

Fiduciary File™

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

- (1) Anticipate the effects of recession-related employment actions on 401(k) and 403(b) plans
 - a. Understand the difference between a “layoff” and a “furlough”
 - b. Partial plan terminations occur when employer-initiated actions cause a significant (*i.e.*, 20% or more) reduction in plan participation
 - c. Be aware of restrictions on eliminating employer matching or nonelective contributions
 - d. Evaluate plan loan and hardship withdrawal procedures
- (2) Low-cost BlackRock target date funds targeted in ERISA litigation
 - a. Claims allege BlackRock LifePath Index Funds were imprudent because they underperformed similar TDFs (*e.g.*, Vanguard, T. Rowe Price)
 - b. At least 10 lawsuits filed since July (including against Microsoft and Booz Allen)
 - c. Shift in approach: plaintiffs claim fiduciaries “chased the low fees” of index funds and ignored return potential of actively managed funds
 - d. DOL has been asked to issue new guidance
 - e. Lesson for fiduciaries: ERISA requires *prudence*, not *prescience*, but any investment decision is subject to challenge
- (3) ERISA’s prohibition on self-dealing can affect fiduciary decisions
 - a. Case Study: *Walsh v. InterArch, Inc.* (D.N.J. filed 8/30/2022)
 - b. DOL sued architecture firm owners/plan fiduciaries over investment losses caused by investment in banks that were affiliated with owners
 - c. Plan lost more than \$12 million over four years
 - d. DOL alleges violation of ERISA’s exclusive benefit rule, duty of prudence, duty to diversify, and prohibited transaction rules
 - e. Lesson for fiduciaries: When fiduciaries have a financial or other interest in a potential transaction involving the plan, they should recuse
- (4) Participant complaints about conflicted rollover advice could be redirected to plan sponsors
 - a. *Carfora v. TIAA* (S.D.N.Y. 9/27/2022) – Federal district court rejected ERISA fiduciary breach claims that TIAA representatives mined participant data and advised rollovers that benefitted TIAA
 - b. Court rejected DOL’s definition of “investment-advice” fiduciary and held TIAA representatives’ statements were not subject to regulation under ERISA
 - c. Also refused to find that participant data is a “plan asset”
 - d. Court found that plan sponsor, rather than recordkeeper, was that proper fiduciary to sue
- (5) Understand how forfeitures must be treated under your plan
 - a. Forfeitures are plan assets for purposes of ERISA, triggering ERISA’s prudence, exclusive benefit, and plan document rules
 - b. Plan documents and Code requirements generally determine when forfeitures occur and how forfeited amounts may be used
 - i. Usually forfeitures occur as of earlier of when the participant (i) receives a complete distribution of entire vested account, or (ii) incurs five consecutive one-year breaks in service
 - ii. Forfeitures must be allocated or used annually; they cannot be allowed to accrue
 - c. Forfeitures *must* be used in manner dictated by plan document; they *may* be:
 - i. Used to reduce future employer contributions or fund repayment of prior forfeitures
 - ii. Used to pay reasonable plan expenses
 - iii. Allocated to participant accounts as additional employer contributions
 - d. Employers should understand plan terms governing forfeitures and make sure administrative practices are consistent with plan terms



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