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Who's On The Hook For Decisions Made In Your 401(k)?

Michael Chamberlain CFP(R) Former Contributor
The Fee-Only Planner Contributor Group

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Wal-Mart recently agreed to pay $3.5 million to settle a lawsuit filed by its employees who claimed it failed to properly supervise the company 401(k). There have been other similar suits out there like this one, and more will come.

Why? Most companies can do a better job in supervising the company 401(k), and the motivation to do so needs to start at the top with the owner of the company or the Board of Directors.

If you are a business owner, on the Board of Directors or serve on the Plan Investment Committee, follow the line of questions from a "hypothetical deposition" directed to you and picture how you would answer the questions.

Attorney: Are you are a fiduciary to your company's 401(k) plan?

Answer: No. We named our CFO as the "Plan Fiduciary". *Reality: Business owners and the Board Members are automatically deemed fiduciaries by the DoL since they have control in appointing those that have discretion over the plan assets. Hence, they are legally responsible and can be personally liable for plan losses.*

Attorney: Could you please tell me the ERISA duties of plan fiduciaries you appointed or asked to serve on the plan committee?

Answer: No

Attorney: When you appointed employees to serve on the Plan Investment Committee, did you determine they were legally qualified?

Answer: There are legal requirements? Well no, I did not. *Reality: Yes there are, ERISA Section 411 a and b*

Attorney asks a series of question:

1. Did you determine that the persons appointed as a plan fiduciary have the capacity to act under "the prudent expert law?

2. Did you inquire as to their experience acting as a plan fiduciary?

3. Did you or anyone inform them of their fiduciary duties under ERISA?

4. Did you offer to provide fiduciary training?

5. Did you inform them that they could be legally responsible for participants plan losses caused by a plan fiduciary breach?

6. Did you make sure that the plan participants were protected from monetary loss for fiduciary breaches under your corporate E&O policy?

7. Did you offer protection under a “fiduciary” insurance policy?

8. Did the company indemnify them for claims against them for fiduciary breaches?

Answer: No to all questions

Attorney: If your company needed a new “truck driver or equipment operator” what would your company do before hiring a person and after the hire?

Answer: We would check for a driver’s license, check their DMV record, check their criminal record, check their credit report, and verify past employment records. Once they were on the job we provide training, a list of jobs requirements and expectations and cover them under the company insurance.

Attorney: Why do you do all that for that job?

Answer: That’s what is deemed responsible or prudent to protect the company and it’s assets.

Attorney: Would that mean that it would be irresponsible and "not prudent" for you to put a person in a position when you do not know the job duties, whether the people were legally qualified to do the job, whether they had the ability (according to DoL) to do the job, whether they have the experience or specific training for the position, and that you did not provide or even offer training for the job, and you failed to insure your plan participants against loss caused by a fiduciary breach by the people you appointed?

Answer: Well….I thought that people in HR and Finance as well as our financial services provider would take care of things. I did not know that I was responsible.

The Reality

The Board of Directors or the owners of company are busy trying to make their companies successful. Spending time understanding and properly supervising the 401(k) is often way down their list of things to do. This "bottom of the list attitude", towards the 401(k) is often demonstrated by the staff administrating the plan as well.

The common result is no one is properly supervising the 401(k). The people "up the chain" think that the people "down the chain" are "taking care of it". The people "down the chain" do not have the training or experience to really "take care of it" and they do not want to disappoint those "up the chain". They often overly rely on their financial services providers (Merrill Lynch, John Hancock, ING, Fidelity, Wells Fargo etc.) who look at the 401(k) as a "cash cow". The result is that the plan participants are often harmed.