

## THE RETIREMENT POLICY PROGRAM



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## Storm Clouds Ahead for 401(k) Plans?

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In 2006, Congress acted decisively to put the nation's retirement saving system on a smoother glide path to success. The Pension Protection Act of 2006 (PPA) blessed three design innovations to make 401(k) and other workplace saving plans more productive.<sup>1</sup> First, employers can sign up workers into saving by payroll deduction ("auto-enrollment"). Second, employers can choose how much, as a percentage of pay, workers will save and can automatically increase it ("auto-contribution") for each year on the job. Third, employers can invest workers' accounts in a designated default fund ("auto-investment"). Workers can always choose not to save, choose a different amount to save, or choose alternative investment options. PPA also includes legal protections for employers who include these features in their plans.

These "auto-pilot" provisions were intended to change two of the most intractable problems facing the 401(k) plan system. The first is low savings rates by workers, especially low- and moderate-income workers. The automatic features are intended to give workers a plan that makes saving easy and rewarding by requiring few up-front choices. The second is low plan sponsorship rates by employers, especially small and medium-sized employers. The hope is that employers will be more willing to offer a plan if it is an auto-pilot plan with less legal liability.

Are PPA's reforms taking hold? Early results indicate some encouraging signs nearly two years later. Will they succeed over the long run? Most indications are positive. A recent Supreme

Court decision in *LaRue v. DeWolff, Boberg & Associates*, however, has clouded the legal landscape for 401(k) plans so recently cleared by PPA. This case, which clarifies the rights of plan participants to sue, threatens to thwart PPA's effort to entice more employers into offering plans.

### A Progress Report on Automatic 401(k) Plan Features

#### Auto-enrollment

PPA did not invent auto-enrollment; McDonald's did. In 1984, it pioneered these features in its 401(k) plan, achieving a 93 percent participation rate by 2002. But McDonald's also found some significant drawbacks to auto-enrollment. It was certainly successful in creating large numbers of accounts but too many remained small, raising administrative costs, and too many were abandoned by workers when they quit.<sup>2</sup> So, in 2002, the company removed auto-enrollment features from the plan covering its typically low-wage, short-tenure workforce.

Other companies, typically large companies with more stable workforces, did discover value in auto-enrollment. Like McDonald's, many companies found that auto-enrollment raised participation rates significantly, often from the typical 45–50 percent rate with voluntary enrollment to closer to 90 percent (Gutner and Rappaport 2008; MassMutual 2008; Vanguard 2008). In addition, while auto-enrollment appears successful among all types of workers, its strongest impact is on workers, such as low-wage and younger workers, with traditionally low rates of participation (Nessmith, Utkus, and Young 2007).

The trend to auto-enrollment was evident even before passage of PPA. About 7 percent of employers offered auto-enrollment in 2002, some 17 percent in 2004 (30 percent for companies with more than 5,000 workers), and about 24 percent by the end of 2007 (MetLife 2008; Wray 2007). Auto-enrollment seems to be more common in larger plans. In 2007, about 41 percent of

plans with 5,000 or more participants featured auto-enrollment compared to only about 7 percent of plans with fewer than 50 participants (Wray 2007). This trend is confirmed by Fidelity which reports that, by the end of 2006, 17 percent of its mid-sized and large plans (at least 1,000 participants) had adopted auto-enrollment, up from 10 percent in the prior year. The largest increase occurred among its plans with 1,000–2,499 participants, which grew from 13 percent of plans in 2005 to 22 percent in 2006 (Fidelity 2008).

Will PPA accelerate this trend? Initial estimates from the government on the effects of auto-pilot features are conservative. In 2005, for example, 401(k)-type plans already held \$2.4 trillion in assets (Copeland 2008). The Department of Labor projects that, by 2034, auto-pilot features will add between \$70 billion and \$134 billion in additional retirement savings (DOL 2007). The Joint Committee on Taxation estimates that the government will spend in tax expenditures about \$500 million in 2010, rising to about \$900 million by 2016, on auto-enrollment (Joint Committee on Taxation 2006). Analysis of the 2010 tax expenditure projection suggests that it translates into additional contributions of about \$2.5 billion, or about an additional \$20 per worker (Perun and Steuerle 2008).

