

# BUSINESS

401(k) Adviser: Giving investors right to sue may lead to better-run plans

## Giving investors right to sue may lead to better-run plans

### 401(k) ADVISER

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Chalk one up for the little guy.

In a landmark decision Feb. 20, the U.S. Supreme Court voted unanimously to make it easier for the country's 50 million 401(k) participants to sue their employers for losses in their account.

In *LaRue vs. DeWolff, Boberg & Associates Inc.*, James LaRue claimed his 401(k) account lost \$150,000 because his employer failed to follow his investment instructions. The Supreme Court agreed to hear his case to determine if an individual should have the right to sue for a loss that occurs solely in his own account.

Previously, courts had ruled that 401(k) participants were allowed to recover lost plan assets only through a class-action lawsuit. They could not sue for individual damages. By deciding this case in favor of LaRue, the Supreme Court established the right to sue for losses in your individual 401(k) account.

Before you scramble to find an attorney in the hopes of recovering the money you've lost in your 401(k) so far this year, understand that it's still quite difficult to successfully sue your employer for poor 401(k) account performance. The federal government has a strong interest in encouraging employers to

offer private retirement programs like 401(k) plans.

Accordingly, the law that governs how 401(k) plans are run, known as the Employee Retirement Income Security Act, or ERISA, contains a provision that effectively shields employers from liability for individual participant investment results.

ERISA outlines three basic steps employers must take to make individual participants responsible for their own investment results: Participants must have access to a broad range of investment choices, the ability to move their plan assets among investment alternatives at least every 90 days, and be provided sufficient information to understand the decisions they are being asked to make.

If these provisions are met, it will be difficult to prevail in court.

My hope is that this newly established right to sue over individual 401(k) plan losses will motivate employers and the service providers they hire to work harder to ensure that their 401(k) plans are run effectively.

Companies should evaluate their compliance policies, review their service provider agreements, consider providing participants access to fiduciary investment advisers, and investigate the extent of their fiduciary liability insurance coverage. These increased safeguards, however, may increase the cost to run a plan.

LaRue may also lead some 401(k) plan sponsors to simplify their plans. Some may decide to remove the participants' right to select their own investments, placing all participant accounts into one professionally managed balanced fund.

While this approach simplifies plan administration and reduces the chance of administrative mistakes, it diminishes a participant's ability to custom-tailor their investments to their own situation.

With more than \$3 trillion invested in 401(k) plans nationwide, the stakes are high. For too long, companies and participants alike have not given their 401(k) plans the attention they deserve.

With the expansion of plan participant rights to address individual losses, 401(k) plan participants should benefit from the increased scrutiny as all parties try harder to maximize the effectiveness of these plans.

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