205 N. 10th Street, Suite 300 · Boise, Idaho 83702
208.342.5522 · 866.ERISALAW
www.erisalawgroup.com

Ten Investment Lessons for Trustees – *Tibble v. Edison*

Jeffery Mandell, Esq.

In *Glenn Tibble, et al., Participants v. Edison International, et al.*, the United States Supreme Court on May 18, 2015 (along with the Eighth Circuit 2014 *Tussey v. ABB, Inc.* decision) reminded fiduciaries of their required conduct regarding a plan's investments. I do not discuss the case itself. What you need to know, however, is here.

Is This Your Misunderstanding?

- The employer and plan allow participants to make plan investment decisions. The employer has hired a qualified investment advisor. It probably even has an Investment Policy Statement (IPS).
- The employer believes it has fulfilled its ERISA duties, that it and the fiduciaries are protected from government and participant attack if a participant's investments go south (and/or if investment fees are excessive).
- That is entirely fallacious.
- ERISA requires more for the fiduciaries to be protected. Read below for some basics.

Ten Fundamental Fiduciary Action Steps

1. **Trustees (and other investment fiduciaries, collectively called trustees or fiduciaries here) must actively, periodically, and systematically review a plan's investments to ensure they are prudent and meet ERISA's other requirements.**

- Focus on those words: active, periodic, systematic.
- This is true regardless of the type of plan – retirement, 401(k) (whether the plan's investments are participant-directed or trustee-directed), health and other plans.

A trustee that is passive, uninformed or misinformed can easily become a defendant (and lose).

- This paramount duty of active, regular, systematic review applies to all investments, whether added to the plan recently or decades ago.

2. **Trustees should think twice before selecting or continuing retail-class shares, rather than institutional-class shares, in its investment offerings.**

- However, the lower expenses of institutional-class funds do not necessarily dictate the investment decision. Trustees must consider all factors, including the "revenue sharing" that the plan's investments might generate because that affects costs.

- Deciding how revenue sharing is applied, e.g., to offset plan expenses, be allocated to participants' accounts, or otherwise if permitted, is a fiduciary decision requiring compliance with ERISA's requirements.

The defense to plan investment risks: legal informed process.

3. **Fiduciaries should not do it alone.**

- Fiduciaries should strongly consider the engagement of a professional investment advisor to help with their investment decisions ("**help**," not "**do**").

- A qualified ERISA attorney is also instrumental to inform fiduciaries of their legal duties so that: (a) they ask the right questions; (b) ERISA-compliant decisions will be made; and (c) the fiduciaries' fulfillment of these duties is wisely (and easily) documented in written form.

4. **Trustees, with the advisor's and attorney's guidance, must carefully (a) develop, (b) implement, and (c) document an investment process and all investment decisions made thereafter.**

- Fiduciaries **must** ask investment questions, understand the reasons for the plan's investments, and (sorry, again) document such process.

- Relying solely upon the advisor's investment report(s) is not sufficient to protect the fiduciaries.

5. **The employer, plan providers and fiduciaries must recognize that changes in investment funds, including mapping, will or may directly affect certain required plan documents**, such as the plan's summary plan description, investment policy statement, services agreement, and automatic contribution arrangement, qualified default investment alternative, 408(b)(2), 404a-5, black-out and mapping disclosures to participants.

- The failure to recognize the impact of investment changes on the plan's documents can cause the trustees to lose their critical Section 404(c) fiduciary protection with respect to plan investments (meaning the fiduciaries are legally responsible for the participants' investment decisions).

Compliance with ERISA's investment requirements is easy… both to understand and implement.

6. **Fiduciaries should now review their investment policy statements.** Prior important court decisions (as well as *Tibble* and particularly *Tussey*) make clear that having a bad IPS, or having a decent IPS which no one is following, is riskier than not having an IPS at all.

- A qualified ERISA attorney should review and will revise the IPS to protect the employer and inside fiduciaries.
- Often the proposed IPS will contain language that is damaging to the employer/inside fiduciaries.

7. **It is compelling that employers and fiduciaries heighten their focus on ERISA's Title I investment requirements and shore up existing or non-existent procedures and documents.**

- Compliance with these requirements is considerably more straightforward, understandable and easier to implement when compared to Internal Revenue Code compliance. Simple informed legal steps are all that it takes.
- Focusing primarily on tax-compliance for these plans is no longer a reasonable business decision.

At the end of the day, the liability buck most always stops with the employer and inside fiduciaries.

8. **Be prepared: the Department of Labor has very significantly increased its attention (audit and otherwise) on investment and fiduciary processes.**

- It now routinely asks for and reviews investment decision-making documentation.

9. **Fiduciaries must properly evaluate (costs, risks, glide path, etc.) and select the target date funds (TDFs) most appropriate for that plan, just as with the other plan investments.**

- Plan monies are increasingly in TDFs.

10. **This article and other fundamental ERISA principles apply generally to trust funds that are not governed by ERISA (but by state law).**

- This article does not cover additional fundamental ERISA or state law investment requirements or recommendations.

For more information for your plan, contact Jeff Mandell (jeff@erisalawgroup.com) or John Hughes (john@erisalawgroup.com), or call 208-342-5522 or 1-866-374-7252.

* * *