It is too soon to tell but the government projections may be too pessimistic. Preliminary evidence from consulting and investment firms suggests employer enthusiasm for auto-enrollment.<sup>3</sup> Schwab found that 20 percent of its plan clients were using auto-enrollment in 2007, a fourfold increase in two years.<sup>4</sup> New York Life Retirement Plan Services reports that the number of its plans adopting auto-enrollment almost doubled (from 18 percent to 32 percent) between January 1 and September 30, 2007, and predicts another 10 percent in adopters in early 2008.<sup>5</sup> Similarly, Diversified Investment Advisors Inc. found that, by the end of 2006, 62 percent of its clients had implemented auto-enrollment, a 7 percent increase over the prior year, and another 33 percent were considering it.<sup>6</sup>

### Auto-contribution

Employer responses to auto-contribution features, however, are less encouraging. PPA lets employers set the initial default contribution, and it appears too many employers are setting it too low. Industry sources say the typical initial default rate is 3 percent of pay (Fidelity 2008; MassMutual 2008; Vanguard 2008; Wray 2007). Vanguard reports, for example, that, while 22 percent of its auto-enrollment plans have an initial contribution rate greater than 3 percent, about one-third of these plans require only a 1 or 2 percent-of-pay contribution (Nessmith et al. 2007). Most experts would agree that even a 3 percent annual contribution rate is too low to generate adequate income in retirement, with a target of 9–12 percent (employee and employer contributions combined) viewed as more realistic (Nessmith et al. 2007).

Many workers also seem to believe the default rate is their savings target, rather than just the initial rate. In one study, for example, deferral rates dropped from 7 percent on average under voluntary enrollment to about 4 percent when auto-enrollment was adopted (MetLife 2008). A Vanguard analysis reported a similar finding:

While plan participation increases under automatic enrollment, median participant contribution rates decrease. The median contribution rate in automatic enrollment designs is 2.9 percent, which is 40 percent lower than the 5.0 percent median contribution rate under voluntary enrollment. (Nessmith et al. 2007)

The initial rate is critical because participants often tend to stay at that rate. A prominent consulting firm, Hewitt Associates, reports that most participants in auto-pilot plans remain at the default contribution rate.<sup>7</sup> PPA does give employers the option to tie higher default contributions to additional years of service. It is not yet clear how many employers will do this. Vanguard reports that 60 percent of its auto-enrollment plans feature automatic increases (Vanguard 2008). Diversified Investment Advisors Inc. finds that more employers are considering this option,

and 30 percent of its clients had this feature in 2006 versus only 15 percent in 2005.

Auto-contribution features are a conundrum for 401(k) plans. Intended to raise average savings rates, they have, unless carefully chosen, the potential to lower them. In addition, because auto-enrollment creates many more accounts, it raises plan costs for employers that provide matching or across-the-board contributions.<sup>8</sup> There are some reports of employer resistance to auto-pilot plans for this reason. Hewitt Associates has estimated that the cost of matching contributions in a plan with full auto-enrollment could increase by 20–30 percent, representing a significant barrier to adoption to many employers.<sup>9</sup> Further, without significant levels of employer contributions, too many accounts will remain small, raising plan costs that reduce the return to saving.

Choosing auto-contribution rates and increases puts employers in a quandary. They must trade off their concern over plan costs with their concern for their workers' retirement security. Many employers—but not all—will accept these additional costs because greater saving by lower-income workers enables higher-paid workers to contribute more in the standard 401(k) plan. On the other hand, low contribution rates (with or without matching contributions) mean smaller account balances, resulting in higher plan expenses. The rationale for auto-enrollment is that it will increase the financial assets of workers for retirement to meaningful levels. As McDonald's found, merely adding more accounts is not enough. What matters is increasing assets in accounts to sustainable levels in terms of plan economics and retirement income adequacy.

