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Employee Benefits Law Action Memo

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RECENT SUPREME COURT CASE SHOULD PROMPT REVIEW OF FIDUCIARY PRACTICES

A recent decision by the United States Supreme Court is likely to increase the number of lawsuits initiated by individual participants against retirement plan sponsors and other plan fiduciaries. The decision should prompt plan sponsors and plan fiduciaries to review their fiduciary and administration practices, and to make appropriate changes in those practices, to minimize exposure to such lawsuits and potential liability.

In LaRue v. DeWolff, Boberg & Associates, Inc., the Supreme Court considered whether the Employee Retirement Income Security Act ("ERISA") provides a basis upon which an individual participant may seek a recovery of losses in the participant's individual account under a participant-directed defined contribution retirement plan where those losses allegedly resulted from breaches of fiduciary duties.

In this case, Mr. LaRue alleged that the plan fiduciary who was responsible for implementing his investment directions under an Internal Revenue Code Section 401(k) plan failed to implement his directions properly. Mr. LaRue alleged that the failure was a breach of fiduciary duty, and that the failure depleted his interest in the plan by approximately $150,000. Mr. LaRue sought to enforce provisions of ERISA that generally provide that a plan fiduciary shall be "personally liable to make good to such plan any losses to the plan" that result from the fiduciary's breach of fiduciary duty. The lower courts had dismissed Mr. LaRue's claims, in part, because the courts read ERISA to provide a basis only for plan-wide relief and not for the individual relief sought by Mr. LaRue. Overturning the lower courts' decisions, the Supreme Court concluded that ERISA does provide a basis for individual recoveries for breaches of fiduciary duty that impair the value of a participant's individual account.

The LaRue decision may be considered somewhat of a departure from prior Supreme Court decisions in which the Supreme Court held that ERISA provides a basis only for plan-wide relief for breaches of fiduciary duty and not a basis for individual relief. Limiting the potential for relief to situations where plan-wide losses occurred may have limited the number of lawsuits seeking the recovery of losses allegedly attributable to breaches of fiduciary duty. The LaRue decision removes that limitation; a participant will no longer have to prove plan-wide losses to pursue a claim for losses (or lost profits) that result from an alleged breach of fiduciary duty. This likely will lead to more lawsuits in which an individual participant claims that fiduciary breaches led to losses (or lost profits) in the participant's individual account.

The LaRue decision should prompt plan sponsors and other fiduciaries of individual participant-directed account plans (including Internal Revenue Code Section 401(k) plans and Internal Revenue Code Section 403(b) plans) that are governed by ERISA to take steps to minimize exposure to such lawsuits and potential liability. Those steps might include:

- reviewing fiduciary and administration practices to ensure compliance with all ERISA Section 404(c) requirements (see summary below), including timely implementation of participant investment directions;
- adopting and following a plan investment policy statement that describes the process to be followed in selecting plan investment alternatives and that provides for regular monitoring of the performance of investment alternatives (and, if applicable, investment managers);
- educating plan fiduciaries about the increased fiduciary liability exposure arising out of this case, and the steps they should take to minimize that exposure;

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- ensuring appropriate due diligence and detailed documentation of fiduciary decisions, which always must be made in the best interest of plan participants;
- retaining investment professionals to assist in the selection and monitoring of investment alternatives;
- reviewing all plan administration practices to ensure that the plan is administered in accordance with its terms; and
- reviewing insurance policies to ensure adequate insurance coverage for all plan fiduciaries (coverage generally should be "non-wasting" to ensure that litigation expenses are not charged against the coverage amount).

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