H.R. & BENEFITS E-NEWS

Labor Department Settlement With Former Enron Executive Jeffrey Skilling Provides Important Warning For Other Businesses & Their Leaders On Employee Benefit Plan Risks

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The U.S. Department of Labor (Labor Department) announced today that it and former Enron executive Jeffrey K. Skilling (Skilling) have agreed to settlement terms for resolving the Labor Department's pending civil lawsuit against Skilling under the Employee Retirement Income Security Act of 1974 (ERISA), which the Labor Department filed in June 2003 to recover losses sustained by participants in Enron's pension plans following the infamous collapse of Enron. The proposed settlement with Skilling and other civil and criminal prosecutions against him and other former Enron officials provides an important warning for businesses sponsoring pension, profit-sharing and other ERISA-covered employee benefit plans and those officers, directors and employees involved in the design or administration of these programs of the importance of properly understanding the fiduciary implications associated with these programs. Businesses and their leaders should not allow the notorious criminal prosecutions against Skilling and other former Enron officials following Enron's collapse and the magnitude of the losses incurred by Enron plan participants and Enron shareholders to obscure their appreciation of these important lessons. Rather, the Enron litigation makes clear that a corporation sponsoring employee benefit plan, as well as those members of its board and management charged with the administration or oversight of the administration of the plan, risk personal liability to participants, the Labor Department, or both if they fail to take adequate steps to ensure that their employee benefit programs are administered in accordance with the high fiduciary standards of conduct established by ERISA. Furthermore, the lengthy list or judgments and settlements obtained by private plaintiffs and the Labor Department in recent years makes clear that smaller plans and the companies, officers, directors or fiduciaries involved in their establishment and administration should not expect to qualify for leniency for failing to meet these standards based on their more limited size or resources.

Skilling & Enron

Private plaintiffs and the Labor Department in separate lawsuits have charged Skilling and other former Enron officials with breaching fiduciary duties under ERISA by failing to properly appoint oversee the fiduciaries appointed to run Enron's plans, failing to correct misstatements about Enron's financial condition made by Kenneth Lay to plan participants, and, as a member of Enron's board of directors, by failing to properly appoint and monitor a trustee to oversee the employee stock ownership plan. Businesses and their leaders involved in the establishment, oversight or administration of employee benefit plans should take note that the claims for damages brought in these lawsuits were not dependent upon a showing of intent to defraud or other criminal intent.

In previous settlements obtained by the Labor Department and private plaintiffs, more than $220.8 million has been recovered for the pension plans from Enron, its directors, officers and fiduciaries who served on the plans' administrative committee. The department and private plaintiffs also obtained a $12 million claim against Lay's estate. The Skilling settlement amount is not included in these recovery totals.

Under the proposed settlement agreement, Skilling will drop his opposition to a previous $85 million settlement, waive his right to benefits from Enron's pension plans and be permanently barred from serving in a fiduciary capacity to any ERISA-covered employee benefit plan in the future. The settlement acknowledges that Skilling already is subject to an order of forfeiture that requires the establishment of a $45 million restitution fund for victims of Enron-related fraud, including plan participants and securities investors entered Oct. 23, 2006 in U.S. District Court for the Southern District of Texas. The Labor Department's settlement provides that, if Skilling's convictions are overturned or vacated and the restitution fund is dissolved, Skilling still will pay $2.5 million to the participants and beneficiaries in the company's savings and employee stock ownership plans plus $500,000 in penalties to the Labor Department. If approved by the U.S. District Court for the Southern District of Texas, the proposed settlement would resolve a civil lawsuit by the Labor Department against Skilling and other Enron officials for mismanagement of the plans in violation of ERISA's fiduciary duty rules.