### Auto-investment

One of PPA's major innovations was to specify categories of default investments that minimized the fiduciary risk to employers. An employer who invests the accounts of participants who fail to choose their own investment options in default funds that meet Department of Labor guidelines will be shielded from liability for

investment losses. Prior to PPA, employers tended to choose default funds emphasizing capital preservation over investment performance in order to minimize their fiduciary exposure in the event of a market turndown.

The choice of default funds is important for workers as well as employers. Investment returns play a critical role in maximizing retirement income for savers. Research has found that workers placed in default investment options tend to remain there (MassMutual 2008). So substituting funds more appropriate for a long-term investing program should help increase worker accumulations for retirement.

Under regulations issued by the Department of Labor in 2007, post-PPA default investments typically must include exposure to equity investing.<sup>10</sup> The approved funds are target-date funds, balanced funds, and managed accounts. The new default options are not limited to auto-enrollment plans and are becoming popular among voluntary enrollment plans as well. Vanguard reports that 75 percent of its plans offered life-cycle funds in 2006, while 86 percent of Fidelity plans did (Fidelity 2008; Vanguard 2008). Statistics for auto-enrollment funds are similar. Fidelity reports that over 60 percent of these plans use an age-based target fund as the default option (Fidelity 2008). Among Vanguard's auto-enrollment plans, about 90 percent offer a default fund with 67 percent choosing an age-based target fund and 22 percent a balanced fund.

### Early Conclusions

Employers—and workers—are still adjusting to the potential of PPA's reforms. At this early point, auto-investment looks well on its way to becoming a standard feature in 401(k) plans. Default funds offer employers significant relief from fiduciary liability, and plan advisors will strongly urge their adoption (Cranch and Notto 2007). These funds are a popular industry product, already widely in use in both auto-enrollment and voluntary enrollment plans.

The full promise of auto-enrollment, however, is inevitably tied to the success of auto-contribution features. Adding millions of accounts through auto-enrollment will mean little if they remain small. Higher default initial contribution rates and automatic increases for longer tenure will be required to build worker accounts substantially. For low- and moderate-income workers, matching contributions will also be critical to boost participation and investment returns. Will employers be willing to invest more in their auto-enrollment plans? That's the question for the future.

## The Threat from *LaRue*

### The *LaRue* Decision

On February 20, 2008, the Supreme Court handed down a unanimous decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, that promises to have a significant impact on 401(k) plans. James LaRue sued his former employer in 2005. His complaint was that he had instructed plan officials to change how his 401(k) account was invested in 2001 and 2002. But, although the plan gave LaRue the right to do this, his instructions were never carried out. LaRue alleged that this was a breach of fiduciary duty under ERISA, the primary federal pension law, for which plan officials were liable. He asserted that this breach of duty had cost his 401(k) plan account \$150,000 and asked that his account be "made whole" (i.e., reimbursed).

The issue before the Supreme Court was not whether LaRue was entitled to that \$150,000 but whether he had sued under an appropriate section of ERISA.<sup>11</sup> The law appeared to be settled that he had not, under a 1985 ERISA case, *Massachusetts Life Ins. Co. v. Russell*. *Russell* involved an employer-sponsored disability plan from which a participant sought damages for a failure by plan fiduciaries to pay her claim promptly. The Supreme Court held that ERISA did not permit claims for money damages under this section of ERISA unless the damages were on behalf of the "entire" plan. Individual participants could not

seek financial redress solely for their personal benefit.

In *LaRue*, the Supreme Court clarified its ruling in *Russell*. To do that, the Court first took note of a key difference between 1985 and 2008—the dominant role now played by 401(k)-type plans in the private pension system. Under ERISA, plan fiduciaries have the duty to manage, administer, and invest plan funds properly and to act in the best interest of plan participants. The Court recognized that plan funds are held in individual participant accounts in 401(k)-type plans. Therefore, an injury to an individual account is an injury to the plan within the meaning of *Russell* for which ERISA provides a remedy. As the Court noted,

fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular accounts, it creates the types of harms that concerned the draftsmen of [ERISA].

