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# Chapter 4

# Spiraling Costs and Crashing Markets — Who Will Be Left Holding the (Empty) Bag for Depleted Pensions and Unfunded Health Care Liabilities?

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## Synopsis

## § 4.01. Introduction.

Since 1974, the federal Employee Retirement Income Security Act (ERISA) has regulated most aspects of providing retirement benefits to employees. ERISA's legal framework provides for the types of claims that can be brought against retirement and welfare plans and who has standing to bring them. However, even thirty-five years after its enactment, ERISA and benefits law continue to evolve. This chapter reviews and analyzes several employee benefits-related topics and issues that are facing companies and practitioners today.

First, this chapter will discuss ERISA fiduciaries and whether they may be left "holding the bag" for depleted pension plans. More specifically, this chapter will examine who qualifies as an ERISA fiduciary, what duties those fiduciaries have, who has standing to sue ERISA fiduciaries and for what civil claims, and what remedies are available against ERISA fiduciaries when they cause harm. Next, this chapter will review recent case law involving the extent to which the ERISA Section 404(c) "safe harbor" provision protects fiduciary investment decisions and the risks associated with investing retirement plan monies in company stock in the current market environment, and will briefly consider 401(k) plan administration fees. The chapter will also investigate who will be responsible for paying the pensions of failed employers and discusses changes to multiemployer plan funding requirements in the Pension Protection Act of 2006. Finally, the chapter will assess whether employer healthcare liabilities may be reduced or eliminated, and whether voluntary employees' beneficiary associations (VEBAs) are a potential solution to the extraordinary healthcare costs being borne by employers.

## § 4.02. ERISA Fiduciaries.

### [1] — Background on ERISA Fiduciaries: Who Are ERISA Fiduciaries, What Are Their Duties, Who Has Standing to Sue Them, What Claims Can Be Brought Against Them, and What Are the Remedies Available to a Participant Who Alleges Harm Caused by Them?

#### [a] — Who Is a Fiduciary Under ERISA?

To understand how one may become subject to liability under ERISA and whether ERISA fiduciaries may be left "holding the bag" for depleted pensions in the current market environment, the statutory text of ERISA must first be examined to determine whom it identifies as a fiduciary.

ERISA provides:

> [A] person is a fiduciary with respect to a plan to the extent **(i)** he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, **(ii)** he renders investment advice for a fee or other compensation, direct