

Fiduciary File™

Plan fiduciaries should be ready to address these “hot topics” this Fall:

- (1) Proceed with caution when considering cryptocurrency funds
 - a. Employers feeling pressure to add cryptocurrency funds to investment lineups
 - b. Some vendors offer limited cryptocurrency opportunities through brokerage windows
 - c. DOL finds prospect of cryptocurrency in 401(k)/403(b) plans “troubling,” though no direct prohibition of such investments under ERISA
 - d. Future DOL guidance is likely
- (2) Removing an underperforming investment fund requires a prudent process (*Kokoshka v. Inv. Advisory Comm. of Columbia Univ.* (S.D.N.Y. 8/19/2021))
 - a. Participant sued after removal of gold fund from lineup
 - b. Court rejected claim, finding committee’s removal process was prudent
 - i. Committee regularly reviewed investment menu
 - ii. Committee followed watch-list process under IPS
 - iii. Participants given notice and opportunity to reallocate
 - c. Court: fiduciaries owe duties to plan as a whole, not individual participants
- (3) Overtime and other irregular compensation can create retirement plan compliance problems (*Kiaunis v. Munro, Inc.* (E.D. Va. filed 9/3/2021))
 - a. Auto repair company sued for failure to pay overtime and failure to make 401(k) contributions on overtime pay
 - b. Irregular pay is often overlooked for plan purposes
 - c. Administrative errors can cause qualification failures and fiduciary breaches
 - d. Lesson: conduct regular internal audits with payroll
- (4) Follow the AT&T roadmap to procedural prudence when monitoring record keeper fees (*Alas v. AT&T Servs.* (C.D. Cal. 9/28/2021))
 - a. Participants challenged record keeping fees as excessive
 - b. Fiduciaries prevailed after presenting “extensive evidence” of prudent process
 - i. Periodically reviewed record keeper’s ERISA § 408(b)(2) disclosure and invoices
 - ii. Hired outside firm to benchmark fees
 - iii. Negotiated lower rates
 - c. Court: fiduciaries acted prudently
- (5) Terminating or amending a plan does not create fiduciary liability (*Jackson v. AT&T* (5th Cir. Aug. 16, 2021))
 - a. Lawsuit involving merger of Cingular Wireless into AT&T Mobility
 - b. After merger, AT&T terminated Cingular plan and transferred participants to AT&T plan
 - c. Terminating and amending plans are “settlor” functions, not subject to ERISA’s fiduciary standards
 - d. 5th Circuit affirmed dismissal of claim alleging plan termination reduced employer contributions and breached fiduciary duties



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