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Company Executives, Plan Sponsors & Others May Face Personal Liability When Others Defraud Plans or Mismanage Employee Benefit Plan Responsibilities

Appropriate Prevention, Monitoring & Response Key To Risk Mitigation

Executives, board members, and other business leaders of companies providing health, 401(k) or other employee benefits under plans regulated by the Employee Retirement Income Security Act of 1974, as amended (ERISA) should heed a series of recent fiduciary liability settlement orders and lawsuits of the U.S. Department of Labor (Labor Department) as important reminders of the potential personal liability exposures executives can may face if their company's benefit programs are not appropriately maintained and administered.

Recent Enforcement Actions, Changing Regulations Highlight Fiduciary Risks

On March 29, 2011, the Labor Department sued the owner of Eyeglass Factory, Inc. (EGF), Stephen Schaffer, for breach of fiduciary duties under ERISA by failing to ensure that EGF timely forwarded health plan contributions collected from employees to pay health plan contributions to the plan and failing to ensure that he and other plan fiduciaries and service providers were bonded in accordance with ERISA's fidelity bond requirements.ⁱ The Labor Department suit charges that from July 1, 2000 to October 1, 2000, Schaffer and EGF withheld and failed to forward to the health plan contributions deducted from employee pay for health insurance coverage and contributions made to the flexible benefit plan sponsored by EGF from January 1, 2000 to December 4, 2000. The employees' paycheck withholdings were commingled with the company's general assets and used for its general operating expenses. The Labor Department is asking the court to order that Schaffer and other defendants make restitution to the plan for the misapplied contributions, including lost opportunity costs, to correct prohibited transactions and to appoint an independent fiduciary to oversee the plans once Schaffer is removed as the plan fiduciary.

The Schaffer suit follows the Labor Department's successful prosecution of a breach of fiduciary duty action against Larry Lauterback, the president and former owner of a Minnesota Cement Company, for his role in allowing his construction company to commingle with company assets and divert to company use employee health and 401(k) contributions withheld from employee's pay. In *Solis v. Larry Lauterback*,ⁱⁱ the District Court ordered Lauterback to restore \$17,273.18 in unremitted employee contributions and lost opportunity costs to the company's health and dental plan, and \$747.20 in unremitted employee contributions to the company's 401(k) plan and enjoins Lauterback from serving or acting as a fiduciary or service provider to any employee benefit plan for three years.. The order followed the entry of a consent judgment against Lauterback and the plan sponsor, Slate Cement, Inc., for failure to remit employee contributions, failure to forward employee contributions to medical and dental providers, co-mingling employee contributions of the general assets and using those assets for company operations.

The *Schaffer* and *Lauterback* actions taken in March, 2011 are only the most recent in a series of enforcement actions taken against business executives, board members, plan vendors and others for their role in committing or failing to take prudent steps to prevent or redress alleged misconduct relating to the maintenance, administration and funding of various employee benefit programs regulated by ERISA. In recent months and years, the Labor Department has filed several lawsuits against business executives and businesses for alleged breaches of fiduciary duties. Over the past 12 months, the Labor Department has brought a host of similar actions against owners of executives for their role in allowing or causing employee health or other employee benefit plan contributions to be co-mingled with assets of a plan sponsor and used to pay company expenses.ⁱⁱⁱ While misuse of employee contributions by plan sponsors is a common focus of many of these actions, plan sponsors, plan service providers and members of their management with discretionary authority or responsibility over plan assets or administration or the election of those appointed to administer those responsibilities often arise out of the failure or these individuals to take prudent steps to prevent, monitor or address misconduct by other plan fiduciaries or service providers.^{iv} Plan sponsors, fiduciaries, service providers and their management should anticipate these risks will continue to rise as the Labor Department moves forward to adopt and implement revisions and

enhancements to its fiduciary regulations such as those provided for in the new “Interim Final Regulation Relating to Improved Fee Disclosure for Pension Plans” scheduled to take effect in July, 2011 and the Proposed Regulation on the “Definition of the Term Fiduciary” published by the Labor Department in July and October, 2010 respectively.