Other Actions Prove Enron Enforcement Not Unique

In its recently ended fiscal year 2005, EBSA enforcement actions related to pension, 401(k), health and other benefit plans of all types and sizes resulted in the recovery of $1.7 billion for millions of American workers and their families. The Labor Department continues its long-standing emphasis on fiduciary enforcement during the current fiscal year. It currently is pursuing a multitude of lawsuits against other businesses and business leaders that it alleges have violated ERISA's fiduciary responsibility requirements and investigating a plethora of other suspected violations. Three Labor Department actions during October highlight this reality.

Like the enforcement actions against Skilling and others from Enron, many of the current enforcement actions and the judgments and settlements obtained last year involve prosecutions of companies and business leaders for mismanagement of plan assets. For instance, in *Chao v. Magnuson,* the Labor Department last month sued the fiduciaries of the Agway Inc. 401(k) plan for allegedly imprudently investing approximately $50 million of the plan's assets in the securities of the company, valuing the stock at prices higher than market value, and giving participants false information about the investment. Before filing for Chapter 11

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bankruptcy in October 2002, Agway Inc. was a cooperative that provided agricultural products and services to member farmers and other customers through its subsidiaries. The 401(k) plan covered 4,080 participants as of June 30, 2002. The plan held approximately $48 million in Agway securities and $2 million in cash reserves. The lawsuit charges that 47 members of the investment committee, administration committee and the Agway board of directors violated ERISA. The investment committee allegedly failed to investigate the prudence of investing in Agway securities, to determine the fair market value of securities acquired by the plan, and to monitor and divest the plan's holdings in the securities. As a result, the department alleges the defendants caused the plan to incur substantial financial losses. They also allowed the plan to purchase and hold securities at prices that exceeded fair market value. The value of stock purchased and held by the plan was set by Agway. Until July 2002, all contributions made by Agway were required to be invested in employer securities. In addition, the suit alleges that the administration committee allowed Agway and the plan to provide false and misleading information to plan participants about investments in Agway securities, and that the board of directors failed to protect the interest of participants and beneficiaries when they failed to oversee the activities of plan fiduciaries. Like the Skilling enforcement action, the suit seeks a court order requiring the defendants to restore to the plan all losses with interest and to forfeit any plan benefits if all losses suffered by the plan are not restored.

The Labor Department also announced in October that under a consent order obtained in *Chao v. Robert E. Chavez, D.D.S*., dentist Robert E. Chavez had paid more than $118,000 to restore misused assets to the profit sharing plan of the dental practice's employees and was permanently barred from service as a fiduciary to any ERISA-covered plan. Chavez was the plan's trustee and was responsible for administering the assets of the plan. In its lawsuit, the Labor Department alleged that Dr. Chavez used plan assets to make loans to entities in which he had a direct personal interest and failed to collect money owed to the plan on the outstanding loans.

In yet another lawsuit filed in October, the Labor Department has sued IMDC Inc. and Gregory C. Mundy, the alleged fiduciary of the company's 401(k) profit sharing plan, to recover lost benefits for plan participants. IMDC is a civil engineering firm, whose company's 401(k) plan covered 12 participants and held approximately $135,693 in assets as of December 31, 2003. The suit alleges that the defendants violated ERISA when they failed to remit employee contributions and loan repayments to the plan starting in January 2000. It further alleges that the defendants illegally used certain plan assets to pay company obligations.

Avoiding Liability

Positioning your company and the officers, directors, and employees involved in the design, oversight and administration of employee benefit plans to avoid or successfully defend against a fiduciary misconduct claim made by the Labor Department, a participant or beneficiary starts with knowing who is or could be accused of being a fiduciary, understanding their fiduciary responsibilities under ERISA, and conducting activities relating to the plan both to ensure your ability to prove either you weren't a fiduciary or that you met your fiduciary duties.

