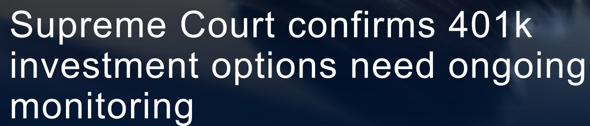

Supreme Court confirms 401k investment options need ongoing monitoring

ANTOINETTE PILZNER | TAX AND BENEFITS CHALLENGES | MAY 22, 2015

The U.S. Supreme Court's May 18th decision in *Tibble v. Edison International* confirmed that the "set it and forget it" approach to selecting 401(k) plan investment options does not satisfy ERISA's fiduciary duties. The *Tibble* decision quotes extensively from trust law in support of its conclusion that the fiduciaries of a 401(k) plan have a continuing duty "of some kind" to monitor investment options offered to participants, and to remove investment options when continuing to offer those options no longer meets ERISA's prudence requirement.

ERISA requires a plan participant to bring legal action against a plan fiduciary for breach of fiduciary duty within six years after the "last action" (or omission) giving rise to the breach occurred. The legal question in *Tibble* was whether 401(k) plan fiduciaries could be sued for breach of fiduciary duty for retaining investment options if those investment options were initially offered to participants more than six years before the claim was brought. With respect to some of the investment options in question in *Tibble*, the initial fiduciary act of selecting the investment options had occurred more than six years before the legal action began. However, the plan participants claimed that the plan fiduciaries had not monitored the ongoing prudence of retaining those investment options, and it was a breach of that ongoing duty to monitor that had occurred within the six years before the plan participants brought their claim.

The Supreme Court agreed with the plan participants, finding that the fiduciary act of selecting the investment option was separate from the fiduciary duty to monitor the continued prudence of offering those investment options. Because a claim for a breach of the fiduciary duty to monitor could arise at any time after the investment option was initially selected, the date on which the investment option was initially offered was not relevant to determining if plan participants had brought a claim for a breach of the duty to monitor within the six-year time limit.

What the Supreme Court did not do was determine what type of ongoing monitoring is required. For example, is monitoring and review of the investment options only required when there is change in circumstances with respect to the plan or the investment option? Or is regular periodic monitoring required even without any specific change in circumstances? The Supreme Court left this question for the Ninth Circuit Court of Appeals to decide when it re-hears the case on remand.

The *Tibble* decision means that 401(k) plan sponsors and fiduciaries who have not reviewed the prudence of their plans' investment options since those investment options were first selected ("set it and forget it") should revisit the retention of those investment options at their earliest opportunity. Plan fiduciaries need to determine if the plan's investment options remain appropriate for the plan and its participants in light of the diversity, performance, and fees of those investment options. Setting up periodic review procedures for the plan's investment options is advisable as well, both to serve plan participants' best interests (another ERISA fiduciary duty) and to protect the plan fiduciaries from possible claims of breach of fiduciary duty. Following periodic review procedures, and documenting both the procedures followed and the results of the periodic reviews, can help defend a fiduciary from these claims.

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I've been on the accountant's side, the employer's side, and the attorney's side of employee benefits over a span of more than 30 years. So I understand, and can help you identify and evaluate, the financial, human resources, administrative, and business aspects of the employee benefit plan decisions you face.

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