

LABOR AND EMPLOYMENT LAW UPDATE



IT'S OPEN SEASON ON ERISA FIDUCIARIES! ARE YOU AN UNSUSPECTING TARGET?

Myths and urban legends have found fertile ground in the area of ERISA fiduciary liability. Two may seem familiar. **MYTH:** An employer doesn't have to worry about fiduciary liability if it has contracted with a professional employer organization. **URBAN LEGEND:** Hiring a third-party administrator shields an employer and its employees from potential fiduciary liability under ERISA.

The price of adhering to myths and urban legends is rising rapidly. In 2006, nearly 10,000 ERISA suits were filed. Nearly 50 class action settlements since 2000 have exceeded \$10 million.

On October 5, 2007, Campbell & LeBoeuf, P.C. partnered with AIG and Apex Global Partners to present a seminar addressing ERISA fiduciary liability and some myths and urban legends which have made many fiduciaries unsuspecting targets of costly litigation. Set forth here are some of the questions discussed at the seminar which one attendee described as "alarming but informative."

WHAT IS ERISA? ERISA is a federal law which sets minimum standards for most voluntarily established pension and health and welfare plans in the private sector.

WHO CAN BE AN ERISA FIDUCIARY? An ERISA fiduciary can be a person or entity. There are three ways to become a plan fiduciary:

PLAN DOCUMENTS: ERISA requires that one or more fiduciaries be named by plan documents.

POSITION: A person is a fiduciary with respect to a plan to the extent he:

1. exercises any discretionary authority or control as to the management of the plan or exercises any authority or control as to management or disposition of its assets;
2. renders investment advice for a fee or other compensation as to any moneys or other property of the plan, or has an authority or responsibility to do so, or
3. has any discretionary authority or responsibility in the administration of the plan.

DELEGATION: Even where fiduciary duties are delegated by a person to others, such person can still be liable for a breach of his duty for:

1. The delegation procedure used;
2. The delegation itself; or
3. The continued delegation of fiduciary responsibilities.

Possible fiduciaries for a plan, therefore, are not limited to plan administrators, trustees and members of a benefits committee. Other potential fiduciaries include the employer sponsoring the plan and its directors, officers and managers, investment managers and advisors and insurance brokers.

WHAT IS THE POTENTIAL LIABILITY OF AN ERISA FIDUCIARY? ERISA authorizes legal actions by plan participants and beneficiaries as well as the U.S. Department of Labor:

PERSONAL LIABILITY: The Act provides that a person who breaches his fiduciary duties "shall be personally liable" for resulting losses to the plan and profits to himself, if any.

CO-LIABILITY: A fiduciary can be liable for a breach by another fiduciary if he:

1. knowingly participates in or undertakes to conceal a known breach by the fiduciary;
2. his failure to perform his duties enables a breach by the fiduciary; or
3. he knows of the breach by the fiduciary but fails to take reasonable steps to cure it.

Several cases have said that a person cannot avoid co-liability by passing responsibility to the fiduciary who actually committed the breach.

REMEDIES AND PENALTIES: A suit alleging breach of fiduciary duties can seek to recover losses to the plan, damages and attorney's fees. A suit brought by the Secretary of Labor may also seek to assess a penalty of 20% of the applicable recovery amount.

DEFENSE COSTS: The costs of defending ERISA fiduciary litigation can be daunting especially when a class action is involved.

WHAT ARE THE RESPONSIBILITIES OF AN ERISA FIDUCIARY? There are several types of transactions which are expressly prohibited by ERISA. The general standards set forth in the statute, however, have provided the bases for most lawsuits:

DUTY OF LOYALTY: A fiduciary must discharge his duties solely in the interest of the plan participants and beneficiaries for the exclusive purpose of "(1) providing benefits to participants and their beneficiaries; and (2) defraying reasonable expenses of administering the plan."

DUTY OF PRUDENCE: A fiduciary must discharge his duties with reasonable "care, prudence and diligence."

DUTY TO DIVERSIFY INVESTMENTS: Unless the circumstances dictate otherwise, a fiduciary must generally diversify the investments of a plan as to minimize the risk of large losses.

DUTY TO FOLLOW PLAN DOCUMENTS: A fiduciary must discharge his duties in accordance with the plan documents.

WHAT CAN AN ERISA FIDUCIARY DO TO MINIMIZE LIABILITY? Education which dispels the myths and urban legends subscribed to by fiduciaries

is the first step to minimizing the risks associated with ERISA fiduciary liability. Second and third steps can include procedural tools, such as written policies, regular meetings and oversight protocols, and risk management tools, such as indemnification agreements and ERISA fiduciary liability insurance.

ADDITIONAL QUESTIONS? If you have any ERISA questions, please contact Robert Chadwick at Campbell & LeBoeuf, P.C.

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