

Fact Sheet



U.S. Department of Labor
Employee Benefits Security Administration
November 2010

Retirement Security Initiatives

The Labor Department's Employee Benefits Security Administration (EBSA) is committed to safeguarding employee contributions to 401(k) plans and health care plans by investigating situations in which employers improperly delay forwarding employee contributions to the appropriate funding vehicle or simply convert the contributions to other non-plan uses. Either or both scenarios may occur when the employer is having financial problems and turns to the plan as a source of financing.

Background

- In 2007, almost 80 percent of families participating in an employment-based retirement plan participated in a 401(k) type pension plan.
- The number of 401(k) plans has grown continually from over 17,000 plans covering approximately 7.5 million active participants in 1984 to an estimated 491,000 plans covering almost 60 million active participants, as of 2007.
- Assets in 401(k) type plans were approximately \$3 trillion in 2007.
- The Labor Department's national enforcement project reduces misuse of contributions made by workers to their 401(k) plans.
- The initiative is multi-faceted, including: conducting investigations into 401(k) misuse; issuing a regulation to shorten the time for transmitting contributions to a 401(k) plan; and launching an education campaign to inform retirement plan participants about their rights and ways to protect their pension.

401(k) Enforcement Initiative Results

- In fiscal year 2009, a total of 1,042 civil investigations were closed – 910 with corrected violations.
- The Labor Department had monetary results of \$17,926,625 nationwide through fiscal year 2009 under this project.
- For fiscal year 2008, 1,271 civil and criminal investigations were closed – 1,103 with corrected violations.

401(k) Initiative Cumulative Statistics (as of 09/30/09)

Fiscal Year	Civil Cases Closed	Civil Cases Closed With Violations	Criminal Cases Closed	Criminal Indictments	Monetary Results
1995*	95	34	5	7	\$1,320,308
1996	458	146	8	14	\$8,039,957
1997	823	388	10	21	\$28,176,814
1998	824	461	30	16	\$13,989,075
1999	852	625	23	17	\$19,366,568
2000	1,025	840	27	21	\$27,882,270
2001	1,150	893	23	8	\$28,828,131
2002	1,317	1,045	20	15	\$42,833,078
2003	1,364	1,157	20	8	\$135,528,157
2004	1,591	1,269	21	10	\$31,636,501
2005	1,480	1,280	35	18	\$42,808,668
2006	1,306	1,122	29	17	\$36,566,477
2007	1,298	1,107	28	24	\$51,294,250
2008	1,232	1,072	39	17	\$24,863,198
2009	1,042	910	64	33	\$17,926,625

*The first year that EBSA began to emphasize 401(k) abuse as a national enforcement initiative.

EBSA Enforcement Efforts

Civil

On January 14, 2009, in *Chao v. Craig Wagner*, the U.S. Department of Labor obtained a default judgment ordering Concrete Construction Co. of Acworth, Georgia, and its president, Craig Wagner, to restore \$11,672 in employee contributions, employer contributions, and interest to the company's 401(k) plan. The Department alleged that the defendants violated the Employee Retirement Income Security Act (ERISA) when they withheld employee contributions to the plan and illegally commingled the contributions with the general assets of the company between March and August 2003, and failed to remit matching employer contributions to the plan from March to December 2003. The order also appoints an independent fiduciary to oversee the plan, removes the defendants as plan fiduciaries, and bars them from serving as fiduciaries of any employee benefit plan covered by ERISA.

On February 12, 2009, in *Chao v. Gene Shawn Group, et.al.*, the U.S. Department of Labor obtained a Consent Judgment and Order. The Consent Judgment requires defendants Young Jin Lee and Juliette Lee, owners of the Gene Shawn Group, LLC dba A-Q Dental Laboratory (Company), to

repay \$32,587, including interest, to the A-Q Dental Laboratory 401(k) Profit Sharing Plan. The Consent Judgment holds the Lees responsible for restoring any losses remaining after the conclusion of the Company's bankruptcy proceedings. Additionally, the Lees were permanently enjoined and restrained from future service as a fiduciary of, or service provider to, any ERISA-covered plan. The Department alleged that the defendants violated ERISA by failing to remit employee contributions, employer matching contributions and loan repayments to the plan.

