Hibbs-Hallmark & Company

Newsletter

In this article you will learn about Fiduciary Liability. Did you know that the directors and officers of your company can be held personally liable for breach of fiduciary duty claims? Read on to find out how to be appropriately covered.

ERISA and Your Fiduciary Risk

Employee Retirement Income Security Act of 1974 (ERISA)-related enforcement and claims activity is on the rise--- no doubt fueled in part by the stock market volatility over the last several years. In fact, employer-sponsored retirement plans lost nearly $4 trillion in value during the financial crisis leading to a range of complex claims and causes of action.

An added concern is that employee benefit plan liability exposures are typically excluded under other professional liability coverage such as EPL and D&O policies. Any company, including a small private company, that offers any type of a pension or 401(k) plan should be aware of its obligations under ERISA and the insurance options that are available to protect its fiduciary responsibility.

ERISA provides protection to employees who participate in employer-sponsored employee benefit plans. It defines a fiduciary as an individual or entity that exercises discretionary authority over the management and administration of a plan or plan assets and/or renders investment advice. Under a *de facto* fiduciary theory, this can include Directors and Officers who act as a fiduciary--- whether or not they are formally named as one. Officers and directors can be held personally responsible for ERISA-related fiduciary claims.

In particular, fiduciaries should be aware of *LaRue v. Dewolff*, a key 2008 decision by the United States Supreme Court, which decided for the first time that individual participants in a defined contribution plan (such as a 401(k) plan) may sue their employer or plan fiduciary under ERISA for any impairment or loss of value in the individual participant's account that is due to a breach of a fiduciary duty.

More recently, in March 2010, the United States Supreme Court made an important decision in a case involving an allegation that a mutual fund advisor charged excessive fees (*Jones v. Harris*). The Court held that all relevant facts must be considered in determining the reasonableness of fees and ruled that fees are too high when they are so disproportionately large that they could not be the result of arms-length bargaining. This standard will be used in future litigation involving allegations that 401(k) plans offered funds that had excessive fees.

If your company provides a 401(k) plan, the directors and officers could be held personally liable for breach of fiduciary duty claims--- in some cases even if they do not formally serve on the company's fiduciary committee. Let us meet with you to review your professional liability coverage and determine if you are adequately protected in this important area.

Please contact your Hibbs-Hallmark & Company account representative for more information about Fiduciary Liability.

Sincerely,
Heather Blaylock
Sales & Marketing Coordinator