### The Significance of *LaRue*

*LaRue* now returns to the lower courts where the facts of the dispute will finally be contested. There is no guarantee Mr. LaRue will ultimately recover the \$150,000 he seeks. But the case represents a significant turning point. This is so not because the ruling was unexpected, as most pension attorneys believed the clear language of ERISA compelled the result. Neither did *LaRue* expand ERISA's reach. Its significance instead is that it puts into sharp relief the vast legal exposure of employers sponsoring 401(k)-type plans under ERISA's regulatory framework.<sup>12</sup>

Under ERISA, someone—usually the employer—must ensure that a plan is managed for the benefit of participants and complies with the law. In most plans, that entity or individual, the "named fiduciary," is the employer. If judged at fault, a fiduciary can be held liable when the plan suffers losses or doesn't comply with the law. A plan can have several fiduciaries perform-

ing different functions. Generally, anyone who has discretionary authority over any aspect of the plan or renders investment advice for a fee is a fiduciary and can be held liable for a breach of duty. But named fiduciaries retain overall responsibility for the plan. They can be held responsible for the behavior of other fiduciaries if they have been imprudent in appointing them or have failed to monitor their behavior.

Why does ERISA require so much of the employer? Because of defined benefit plans. Thirty-five years ago when ERISA was drafted, defined benefit plans dominated the private pension system. In the hard economic times just past, many workers lost the retirement income they had earned after many years of service when some large plans failed. ERISA's primary purpose was to require employers to do more to strengthen their defined benefit plans and to hold them more accountable when they failed. The law requires employers to fund plans with sufficient assets and manage them responsibly (or hire and monitor competent advisors) or face financial liability when they do not. In addition, thanks to ERISA, the government guarantees a portion of worker benefits against plan insolvency through a federal insurance program. ERISA designates employers as the focal point of its regulatory scheme for two major reasons: (1) to secure the defined benefit promise for workers and (2) to protect the government's interest in the financial health of these plans.

How well does ERISA's structure fit 401(k) plans? Not very well, as 401(k) plans have few of the features that ERISA was drafted to protect: no long-term promise, no lifelong retirement income, no government insurance, no central pool of assets, no required employer contributions. These plans are really just investment programs, not pension plans. Workers contribute to their own individual accounts and choose investments from a broad array of choices. Some employers offer matching or across-the-board contributions, often on a year-by-year basis, but many do not. Few employers play a significant role in plan administration. Instead, they turn to the large industry of financial service companies,

consulting firms, record-keepers and assorted other service providers available to perform the complicated services that 401(k) plans require.

Many larger employers understand they are plan fiduciaries and factor the risks of plan litigation into their employee benefits costs. But too many employers are not even aware that they are fiduciaries. In one study by AllianceBernstein, 60 percent of defined contribution plan sponsors asserted they were not fiduciaries, with about 80 percent of sponsors in very small plans and 62 percent of sponsors in small plans holding that belief. Even over 50 percent of employers in medium-sized plans and over 40 percent in large plans did not believe they were fiduciaries (Gangemi and Mintzer 2006).<sup>13</sup> It is not clear why this is so. Some seem to believe that other service providers fill that role. For example, whatever the size of the plan, over one-third of employers believed they had hired an independent fiduciary service. This is almost certainly not the case. Even if true, few employers could escape being tagged as the "named fiduciary" for their plans.

The AllianceBernstein study concluded that the majority of plan sponsors do not spend adequate time designing and maintaining their plans, understanding the fees charged for services, choosing and reviewing their investment menus, or understanding how they could minimize their legal liability. This makes them vulnerable to the fiduciary litigation blessed by *LaRue*. But *LaRue* is not necessarily a green light for plan participants to head down in droves to the local courthouse. Litigation is expensive and time consuming, and victory is always uncertain. Without a significant financial loss and relatively certain chances of recovery, few participants will find a lawyer willing to take their case. Participants almost never get compensated for attorneys' fees and, under ERISA, never get extracontractual damages (pain and suffering). The most participants can hope for is the full benefit they would have received but for the fiduciary breach.

