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Supreme Court Approves Application of Continuing Breach Theory in 401(k) Excessive Fee Case

By The Global Compensation, Benefits & ERISA Practice Group

On Monday, the Supreme Court made it easier for plaintiffs to bring ERISA fiduciary breach claims. In *Tibble v. Edison International*, the Court unanimously held that ERISA fiduciaries have a continuing duty to monitor plan investments. Based on this holding, the court ruled that 401(k) plan participants may sue fiduciaries under ERISA for offering investment options that were allegedly too expensive, even if the investments were selected more than six years before the complaint is filed. But, plaintiffs only will be able to reach back six years from the date of the complaint.

ERISA allows fiduciary breach claims to be filed within the earlier of three years after the earliest date on which the plaintiff had actual knowledge of the breach or six year after the date of the last action that constituted part of the fiduciary breach. In *Tibble*, plaintiffs alleged the defendants breached their ERISA fiduciary duties by selecting and offering as 401(k) plan investment options higher priced retail class mutual funds instead of lower cost institutional investor class mutual funds. Three of the mutual funds were selected by the defendants in 1999, more than six years before plaintiffs filed their complaint in 2007. The district court concluded that participant's complaint was untimely for these three funds because they were selected more than six years before the complaint was filed and plaintiffs had not proven any of three funds underwent "significant changes" within the six-year period that would have warranted defendants to undertake a full due diligence review and convert the retail class funds to lower cost institutional class funds. The United States Court of Appeals for the Ninth Circuit affirmed the district court holding that participants had not established a significant change in circumstances that might trigger an obligation to review and change investments within a six-year limitation period.

The Court reversed the opinion of the Ninth Circuit, disagreeing with its conclusion that *only* a significant change in circumstances could constitute a new breach of fiduciary duty. Borrowing from the law of trusts, the Court noted "a fiduciary normally has a continuing duty of some kind to monitor investment and remove imprudent ones. A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of the suit, the claim is timely." In other words, the *Tibble* plaintiffs can claim that the funds were too expensive during the six years before they filed their complaint, but not beyond that date. The Court did not address the level

of review required by defendants in this case. Instead, it remanded the case back to the Ninth Circuit for further analysis consistent with the Court's opinion.

Given the Court's opinion, retirement plan fiduciaries should reevaluate their procedures for monitoring plan investments and verify that they reflect best practices.

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