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## Supreme Court

### Supreme Court Considers Right of Recovery for Fiduciary Breaches under ERISA

On February 20, 2008, the Supreme Court of the United States in *LaRue v. DeWolff, Boberg & Associates, Inc.* (LaRue) decided that ERISA does provide a remedy for certain fiduciary breaches that impact the value of plan assets in a participant's individual account. <http://www.supremecourtus.gov/opinions/07pdf/06-856.pdf>

James LaRue was a 401(k) plan participant. In 2004, he sued his former employer, DeWolff, Boberg & Associates (DeWolff), alleging that in 2001 and in 2002 he had instructed DeWolff to re-allocate his 401(k) account investments, and that DeWolff never implemented his instructions. LaRue claimed his account suffered losses of \$150,000 because his directions were not followed. He sued under ERISA, arguing that DeWolff's failure to implement his investment instructions amounted to a fiduciary breach for which his plan account was entitled to recovery.

LaRue's lawsuit is significant because it presented the Supreme Court with the issue of whether plan participants can bring claims seeking individual plan account recovery (as opposed to recovery by the plan as a whole) under ERISA. LaRue's claim was denied at the appeals court level. The Fourth Circuit Court of Appeals had held that LaRue could not proceed because ERISA only allows breach of fiduciary duty claims that affect the entire plan and does not permit individualized recoveries like LaRue was seeking.

The Supreme Court settled the question in favor of LaRue. The Court held that ERISA "does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's account." Note that the Supreme Court did not grant any remedy to LaRue. The issue of whether LaRue's account is actually entitled to all or a portion of the \$150,000 he is seeking is yet to be decided. The Court's decision clarifies that LaRue can proceed with his claim under ERISA at the trial court level.

## Internal Revenue Service

### IRS Notice Provides Guidance on Pension Protection Act Distribution Rules

The IRS released IRS Notice 2008-30 <http://www.irs.gov/pub/irs-drop/n-08-30.pdf> to provide information about distribution rules that are currently effective under the Pension Protection Act of 2006 (PPA). Guidance is provided on:

- rollovers from eligible retirement plans to Roth IRAs for distributions on or after January 1, 2008,
- the qualified optional survivor annuity (QOSA) available to married participants in ERISA plans generally effective for plan years beginning after December 31, 2007, and
- gap period earnings included with the distribution of excess deferrals applicable for taxable years beginning on or after January 1, 2007.

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## ***Rollovers to Roth IRAs***

The PPA amended the definition of qualified rollover contribution to permit rollovers from eligible retirement plans to Roth IRAs starting in 2008. Details in the notice include the following:

- For taxable years beginning before 2010, an individual can make a qualified rollover contribution from a 401(a) plan (including 401(k)), 403(a) and (b) and from a governmental 457(b) plan if certain conditions are satisfied. For the year the eligible rollover distribution is made, the individual must have modified adjusted gross income (MAGI) less than or equal to \$100,000. An individual is also ineligible if the individual is married and files a separate return. Starting in 2010, the income limitation is removed.
- A rollover can be made through a direct rollover from the plan to the Roth IRA **or** an amount can be distributed from the plan and indirectly rolled over to the Roth IRA within 60 days.
- This is a mandatory plan provision for employees and spouses; however, a plan administrator is not responsible for assuring that the distributee is eligible to make a rollover to a Roth IRA.
- To the extent an eligible rollover distribution is paid to an employee or employee's spouse, the 20% mandatory withholding applies. No mandatory withholding is required if the distributee elects to have an eligible rollover distribution paid directly to an eligible retirement plan, including a Roth IRA.
- The notice says that a distributee and a plan administrator or payor are permitted to enter into a voluntary withholding agreement with respect to an eligible rollover distribution that is directly rolled over from an eligible retirement plan to a Roth IRA.
- Beneficiaries can make qualified rollover contributions to Roth IRAs, if eligible. A plan may, but is not required to, permit rollovers by nonspouse beneficiaries. A rollover by a nonspouse beneficiary must be made by a direct trustee-to-trustee transfer. The nonspouse beneficiary is not permitted to treat the Roth IRA as the beneficiary's own. Any recharacterization required because the beneficiary is ineligible to effectuate a rollover would be made to a traditional IRA.
- A surviving spouse who makes a rollover to a Roth IRA may elect either to treat the Roth IRA as the spouse's own or establish the Roth IRA in the name of the decedent with the surviving spouse as the beneficiary, which would then be subject to RMD requirements as a beneficiary.
- To avoid taxation and penalties if the distributee is ineligible to effectuate the rollover to the Roth IRA, the amount rolled to the Roth IRA (including all earnings from the date of rollover) can be moved into a traditional IRA by the due date (including extensions) for the individual's tax return for the year the individual made the conversion into a Roth IRA. If this is accomplished, the amount converted to the traditional IRA is not included in taxable income. If an individual does not meet the Roth IRA income requirements, such amounts will not be returned to the eligible retirement plan.

## ***Qualified Optional Survivor Annuity***

According to the PPA, the level of spouse survivor annuity that must be provided under a QOSA to certain ERISA defined contribution plans depends upon the level of spouse survivor annuity provided under a plan's qualified joint and survivor annuity (QJSA) form of benefit. A QJSA is provided to a married participant in the absence of a waiver of such form of benefit.

