

401(k) Hot Seat



Beyond Insurance

SUPREME COURT GIVES WORKERS GREEN LIGHT TO SUE OVER LOSSES

THE SUPREME Court's recent decision in *LaRue v. DeWolff, Boberg & Associates, Inc., et. al.*, impacts employers across the country. According to Fisher & Phillips LLP, the Court has made it easier for individual workers to bring claims against their employers for losses to their 401(k) plans and other retirement plans subject to federal pension laws (ERISA).

The decision was significant because the Supreme Court reversed lower-court rulings that had held employers not liable for losses suffered by their workers, even if accounts had been mismanaged.

Now that the impediment to individual claims has been removed, employers need to heighten their understanding of their fiduciary obligations, notes Fisher & Phillips. The decision sends a clear message to plan fiduciaries of the need for ensuring absolute compliance with ERISA's dictates. Other than enrolling employees as they meet eligibility requirements, most employers have very little day-to-day interaction with the plan.

However, what employers may not understand is that despite their minimal involvement, they are fiduciaries of the plan, either because they are named as such in plan documents or by virtue of actions they have taken with respect to the plans, says Fisher & Phillips. They can be liable for the type of losses alleged by Mr. LaRue even if they were not directly responsible for the act giving rise to liability.

The case further emphasizes the need for plan administrators to carefully administer participant investment elections, according to Ice Miller LLP. They note that plan fiduciaries can further reduce their potential liability by taking the following actions:

- Administer the plan in compliance with its terms.
- Hire an independent investment advisor to assist the plan fiduciaries with selecting and monitoring the investment funds made available under the plan.
- Adopt an investment policy statement to document the investment decisions and the criteria and benchmarks by which the investments will be monitored over time.
- Carefully consider the risks and benefits of adding or retaining employer stock as an investment option under the plan.
- Obtain appropriate fiduciary insurance and/or indemnification provisions to protect individual fiduciaries.
- Consider hiring legal counsel to perform a mock fiduciary compliance audit.

"Plan fiduciaries and administrators should take their roles seriously, seek expert advise in the selection and monitoring of investment funds available under the plan, and document the decisions made," says Craig C. Burke, partner, Ice Miller Employee Benefits Group. ■

