



LARUE SUPREME COURT DECISION AND FIDUCIARY LIABILITY EXPOSURES

Benefit Plan Fiduciary exposures to litigation may escalate as a result of a recent Supreme Court decision. On February 20, 2008, the U.S. Supreme Court issued a decision in *LaRue v. DeWolff, Boberg & Associates, Inc.* that will likely make it easier for individual participants in 401(k) plans to bring lawsuits against their employers for losses to their retirement savings arising from alleged breaches of fiduciary duty.

In the *LaRue* decision, the Supreme Court ruled on a conflict between two U.S. Circuit Courts of Appeals. This involved a decision on whether individual participants in a defined contribution plan may sue plan fiduciaries under ERISA for losses suffered by their accounts. The Fourth Circuit Court of Appeals had ruled in *LaRue* that an individual participant in a defined contribution plan had no such right to sue under ERISA. However, in February this case was brought to the Supreme Court. The high court did overturn the Fourth Circuit's decision in a unanimous opinion. The decision held that individual participants do have the right to sue and recover losses to their individual accounts in a defined contribution plan.

The plaintiff in the *LaRue* case sued his former employer, who was the sponsor of a section 401(k) plan. The plaintiff alleged that he directed his employer to make changes in his account but the employer never carried out these instructions. He claimed this error lowered his interest in the plan by approximately \$150,000 and that it was a breach of their fiduciary duty. The U.S. District Court granted the employer's motion to dismiss, which was upheld by the Fourth Circuit which had cited a decision in a 1985 U.S. Supreme Court, *Massachusetts Mutual Life Insurance Company v. Russell*.

The recent Supreme Court decision said that *Russell* was aimed at protecting defined benefit plans from fiduciary misconduct that would impact the benefits plan participants are entitled to receive under defined benefit type plans. The Court stated the landscape of employee benefit plans has dramatically changed since *Russell* was decided in 1985. The Court further noted that when ERISA was enacted in 1974 and when *Russell* was decided, the defined benefit plan was the "norm of American pension practice," where defined contribution plans dominate the retirement plan scene today. In light of these circumstances, the Court held that ERISA does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account in a defined contribution plan.

The *LaRue* decision eliminates a potential impediment to lawsuit under ERISA against 401(k) plan sponsors and other plan fiduciaries by individual participants in such plans. This ruling will make it easier for participants to obtain relief for their accounts if they can show the investment losses were due to a breach of fiduciary duty. Under ERISA, fiduciaries to a plan are personally liable for losses resulting from a breach of fiduciary duty. Therefore, in light of the *LaRue* decision, plan sponsors of 401(k) plans should consider taking immediate action to reduce their potential liability for such claims, including, but not limited to:

- * Hire independent investment advisers to select and monitor the investment options that are chosen as investment alternatives under the plan;
- * Review company stock as an investment option. If available as an option, consider imposing restrictions on the percentage of their accounts that participants can have invested in employer stock;
- * Hire and/or review the need to perform an ERISA fiduciary compliance audit of the plan with outside legal counsel;
- * Comply with all the requirements of Section 404 (c) of ERISA. This provision insulates plan fiduciaries from liability for losses resulting from a participant's exercise of control of the investment assets in his or her account; and
- * Review materials and communications provided to employees on the ability to change investments within the plan and the need to diversify plan offerings.

Lastly, it is critical to review the insurance protection that is available within a Fiduciary Liability Insurance Policy. This should include a review of the limits and retention in light of a potential increase in the frequency of claims within these policies. In addition, a detailed review of the specific coverage terms that may be impacted by this recent Supreme Court decision is also of utmost importance.

Please contact a member of your Hays Executive Risk Service Team if you would like to discuss further.