If the QJSA for a married participant provides a survivor annuity for the life of the participant's spouse that is less than 75 percent of the amount of the annuity that is payable during the joint lives of the participant and the participant's spouse, the QOSA must provide a spouse survivor annuity percentage of 75 percent. If the QJSA for a married participant provides a survivor annuity for the life of the participant's spouse that is greater than or equal to 75 percent of the amount of the annuity that is payable during the joint lives of the participant and the participant's spouse, the QOSA must provide a spouse survivor annuity percentage of 50 percent.

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There is no requirement that a plan offer to participants, as an alternative to a qualified preretirement survivor annuity, a preretirement survivor annuity that is based on QOSA.

### **Gap-Period Earnings**

The final regulations under Section 402(g) published on April 30, 2007, provide that the gap-period earnings must be included with the distribution of excess deferrals to the extent the employee is or would be credited with an allocable gain or loss on those excess deferrals for the gap period, if the total amount were to be distributed. This gap-period earnings rule applies to both pre-tax excess deferrals and excess deferrals that are designated Roth contributions. The effective date for the rule on gap-period earnings is taxable years beginning on or after January 1, 2007.

The notice provides additional information on timing of amendments that have been submitted to the IRS for a determination letter or are due to be submitted. An interim plan amendment to provide for the inclusion of gap-period earnings in the distribution of excess deferrals will not be required to be adopted until the last day of the first plan year beginning on or after January 1, 2009.

### **IRS Releases Retirement Publications**

The Winter Edition of *Retirement News for Employers* [http://www.irs.gov/pub/irs-tege/rne\\_win08.pdf](http://www.irs.gov/pub/irs-tege/rne_win08.pdf) has been published. Information discussed in this useful publication includes the following:

- An article detailing how much can be deducted by employers for retirement plan contributions.
- Two questions and answers for employers who sponsor SIMPLE IRA plans.
- An explanation of when a plan amendment can be used to correct a mistake in the operation of a plan under the IRS Self-Correction Program.
- List of IRS Employee Plans Videos, which run from 1 – 7 minutes, that are available online:
  - “The Navigator” – Navigating Employer Information on Retirement Plans
  - Maintaining Your Plan
  - Self-Correcting Plan Mistakes
  - Fixing Plan Mistakes Found During an IRS Audit
  - Increasing Your Retirement Savings
  - Managing Your IRA
  - Starting a SEP or SIMPLE IRA Plan
  - Stopping Abuses in Retirement Plans
  - IRS Enforcement Priorities

In addition, the IRS has published the 401(k) Fix-it Guide [http://www.irs.gov/pub/irs-tege/401k\\_mistakes.pdf](http://www.irs.gov/pub/irs-tege/401k_mistakes.pdf), which details common 401(k) mistakes with tips on how to find, fix and avoid them.

## **Department of Labor**

### **Department of Labor Proposes Safe Harbor Rule for Employee Contributions to Small Pension Plans**

On February 29, 2008, the Department of Labor (DOL) announced a proposed rule to provide greater protection for employee contributions deposited to pension and welfare benefit plans with fewer than 100 participants that are subject to ERISA by proposing a safe harbor period. <http://a257.g.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/pdf/E8-3596.pdf>

“Our proposal will protect workers by encouraging employers to deposit participant contributions to small pension and welfare plans in a timely manner,” said Assistant Secretary of Labor for the Employee Benefits Security Administration Bradford P. Campbell in a press release. “It also will provide employers with a higher degree of compliance certainty.”

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### ***Current Rule***

Under the current rules, employers of all sizes must transmit employee contributions to pension plans as soon as they can reasonably be segregated from the general assets of the employer, but no later than the 15th business day of the month following the month in which contributions are received or withheld by the employer.

### ***Proposed Rule***

The proposed rule indicates that employers of all sizes must transmit employee contributions and participant loan repayments as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets.

In accordance with the proposed rule, participant contributions to a small plan with fewer than 100 participants at the beginning of the plan year will be deemed to satisfy the safe harbor period and comply with the law if those amounts are deposited with the plan:

- within seven business days following the day on which such amount is received by the employer (in case of amounts that a participant or beneficiary pays to an employer); or
- the 7<sup>th</sup> business day following the day on which such amount would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

While the revised rule will not become effective until the final rule is published, the DOL will be looking at the proposed safe harbor for small plans sooner. Before the effective date of the final regulation, the DOL will not assert a violation of the ERISA regarding participant contributions where such contributions are deposited with small plans within the seven business day safe harbor period. Small plans desiring safe harbor protections should review their current contribution practices in light of the proposed rule.

### ***Assessment of Possible Safe Harbors for Larger Employers***

In addition, the DOL is evaluating the current contribution practices of large employers. It requests information and data regarding a possible safe harbor for plans with 100 or more participants to enable it to evaluate the current contribution practices of these large employers.

## **Department of Labor Announces Retirement Planning Worksheets to Help Americans Chart Retirement Finances**

On February 21, 2008, the Department of Labor released a new online resource that makes it easier for Americans to prepare for a financially secure retirement. A series of interactive worksheets were developed as a companion to *Taking the Mystery out of Retirement Planning*. According to the press release announcing the updated publication, individuals who are 10 to 15 years from retirement can use the worksheets to calculate their income and savings as well as their projected expenses in retirement. <http://www.dol.gov/ebsa/pdf/nearretirement.pdf>

In addition, to those approaching retirement, the worksheets and booklet can be a helpful resource for recent retirees. In addition to accessing the worksheets online, free copies of the booklet are available by calling the Employee Benefits Security Administration (EBSA) toll-free at 866-444-3272.

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