Nevertheless, 401(k) plan litigation is expanding. Major lawsuits are already pending against large employers and plan service pro-

viders over allegations of excessive fees, improper revenue-sharing arrangements, and imprudent investment options.<sup>14</sup> Such cases are economically attractive to class-action lawyers because of the large number of participants involved. But they are not frivolous lawsuits. These cases are important tests of ERISA principles in the defined contribution context, and pension regulators are watching carefully. The Department of Labor, for example, recently intervened in support of workers' claims in a high-profile case involving Fidelity Investments and Deere & Co. over plan fees.<sup>15</sup> In this case, the Department of Labor is highlighting how it believes ERISA protects 401(k) plan participants. Because courts often give deference to the Department's interpretation of ERISA, it is likely that participants will win some big cases soon.

What is the significance of *LaRue*? It's a loud wake-up call for employers, especially those in the small and medium-sized plan market. Many won't worry about a big lawsuit over plan fees or investment options. But being sued and having to pay for not processing a participant's form—a garden variety slipup in 401(k) plans? That is all too imaginable.

*LaRue* teaches employers that they are the financial backstop for their plans. Because 401(k) plans have no pool of unallocated assets, they will be the deep pocket when something goes wrong in a participant's account. Many employers will conclude that this is not the role they want or believe they should play in helping their workers prepare for retirement. For others, despite PPA's reforms, the financial risks and administrative burdens of sponsoring a plan will be too great. Already, there is concern that *LaRue* will reverse recent gains in plan sponsorship in the small and medium-sized plan market.<sup>16</sup>

*LaRue* represents a perception problem as much as it does a legal problem. While the case did not change employers' responsibilities as a legal matter, the fact that the courthouse door is now clearly open to plan participants has raised employers' concerns. Such concerns can have a significant effect on employer behavior. For example, employers did not really need PPA to

legitimate auto-pilot features for their plans. They were already available, although there was some legal ambiguity in some states about auto-enrollment. Many employers, however, refused to add auto-pilot features without the explicit release from legal liability that PPA provided. Post-*LaRue*, many risk-averse employers are likely to think twice about sponsoring a plan, even though, in reality, the likelihood of litigation is low.

### Looking beyond *LaRue*

The theory behind PPA was that streamlining 401(k) plans could go a long way toward getting more workers to save and getting them to save more. But that theory holds only if employers are willing to sponsor plans. Assuming *LaRue* poses a real threat to plan sponsorship, what might be done to ameliorate its effects on employers without jeopardizing the interests of workers? Here are four possible courses of action:

#### *Amend the Law to Restrict Participant Lawsuits*

Congress could always overrule *LaRue* by amending ERISA to restrict participant lawsuits in defined contribution plans. The pros and cons of this alternative were clearly before the Court in *LaRue*. Advocates for employers argued that, without protection from litigation, employers would terminate their plans or cut back on benefits in response to higher plan costs. Advocates for workers argued that denying participants the right to sue would leave them with no meaningful legal recourse to protect their retirement assets. It would also leave the trillions of dollars in defined contribution plans effectively unregulated.<sup>17</sup>

On balance, worker advocates seem to have the better argument. Shutting the courthouse door completely on participants would be an extreme response to the as yet uncertain consequences of *LaRue*. Given that a primary purpose of ERISA is to protect plan assets for the benefit of workers, it is difficult to imagine Congress

becoming interested in restricting worker rights any time soon.