Meanwhile, the Labor Department enforcement activities highlight the longstanding and ongoing policy of aggressive investigation and enforcement of alleged misconduct by companies, company officials, and service providers in connection with the maintenance, administration and funding of ERISA-regulated employee benefit plans. Labor Department officials report that these aggressive enforcement activities during its Fiscal year 2010 resulted in the monetary recoveries by the Labor Department of more than \$1.05 Billion. During Fiscal Year 2010, the Labor Department reports that it closed 3,112 civil investigations, from which 2,301 (73.94%) resulted in monetary results for plans or other corrective action, 264 referrals for litigation and 128 civil lawsuits filed by the Labor Department. Meanwhile, the Labor Department also reports that during Fiscal Year 2010, the Labor Department reports it closed 281 criminal investigations and its criminal investigations resulted in the indictment of 96 people.

In addition to prosecutions brought by the Labor Department, companies and individuals that exercise discretion and control of the administration or funding of employee benefit plans regulated by ERISA also may be sued personally by participants and beneficiaries for breach of fiduciary under ERISA. A review of the Labor Department's enforcement record and existing precedent makes clear that where the Labor Department perceives that a plan sponsor or its management fails to take appropriate steps to protect plan participants, the Labor Department will aggressively pursue enforcement regardless of the size of the plan sponsor or its plan, or the business hardships that the plan sponsor may be facing.

Companies and other individuals that in name or in function possess or exercise discretionary responsibility or authority over the maintenance, administration or funding of employee benefit plans regulated by ERISA are accountable for complying with the high standards required by ERISA for carrying out these duties. Despite these well-documented fiduciary exposures and a well-established pattern of enforcement by the Labor Department and private plaintiffs, many companies and their business leaders fail to appreciate the responsibilities and liabilities associated with the establishment and administration of employee benefit plans. Frequently, companies sponsoring their employee benefit plans and their executives mistakenly assume that they can rely upon vendors and advisors to ensure that their programs are appropriately established and maintained with limited review or oversight by the sponsoring company or its management team. In other instances, businesses and their leaders do not realize that the functional definition that ERISA uses to determine fiduciary status means that individuals participating in discretionary decisions relating to the employee benefit plan, as well as the plan sponsor, may bear liability under many commonly occurring situations if appropriate care is not exercised to protect participants or beneficiaries in these plans. For this reason, businesses providing employee benefits to employees or dependents, as well as members of management participating in, or having responsibility to oversee or influence decisions concerning the establishment, maintenance, funding, and administration of their organization's employee benefit programs need a clear understanding of their responsibilities with respect to such programs, the steps that they should take to demonstrate their fulfillment of these responsibilities, and their other options for preventing or mitigating their otherwise applicable fiduciary risks.

Plan Sponsors, Fiduciaries, Service Providers & Their Management Should Act To Manage Exposures

To help guard and position themselves to defend against these and other exposures, plan sponsors, fiduciaries, service providers and others involved in the administration of health or other employee benefit plans should seek the advice of legal counsel with appropriate experience with employee benefit and other related matters to develop an understanding of ERISA and other laws and the duties and liabilities that these rules may create for their organizations and themselves personally. As part of these risk management activities, it generally is advisable to discuss opportunities for mitigating fiduciary and other risks by among other things:

- Understanding when they and others dealing with the plan, its administration or the selection, management or oversight of these responsibilities may be considered fiduciaries or otherwise subject to credentialing or bonding requirements under ERISA based on both the written appointments made and the functional powers or activities in which they engage;
- Understanding the fiduciary responsibilities and exposures that attach to fiduciary status under ERISA including the potential exposure that can arise from functional or co-fiduciary status;
- Carefully structuring and making written appointments allocating fiduciary responsibility to manage fiduciary responsibilities and manage fiduciary risks to the extent allowed by ERISA consistent with the functional realities;
- Understanding and ensuring that appropriate fidelity bonds and other liability insurance protection is secured and maintained on entities and individuals named or functioning as fiduciaries or in other capacities that can create bonding or other fiduciary obligations or risks under ERISA;

