

## Retirement Plan RFPs Every 3 Years – The New Normal?

9/7/2011 Heidi A. Lyon

Two recent developments emphasizing the need to conduct a request for proposal (RFP) every three years deserve the attention of employers seeking to avoid future litigation.

In the preamble to its 2010 service provider fee disclosure rules, the Department of Labor (DOL) assumes (or one might say suggests) plan sponsors conduct an RFP about every three years. While this is contrary to industry studies concluding a majority rely on outside consultants or studies instead of RFPs, the 2011 Seventh Circuit Court of Appeals decision in *George v. Kraft Foods* is reinforcing concerns this is the new normal for a prudent plan fiduciary.

Kraft's 401(k) plan participants sued for breach of fiduciary duty alleging Kraft should have done an RFP every three years and this failure resulted in payment of excessive investment fees to the plan's service provider. A lower court accepted Kraft's defense that it relied on expert outside consultants to ensure fees were competitive when extending that service provider's contract multiple times and granted summary judgment in Kraft's favor. On appeal, the Seventh Circuit rejected that as an absolute defense and sent the case back for a trial, which could end up costing more than settling.

It is far from settled whether the new normal is to conduct an RFP every three years. Service provider and employer groups will strongly assert it shouldn't be. Meanwhile, it's important for employers who sponsor defined contribution retirement plans to reconsider what is appropriate without waiting to see what happens.

RFPs can be costly and time consuming, and the prudence of their scope and timing may vary depending on a plan's size and complexity. Before making a decision about what to do for your plan, consult a legal expert. You may contact any Warner Norcross & Judd LLP employee benefits attorney for this purpose or with other questions you may have about being a prudent fiduciary. Also, stay tuned for our webinar later this year on RFPs.