

Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / THIRD QUARTER 2008

inside

PROTECT EMPLOYEES

Tips for avoiding confrontations with the EEOC

Still Receiving Annoying Calls?

Planning for Tragedy

Silent Harassment

Legal Briefs

SUPREME COURT EXPANDS 401(K) LIABILITY

A new groundbreaking decision by the U.S. Supreme Court could open the floodgates to increased litigation by 401(k) plan participants. The highest court in the land said that employees could sue their plan sponsors for personal losses suffered when the sponsor fails to follow their instructions.

Key facts: A participant in a 401(k) plan had divided up his plan assets among several mutual funds. Seeking to diversify with a more conservative approach, he allegedly directed the plan administrator to switch some of the mutual funds in his account. But the changes were never made. The employee claimed that this failure resulted in losses of \$150,000. The plan participant sued the employer for breaching its fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA).

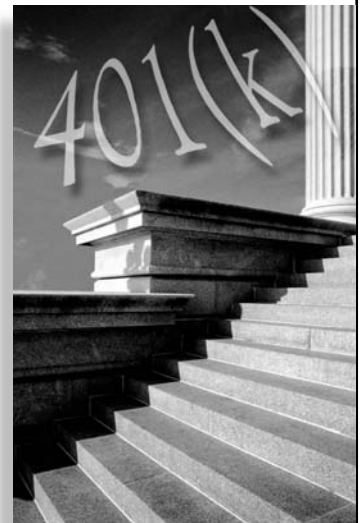
At first, the lower courts sided with the employer. **One reason:** In a previous landmark case, the lawsuit

was limited to equitable relief. But the Supreme Court distinguished the current case at hand.

The Supreme Court noted that the plaintiff in the prior case was a participant in a defined benefit plan, such as a traditional pension plan, as opposed to a defined contribution plan, such as a 401(k) plan. There are no individual accounts with a defined benefit plan; the payouts are based on actuarial computations. In contrast, the benefits of a 401(k) plan are dependent upon the investment choices made for the participant's personal account.

As a result, the court ruled that the plan participant could sue the plan sponsor under ERISA. He may be able to recover damages for personal investment losses if it can be proven that a fiduciary breach occurred. The court's decision was unanimous (although there was some slight disagreement over the technical application of ERISA).

(see Supreme Court on next page)



HEED THE NEW EEOC INITIATIVES

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing Title VII of the Civil Rights Act of 1964 banning employment discrimination based on race, color, religion or national origin. Similarly, the EEOC protects individuals with disabilities under the Americans with Disabilities Act of 1990 (ADA) and workers 40 years of age or older under the Age Discrimination in Employment Act of 1967 (ADEA).

New developments: The EEOC is reenergizing its efforts to avoid workplace discrimination in 2008. Specifically, it is pointing toward three key initiatives to help lead the way:

1. E-RACE program: The EEOC has developed the Eradicating Racism And Colorism from Employment (E-RACE) program. This initiative is an education and enforcement campaign primarily devoted to ridding the workplace of racial discrimination. In doing so, the EEOC is responding to several high-profile cases and an upward trend in bias against workers of various races, colors and national origins.

2. Employee testing program: The Employment Tests and Selection Procedures (ETSP) initiative is designed to avoid discrimination in the hiring process. In particular, employers have increased pre-employment testing in the wake of 9/11 at the same time that the Internet has enabled them to screen vast numbers of candidates in less time. The ETSP program reminds employers that such testing may violate laws protecting older workers, minorities and people with disabilities.

3. Caregiver program: The EEOC has combined aspects of several laws—including the Civil Rights Act, the ADA and the ADEA—in a document explaining how employees with caregiving responsibilities are protected from discrimination. Lawsuits may also result from actions filed under the Pregnancy Discrimination Act of 1978 (PDA), the Equal Pay Act of 1963 (EPA), and the Family and Medical Leave Act of 1993 (FMLA).

How can your company avoid confrontations with the EEOC? Here are a few simple suggestions:

- ◆ Review your employee manual to make sure it is in full compliance with the aforementioned laws.
- ◆ Examine all hiring tests and procedures. Make the necessary modifications if your practices may be construed as being discriminatory.
- ◆ Train all employees—in particular, officers and other supervisors—about the applicable laws and ways to prevent discrimination. Highlight the new EEOC guidelines.

Finally, do not hesitate to rely on your legal advisers for guidance. This can help steer you away from potential lawsuits. ☞

SUPREME COURT (continued from front page)

Note: This is not the end of the matter in this particular case. The plan sponsor may raise defenses relating to the instructions reputedly given by the plaintiff.

To avoid complications for your company's plan, consider the following suggestions:

- ◆ implement a fail-safe system of internal controls;
- ◆ examine procedures concerning participant instructions;
- ◆ arrange for liability insurance coverage (or expand existing coverage);
- ◆ review investment choices currently available to plan participants; and
- ◆ increase availability of investment advisers.

These precautions will not completely shield your company from a lawsuit, but they should provide greater protection. If you have any questions concerning the application of the new case to your situation, do not hesitate to seek legal assistance. ☞





The Do Not Call List: Hold the Phone

Are you registered with the federal Do Not Call Registry and still receiving annoying calls? Be aware that the law is not completely restrictive.

