

ERISA LITIGATION

ISSUE

Employee Pension and Benefits law in the United States is governed by the Employee Retirement and Income Security Act of 1974 (ERISA). Canadian companies who maintain pension plans for the benefit of U.S. employees take note - ERISA litigation is on the rise, most notably:

- A 16% increase in civil and criminal investigations filed by the Department of Labor in FY 2009 over FY 2008
- A 54% increase in Fiduciary Liability claims reported to Willis Executive Risks group
- \$450 million in ERISA class action settlements in 2009

Numerous factors account for this, including ERISA “Tag Along” cases and the recent large losses suffered by benefit plans since disruption of the world financial markets. In fact, **Lisa Brogan, a partner at Baker & McKenzie** cites some reports which suggest that losses to ERISA regulated retirement plans have been depleted by more than \$2 trillion, or 26%, between late 2007 and August 2009.¹

Recent court decisions have made ERISA-related litigation even more attractive to the plaintiff’s bar. Most notably, in the 2008 case *LaRue v. DeWolff, Boberg & Associates*, the U.S. Supreme Court ruled that past participants in a defined contribution plan (such as a 401(k)) may

sue a fiduciary of the plan whose alleged misconduct reduced the value of the plan participants’ individual accounts.

IMPACT

The consequences for our clients from increasing ERISA litigation include the risk of significant costs associated with defending ERISA suits as well as management’s time invested in compliance and risk avoidance activities. The complex nature of ERISA-related suits makes it more likely that the litigation process will be a long and protracted one, which can include expert witnesses and forensic accountants, the use of which can increase exponentially the cost of any ERISA defense.

In addition to litigation costs, equitable relief on the plaintiff’s behalf under ERISA is a cost risk to companies. This type of relief can include the reformation of the plan, revisions to the plan document and removal of plan trustees.

ACTION

Plan fiduciaries should routinely analyze their processes for selecting and evaluating the plan’s service providers and investment advisers. Additionally, plan fiduciaries should document all their activities related to choosing plan service providers and evaluating plan investments. ERISA litigation experts agree that documented procedures can be an effective defense against ERISA litigation.

Another important area of risk mitigation is communication with plan participants. Our advice is to be careful, clear and diligent with communications to plan participants. Any

¹ “ERISA Litigation on the Rise,” by Muazzin Mehrban, *Financier Worldwide Magazine*, November 2009



communications with plan participants should be thoroughly vetted by an ERISA attorney prior to distribution to plan participants.

Finally, a broadly worded fiduciary liability insurance policy written with a financially stable insurance company can provide protection for plan fiduciaries and the plan sponsor organization. A knowledgeable insurance broker can assist plan fiduciaries in determining the optimal components of the insurance policy as well as the amount of insurance limits to purchase.

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