Susan Bukowski, Vice President, Hays Companies



California Federal Employment and Housing Act (FEHA).....	Page 2
The Case for Wellness Programs.....	Page 3

CALIFORNIA FEDERAL EMPLOYMENT AND HOUSING ACT (FEHA)

Disability discrimination lawsuits under California's Federal Employment and Housing Act (FEHA) are on the rise. It is important for clients with California locations and workers' compensation exposures, to be aware of the requirements under FEHA, how FEHA affects workers' compensation claims and to have appropriate policies and programs in place, in order to avoid possible disability discrimination lawsuits.

What is FEHA? It is a California law that provides protections in the area of disabilities, independent of those in the federal Americans with Disabilities Act (ADA). It contains broad definitions of physical and mental disabilities and medical conditions. Limitations are not required to be "substantial", as with the ADA, and "working" is considered a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a broad class of jobs.

FEHA applies to occupational and non-occupational disabilities, temporary and permanent disabilities and addresses any limitation of a substantial life activity. FEHA requires all California employers, regardless of size or number of employees, to comply with FEHA regulations. FEHA disputes are handled in a civil jury trial, rather than in the workers' compensation courts. If the plaintiff recovers anything as the result of a lawsuit, their attorney fees are also payable by the employer.

Who is covered under FEHA? Traditional employees (at will or by employment contract), individuals who provide services as an independent contractor and individuals who work under the control of the employer. FEHA's interpretation of "employee" is much broader than that of the ADA.

The key components of FEHA are the duty to engage in the interactive process with the employee to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation and the duty to make a reasonable accommodation for the known or perceived physical or mental disability of an applicant or employee. The interactive process means talking about the employee's disability and reasonable accommodation in person with the employee and should be independent and continuous as the employee's circumstances change.

Some triggers for the interactive process occur whenever an employee states he/she is limited or needs accommodation. This statement can be part of a return to work decision after a work-related injury or leave of absence; recruiting or placement; during performance feedback or counseling; during or after harassment or retaliation investigation; during discipline or discharge decisions; and an effort to achieve consistent policy enforcement.

California's recent workers' compensation reforms heightened FEHA risks for employers. Temporary disability is now capped at 104 weeks. This triggers the need to consider providing modified duty: can the employee work before being declared Permanent & Stationary (P&S), can he/she perform essential job functions with accommodation or are there other jobs for which the employee is

qualified by training or experience. Is the accommodation reasonable? When vocational rehabilitation benefits are no longer available, the exposure for a retraining voucher and Permanent Disability increase and may apply. The employee has the burden to consider all reasonable accommodations.

FEHA impacts workers' compensation claims throughout the course of the claim. While the claim is open, the employer has the duty to evaluate modified duty and requests to accommodate. In addition, the employer has the continuing duty to interact with the employee and consider reasonable accommodations upon return to work. An employee can be given a 0% Permanent Impairment rating for a work-related injury under the AMA Guidelines, or not yet be Permanent and Stationary (P&S), and still be covered under FEHA, because FEHA covers occupational and non-occupational disabilities.

Closure of a workers' compensation claim does not affect the employer's duties or potential FEHA cause of action. A Compromise and Release does not automatically release an FEHA claim, even for separating employees. The release of an FEHA claim requires an independent "valuable" consideration and release. The employee has a one-year statute of limitation following the employment separation to file an FEHA action.

132a workers' compensation retaliation claims relate only to terminations or adverse actions. 132a is a specific claim of discrimination for how the employer handled a workers' compensation claim or in retaliation for the employee filing a workers' compensation claim. FEHA claims cover a broad scope of occupational and non-occupational disabilities. Potential FEHA retaliation risks include any actions or threats during or after the injury and during the interactive process.

Further, the discovery process during an FEHA claim is much broader than in a litigated workers' compensation claim. All employer records, and much of the workers' compensation claim, are relevant and discoverable. All non-privileged e-mails exchanged with the client, **even internally**, are discoverable, even when not printed or placed in the official claim file.

FEHA allows the manager or supervisor to be held personally liable for retaliation under FEHA. The supervisor's conduct is not barred by the governmental immunity provisions. FEHA is applicable to a cause of action for failure to prevent retaliation. The employer has a duty under FEHA to investigate and prevent retaliation, as retaliation is a form of discrimination.