On March 11, 2009, in [Chao v. Durkin](#), the U.S. Department of Labor obtained a default judgment ordering defendant Kevin Durkin to pay to the Atlantic Worldwide I Profit Sharing Plan \$5,478, plus interest, which will accrue until paid. The Department alleged that plan fiduciary Durkin violated the Employee Retirement Income Security Act by failing to remit employee contributions withheld from employees' paychecks.

In [Chao v. Triangle Laboratories](#), the U.S. Department of Labor obtained judgments ordering the restoration of \$97,317 to the Triangle Laboratories Inc. Retirement Fund. On March 13, 2009, the Court ordered Joseph Morales to restore \$54,317 to the plan. Settlements were reached with three additional defendants in October 2008. Donald Harvan agreed to restore \$25,000 to the plan, and Debbie Monaghan and Craig Stoke agreed to restore \$9,000 to the plan. In addition, all of the defendants were barred in the future from serving as fiduciaries to any employee benefit plan governed by ERISA. The Department also obtained a Consent Judgment against J. Ronald Hass barring him from serving as a fiduciary. The Department alleged that the defendants violated ERISA by failing to remit employee contributions and loan payments to the plan.

On October 15, 2009, in [Chao v. Feige](#), the U.S. Department of Labor obtained a Consent Judgment requiring Robert Feige, plan trustee, to restore \$25,284 to the 401(k) plan of the defunct Benes Communications, Inc. The judgment also orders Feige to distribute the Plan's assets to participants and terminate the plan, and permanently bars him from serving in a fiduciary capacity to any ERISA-covered plan in the future. The Department sued Robert Feige for allegedly violating ERISA. The Department alleged Feige violated ERISA by failing to forward employee salary deferrals to the plan and to take prudent steps to collect contributions owed to the plan.

Subsequent to the Fact Sheet release: On September 21, 2010, in [Solis v. Hardt, Donne, and Journey Electrical Technologies](#), the U.S. Department of Labor filed a civil complaint alleging that executives of a Laguna Hills, California company failed to collect more than \$920,000 in employee and employer contributions in violation of the Employee Retirement Income Security Act. The executives were trustees of the company's 401(k) plan, which covered approximately 264 employees.

Criminal

On September 3, 2009, [Barry Stokes](#) was sentenced to 151 months of imprisonment, to be followed by three years of supervised release. The court also ordered Stokes to pay restitution in the amount of \$19,964,553.93. On September 9, 2008, Barry R. Stokes pled guilty to twenty nine counts of embezzlement from employee benefit plans, one count of mail fraud, two counts of wire fraud, six counts of money laundering and four counts of criminal contempt of court in U. S. District Court for the Middle District of Tennessee, Nashville Division. Stokes was president and CEO of 1 Point Solutions, LLC, a third party administration firm located in Dickson, Tennessee. 1 Point Solutions provided administration services to 401(k) plans as well as other employer sponsored employee benefit plans. As part of its services, 1 Point Solutions collected employee contributions for client plans which were meant to be invested in 401(k) accounts of plan participants. Instead, Stokes used

the plans' funds for his personal and business purposes including his use of funds to purchase an extensive Japanese art collection. The total amount of the amount of funds Stokes embezzled exceeded \$14 million.

On July 22, 2009 [Mark Harrington](#) was sentenced to 2 years imprisonment, 24 months probation, and ordered to pay restitution of \$349,870. On April 14, 2009, Mark Harrington pled guilty in the U.S. District Court for the District of Massachusetts to embezzlement from an employee pension fund. Mr. Harrington had been the Vice President and Controller at Anchor Capital Advisors, LLC and in this position he also acted as the Plan Administrator for the Anchor Employees' 401(k) Plan (Plan). As the Vice President and Controller, he was involved with the annual audit performed by the company's independent auditors, and he noted that those auditors never reviewed any of the retirement plan's records or activities which lead to his strategy for augmenting his income. As the Plan Administrator, he directed the custodians of the Plan's assets to make distributions totaling \$386,711.70 to various fictitious entities. At the same time, he employed the services of a relative to establish bank accounts at different banks in the name of these fictitious entities and to deposit the distributions into those bank accounts. Harrington used the stolen funds to buy a home, a Cadillac Escalade, breast implants, jewelry and other items.

