HUNTON& WILLIAMS

ERISA LITIGATION ALERT

July 2008

Contacts

L. Scott Austin*
1445 Ross Avenue
Suite 3700
Dallas, TX 75202-2799
(214) 979-3002

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4088
saustin@hunton.com

*Licensed in Texas; not yet licensed in Georgia

Terence G. Connor
1111 Brickell Avenue
Suite 2500
Miami, FL 33131
(305) 810-2517
tconnor@hunton.com

Patricia K. Epps
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8249
pepps@hunton.com

Wood W. Lay
Bank of America Plaza
Suite 3500
101 South Tryon Street
Charlotte, NC 28280
(704) 378-4753
wlay@hunton.com

Kurt A. Powell
Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4015
kpowell@hunton.com

J.G. Ritter, II
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8402
jritter@hunton.com

ERISA Fiduciary Liability — Minimizing Exposure

Recent developments in case law make it more important now than ever before for fiduciaries of employee benefit plans to carefully consider and understand their obligations, and to take actions to reduce potential exposure to ERISA fiduciary litigation. Within the last two years, a new line of cases, known as the "fee litigation" cases, have been initiated against fiduciaries of a number of 401(k) plans. Among other things, these cases allege that plan fiduciaries violated their duties by not understanding, and making more favorable arrangements for, the underlying fees paid to plan administrators and within mutual funds offered under the plan. These cases also attack common fee arrangements such as "fee sharing" arrangements. The Department of Labor has also issued guidance recently that makes it incumbent on plan fiduciaries to understand and carefully negotiate the fee structures involved in the administration of their plans.

Additionally, earlier this year, the Supreme Court, in *LaRue v. DeWolff, Broberg & Associates, Inc.*, held that an individual 401(k) plan participant could bring a claim for breach of fiduciary duty under ERISA even though the alleged breach only affects his/her account. This landmark decision arguably expands the parameters under which plaintiffs can bring ERISA fiduciary breach claims; many plan fiduciaries had thought these claims could only be brought for alleged injuries to the plan "as a whole." Since the decision in *LaRue*, we have already seen individual plan participants bring ERISA fiduciary breach claims for alleged imprudent selection of plan investment alternatives, including employer stock. These types of cases have historically been limited to class action scenarios. Although the ultimate effect of *LaRue* is uncertain, it is clear that individual plaintiffs will be relying on it to assert claims in the event that they become unhappy with some aspect of their 401(k) plan.

In light of these developments, plan fiduciaries should take a number of actions, including:

- Identifying the specific plan fiduciaries (*e.g.*, administrative committee) and confirming that the underlying plan documentation is consistent with these fiduciary designations.
- Educating themselves on ERISA's fiduciary obligations.
- Conducting an internal audit of all plan administrative functions to confirm that the plan is working in its intended manner.
- Confirming that the plan complies with ERISA § 404(c) to limit fiduciary exposure.

- Reviewing and, if appropriate, renegotiating administrative service agreements with plan vendors.

The ERISA Litigation Group at Hunton & Williams is comprised of a cross section of lawyers who bring all of the necessary expertise in these matters to the table, including plan design and drafting, plan governance, experience in dealing with the IRS and DOL, employee and labor relations, and litigation (including complex class action litigation). To help deal with the risks of potential ERISA litigation, we can (1) meet with, and help your internal benefit plan administrative committees fully understand their ERISA fiduciary duties, (2) work with you to conduct an internal audit of your plan fiduciary practices, and (3) suggest, and help you implement, strategies to minimize exposure to ERISA fiduciary litigation. In the event of litigation, we have the depth, resources and experience to defend the case. If you are interested in discussing these matters with us, please contact the attorneys listed on this alert.