### ***Require Participants to Exhaust Plan Procedures before Litigation***

Chief Justice Roberts suggested this alternative in his concurring opinion in *LaRue*. He invited lower courts to consider whether *LaRue*-type claims should be subject to plan appeal procedures under an alternative section of ERISA prior to litigation. ERISA requires claims for benefits to be initially submitted for resolution to plan administrators. This procedure gives employers an advantage. Under a prior Supreme Court decision, *Firestone Tire & Rubber Co. v. Bruch*, if a plan gives the plan administrator the discretion to resolve claims for benefits, a court will not later overturn an adverse decision unless the administrator's ruling was arbitrary and capricious.

This might be a compromise alternative. It provides a forum for participant grievances without the expense of full-blown litigation. On the other hand, the plan administrator is typically an agent of the employer, even though charged as a fiduciary to act solely in the best interests of plan participants. A just-issued Supreme Court decision, *Metropolitan Life Insurance Company v. Glenn*, considered how to address the issue of conflicts of interest in benefit-claim decisions. The Court acknowledged that a plan administrator's dual role of both paying and evaluating claims creates a conflict of interest. It did not change the *Firestone* standard but it did hold that courts reviewing benefit-claim denials should consider conflicts of interest when evaluating a plan administrator's decision. In some respects, this case is a win for employers. It did not restrict their discretion to decide claims for benefits. But it is almost certain that going forward, every plaintiff will raise the conflict of interest issue in litigation, and many employers may find it difficult to defend themselves.

On balance, requiring plan participants to jump the benefit-claim hurdle does not seem fair. Given the inherent conflicts of interest present in

these procedures, it seems unreasonable to ask an employer to sit in judgment on its own behavior as a fiduciary. Plan participants should have some due process rights to a fair procedure with an independent fact finder. That leaves the courts as a first, not a last, resort.

### ***Reduce Fiduciary Litigation through Employer Education and Assistance***

Since *LaRue*, plan advisors have been actively counseling their clients on steps they could take to minimize the threat of litigation. Those include auditing their plan procedures to reduce the risk of errors, updating their fiduciary insurance coverage, reviewing contracts with service providers to ensure fiduciary roles are clear, and revising plan documents to minimize fiduciary exposure wherever possible.<sup>18</sup> This is fine advice, likely to be followed by the large employers who employ benefits advisors. But it probably won't reach employers the most in need of it—those who don't understand what their fiduciary duties are and even that they are fiduciaries.

A variation on this theme is to assist employers with their fiduciary decisions by requiring more disclosure from service providers. The theory here is many employers are placed in legal jeopardy because they don't have the information necessary to make the informed decisions required of fiduciaries. Currently under discussion in Congress is H.R. 3185, the "401(k) Fair Disclosure Act for Retirement Security Act of 2008." Among other things, this bill would require service providers to furnish plan administrators with detailed information about services to be performed and their costs, including any revenue-sharing arrangements. It also requires plan administrators to provide participants with more information about the available investment options and their cost structure. The bill imposes financial penalties on service providers and plan administrators who fail to comply. In addition, the Department of Labor has been active on this issue by proposing new regulations to require service providers to disclose more information about their fees and potential conflicts of inter-

ests. The Department also intends to give employers some relief from fiduciary liability when service providers fail to meet their disclosure obligations.<sup>19</sup>

These requirements will certainly be helpful in clarifying a murky area in 401(k) plan management: (1) the fees charged by service providers and (2) the relationships among service providers and their relationship to the fees charged. Many employers, particularly large employers, will accept and perhaps even welcome them. But the AllianceBernstein study revealed that many employers are disengaged from their plans. Will this information help them perform their fiduciary responsibilities better? Or will it persuade them that sponsoring a plan is too much work for too little reward?

### *Relieve Employers of Named Fiduciary Status Where Appropriate*

PPA brought some fiduciary relief to employers, but it did not significantly reconfigure their role. Legally speaking, employers are the focal point in defined contribution plans just as in defined benefit plans. But, functionally speaking, employer involvement in the management of these plans is poles apart. So why do we hold them both to the same fiduciary standard?

Few employers are qualified for or interested in running an investment program for their employees. So, in order to make a 401(k) plan available, an employer must buy it from a vendor much like any other product an employer buys. The financial services industry has made this possible by selling off-the-shelf 401(k) plans with a bundled package of service providers. For this market, it seems unreasonable to hold an employer ultimately responsible as a named fiduciary for a product and services it did not and could not select by itself.