On June 29, 2009, [Danna Wachter](#) was sentenced to 12 months imprisonment; 36 months supervised release and ordered to pay restitution of \$36,880. On December 5, 2008 Wachter pled guilty to aggravated identity theft and embezzlement from an employee benefit plan. On June 25, 2008 an indictment was returned against Wachter in the U.S. District Court for the Western District of Missouri, Western Division. The indictment alleged that from November 2006 through July 2007, Wachter, a former table games dealer at a Kansas City casino, stole the identity of a co-worker in furtherance of a number of economic crimes that resulted in actual damages to the victim of over \$38,000. Among the allegations, the indictment contended that in March 2007 Wachter used her co-worker's Social Security Number and PIN to authorize an \$18,000 distribution from her co-worker's 401(k) account. Wachter is further alleged to have stolen the distribution check from the U.S. mails and to have forged the participant's signature on the check.

On March 3, 2009, [Marilyn K. Adams](#) was sentenced in the U.S. District Court of Nebraska, to a prison term of 12 months, supervised release of 3 years, and ordered to pay restitution in the amount of \$111,136.79. On April 23, 2009 Jeffrey Adams was sentenced to a prison term of 6 months and ordered to pay restitution in the amount of \$111,136.79. The Adamses were indicted on April 22, 2008 for embezzlement from the AMS 401k Plan (Plan) and for failing to file the Plan's annual Form 5500. Marilyn K. Adams was President of AMS Healthcare Services, Inc. a Nebraska corporation providing medical staffing services and served as the Plan's Trustee. Jeffrey L. Adams was the CEO of AMS which sponsored the AMS Healthcare Services 401k Plan. The 401k Plan was funded through voluntary contributions by employees of AMS Healthcare Services, Inc. which were intended to be forwarded to the Plan's trust account. The Adamses embezzled \$111,136 by withholding employee 401k contributions from their employees' paychecks and using them for other purposes. In order to conceal the failure to forward the employee contributions to the Plan, the Adamses did not inform their employees about their failure to forward their contributions, and failed to provide the summary annual reports to participants, and file the required Form 5500 Annual Report with the Department of Labor.

On June 23, 2008, [Christian D. McIntire](#), owner of Atlantic Capital Management, Inc. ("Atlantic") pled guilty in the United States District Court for the Western District of North Carolina Charlotte

Division to a two count Information for embezzling assets of an employee benefit fund and failing to disclose on his 2001 Federal tax return approximately \$60,850 in income. He was sentenced to 36 months probation and ordered to pay restitution of \$109,544. Atlantic was a third party administrator (“TPA”) to several employer sponsored 401(k) plans in the Charlotte, NC area. Atlantic collected contributions on behalf of the plans and would then forward them to American Funds. The plan contributions were then invested through American Funds. It was McIntire’s scheme, in part, to request distributions from plan participant accounts from American Funds without the knowledge of plan participants. American Funds would then issue checks in the name of plan participants and mail them to McIntire. McIntire would then deposit the checks into his or Atlantic’s account and use the funds for Atlantic’s or his own personal benefit.

On July 17, 2008 [David Jacobs](#) was sentenced to 46 months imprisonment, three years of supervised release and ordered to pay court ordered restitution of \$832,890 in United States District Court, Northern District of Illinois, Eastern Division. Jacobs had previously pled guilty to stealing funds from an employee benefit plan, in violation of 18 USC 664. Jacobs was the owner, operator and President of Northwestern Plating Works, Inc. (“NPW”), located in Chicago, Illinois. NPW was in the business of metal finishing. From September 2001, to March 2005, Jacobs withdrew money from the NPW Profit Sharing Plan (the Plan). In total, Jacobs wrote 49 checks from the Plan’s account at Morgan Stanley, totaling \$832,890.84. The checks ranged in amounts from \$5,000 to \$60,000. The checks were first deposited into Jacobs’ personal bank account and then transferred to the NPW operating account. Jacobs was the sole trustee of the Plan. NPW went out of business in August 2005.

On May 5, 2008, [Ronald Dale Patterson](#), age 64, was sentenced to a 4-year deferred adjudication by the Harris County District Court in Texas. Patterson was previously indicted and on January 24, 2008, entered a plea of no contest to one count of Misapplication of Fiduciary Property. Patterson was the President of Ronnie’s Food Markets and Trustee of the Ronnie’s Food Markets Profit Sharing Plan (the “Plan”). Between the period of January 10, 2002 and May 3, 2003, Patterson misapplied plan assets totaling \$37,990.43 from the Plan’s bank account by writing checks to himself and paying personal expenses.

