



# RISK MANAGEMENT INSIGHTS

by W. Brian Ahern, RPLU

## Employee Plan Fiduciaries & Personal Liability

**M**ost law firms offer retirement and/or healthcare plans to employees. Lawyers who act as fiduciaries of such plans may not realize that their personal assets are at risk under ERISA law if legal issues arise associated with the plans. Additionally, it is important to note that standard D&O policies exclude claims for ERISA violations. To ensure attorneys – and their personal assets – are protected, firms should consider obtaining fiduciary insurance coverage.

A plan fiduciary is anyone who has discretionary control over employee benefit plan assets. Fiduciaries have an obligation to act solely in the interest of plan participants and beneficiaries when making decisions about the plans. Duties of fiduciaries include:

- Making careful investment-related decisions, including diversifying the investments
- Selecting and monitoring capable outside firms hired to manage the plans
- Providing benefits
- Monitoring and paying reasonable expenses
- Following plan terms

The downturn in financial markets, downsizing and changes in benefit laws have put fiduciaries at greater risk. ERISA lawsuits are on the rise, with the most common types of claims involving investment losses; benefit reductions; downsizing; excessive 401K fees; and changes in regulatory and legal environments.

Defending an ERISA claim, even if it is without merit, is expensive and time-consuming. ERISA litigation in district courts is resolved in favor of plaintiffs in nearly 70% of substantive cases. The average cost of paid claims is \$994,000 with an average reported defense costs of \$365,000.

With personal assets on the line, the investment in a fiduciary liability insurance policy is essential for all law firms. Such coverage provides protection for fiduciaries, including coverage of defense costs; payment of fines, fees, penalties, sanctions and other costs; and coverage for all personal liability. A fiduciary liability policy is different than an employee benefits liability (EBL) policy or an ERISA bond. EBL coverage is limited to administrative errors and omissions. Typically claims involving such errors and omission are frequent but not severe. An ERISA bond, which is required by law, is first party coverage that pays the plan for any loss from theft of plan assets.

Several insurance providers offer fiduciary policies that provide the coverage specifically needed by law firms. With an increase in employee lawsuits regarding benefits and with personal assets at risk, there is no time like the present to ensure your firm and attorneys are properly covered.



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