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How to take advantage of ERISA's anniversary

By Christopher Williams

While 1974 may be better remembered for the Watergate scandal and Hank Aaron tying Babe Ruth's all-time home run record, it also marked the enactment of the Employment Retirement Income Security Act (ERISA). This law provides important protection to participants in various employee benefit plans, including health plan and 401(k) participants.

Momentum for pension legislation began building following the bankruptcy of legendary American automotive manufacturer, Studebaker. When the company filed for bankruptcy, its pension funds were so poorly funded that many of its employees received only a fraction of what they were entitled to receive. That crisis ultimately lead to the enactment of ERISA, which established standards for plan fiduciaries, and with it, a means for harmed plan participants to sue those responsible for managing benefit plans. Due to the adoption of ERISA, the fiduciary of an employee benefit plan is obligated to:

- Act in the best interests of the plan participants for the purpose of providing benefits;
- Act with the care, skill and diligence that a prudent person would use in a similar situation;
- Diversify plan assets; and
- Follow the plan document.

With this in mind, independent agents can use the 40th anniversary of ERISA as an opportunity to remind customers of potential fiduciary exposures and the need to insure against them.

But how?

When a fiduciary is liable

ERISA holds fiduciaries personally liable for a breach of their obligations. Given this accountability and potential liability, it is critical that fiduciaries understand their responsibilities under ERISA and ensure that the company they represent has the right insurance coverage in place to protect and defend them if something goes wrong. Fiduciary Liability Insurance protects the fiduciaries and their sponsor organizations from costly defense expenses, settlements or verdicts when there is an actual or alleged breach of fiduciary duty.

Over the years, fiduciaries have been sued for many reasons. For example, fiduciaries have been held accountable for failing to select proper investments. While fiduciaries cannot be sued merely for selecting an investment that suffers a loss, they can be sued if they fail to exercise prudence and due diligence in selecting that investment. Numerous suits have also been filed against plan fiduciaries for providing poorly performing company stock as an investment option. Plaintiffs will generally allege that the company stock was an imprudent investment option, and as a result the plan

participants suffered significant losses. According to research from Cornerstone, the average settlement of a stock drop claim is $17.2 million.

Some fiduciaries have also been sued for poorly selecting plan vendors. In one case, plan participants sued the fiduciary for hiring an investment manager who subsequently stole plan assets, alleging the investment manager was not fully vetted before being hired.

Fiduciaries can also be sued for failing to carry out a participant's instructions. For example, if a fiduciary does not complete the investment instructions of a 401k participant, they can be sued for losses sustained by that participant. These claims were particularly prevalent during the market decline of 2008 when there was a greater frequency of investment instructions that were not followed.

Since 2006, the plaintiffs' bar has also held fiduciaries accountable for failure to monitor the fees being charged by third party vendors, alleging that the fees paid for those services were

excessive. Settlement and verdicts for these claims can be excessive: One law firm alone has recovered $175 million in these types of cases.

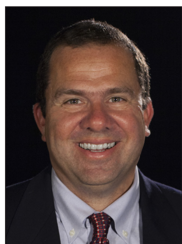
ERISA can also create exposures for plan sponsors. Given the majority of ERISA claims involve challenges to the denial of health or disability insurance claims, plaintiffs often will sue not only the plan, but the sponsor and fiduciaries as well. While these cases do not generally present a high financial exposure, it's not unheard of to see settlements in excess of $100,000.

In addition to plaintiffs' lawyers bringing claims, the Department of Labor's Employee Benefits Security Administration (EBSA) is responsible for ensuring plans comply with ERISA and can bring claims against fiduciaries and sponsoring companies, as well. In 2012 alone, EBSA recovered $1.27 billion and completed 3,566 investigations, resulting in 2,570 monetary settlements or other corrective actions.

ERISA exposures continue to evolve

While ERISA and the EBSA have certainly protected plan participants over the past 40 years, they have also created a new host of exposures for plan fiduciaries, which continue to evolve. In fact, the enactment of the Patient Protection and Affordable Care Act is likely to give rise to new fiduciary exposures.

It is critical that fiduciaries understand their responsibilities, as well as their evolving exposures, to ensure they are protected if something goes wrong. The best independent agents will use this milestone anniversary as an opportunity to educate their customers on the evolving fiduciary risks and how the right insurance coverage can help protect a fiduciary's personal assets if a lawsuit is filed against the fiduciary or plan sponsor.



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