

Fiduciary File™

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

- (1) Supreme Court paves the way for more challenges to investment fund selection
 - a. *Hughes v. Northwestern Univ.* (S. Ct. Jan. 24, 2022)
 - i. Participants alleged excessive recordkeeping fees (two vendors), use of expensive retail share class funds, and confusing fund lineup in 403(b) plans
 - ii. Claims dismissed by district court, affirmed by Seventh Circuit
 - iii. Supreme Court unanimously revived claims
 - b. Decision limits protection under ERISA § 404(c)
 - i. Court rejected theory that offering *some* prudent/inexpensive funds “cures” inclusion of some imprudent options
 - ii. Seventh Circuit scolded for ignoring Supreme Court’s guidance in *Tibble* about retail share class funds
 - iii. If fiduciaries “fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty”
 - c. Torrent of lawsuits likely to continue

- (2) Wave of ERISA litigation has disrupted the fiduciary liability insurance market
 - a. Fiduciary liability insurance policies provide protection from ERISA lawsuits, including covering attorneys’ fees
 - b. Spike in litigation has caused insurers to reduce limits, significantly increase retention amounts, and increase premiums
 - c. Carriers unable to appropriately underwrite risk, as cases involve shifting claims and smaller plans
 - d. Fiduciaries should carefully review terms of policies at renewal time

- (3) Pay attention to letters from the DOL about late contributions
 - a. “Late” remittance of employee contributions creates prohibited transactions under ERISA and Tax Code
 - b. DOL tracks reports of delinquent contributions on Form 5500 and often follows up with friendly reminders about VFCP program and excise tax returns
 - c. DOL’s Voluntary Fiduciary Correction Program provides opportunity to correct late contributions
 - d. Failing to appropriately correct delinquencies can lead to costly penalties

- (4) The next excessive fee theory?
 - a. Third-party subpoena issued to Fidelity Investments in *Harmon v. Shell Oil* (D. Mass. Jan. 11, 2022)
 - i. Shell plan participants allege fiduciaries paid excessive recordkeeping fees to Fidelity
 - ii. Fidelity is no longer a party
 - iii. Subpoena seeks information about Fidelity’s use of participant data to market non-plan services, and revenue Fidelity generated from that data
 - b. Plaintiffs allege that Shell fiduciaries should have taken that revenue into account when evaluating Fidelity’s recordkeeping fees
 - c. Fidelity and Shell fiduciaries have challenged subpoena
 - d. If plaintiffs are successful, plan fiduciaries may need to inquire about ancillary revenue generated from participant data when evaluating recordkeeping fees

- (5) New guidelines for private equity and “socially responsible” investment funds in ERISA plans
 - a. Biden Administration’s DOL walks back prior guidance on private equity and ESG funds
 - b. December 21, 2021, DOL statement cautions fiduciaries against including private equity, especially for small plans
 - c. Proposed regulations loosen standard for considering environmental, social, and governance factors when selecting investment funds



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