NATIONAL BENEFIT SERVICES, INC.
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FIDUCIARY LIABILITY INSURANCE:
A Risk Management Tool for Fiduciaries in a New Retirement Plan Environment
Updated for the Pension Protection Act of 2006

Introduction

The new retirement plan environment referred to in the headline includes a recent case unanimously decided by the U.S. Supreme court that has significant implications for plan fiduciaries.

On February 20, 2008 in *LaRue v. DeWolff Boberg & Associates, Inc., et al.*, the Court ruled 9-0 that Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), "does not provide a remedy for individual injuries distinct from plan injuries," but that provision "does authorize recovery for fiduciary breaches that impair the value of plan assets" in one or more, but not all, participants' accounts.

In non-legalese, the Court held that individual participants in a defined contribution plan can sue for a breach of fiduciary duty that results in a loss to the participant's own account, even if not all participants' accounts have similar losses.

No one knows, of course, whether we will see an increased in lawsuits against fiduciaries, but many ERISA attorneys predict that LaRue's victory means that there is likely to be a significant increase in litigation involving 401(k) plans, and that plan fiduciaries may be confronted with a variety of claims brought by plan participants seeking to recover losses to their individual accounts.

In this new environment, we think that fiduciaries should think in risk management terms and consider whether they should purchase fiduciary liability insurance.

This *Benefit Briefing* will provide you with answers to frequently asked questions (FAQs) to help you decide whether you should purchase fiduciary liability insurance.

Fiduciary Liability Insurance FAQs

What does fiduciary liability insurance provide?

This coverage protects plan sponsors and trustees from the defense and penalties if they are sued for fiduciary decisions they make for an employee benefit plan. Plan fiduciaries are open to many types of lawsuits. Plan participants may sue individually or as a class if they feel that benefits were misrepresented or if they believe that different decisions by the trustees could have yielded a higher return. They may even sue over enrollment issues.

Who are considered fiduciaries?

A plan fiduciary is anyone who has discretionary judgment authority for the employee benefit plans. Under ERISA regulations a fiduciary is personally liable for the cost of their own defense if they are sued for their decisions. They are liable for judgments and penalties, too.

Where does it say that fiduciaries are held personally liable?

ERISA is explicit in providing for the personal liability of fiduciaries by stating that fiduciaries cannot be relieved of their responsibilities through indemnification language in corporate bylaws (Section 410(a)).

However, ERISA specifically permits persons with personal liability exposure to purchase liability insurance, if desired (Section 410(b)).

Is Fiduciary Liability Insurance mandatory under ERISA?

ERISA does not require liability protection; the only mandatory insurance is an ERISA Fidelity bond to protect the plan assets from losses due to misuse or misappropriation. The ERISA Fidelity bond protects the plan assets. Without Fiduciary Liability insurance, who protects the fiduciaries?

Doesn't the ERISA/Fidelity Bond cover lawsuit costs?

No. As stated above, the ERISA/Fidelity bond protects the plan assets, not the fiduciaries.

Who can file a lawsuit against a fiduciary?

A lawsuit against a fiduciary can be filed by the Secretary of Labor, any plan participant or beneficiary, or by another plan fiduciary. In addition, the Treasury Department and the Pension Benefit Guarantee Corporation can also impose penalties or bring lawsuits against plan fiduciaries.

What does fiduciary liability insurance generally cover?

This coverage provides protection for losses that the insured is legally obligated to pay because of a claim made for a wrongful act".

Most policies define this to include any violation of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA, as well as acts, errors, or omissions involved in plan administration. The policy also includes coverage for defense costs in connection with a covered claim.

What parties are normally covered by the policy?

The insureds under this coverage will normally include the sponsor organization, the plans, and the individual fiduciaries.

What are typical defense costs in a fiduciary lawsuit?

According to a Fiduciary Liability Insurance Survey performed by the global actuarial consultants Tillinghast – Towers Perrin, the average per claim defense cost hovered around $365,000 in 2003, the latest year for which data was available.

There is, of course, no way to totally prevent law suits. Proper plan management practices and an insurance program can be an effective way to manage fiduciary risk.

About National Benefit Services, Inc.

Founded in 1978, National Benefit Services, Inc. provides retirement plan consulting and administrative services for a wide range of privately held and publicly traded employers.

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