

Fiduciary File™

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

- (1) Supreme Court to clarify prudence standards for investments and administrative fees
 - a. *Hughes v. Northwestern Univ.* – to be considered during Court’s October term
 - i. Allegations of excessive recordkeeping fees (use of two vendors) for 403(b) plan and use of retail share class investment funds
 - ii. District court and 7th Circuit dismissed plaintiffs’ claims, while other appellate courts have allowed similar claims to proceed
 - b. Ruling could significantly affect future of fee litigation and fund selection
 - c. Issues on the table:
 - i. Use of retail-class funds when cheaper alternatives available
 - ii. Is prudence measured on a menu- or individual-fund basis?
 - d. “This case has the potential to affect every 401(k) and 403(b) plan in America.” (J. Schlichter)
- (2) The DOL wants to see your cybersecurity policy – *now*
 - a. Guidance on scope of fiduciary duties and recommend preventative actions issued in April
 - i. Cybersecurity program best practices
 - ii. Tips for hiring service providers
 - iii. Online security tips for participants
 - b. Broad DOL enforcement initiatives have already begun
 - c. Cybersecurity program best practices include having formal cybersecurity program, conducting annual risk assessments, and strong data controls
 - d. Fiduciaries should consider proactive steps *now*:
 - i. Prepare and memorialize a formal cybersecurity policy
 - ii. Send cybersecurity questionnaires to vendors
 - iii. Have service providers explain security measures in committee meetings
- (3) Committee structure and delegation of fiduciary responsibility can reduce risk (*Luense v. Konica Minolta* (D.N.J. 2021))
 - a. Trial court dismissed significant portions of putative class action alleging excessive administrative and investment fees
 - b. Complaint named plan sponsor, board of directors, individual directors, and others as defendants
 - c. Court stripped away claims against company, board, and individuals due to company’s delegation of fiduciary authority to committee
 - d. Fewer defendants means less leverage for plaintiffs, less expensive defense, and more probable fiduciary victory
- (4) How does your investment committee measure up?
 - a. Plan Sponsor Council of America survey of 255 plan sponsors in April 2021
 - b. Interesting metrics regarding 401(k)/403(b) plan committees:
 - i. 64% have one committee; 20% have two committees
 - ii. 80% have a formal committee charter or governing document
 - iii. Most committees have between 5-10 members
 - iv. 65% have legal counsel present for committee meetings
 - v. 90% of large employer committees meet quarterly; 40% of small employer committees meet semi-annually



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