Because ERISA defines the term "fiduciary" broadly, many times plan sponsors, directors, officers, employees or service providers engage in fiduciary activities without realizing it. Under ERISA, the definition of fiduciary generally includes any person or entity (1) that is named as a fiduciary in or pursuant to the governing plan documents, (2) that functionally exercises discretion or control over the management of the plan or the management or disposition of assets of the plan, (3) that functionally has any discretionary authority or responsibility over the administration of the plan; or (4) that is an investment manager. This broad definition means that fiduciary exposure often exists not only for individuals named as fiduciaries in plan documents, but also for board members, officers or employees involved in the selection and oversight of the internal staff or outside vendors who are responsible for administering the plan or its assets. The Supreme Court also has ruled that companies may be treated as acting as fiduciaries when making communications about employee benefit plan matters even if the plan documents don't name the company as a fiduciary for that purpose. Consequently, officers, directors, and human resources personnel making statements about employee benefits must exercise care when communicating with employees and beneficiaries about employee benefit plan matters, whether or not doing so on behalf of or as a plan fiduciary.

ERISA requires fiduciaries and certain other persons exercising discretion over employee benefit plans be bonded and prohibits individual with certain criminal convictions from serving as fiduciaries. ERISA's also creates high standards of behavior for fiduciaries. When acting as a fiduciary, ERISA requires that a fiduciary discharge his duties with respect to the interest of the participants and beneficiaries:

- Solely in the interest of participants and beneficiaries of the plan;
- For the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan;
- With the care, skill, prudence and diligence that a prudent person acting with like capacity and familiar with such matters would use under the circumstances;
- In accordance with the terms of the written plan documents; and
- In accordance with ERISA, any other applicable Federal law or regulation and any applicable state law or regulation not preempted by Federal law.
- Section 408 of ERISA also generally prohibits plan fiduciaries from engaging the plan in a transaction with certain parties who are or are related to a fiduciary, a plan service provider, the fiduciaries' employers, officers, directors, and significant shareholders, or certain other individuals.

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When conducting activities relating to an employee benefit plan, its plan sponsors and others involved in a dealing involving the plan should both determine who the plan documents designate as the named fiduciary responsible for carrying out that fiduciary responsibility, as well as the likelihood that their own actions or inactions might be viewed as a fiduciary act if things go wrong. Care should be exercised to ensure that fiduciaries act, and that documentation is created to record that they have acted, in accordance with ERISA's fiduciary responsibilities. Because successor and co-fiduciaries can be held liable for failing to take appropriate action to investigate and correct a prior fiduciary's misconduct, the company and others acting in a fiduciary role or empowered with discretion over an employee benefit plan who suspect or discover possible misconduct may need to take, and make an appropriate record of, their corrective actions if their involvement with the plan creates a possibility that they could be considered a fiduciary. Because undertaking to exercise discretion can cause the company or another person to be a fiduciary when it otherwise wouldn't be, however, parties monitoring the performance of named fiduciaries or service providers who are not named as fiduciaries generally should couch their conduct and communications carefully to avoid unintentionally undertaking fiduciary status as well as to position themselves to defend against a fiduciary liability claim if their involvement leads to a finding that they are a fiduciary.

We hope that this information is useful to you. If you are interested in arranging training for your board or management team on fiduciary liability management, need representation or have questions about the implications of ERISA's fiduciary responsibility requirements on, or assistance in establishing processes to manage the fiduciary liability risks to, your Company, its employee benefit plans, or the fiduciaries, employees, officers or directors involved in the oversight or administration of those plans, please contact: Cynthia Marcotte Stamer, P.C., Member, Glast, Phillips & Murray, P.C., 2200 One Galleria Tower, 13355 Noel Road, LB 48, Dallas, Texas 75240. Telephone (972) 419-7188. E-mail cstamer@gpm-law.com.

For other helpful resources and information about employee benefits and human resources matters, see CynthiaStamer.com or contact Ms. Stamer. If you or someone else you know would like to receive future Alerts or announcements about other developments, publications or programs, please be sure that we have your current contact information – including your preferred e-mail – by providing that information to us via telephone, fax or e-mail using the above contact information.

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