

## ENTERPRISE

### Investing

#### **Biz owners could be liable for worker pension losses**

Scott Everhart

In light of the corporate scandals uncovered last year and the impact on 401(k) accounts, fiduciary liability is becoming an increasing concern for companies of all sizes. As a business owner or executive, you may be personally liable for employee losses in pension plans.

Exactly what is a fiduciary and who should be concerned about these risks? A fiduciary to a 401(k) plan is anyone who is in a decision-making position for that plan. That would often include chief financial officers, controllers, human resources directors, trustees and certainly owners of small and mid-size businesses.

Anyone in this type of role is at risk for a lawsuit – especially when disgruntled employees experience large losses in their 401(k) balances and are looking for someone to blame.

The first area I routinely see creating a large liability exposure for fiduciaries is that of cost. Most plans we examine are being severely overcharged.

These fees come in various shapes and sizes, including mutual fund expenses, third-party administrator fees, record keeper fees, and asset or annuity charges. Third-party administrator and record-keeper fees can be billed as hard-dollar costs directly to the company or buried into the plan as plan expenses. The mutual fund expense ratio and the asset charge or annuity charge are always buried into the plan.

The biggest and easiest fee to eliminate tends to be the asset charge or annuity charge. These fees are usually charged by insurance companies. This asset fee or annuity fee can range from 0.6 percent to 1.55 percent and averages about 1.25 percent of plan assets annually. Get rid of them and save some money.

Consider a \$4 million plan. By eliminating the asset fee, you would save \$50,000 in fees at the average 1.25 percent. Keep in mind this fee is charged every year and increases annually as plan assets grow.

Businesses are advised to look closely at their fee structure, particularly if their plan is administered by an insurer. The fees won't be trumpeted, but they must be disclosed in the annuity or insurance contract. If you look closely, you'll find them there.

## **Measuring up**

Another area creating liability is investment performance and quality. If your plan investment options haven't been performing well compared with their peer group, fiduciaries have a responsibility to examine the situation and make changes if necessary.

Few stock investments have posted positive returns in the last few years, but is company liable for poor stock performance? Probably not.

Comparing your plan's returns to peer groups is the key. For example, if the foreign investment choice you are offering has lost ground, but foreign holdings in general are down even more, your option's performance is clearly acceptable in light of its peer group's performance.

If, however, the opposite is true and your option is trailing its peer group, a change may be in order. Keep in mind that performance needs to be evaluated using appropriate time frames.

I'd recommend placing the most emphasis on 10- and 15-year investment performances. Remember, retirement investing is a marathon, not a sprint. This money will be invested for decades, through the end of an investor's retirement years, so solid long-term performance is the key.

Fund manager tenure, turnover rate of the holdings inside the investment vehicle and risk must also be examined. These areas, along with expenses, are the primary contributors to investment performance over extended periods of time.

For instance, if your plan is using a growth fund with a manager possessing just two years experience, and there are options available with a team of managers that have 20 years of experience, you may want to choose another investment option or at least clearly document the reasons for choosing the prior option.

## **Investment schooling**

A third area to be aware of is participant education. If your participants aren't being properly educated about the plan, its investment options and basic investment concepts in general, there is an area of liability to address.

Employers should hold educational meetings each time a new group of workers becomes eligible to participate in the plan. Meetings should be held in person if possible, preferably by a certified financial planner. Meetings should also be open to existing participants and anyone else who would like to attend, such as spouses.

By providing an open forum to address plan questions, you'll avoid later claims about lack of education about the plan. It's a good idea to record attendance to document dates and who chose to attend.

Addressing the areas of cost, investment performance and participant education will go a long way toward limiting your liability as a fiduciary of your company's 401(k) plan. If legal action is taken, you should be well armed to defend your plan, your decisions and your pocketbook.

*Scott Everhart is a partner of Everhart Financial Group, an independent registered investment advisory firm in Columbus. Reach him at 614-717-9705 or [scotte@everhartfinancial.com](mailto:scotte@everhartfinancial.com).*