

## Ten Best Practices for the Prevention of 401(k) Lawsuits

*This article is a follow-up to "A 401(k) Plan Fiduciary's Nightmare" --- U.S. Supreme Court Opens the Litigation Flood Gate with Employee Retirement Benefit Plans. If you did not receive this article via email, please visit our website at [www.w-p.com](http://www.w-p.com) for the full text.*

On February 20, 2008, the U.S. Supreme Court handed down a decision that will affect all employers that sponsor a defined contribution plan. The case is *LaRue v. DeWolff, Boberg & Associates, Inc* and in its ruling **the Supreme Court held that an employee can now sue his or her employer by asserting a claim of breach of fiduciary duty under §502(a)(2) of ERISA.**

Fiduciaries, already facing an increase in litigation issues in recent years, now have more reason to get back to the basics of ensuring proper plan operation. Below is a checklist of plan compliance points that will help mitigate the possibility of lawsuits by plan participants:

1. **DOCUMENT, DOCUMENT, DOCUMENT!** Fiduciaries should document decisions and the basis for such decisions. Whether it is the decision to document the process used to carry out fiduciary responsibilities or decisions for hiring plan service providers, keeping good documentation and the basis for such decision(s) will go a long way in preventing litigation and minimizing litigation costs.
2. **REVIEW.** Review all processes and procedures for plan operation and communication to ensure compliance. For example, are participant election changes and deferral changes being executed with reasonable timeliness? Are participant communications, such as summary plan descriptions and summary material modifications being given to participants when appropriate?
3. **LET GO OF CONTROL!** Give participants control over how to invest their money. By giving participants control and including a diversified investment portfolio (explained below), a fiduciary can minimize risks associated with market fluctuations.
4. **DIVERSIFY.** Make sure the plan has a diversified investment portfolio including funds from different families and different risk levels. Participants should not only be given a broad range of investment options, but they should be given enough information to make informed decisions about such investments.
5. **MONITOR.** Monitor or hire a third party to monitor the investment line up in the plan. If you hire a third party to monitor the investment returns of the funds in the plan, remember to monitor that third party! Fiduciaries have a duty to ensure that the third party is doing its job.
6. **KNOW WHEN TO REPLACE FUNDS IN THE LINEUP!** Make sure that whoever is responsible for monitoring the investment performance replaces under-performing funds in the plan.
7. **FEES, EXPENSES AND LAWSUITS, OH MY!** One of the biggest areas contributing to recent litigation (causing major employer headaches) is fees. Always monitor the plan's fees and expenses to determine if such fees and expenses continue to be reasonable.
8. **FIDUCIARY BOND.** Ensure that all fiduciaries to the plan are bonded and that such bond amount is adequate based upon plan assets. A fiduciary bond, sometimes referred to as a fidelity bond is a type of insurance that protects the plan against loss resulting from a fiduciary's fraudulent or dishonest acts. Generally speaking such bond amount must be 10% of plan assets, subject to a \$1,000 minimum and \$500,000 maximum (although if there are employer securities in the plan the maximum amount required is \$1,000,000).
9. **TIMING IS EVERYTHING.** Ensure timing of participants' 401(k) contributions is within the prescribed time frame. The law requires that participant contributions be deposited in the plan as soon as it is reasonably possible to segregate them from the company's assets; however in no case should this be later than the 15<sup>th</sup> business day of the month following when such contributions were withheld.
10. **WHEN IN DOUBT SAFE HARBOR IS THE ROUTE.** ERISA provides plans the ability to reduce the possibility of participant litigation with many safe harbor plan designs. For example, section 404(c) and safe harbor default investments allow fiduciaries to limit their liability by making plan participants responsible for their investment choices, even if they fail to file elections (in the event of an automatic enrollment plan).

If you have any additional questions on this article, please contact Wessels & Pautsch, P.C. Attorneys Lisa A. Baiocchi (at (414) 291-0600 or at [libaiocchi@milw.w-p.com](mailto:libaiocchi@milw.w-p.com)) or Rebecca Dobbs (at (630) 377-1554 or at [redobbs@stch.w-p.com](mailto:redobbs@stch.w-p.com)).