

June 2015

ERISA FIDUCIARY DUTIES FOR PLAN INVESTMENTS

Many employers offer 401(k) and other retirement plans for their employees as part of the cost of doing business. Too often, retirement plans are established and operated without much thought given to the numerous legal obligations that plan fiduciaries have, leaving employers vulnerable to challenges by their own employees as well as governmental agencies auditing their plans. A particular point of vulnerability are the investment choices that employers make for their retirement plans.

Plan committees and other fiduciaries in charge of selecting investments for a retirement plan are bound by law to make prudent and diverse investment choices and to monitor those choices periodically. These duties also apply to 401(k) plan fiduciaries who choose the menu of investment options from which employees may select investment of their own plan accounts. The U.S. Supreme Court recently underscored the seriousness of these duties by allowing employees to challenge some fiduciary decisions made years ago.

FACTS OF THE CASE: In *Tibble v. Edison International*, 401(k) plan participants sued plan fiduciaries because of certain expensive mutual funds that the fiduciaries had selected for the plan. The Edison 401(k) plan held \$3.8 billion and served 20,000 participants. Since it was so large, the Edison plan could have offered investment-class mutual fund options to plan participants that had much lower fees than the identical retail-class funds offered.

The employees sued Edison to recover losses suffered by the plan for the extra fees that the plan paid as a result of the fiduciaries' choosing more expensive retail fund investment options.

Edison argued that the participants' lawsuit was filed too late because the funds in question were added to the plan menu more than six years before, arguing that the statute of limitations had already run. The employees argued

continued...

ABOUT LABOR EMPLOYMENT & EMPLOYEE BENEFITS:

Burns & Levinson's Labor, Employment and Employee Benefits attorneys advise clients about all aspects of the employment relationship, from pre-hiring considerations through separations, layoffs and terminations. We counsel employers on strategies for maximizing the effectiveness of their human resource function by avoiding litigation, while navigating the maze of state and federal regulations now governing employers' actions. We assist our clients in developing policies and procedures that assure compliance with governing laws and contracts. In addition, we develop and implement effective training programs for managers and staff.

FOR MORE INFORMATION:

Evelyn Haralampu

Partner, Labor, Employment & Employee Benefits practice

T: 617.345.3351

E: eharalampu@burnslev.com

To learn more about our **Labor, Employment and Employee Benefits** practice, visit burnslev.com.

that their suit was not time-barred because plan fiduciaries have an ongoing fiduciary duty to monitor the prudence of fund choices in a retirement plan.

SUPREME COURT HOLDING: In a unanimous opinion, the Supreme Court allowed the employees to sue the plan fiduciaries. The Court observed that because a fiduciary has a continuing duty to monitor plan investments at regular intervals, the participants' claim was not barred by the statute of limitations. The Court observed that a fiduciary's duty of prudence in selecting an investment is separate from the duty of continuing to monitor that investment.

PLANNING POINTS: Plan fiduciaries, including administrative committees that review plan investments, have some basic duties regarding plan investments. Among these are to make prudent, diverse investment choices. In addition, fiduciaries are obligated to monitor previous investment choices on a continuing basis and remove choices that are no longer prudent.

To show that it has met these requirements, a plan fiduciary is well-advised to have periodic meetings to review the investment choices of the plan, and record the empirical data it reviewed in determining whether the plan's investment choices are and remain prudent. One important item to consider is the expense ratio of any mutual fund in a plan and whether that ratio is reasonable. Is another class of shares in the mutual fund available at a lower cost? Is the choice of the investment itself prudent? Are plan investments as a whole diversified? Does an investment choice continue to be prudent given its performance compared to applicable benchmarks? These are questions that the fiduciary should ask, answer and document at regularly scheduled periodic reviews to meet the legal obligations discussed in *Tibble v. Edison International*.

If you would have questions or concerns about the scope of your particular legal obligations under these circumstances, please feel free to contact Evelyn Haralampu at eharalampu@burnslev.com.

ABOUT BURNS & LEVINSON:

Burns & Levinson is a Boston-based, full service law firm with more than 125 attorneys in Massachusetts, New York and Rhode Island. The firm has grown steadily and strategically throughout the years, and has become a premier law firm with regional, national and international clientele. Core areas of practice are Business Law, Business Litigation, Intellectual Property, Private Client Legal Services and Real Estate.

For more information, visit burnslev.com.

OFFICE LOCATIONS:

Boston (HQ) | Andover | Hingham | New York | Providence | Waltham
MA: 617.345.3000 NY: 212.231.2237 RI: 401.831.8330