh v. Engel, 727 F.2d 113 (see note 41); In re Enron, 284 F. Supp. 511 (see note 70); In re Williams Companies, 31 E.B.C. 1870 (see note 102).

[108] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002); 29 U.S.C. § 1021(i).

[109] Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120 (3rd Cir. 1998).

[110] Waller v. Blue Cross of California, 32 F.3d 1337 (9th Cir. 1994).

[111] Jackson, 933 F. Supp. 1124 (see note 67).

[112] Morales v. Plan American Life Insurance, 914 F.2d 83 (5th Cir. 1990).

[113] Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).

[114] Lockheed v. Spink, 517 U.S. 882 (1996).

[115] Ahng v. Allsteel, Inc., 96 F.3d 1033 (7th Cir. 1996).

[116] Heath v. Varity, 71 F.3d 256 (7th Cir. 1995).

[117] Local 56, United Food and Commercial Workers Union v. Campbell Soup Company, 898 F. Supp. 1118 (D.N.J. 1995).

[118] United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund, 816 F. Supp. 602 (N.D. Cal. 1993), aff'd, 32 F.3d 1337 (9th Cir. 1994).

[119] Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997).

[120] Vizcaino v. United States Dist. Court for the W. Dist. of Wash., 173 F. 3d 713 (9th Cir. 1999), amended by, reh'g denied sub nom., White v. United States Dist. Court, 184 F.3d 1070 (9th Cir. 1999).

[121] Capital Cities/ABC, Inc. v. Ratcliff, 141 F.3d 1405 (10th Cir. 1998).

[122] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[123] Abraham v. Exxon Corp., 85 F.3d 1126 (5th Cir. 1996).

[124] Even if reclassified workers are excluded from accruing benefits under an ERISA plan, such workers will be included in the employee population for purposes of participation in non-discrimination testing.

[125] Wolf v. Coca-Cola Co., 200 F.3d 1337 (11th Cir. 2000) (plaintiff who was a "leased employee" as defined in an ERISA plan was excluded from receiving benefits even if she qualified as a common law employee).

[126] The Internal Revenue Service has issued a technical advice memorandum stating that an employee benefit program may add language to the plan document to indicate that, if independent contractors are reclassified as common law employees, the reclassification will not apply to retroactively provide benefits to the reclassified employees. Internal Revenue Service National Office Technical Advice Memorandum, July 28, 1999 (Unreleased).

[127] Jaeger v. Matrix Essentials, Inc., 236 F. Supp. 2d 815 (N.D. Ohio 2002).

[128] Conner v. Mid South Ins. Agency, 943 F. Supp. 647 (W.D. La. 1995).

[129] Lancaster, 55 F.3d 1034 (see note 24).

[130] Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992).

[131] Lancaster, 55 F.3d 1034 (see note 24).

[132] Brock, 840 F.2d 339 (see note 13).

[133] 26 U.S.C. § 4975(a), (b).

[134] 29 U.S.C. § 1105(a).

[135] Martin v. Harline, 15 E.B.C. 1138, No. 87-NC-115J, 1992 U.S. Dist. LEXIS 8778 (N.D. Utah 1992).

[136] Conner, 943 F. Supp. 647 (see note 128).

[137] Scardelletti, 897 F. Supp. 913 (see note 54).

[138] Hughes Aircraft Co., 525 U.S. 432 (see note 113).

[139] Chicago Dist. Council of Carpenters Pension Fund v. Sciortino Contractors, Inc., 934 F. Supp. 277 (N.D. Ill. 1996).

[140] Central Pennsylvania Teamsters Pension Fund v. McMormick Dray Line, Inc., 85 F.3d 1098 (3d Cir. 1996).

[141] 29 U.S.C. § 1110(a).

[142] 29 U.S.C. § 1110(b).

[143] 29 U.S.C. § 1112.

[144] Mertens v. Hewitt Associates, 508 U.S. 248 (1993).

[145] Florin v. Nationsbank of Georgia, 60 F.3d 1245 (7th Cir. 1994); Reich v. Continental Cas. Co., 33 F.3d 754 (7th Cir. 1994).

[146] Reich v. Compton, 57 F.3d 270 (3d Cir. 1995); Reich v. Stengl, 73 F.3d 1027 (10th Cir. 1996).

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