Releasing the employer from its obligations as a named fiduciary in a packaged 401(k) plan leaves other fiduciary protections still in place. ERISA already contains a comprehensive regulatory system for fiduciaries that calibrates legal liabilities with functional responsibilities. In this

system, (1) anyone who has discretion over plan funds is a fiduciary, and (2) a plan must have a named fiduciary overseeing all the other fiduciaries. Without the employer as the named fiduciary, financial services companies making discretionary decisions about plan investments and consulting firms providing discretionary plan services would still be liable under current rules when they breach their duties. Employers would retain all other responsibilities such as to transfer participant contributions to the plan on a timely basis and to ensure the plan qualifies for special tax benefits. But they could no longer be held responsible for the actions of other fiduciaries they have no ability to supervise.

The notion that employers should be the ultimate responsible parties is deeply embedded in ERISA, and resistance to changing it will be strong. Practically speaking, however, participants and their accounts would be protected just as they are today while employers would be protected from inadvertently becoming the deep pocket for their plans. Experience with IRAs suggests this change is indeed feasible. Accounts in 401(k) plans are really just individual retirement accounts under a plan umbrella. IRAs do not have the overlay of ERISA fiduciary rules and an employer as an intermediary, but they are largely scandal free. It is time to ask which ERISA protections in the defined contribution plan context are counterproductive because they deter employers from sponsoring plans.

This modest first step toward rationalizing ERISA could accomplish something critical to the success of 401(k) plans—aligning the interests of employers and workers. What *LaRue* illustrates is how ERISA today turns employers and workers into adversaries. What is needed instead is employers to be on the side of workers when things go wrong, not to be caught in the middle.

### Notes

1. A 401(k) plan is a workplace saving plan described in Internal Revenue Code Section 401(k). If an employer decides to offer one, employees are able to save on a tax-deferred basis. Many employers offer across-the-board contributions, matching contributions, or both as addi-