The National Do Not Call Registry was created by the Federal Trade Commission (FTC). Under the FTC rules, placing your number on the registry will stop most telemarketing calls, but not all. For example, there are exceptions for calls from charities, legitimate telephone surveys and calls from companies with which you have an existing business relationship.

Finally, with the elections fast approaching, note that calls by political organizations generally are exempt from the usual requirements.

PLAN FOR THE WORST, HOPE FOR THE BEST

It is a distressing fact that thousands of people die each year due to accidental causes. Worst of all, these accidents may involve two or more individuals from the same family. Although no one likes to contemplate such a tragedy, this possibility should be addressed as part of a comprehensive estate plan.

Potential problem: If both spouses die in an accident, it may be impossible to prove that one predeceased the other. Under common law principles, there is no presumption of survivorship. This means that both spouses are presumed to have died at exactly the same time.

To resolve disputes, many states have adopted a version of the Uniform Simultaneous Death Act. How it works: Each spouse is treated as having survived the other spouse with respect to his or her property. In other words, the assets of the husband pass by his will; the wife's assets are distributed through her will.

Note: Variations may exist under state law.

Unfortunately, this can result in a higher estate-tax bill for the children. **Reason:** Both estates may not be able to take advantage of the estate-tax exemption. Currently, the credit can be used to shelter up to \$2 million from federal estate tax. This exemption is frequently coordinated with the unlimited marital deduction for planning purposes.


Example: Matthew Smith, married to Rose, currently owns \$3 million in personal assets. His will provides that half of his estate will go to a trust to benefit Rose. The other half goes directly to her. Any remaining funds in the trust will pass to their children after Rose's death.

Under the prevailing law in the state where they live, each spouse is treated as surviving each other in the event of a common disaster. Because the estate-tax exemption shelters \$2 million, \$1 million of Matthew's assets will be subject to federal estate tax.

But suppose the couple includes a common disaster clause in their wills. It treats Matthew as predeceasing Rose should they both die in a common tragedy.

New result: The \$1.5 million left outright to Rose is exempt from tax under the unlimited marital deduction. The other \$1.5 million in the trust bypasses her taxable estate. These funds are sheltered by the estate-tax exemption for Matthew's estate. So there is no estate tax due.

Note that there may be additional complications under state law, particularly in community property states. Professional assistance in this area is a must.

While nothing can replace the loss of loved ones, planning for the worst-case scenario may provide a measure of financial security. 



SEXUAL HARASSMENT: SILENCE IS NOT GOLDEN

A new case shows that sexual harassment may exist in the workplace without one person touching or even speaking to another. "Environmental harassment" represents unwelcome sexual conduct that creates an intimidating or offensive work environment. The most egregious cases of environmental harassment involve unwanted touching or lewd comments or jokes. But the courts have also indicated that silence, when it is constant and pervasive, can result in a sexually hostile environment.



Facts of the new case: A woman worked as a secretary for a township in Massachusetts. Her immediate supervisor was the town administrator. They had no prior relationship.

From day one on the job, the secretary claimed that the town administrator stared at her breasts. He never initiated any inappropriate action toward her nor did he make any comments or joke in a sexually explicit way. Yet the alleged staring made


her feel uncomfortable. She often felt compelled to cover her breasts with a piece of paper or something else when she was in her boss's presence.

When the secretary complained about the behavior, the township conducted an investigation. The township determined that the alleged staring did not create a hostile environment.

Subsequently, the town administrator suffered a heart attack, which was attributed (at least in part) to the stress of enduring the investigation. When the administrator returned to work, the secretary was transferred to a different position based on the request of his attorney—not hers. The request emphasized the need to remove the reputed source of the stress because of his disability.

The new job was not as rewarding and less prestigious for the secretary although she was paid the same amount and received the same benefits package. She sued the town for sexual harassment and retaliation.

Result: The First Circuit Court of Appeals sided with the secretary. It said that constant staring at her breasts may qualify as sexual harassment, and the job transfer could be retaliation. The case was sent back to trial.

The new case points out the need for comprehensive training about sexual harassment issues in the workplace. 

B R I E F S

◆◆**Have It Your Way**—In a new case, employees of Burger King sued the franchise, arguing that they should have been paid for participating in a self-directing training program. The program was offered to employees who wanted to rise through the ranks. Because the training was voluntary, occurred during off-hours and did not relate to their current jobs, a District Court in New York ruled the employees were not required to be compensated.

◆◆**Heartbreaking Decision**—An employee received \$160,000 from the owner of her company. She claimed that the payment was a gift reflecting the owner's romantic interests. However, to qualify as a gift for tax purposes, the payment must stem from generosity, affection, respect, admiration, charity, etc. **Result:** The Tax Court determined that this "gift" was an enticement for the worker to stay with the company. Therefore, it constituted taxable income.

◆◆**Executor Duties**—Have you been named as the executor of an estate? In this capacity, you are responsible for wrapping up the decedent's financial affairs. This usually means taking care of property, paying bills and taxes, and ensuring that assets are transferred to their proper beneficiaries. Do not hesitate to seek legal guidance when it is appropriate.

◆◆**Military Matters**—Under new modifications to the Family and Medical Leave Act (FMLA), signed January 28, 2008, employees caring for wounded military personnel can now take up to 26 weeks of unpaid FMLA leave each year. In addition, employers must grant leaves of up to 12 weeks each year to families of reservists and National Guard members who are called into active duty. 