

Retirement Guidance



LOCKTON RETIREMENT SERVICES

THINK ONLY LARGE PLANS GET SUED? THINK AGAIN.

Litigation trends tell us that, for billion dollar 401(k) plans, it is a matter of when, not if, they will face a participant lawsuit. So when the LaMettry's 401(k) Profit Sharing Plan, a plan with only 114 active participants and just over \$9 million in plan assets, was sued on the same grounds as the biggest plans in America, the retirement industry and small employers everywhere were taken by surprise. But should they have been?

A Small Target Is Still a Target

The complaint alleges that the LaMettry Plan fiduciaries did not have or follow an established process to evaluate service providers and the reasonableness of participant fees. We have seen the same allegations for years:

❖ **INVESTMENT BUYING POWER**

Fiduciaries should have negotiated for institutional share class mutual funds instead of retail mutual funds as plan investments. They should have considered low-cost equivalent funds (e.g., Vanguard funds), and the pooled separate accounts in the plan should have considered institutional share class options with much lower expense ratios.

❖ **COMMISSIONS ON PLAN ASSETS**

The plan used Voya as its bundled broker and recordkeeper. In addition to several Voya retail mutual funds, the plan's investment lineup also included Voya pooled separate accounts and a Voya guaranteed investment contract. The resulting revenue sharing arrangements provided uncapped, excess compensation to Voya as plan assets increased.

❖ **RECORDKEEPING FEES**

Voya billed a Daily Asset Charge and the Voya Admin Fee against participant accounts. These fees were assessed as a percentage of plan assets daily and deducted from accounts monthly, resulting in total fees up to 0.90 percent, considered excessive by common benchmarking standards.

AUTHOR

**SAMUEL A. HENSON, JD,
CEBS, RPA, GBA**

Vice President,
Director of Legislative & Regulatory Affairs



INSIDE

Plaintiff's attorneys are finding new lawsuit opportunities with smaller employers who lack the expertise to monitor their retirement plans and the resources to defend themselves in legal battles.



Indication of Things to Come

There are only so many billion dollar plans and many of those who haven't been sued yet have taken defensive steps to insulate themselves. With nearly a decade of successful litigation examples, more plaintiffs' firms now understand the ERISA issues and are entering the fray. With fewer big fish left in the sea, it may only be a matter of time until the sharks begin eating smaller prey. What is worse, smaller plans generally lack the in-house or independent advisor expertise to address the issues targeted by the lawsuits.

Most small plans still work under bundled recordkeeping and broker arrangements with proprietary fund lineups. To be clear, this approach is not in itself grounds for a lawsuit. But, if steps are not taken to look beyond sticker prices and negotiate on behalf of participants, risks can be high. Combined with the smaller employers' lack of defense resources, aggressive plaintiffs' firms may see them as easy pickings.

It's Time for All Employers to Play Defense

Employers, regardless of size, should take a proactive risk management approach. But many small employers simply don't know what questions to ask or where to begin. Because ERISA is so complex and foreign, when they do seek advice, it can be difficult to discern if that advice is reliable. As a simple guiding principle for all employers, any advice should be fiduciary advice and in the participants' best interest. That advice should also be unconflicted and always lead to:

- ❖ Negotiating reasonable plan and investment related fees.
- ❖ Understanding how advisors and service providers are compensated.
- ❖ Having a prudent and documented process showing the actions taken on the above two items.

These are matters that a Lockton fiduciary advisor can help employers navigate. Through a robust fiduciary governance process, a Lockton advisor can help employers navigate these issues on a regular basis, provide unconflicted and independent advice, and assist with negotiating reasonable plan and investment fees.

If you have questions surrounding the issues of this case or have any questions, please contact your Lockton Retirement Services Team.

The communication is offered solely for discussion purposes. Lockton does not provide legal or tax advice. The services referenced are not a comprehensive list of all necessary components for consideration. You are encouraged to seek qualified legal and tax counsel to assist in considering all the unique facts and circumstances. Additionally, this communication is not intended to constitute US federal tax advice, and is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing, or recommending any transaction or matter addressed herein to another party.

This document contains the proprietary work product of Lockton Financial Advisors, LLC, and Lockton Investment Advisors, LLC, and is provided on a confidential basis. Any reproduction, disclosure, or distribution to any third party without first securing written permission is expressly prohibited.

Securities offered through Lockton Financial Advisors, LLC, a registered broker-dealer and member of FINRA, SIPC. Investment advisory services offered through Lockton Investment Advisors, LLC, an SEC-registered investment advisor. For California, Lockton Financial Advisors, LLC, d.b.a. Lockton Insurance Services, LLC, license number 0G13569.