Fiduciary Liability Claims Under the Employee Retirement Income Security Act of 1974 (“ERISA”)

by Charles A. Yuen on August 6, 2012

The other day, a prominent retirement plan consultant asked: “What types of claims might generally be covered under fiduciary liability insurance policies?”

This is a good question that all ERISA fiduciaries should be asking. “Employee benefit plans,” which under ERISA may be either retirement or welfare benefit plans, can expose a plan fiduciary to substantial liability. Claims may be brought by past or present employees, their beneficiaries, other fiduciaries or the federal government (either U.S. Department of Labor or the IRS).

Typical claims include:

- Failure to follow the Plan document.
- Imprudent investment of plan assets.
- Failure to diversify plan assets.
- Improper selection of plan advisors.
- Conflict of interest among plan fiduciaries.
- Failure to fund a benefit plan.
- Improper denial or change of plan benefits.
- Error in regard to the calculation or payment of plan benefits.
- Improper advice or counsel to a participant regarding a plan.
- Misleading representations concerning a plan.
- Wrongful termination of a plan.
- Civil rights or other discrimination in regard to a plan or its benefits.
- Cash balance plan conversions

ERISA exposes fiduciaries to personal liability for losses resulting from breach of fiduciary duties. This past March, in the case of Tussey v. ABB, the plan fiduciaries suffered a $41.0 million judgment for failing to keep plan costs charged to participants in a large 401k plan at a level deemed to be appropriate by the U.S. District Court in Illinois.

Fiduciary Liability Insurance

It is strongly recommended that fiduciary liability insurance is purchased to cover claims alleging failure to comply with ERISA. An “Insured” may include a trust or employee benefit plan; any trustee, officer or employee of the plan; an employer as plan sponsor; and any other individual or organization designated or serving as a fiduciary. The policy may provide coverage in regard to pension and retirement plans as well as group life and medical expense plans.

If you are a fiduciary, it is important that you review your existing the coverage provided by your fiduciary liability insurance policy. Typically, the policy form will contain wordy and complex sentences grouped in sections designated as “insuring agreements,” “conditions,” “definitions,” and “exclusions.” Endorsements will often modify coverage to an additional extent.

It is important that you do this before there is a claim. Frequently, in the event of a claim, you may find your carrier questioning or denying coverage for legal or technical reasons. In such case, you should then seek legal assistance in sorting through the issues, providing appropriate information to the carrier, and — where appropriate — in asserting your legal rights for coverage.