- tional incentives to save. Employees in nonprofit organizations and public schools often have access to a similar saving plan at work called a 403(b) plan, described in Internal Revenue Code Section 403(b). ERISA, the primary federal pension law, always applies to 401(k) plans but not to 403(b) plans if only employees make contributions to the plan.
2. Kathleen Pender, "Automatic Enrollment in 401(k)," *San Francisco Chronicle*, August 8, 2006.
  3. It is important to note that auto-enrollment may not immediately result in massive increases in the number of participants in any particular plan. PPA does not require employers to apply auto-enrollment to all workers, and many plans target only new hires.
  4. Charles Schwab, "Employers Use Automatic Tools to Jumpstart Participation and Saving in 401(k) Plans," news release, September 5, 2007, [http://scrs.schwab.com/press\\_releases/20070905\\_Auto\\_Retirement\\_Tools.pdf](http://scrs.schwab.com/press_releases/20070905_Auto_Retirement_Tools.pdf) (accessed July 10, 2008).
  5. The New York Life Retirement Plan Services study involved 222 401(k) plan clients out of its 2,200-client database. See Jenna Gottlieb, "Rush to 401(k) Auto Enrollment Takes NYL by Surprise," *Pensions & Investments*, December 24, 2007, <http://www.pionline.com/apps/pbcs.dll/article?AID=/20071224/REG/181799198/1030/TOC> (accessed July 10, 2008).
  6. The Diversified Investment Advisors survey included more than 200 clients with at least 1,000 employees. See Jennifer Byrd, "PPA Boosting 401(k) Participation, Survey Claims," *Pensions & Investments*, December 10, 2007, <http://www.pionline.com/apps/pbcs.dll/article?AID=/20071210/REG/71207031/1030/TOC> (accessed July 10, 2008).
  7. See "Auto Enrollment May Soon Be Standard Feature of 401(k) Plans," [http://www.plansponsor.com/pi\\_type10/?RECORD\\_ID=37807](http://www.plansponsor.com/pi_type10/?RECORD_ID=37807) (accessed July 10, 2008).
  8. The cost of employer contributions, however, is mitigated because they are deductible for income tax purposes, exempt from Social Security taxes and, in the view of many economists, paid for by workers in the form of lower cash compensation.
  9. Mark Bruno, "Cost of 401(k) Match Limits Use of Auto-Enrollment," *Financial Week*, March 10, 2008, <http://www.financialweek.com/apps/pbcs.dll/article?AID=/20080310/REG/605295055/1001/TOC> (accessed July 10, 2008).
  10. DOL Regulation Section 2550.404c-5, 29 CFR Part 2550 (September 27, 2006).
  11. The specific section of ERISA at issue is Section 502(a)(2).
  12. Pension and 401(k)-type plans must also satisfy many requirements of the Internal Revenue Code necessary to insure they qualify for tax-exempt status. This brief is concerned with the fiduciary rules that govern plans under ERISA, so those rules will not be discussed here.
  13. This study involved a survey of 1,200 plan sponsors, with 300 sponsors in each of the following categories: (1) very small plans with assets under \$2 million, (2) small plans with assets of \$2 to \$5 million, (3) medium-sized plans with assets of \$5 to \$20 million, and (4) large plans with assets between \$20 and \$400 million (73 percent in the \$20 to \$100 million range).
  14. Major lawsuits are already pending against large employers and plan service providers over allegations of excessive fees, improper revenue-sharing arrangements, and imprudent investment options. See Jenna Gottlieb, "More 401(k) Fee Cases are in the Works," November 29, 2007, *Workforce Management*, <http://www.workforce.com/archive/feature/25/23/83/index.php> (accessed July 10, 2008).
  15. See Mark Bruno, "DOL Keeping an Eye on Rising Tide of 401(k) Fee Lawsuits," April 4, 2008, *Workforce Management*, <http://www.workforce.com/archive/feature/25/45/97/index.php> (accessed July 10, 2008) and *Hecker v. Deere et al.*, 7th Cir., No. 07-3605, No. 08.1224.
  16. Marla Brill, "Under Pressure," May 12, 2008, *Financial Advisor*, [http://www.fa-mag.com/issues.php?id\\_content=2&idArticle=1725](http://www.fa-mag.com/issues.php?id_content=2&idArticle=1725) (accessed July 10, 2008).
  17. For employer advocates, see "Brief of the ERISA Industry Committee as Amicus Curiae Supporting Respondents" and "Brief of the Chamber of Commerce and the Financial Services Roundtable as Amici Curiae Supporting Respondents." For worker advocates, see "Brief Amicus Curiae of AARP in Support of Petitioner" and "Brief of the Pension Rights Center as Amicus Curiae in Support of Petitioner." The Supreme Court decision and supporting briefs in the *LaRue* case are generally available at <http://www.lawmemo.com/supreme/case/LaRue> (accessed July 10, 2008).
  18. See, for example, Kennedy Covington, "Supreme Court Opinion Expands Liability for Fiduciary Breaches," March 2008, <http://www.kennedycovington.com/attachment.html/articles/460/Employee+Benefits+Newsletter+March+2008.pdf>, and Wilson, Sonsini, Goodrich & Rosati, "Supreme Court Expands Fiduciary Liability under ERISA by Permitting a 401(k) Participant to Sue Plan Fiduciaries for Failure to Follow Investment Instructions", *Client Alert*, March 2008, [http://www.wsgr.com/publications/pdfsearch/clientalert\\_larue.pdf](http://www.wsgr.com/publications/pdfsearch/clientalert_larue.pdf) (both accessed July 10, 2008).
  19. See the Department of Labor Fact Sheet, "Proposed Regulation Relating to Service Provider Disclosures under ERISA Section 408(b)(2)," <http://www.dol.gov/ebsa/newsroom/fs408b2.html> (accessed July 10, 2008).

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