- Requiring that entities and individuals appointed or functioning as fiduciaries, service providers or other members of the workforce of the Plan or a party involved in its administration consent in writing to submit to initial background checks and other monitoring, investigation and oversight as is prudent to confirm the suitability of their performance and conduct for service in relation to the plan and then conducting those investigations as prudently required to provide for the appropriate administration of the plan and safeguarding of its assets;
- Initial and ongoing scrutiny of plan fiduciary, service provider and other relationships for potential prohibited transactions or other inappropriate conflicts of interest that could interfere with the administration of the plan for the exclusive benefit of participants and beneficiaries;
- Carefully documenting and monitoring compliance with plan documents, plan administration or other fiduciary or service provider appointments, and other policies and procedures as needed to provide for the prudent administration of the plan and its assets in accordance with ERISA and other laws;
- Requiring and verifying on a prudent periodic basis that employee contributions and other plan assets are deposited into trust and otherwise handled in accordance with ERISA's fiduciary responsibility standards;
- Scrutinizing compensation and other service provider engagement and compensation terms for compliance with applicable regulatory standards, reasonableness and appropriateness, and otherwise applicable prudent criteria;
- Conducting periodic and spot audits as prudently necessary to provide for the prudent administration of the plan and its assets;
- Taking appropriate steps to investigate and take appropriate action to redress concerns and questions about the design and administration of the plan and its assets as prudently required based on the facts and circumstances;
- Documenting the actions, and underlying investigation, deliberations and determinations behind decisions and actions taken to preserve critical evidence of appropriate fiduciary conduct; and
- Securing, and requiring service providers to secure appropriate fiduciary and other bonds, insurance and other protections to help provide funds to defend against potential investigations or litigation and provide coverage for potential claims where available on appropriate terms.

For other helpful resources and information about employee benefits and human resources matters, see www.CynthiaStamer.com or contact Ms. Stamer.

For Help With These Or Other Needs

If you have any questions or assistance with regard to these or any other workforce management, employee benefits, compensation or other internal control concerns, please do not hesitate to contact the author of this update, Board Certified Labor and Employment attorney and management consultant Cynthia Marcotte Stamer [here](#) or at (469)767-8872.

Ms. Stamer regularly counsels, presents training and is interviewed about these risks and responsibilities including a detailed discussion of these concerns highlighted in an interview of Ms. Stamer published in the December, 2006 edition of the *401(k) Advisor*.^v She is a featured panelist for the "Health Plan Embezzlement & Fraud: Prevention, Detection & Response Strategies for Strengthening Your Health Plan's Defenses" teleconference hosted by the American Bar Association Joint Committee on April 5, 2011. She also frequently conducts fiduciary liability risk management and compliance training for a wide range of boards, associations and other organizations and individuals.

Chair of the ABA RPTE Employee Benefit and Other Compensation Committee, a council member of the ABA Joint Committee on Employee Benefits, and the Legislative Chair of the Dallas Human Resources Management Association Government Affairs Committee, Ms. Stamer helps businesses, employee benefit plans and other organizations solve problems, develop and implement strategies to manage people, processes, and regulatory exposures to achieve their business and operational objectives and manage legal, operational and other risks. Board certified in labor and employment law by the Texas Board of Legal Specialization, with more than 23 years management-focused human resource and employee benefits experience, Ms. Stamer helps businesses manage their people-related risks and the performance of their internal and external workforce through appropriate human resources, employee benefit, worker's compensation, insurance, outsourcing and risk management strategies domestically and internationally. Throughout her career, Ms. Stamer has continuously advised and represented a broad range of fiduciaries, plan sponsors, bankruptcy trustees, creditors, debtors, service providers and their officers and directors about the prevention, investigation, mitigation and resolutions of civil and criminal liability arising from suspected or know breaches of fiduciary duty, fraud or other misconduct involving health, pension or other employee benefit and insurance arrangements. As a continuing part of this representation, Ms. Stamer regularly represents and defends plan sponsors, fiduciaries, third party administrators and other service providers and management officials in dealings with the Department of Labor, Department of Justice, Department of Health & Human Services, Department of Defense, Securities and Exchange Commission, state insurance regulators, state attorneys general and other federal and state regulators and prosecutors in connection with investigations, prosecutions, audits and other actions arising from employee benefit, insurance and related arrangements and products.

Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer also is a highly regarded author and speaker, who regularly conducts management and other training on a wide range of labor and employment, employee benefit, human resources, internal controls and other related risk management matters. Her writings frequently are published by the American Bar Association (ABA), Aspen Publishers, Bureau of National Affairs, the American Health Lawyers Association, SHRM, World At Work, Government Institutes, Inc., Atlantic Information Services, Employee Benefit News, and many others. For a listing of some of these publications and programs, see here. Her insights on human resources risk management matters also have been quoted in The Wall Street Journal, various publications of The Bureau of National Affairs and Aspen Publishing, the Dallas Morning News, Spencer Publications, Health Leaders, Business Insurance, the Dallas and Houston Business Journals and a host of other publications. In addition to her many ABA leadership involvements, she also serves in leadership positions in numerous human resources, corporate compliance, and other professional and civic organizations. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, World At Work, the ICEBS, SHRM and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly.

Other Helpful Resources & Information

If you found this article of interest, you also may be interested in reviewing other Breaking News, articles and other resources available [here](#) including:

- **[EEOC Finalizes Updates To Disability Regulations In Response to ADA Amendments Act: Employers Should Manage Risks](#)**
- **[Extended Grace Period For Some, But Not All New Affordable Care Act Health Claims & Appeals Rules Gives Qualifying Plans, Insurers Limited & Imperfect Relief](#)**
- **[Stamer Speaks 4/29 On "Welcome to the Jungle - Health Care Reform Bootcamp" At ABA RPTE](#)**
- **[Stamer Speaks 4/28 On "Lean On Me" - Group Health and Disability Claims and Appeals At ABA RPTE](#)**
- **[3/7/2011 Speak Up On The 1st Anniversary of Health Care Reform](#)**
- **[Avoiding Liability For Another's Health Plan Fraud](#)**
- **[\\$1 Million + FLSA Overtime Settlement Shows Employers Should Tighten On-Call, Other Wage & Hour Practices](#)**
- **[CMS Publishes Proposed Consumer Disclosure Notices Detailing Required Health Insurer Rate Increase Justification Disclosures](#)**
- **[\\$4.3 Million HIPAA Penalty Signals Health Plans, Sponsors & Service Providers](#)**
- **[HHS Imposes 1st HIPAA Privacy Civil Penalty of \\$4.3 Million](#)**
- **[NLRB Settlement Shows Care Necessary When Employers Use Social Networking & Other Policies Restricting Employee Communications](#)**
- **[Attorney Cynthia Stamer Shares Best Practices for Protecting Plan Participant & Other Employee Information At SBWA/IRS Plan Administrator Skills Workshops](#)**
- **[Supreme Court Medical Resident Stipend Ruling Highlights Advisability of Worker Classification & Payroll Practice Review Advisable For Health Care, Other Employers](#)**
- **[IRS, HHS & DOL To Delay Enforcement of New Insured Group Health Plan Non-Discrimination Rules Pending Guidance; Seek Public Input on Rules](#)**
- **[IRS Expands When HFSAs & HRAS May Allow Over-The-Counter Drug Purchases With Drug Cards](#)**
- **[Holiday Season Celebration Reminder To Manage Intoxication Risks](#)**
- **[Avoiding Post-Holiday Season HR Liability Hangover](#)**
- **[2011 Standard Mileage Rates Announced](#)**
- **[Proposed New DOL Defined Benefit Plan Annual Funding Notice Rule](#)**
- **[Affordable Care Act Grandfathered Plan Rules Loosened To Allow Insured Plans Making Some Insurance Changes To Qualify](#)**
- **[Managed Care Executive Quotes Stamer On Implications Of Affordable Care Act Claims & Appeals Rules](#)**
- **[DOL Proposes To Expand Investment Related Services Giving Rise to ERISA](#)**
- **[EEOC Charges Employers With Violating ADA By Denying Medical Leave](#)**
- **[Annual Benefit Limitation Waiver & Anticipated HHS Medical Loss Ratio Guidance Offer Quick Acting Employers, Insurers New Mini-Med, Health Plan Design Options](#)**
- **[New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules](#)**
- **[Tighten & Update of Health & Other Plan Claims & Appeals Procedures & Documentation In Response To New Regulations, Tightening Court Review](#)**

