

\$57 Million Settlement Filed in 401(k) Fee Lawsuit

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Last week, the Boeing Company and participants in its 401(k) plan filed a motion for preliminary approval of a class settlement to end longstanding litigation. The settlement concludes a long and complicated journey for one of the many excessive fee cases filed in the mid-2000s.

The case was originally filed on September 28, 2006. The participants alleged that plan fiduciaries breached fiduciary duties by causing the company's 401(k) plan to pay excessive fees, imprudently including a volatile technology sector fund and managing the plan's company stock fund in a manner inconsistent with ERISA's duty of prudence.

Critical elements of the settlement agreement include:

- The settlement amount is \$57 million. This amount is to be split among the following participants after attorneys' fees, taxes, and administrative expenses:
 - 50% to all participants of the plan with an account balance between September 28, 2000, and December 31, 2006;
 - 20% to all participants who invested in any of the plan's mutual funds between September 28, 2000, and December 31, 2005;
 - 15% to all participants who invested in the plan's technology fund between September 28, 2000, and December 31, 2005;
 - 10% to all participants who invested in the company stock fund between September 28, 2000, and December 31, 2006 and whose investment underperformed that of the company's common stock; and
 - 5% to all participants who invested in the small cap mutual fund between September 28, 2000, and December 31, 2005.
- An independent fiduciary will be retained by the company, on behalf of the plan, to determine independently whether to approve the settlement.
- Assuming that the company's investment committee determines that a technology sector fund should remain one of the plan's core investment options, the committee will obtain an opinion and recommendation from an

independent investment consultant as to whether and how to provide participant access to a technology sector strategy as a core option.

- The agreement assumes that the company has a target for cash in its company stock fund and has contracted with a fiduciary to monitor the cash levels in this fund.

This settlement comes on the heels of other large 401(k)-related settlements that have been made public this year: \$62 million in one case and \$32 million in another. Unsurprisingly, the attorneys' fees are substantial—totaling \$19 million (plus \$1.845 million in expenses) of the \$57 million Boeing settlement and \$20.67 million (plus \$1.6 million in expenses) of the \$62 million settlement. Needless to say, this level of attorneys' fee awards will encourage additional, future litigation.

It has never been more important for plan fiduciaries to take all steps necessary to ensure that they are using sound practices when managing their benefit plans. We have significant experience in guiding plan fiduciaries in all aspects of fiduciary requirements and the latest trends in this important area.

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