On January 22, 2008, [William B. Wofford](#) was sentenced to 51 months imprisonment followed by 36 months probation and ordered to pay restitution of \$277,938. On August 24, 2007, William B. Wofford, age 47, was convicted by a jury trial in the United States District Court, Northern District of Texas of 10 counts of Theft or Embezzlement from an Employee Benefit Plan. Wofford was the owner of Premier Consulting, Inc., (Premier) that sponsored the Premier Employers Group 401(k) Plan. Premier was a company that was in the business of leasing employees back to the companies for which the employees worked. Companies that hired Premier would no longer employ their own workers. Instead, Premier would employ the workers, and the clients of Premier would then lease the employees back from Premier. One of the benefits Premier offered was a 401(k) plan, known as the Premier Employer’s Group 401(k) Plan. From April 2002 through October 2004, Wofford directly and indirectly borrowed, withdrew and used, for his own use and benefit and for the use and benefit of companies and entities in which he had a financial interest, over \$300,000 from the Plan.

On November 16, 2007, [Thomas E. Zimmer](#) was sentenced in the United States District Court for the Northern District of Ohio, to 2 years of supervised probation, 6 months of home confinement and, fined \$1,000 with a special assessment of \$100. On October 3, 2007, Zimmer plead guilty to one count of theft or embezzlement from an employee benefit plan in violation of Title 18 USC 664. Zimmer was 60 % owner of Allied Construction Group, Inc. and plan administrator of the company's

401(k) Plan covering employees of the Company. During the period May 3, 2002 - January 31, 2003 Zimmer withheld \$10,692 from the pay of employees as contributions to the Company 401(k) Plan, but, failed to remit these withholdings to the plan's custodian of assets. Instead, he deliberately chose to spend these funds held by the company for business or personal purposes.

Participant Contribution Regulation

The Department's participant contribution regulation requires employers of all sizes to transmit employee contributions to pension plans as soon as they can be segregated, but in no case later than the 15th business day of the month immediately following the month in which the contribution is either withheld or received by the employer. The Department proposed an amendment to the participant contribution regulation to create a safe harbor rule under which participant contributions to small plans (with fewer than 100 participants) will be deemed to be made in compliance with the law if those amounts are deposited with small plans within seven business days of withholding or receipt. Pending the adoption of a final rule by the Department, EBSA will not assert a violation of ERISA regarding participant contributions where such contributions are deposited with a small plan within 7 business days. Because the final rule may change, periodically check www.dol.gov/ebsa for the publication of the final rule.

Voluntary Fiduciary Correction Program

EBSA adopted the Voluntary Fiduciary Correction Program (VFCP) to encourage employers and fiduciaries to comply with ERISA. This program allows plan officials to self correct certain violations and receive "no action" letters if they meet certain criteria. Most of the VFCP applications involve delinquent employee contributions. As VFCP applications continue to increase, fewer investigations involving these issues need to be conducted in order to correct violations. Since the VFCP was adopted on a permanent basis in March 2002, EBSA has received more than 5,300 applications and verified \$439 million in corrections on behalf of plans and their participants.

Consumer Education

- The Department began a consumer education program simultaneously with its enforcement effort on employee contributions.
- The "Top Ten Warning Signs" were published on EBSA's Web site to provide consumers with tips on indicators of potential 401(k) abuse.
- Several new publications were developed to assist individuals in learning about their rights and monitoring the safety of their retirement benefits. Some of the more popular include "What You Should Know About Your Retirement Plan" and "A Look at 401(k) Plan Fees".
- These publications are available on EBSA's Web site at www.dol.gov/ebsa or through EBSA's toll free number at **1-866-444-EBSA (3272)**.
- If you have questions not answered in this fact sheet, contact EBSA through the toll-free number or electronically at www.askebsa.dol.gov.

This fact sheet has been developed by the U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC 20210. It will be made available in alternate formats upon request: Voice phone: 202-693-8664; TTY: 202-501-3911. In addition, the information in this fact sheet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.