- **Small Employers Sponsoring Health Coverage May Qualify For New Tax Credit, Must Act Quickly To Comply With Other New Federal Health Plan Mandates**
- **Rite Aid Agrees to Pay \$1 Million to Settle HIPAA Privacy Case As Office of Civil Rights Proposes Tighter HIPAA Privacy & Security Regulations**
- **New Affordable Care Act Mandated High Risk Pre-Existing Condition Insurance Pool Program Regulations Prohibit Plan Dumping of High Risk Members, Set Other Rules**
- **Review Of Worker Classifications Needed As Classification Scrutiny Rises**
- **Businesses Employing Children Should Review & Tighten Practices in Light of Tightened Rules & Increased Penalties**
- **Labor Department FMLA Guidance Adopts Broad Interpretation, Employer Care Needed Determining Who Qualifies As Child**
- **Agencies Release Regulations Implementing Affordable Care Act Health Plan Preventative Care Mandates**
- **Office of Civil Rights Proposes Changes To HIPAA Privacy, Security & Civil Sanctions Rules**

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [here](#). For important information concerning this communication click [here](#). If you do not wish to receive these updates in the future, unsubscribe by updating your profile [here](#).

THE FOLLOWING DISCLAIMER IS INCLUDED TO COMPLY WITH AND IN RESPONSE TO U.S. TREASURY DEPARTMENT CIRCULAR 230 REGULATIONS. ANY STATEMENTS CONTAINED HEREIN ARE NOT INTENDED OR WRITTEN BY THE WRITER TO BE USED, AND NOTHING CONTAINED HEREIN CAN BE USED BY YOU OR ANY OTHER PERSON, FOR THE PURPOSE OF (1) AVOIDING PENALTIES THAT MAY BE IMPOSED UNDER FEDERAL TAX LAW, OR (2) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TAX-RELATED TRANSACTION OR MATTER ADDRESSED HEREIN.

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ⁱ *Chao v. Stephen Schaffer, the Eyeglass Factory, Inc.*, No O2-CV-60197, as announced in EBSA Release No. 11-341-CHI (March 29, 2011).

ⁱⁱ *Solis v. Larry Lauterback*, as announced in EBSA Release No 11-322-CHI (March 14, 2011).

ⁱⁱⁱ See, e.g., *Solis v. Mark A. Arciero*, as announced in EBSA Release No. 11-253 DAL (February 28, 2011); *Solis v. Clifton*, as announced in EBSA Release No. 10-5-ATL (037); *Solis v. Eanes*, as announced in ESA Release No. 10-24-CHI (January 13, 2010); *U.S. v. Messer*, as announced in EBSA Release No. 090597-ATL (June 5, 2009)(owner criminally sentenced for embezzlement).

^{iv} See, e.g. *Chao v. Associated Plan Administrators*, as announced in EBSA Release No. 07-1265-BOS/BOS 2007-298 (October 16, 2007); *Chao v. Starkey*, as announced in EBSA Release No. 05-747-ATL (May 2, 2005); *Chao v. Perry.*, as announced in EBSA Release BOS 2002-054 (March 21, 2002); *Chao v. Mabry*, as announced in EBSA Release No. 160 (March 20, 2002). See also, e.g., *Baker v. Kingsley*, 2006 WL 2027606 (N.D.Ill.2007); *In Re Enron Corp Securities Derivative & “ERISA” Litigation*, 284 F.Supp. 511 (S.D.Tex. 2003); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Brink v. DeLesio*, 496 F. Supp. 1350 (D.Md. 1980).

^v See, “Enron litigation has implications for plan sponsors and management,” 401K Advisor (December 1, 2006).