It is important that employers train their managers and supervisors regarding the company's workers' compensation and FEHA policies and procedures to ensure they understand the critical distinctions between the workers' compensation claim process and duties under FEHA.

Employers with questions or concerns about their policies and procedures related to FEHA are urged to contact a law firm experienced in advising employers and defending FEHA disability discrimination lawsuits.

Julia Uehling, Vice President, Hays Companies

THE CASE FOR WELLNESS PROGRAMS

Consider This

Less than one-third of adults in the United States are at a healthy weight. In fact, of the two-thirds of adults who are overweight, about one-half (or one-third of the total adult population) are not just overweight but are obese according to data from the National Health and Nutrition Examination Survey conducted from 2001 to 2004 by the National Institutes of Health. The prevalence continues to increase each year and does not discriminate based on gender, age, race, ethnicity, educational level or tobacco status.

Overweight and obesity are known risk factors for:

- * Diabetes
- * Coronary heart disease
- * High blood cholesterol
- * Stroke
- * Hypertension
- * Gallbladder disease
- * Osteoarthritis
- * Sleep apnea and other breathing problems
- * Some forms of cancer (breast, colorectal, endometrial and kidney)
- * Complications of pregnancy
- * Psychological disorders, such as depression
- * Increased surgical risk
- * Increased mortality

Consider This

Smoking harms nearly every organ of the body. Smoking causes the leading cause of death in the United States, coronary heart disease. Smoking causes cancers of the bladder, oral cavity, pharynx, larynx, esophagus, cervix, kidney, pancreas and stomach. Smoking causes about 90% of lung cancer deaths in women and about 80% of lung cancer deaths in men. Smoking causes acute myeloid leukemia and doubles a person's risk for stroke.

Why are these facts significant?

Medical costs associated with the above chronic diseases and conditions are extreme. When it comes to healthcare costs, many health plans see annually that their experience follows the 80-20 rule; that is, 80% of a group health plan's costs are for the claims of 20% of the covered persons. Subsequently many group health plan sponsors have shifted their focus to managing the costs of the highest cost conditions.

The World Health Organization reports that more than 80% of premature heart disease, stroke, respiratory diseases and diabetes and 40% of cancer could be prevented through healthy diet, regular physical activity and avoidance of tobacco products and harmful use of alcohol. **Prematurity is defined as under age 70.** Since most chronic diseases and conditions are preventable, a prevailing theory is that spending more on health promotion and

disease prevention will save money. Enter wellness programs.

A wellness program has the primary goal of achieving healthier lifestyles among participants in the health plan as a way to control healthcare costs by preventing preventable chronic conditions. When wellness becomes a cultural standard, indirect cost savings are also achieved through reduction in absenteeism and turnover, improved productivity and improved occupational safety and hazard risk. Another benefit of a wellness program is often improved employee morale.

Initially, a typical wellness program focuses on preventing heart disease and stroke, cancer, chronic respiratory diseases and diabetes as these chronic diseases have the greatest cost impact. Basically, this entails increasing opportunities for healthy eating and physical activity and in some groups, smoking cessation. For some employers, this could be as simple (and low-cost) as providing education, sharing healthy recipes, encouraging physical activities through community walks and/or internal challenges. Other employers may spend a bit more by subsidizing health club memberships or even building onsite physical fitness centers.

Wellness Programs have various components. At a minimum, most programs attempt to raise awareness of the benefits of healthy lifestyles through communications such as posters, payroll stuffers, emails, magnets, periodic tips, healthy recipes, etc. Some employers supplement these communications with an annual health fair and/or wellness-themed lunch 'n learns. In addition, many employers offer Employee Assistance Programs as a resource for not only health information but other important lifestyle information (financial, legal, elder care, etc. advice) as a means to reduce external stressors of employees.

