

INCREASED LIABILITY FOR ERISA-PLAN ADMINISTRATORS

By Arthur J. Glassman

The U.S. Supreme Court recently ruled that an individual participant in a 401(k) profit-sharing plan can sue the plan administrator to recover investment losses. The decision in *LaRue v. DeWolff, Bobery & Associates, Inc.* stems from the attempts of James LaRue of Southlake, Texas, to sue his former employer and 401(k) plan administrator, Dallas-based DeWolff, Bobery & Associates. He accused the administrator of failing to follow his instructions to move the funds in his self-directed account into safer investments. LaRue alleged that because his instructions were ignored, the value of his account fell by approximately \$150,000.

At issue in LaRue's case was whether the Employee Retirement Income Security Act ("ERISA") allows an account holder to sue plan administrators for not fulfilling their fiduciary duties. Fiduciaries have personal liability under Section 409(a) of ERISA, which provides that "[a]ny person who is a fiduciary with respect to a plan. . . shall be personally liable to make good to such plan any losses to the plan resulting from each [fiduciary] breach." Prior to *LaRue*, the Supreme Court held that ERISA was available only to sue fiduciaries to recoup losses for the entire plan – not for individual participants.

The court noted, "[f]iduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. . . . We therefore hold that although [ERISA] does not provide a remedy for individual injuries distinct from plan injuries, [ERISA] does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."

The court emphasized that a plan's compliance with the investment "safe harbor" provisions of ERISA § 404(c) "exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts."

In light of this case, sponsors of profit-sharing and 401(k) plans and their fiduciaries should:

- Review the plan's ERISA § 404(c) compliance, including the plan's investment policies and procedures, to ensure that the plan's investment options are prudent;
- Review the plan's administrative procedures for fielding participant's concerns and ensure they are followed;
- Review the plan procedures for ERISA compliance, processing participant directions, and ensuring proper controls are in place to reduce potential errors;
- Review the adequacy of fiduciary liability insurance coverage;
- Review service provider agreements to ensure an appropriate allocation of liability and indemnification rights; and
- Analyze fees charged by service providers to minimize the potential for participants' objections.

LaRue is the first decision by the U.S. Supreme Court in what is expected to be a very busy year for employment law-related cases. Currently eight cases have been argued but not yet decided by the court and another eight cases have yet to be argued. Watch for future Moss & Barnett alerts to keep informed on the latest developments in employment law or visit our web site at www.moss-barnett.com.

If you would like assistance in assuring best practices in this area, or need assistance in revising any other policies or addressing employment law issues, please contact your attorney at Moss & Barnett.



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