Many employers opt to conduct health risk assessments which will help focus programs according to the areas of greatest need (e.g. smoking cessation, weight management, nutrition etc.). In fact, a 2006 survey conducted by UBA indicates that 70% of employers who have a wellness program include a health risk assessment. A health risk assessment normally includes questions designed to gauge an individual's health status as well as propensity for disease based on current health status and lifestyle. Biometric screening may be added to support the results from the health risk assessment.

Popularity of health risk appraisals has increased over the past five years. According to Mercer's *National Survey of Employer Plans*, 22% of all reporting employers conducted health risk assessments in 2006, compared to 6% in 2001. Among employers with more than 500 employees, the rate has more than doubled, increasing from 20% in 2001 to 53% in 2006. Among employers with less than 500 employees, the rate has more than tripled, increasing from 6% in 2001 to 21% in 2006.

According to the Wellness Council of America, a successful wellness program can see a 3 to 1 Return on Investment (ROI) ratio. To be successful, a wellness program should contain at least the following elements:

- * Executive leadership and support to lead and encourage a cultural standard of wellness;

WELLNESS (cont.)

- * Coordinating body to develop, implement, review and modify the company policy regarding health and safety, including representation from all levels within the organization and varying health statuses;
- * Gap analysis to determine the specific risks currently being faced and to prioritize accordingly;
- * Long-term timeline to change behavior in a reasonable manner;
- * Focus on the family to encourage a healthy lifestyle;
- * Performance reviews to regularly monitor health- and safety-related costs to determine the specific risks currently being faced and to gauge the success of the current program.

There are also legal considerations for designing a successful wellness program. The Health Insurance Portability and Accountability Act (HIPAA) generally prohibits discrimination based on health factors. However, there is an exception to this prohibition for plan provisions that vary benefits or contributions in connection with a wellness program that satisfies the following requirements:

- * The total cost difference may not exceed 20% of the cost of coverage;
- * The program must be reasonably designed to promote health or prevent disease;
- * The program must give eligible individuals the opportunity to qualify for the reward at least once per year;
- * The reward must be available to all similarly situated individuals. This means that the program must allow a reasonable alternative standard (or waiver of the applicable standard) for any individual for whom, for that period, it is unreasonably difficult due to a medical condition or is medically inadvisable for the individual to satisfy the standard.

The plan must disclose the availability of a reasonable alternative standard. To comply with this requirement, the program should use the following language in all plan materials describing the terms of the program:

"If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is

medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us and we will work with you to develop another way to qualify for the reward."

Employers should also take the Americans with Disabilities Act (ADA) into consideration when designing a wellness program. In general under the ADA, employee medical examinations and inquiries must be "job-related" and "consistent with business necessity." However, there is an exception to the "job-related" and "consistent with business necessity" requirements for voluntary wellness and health screening programs.

Many employers who have voluntary wellness programs financially encourage participation through discounts or penalties. In response to this, the Equal Employment Opportunity Commission (EEOC) has informally stated that it has "concerns when penalties become large enough to make the wellness program for all practical purposes involuntary."

Wellness programs make an impact.

According to the 2007 Health Confidence Survey conducted by the Employee Benefit Research Institute (EBRI), 82% of workers have responded positively to wellness programs. More than 6 out of every 10 Americans have noticed an increase in health care costs and, as a result, 81% of survey respondents try to take better care of themselves, compared to 71% in 2005. The majority of workers, 88%, responded that wellness programs can help people develop healthier lifestyles and 83% responded that a wellness program would help them develop a healthier lifestyle.

Hilary Judy, Technical Assistance, Hays Companies Wisconsin



HAYS COMPANIES
IDS Center, Suite 700
80 S 8th Street
Minneapolis, MN 55402

Locally Owned, Globally Connected, Serving the needs of our customers: Risk Management, Insurance, Employee Benefits and Retirement Planning.

With Offices in 19 U.S. cities—For a complete listing, please consult our website at www.hayscompanies.com.