

Fiduciary Litigation Update

Item 5 - Deferred Compensation Board

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Informational item only

- No Board action is required.

Legal Foundation for Fiduciary Duties

Common Law of Trusts

Federal Employee Retirement
Income Security Act (ERISA)

Wisconsin State Law:

- Uniform Fiduciaries Act, Chapter 112
- Uniform Prudent Investor Act, Chapter 88
- Chapter 40 and ETF 70

Board Responsibilities in Wis. Admin. Code ETF §70.03

Program Administration

- Determine and implement the most efficient and cost-effective method for program administration consistent with high quality services to members

Establish Standards

- Establish standards for evaluating the plan administrator

Evaluate Performance

- Evaluate the performance of the administrator, biennially, for contractual compliance and compliance with standards

Define General Categories

- Define general categories of investment products to be offered

Establish Evaluation Criteria

- Establish criteria by which specific investment products shall be evaluated for initial and continued participation in the plan and evaluate investment products annually

2023-24 Trends in Fiduciary Litigation

- Total cases filed were down compared to 2022.
- For the most part, participants have not been successful.
- The successful cases often involved a lack of documentation that board members considered issues and used a prudent process in arriving at a decision.
- Recent trend has been to challenge the use of plan forfeitures.

Notable Updates on Past Cases

Hughes v. Northwestern University

- ***Hughes v. Northwestern University***. The United States Supreme Court issued a decision on January 24, 2022, on whether Northwestern breached its fiduciary duty to its 403(b) plan participants in three ways:
 1. Failing to monitor and control recordkeeping fees
 2. Offering mutual funds and annuities in the form of retail share classes that carried higher fees than those charged by otherwise identical share classes of the same investments
 3. Offering options that were likely to confuse participants
- Case sent back to the 7th Circuit Court of Appeals to identify the appropriate standard for breach of fiduciary of prudence claims.
- 7th Circuit decision on March 23, 2023, allowed the first two claims to proceed, identifying the legal standard as a plausible allegation that a fiduciary decision was outside the range of reasonableness.

Key Takeaway:

Fiduciaries have a duty to prudently select and monitor all investments on a defined contribution plan menu. The U.S. Supreme Court concluded that failure to remove imprudent investments within a reasonable time is a violation of fiduciary duty.

Vellali v. Yale University

Participants in Yale's 403(b) plan alleged Yale breached its fiduciary duty of prudence by offering too many investment options, delaying consolidation to a single recordkeeper, failing to obtain competitive bids, and failing to prohibit TIAA from cross-selling resulting in losses to the plan.

A jury found that Yale had violated its fiduciary duty, but that the participants suffered no damages. Participants have appealed to the 2nd Circuit Court of Appeals.

Key Takeaways:

- 1. When unreasonable fees are identified, it is prudent to act within a reasonable time period.** Waiting five years to consolidate from two recordkeepers to a single recordkeeper after noting fees were too high may not be prudent.
- 2. Check Plan policies and federal guidance on frequency of engagement in RFP process:** While ERISA doesn't require fiduciaries to engage in competitive bids, Yale's policies did. Plus, the U.S. Department of Labor recommends fiduciaries conduct an RFP or other competitive bidding process for recordkeeping fees every three to five years.
- 3. Understand a record-keepers total compensation to ensure reasonableness.** Be aware of all record-keeper functions and compensation received from those functions.

Lawsuits Alleging Breach of Fiduciary Duty for Offering BlackRock Funds

In 2022, numerous lawsuits were filed against plan fiduciaries for using the BlackRock LifePath indexed target date funds claiming the BlackRock funds had consistently lower returns than other actively managed target date funds. All but two have been dismissed:

1. *Trauernicht et al. vs. Genworth Financial Inc. et al.* . Evidence of a deficient monitoring process was identified during discovery.
2. *Kistler et al. vs. Stanley Black & Decker Inc.* Board meeting minutes reflect no discussions of the consistent underperformance of the BlackRock TDFs from 2011-2021.

Recent Fiduciary Cases

Matney v. Barrick Gold of North America

This 2023 10th Circuit Court of Appeals decision affirming dismissal held that to establish that investment or recordkeeping fees are plausibly excessive requires a “meaningful benchmark.”

Whether a benchmark is “meaningful” will depend on context because the duty of prudence is context specific.

Regarding excessive investment fees, plaintiffs must allege that the alternative investment options have similar investment strategies, objectives, or risk profiles.

On recordkeeping fees, plaintiffs must allege that the recordkeeping services rendered by the benchmark plans are similar to the services offered by their plan.

Kelley et al v. TIAA-CREF and Morningstar

On Aug. 5, 2024, plaintiffs filed a class action lawsuit in the U.S. district court for the southern district of New York against TIAA and Morningstar for allegedly breaching their fiduciary duty by using a jointly created retirement planning tool to steer participants in the TIAA 403(b) plan into TIAA investment products.

Specifically, the complaint alleges that Morningstar “allowed TIAA to have substantial input in the development of the RAFV [Retirement Advisor Field View] tool, to favor TIAA’s own proprietary annuities.”

Johnson et al v. Carpenters of Western Washington Board of Trustees

Unpublished decision of the 9th Circuit Court of Appeals overturning lower court dismissal.

Plaintiffs alleged that the board established conservative investment aims, yet imprudently invested in two volatility hedge funds managed by Allianz Global Investors despite awareness of the risks.

The result was losses to plaintiffs' retirement account balances.

Court found that plaintiffs identified appropriate comparators in the Vanguard Total Bond Market Index Fund and the Vanguard Russell 1000 Index Fund.

Use of Plan Forfeitures


- Over the past several months, lawsuits have been filed against companies such as Bank of America, Tetra Tech, Inc., Honeywell, Thermo Fisher Scientific, Inc., Clorox, Intel, Qualcomm, Intuit and HP asserting the plans violated their fiduciary duty of loyalty by using forfeited nonvested plan assets to reduce plan expenses or future employer contributions rather than use those assets for the exclusive benefit of plan participants.
- IRS guidance and proposed rules allow this practice.
- Adoption of discretionary plan terms is a fiduciary decision.

Board Fiduciary Duties in Practice


How Does the Board Demonstrate it is Properly Exercising its Fiduciary Duties?

Fiduciary Checklist Examples:	Corresponding Board Activities:
Are fiduciaries aware of their duties?	<ul style="list-style-type: none"> • Fiduciary Checklist Review Sept. Board Meeting • New Board Member and Ongoing Fiduciary Training
Are record keeping fees reasonable?	Latest contract provides lower administrative fees
Is investment performance reviewed? Are fees being paid for the investment options reasonable?	<ul style="list-style-type: none"> • Quarterly Investment Performance Review • Financial Statement Audit Report June Board Meeting • Fund House Presentations June and Sept. Board Meetings
Are participant administrative fees reasonable?	Participant Administrative Fee Analysis December Board Meeting
Have participant complaints been documented and resolved?	<ul style="list-style-type: none"> • Board correspondence is passed to the board and response sent as appropriate by WDC Program Director • Formal Administrative Appeals Process


Practical Guidance



Follow the Annual Fiduciary Checklist




Review Board Meeting Materials



Ask Questions at Board Meetings



Continue to Hire Experts When Necessary




Review Board Meeting Minutes for Accuracy




Engage in Continued Learning About Fiduciary Topics




Update Plan Documents to Reflect Changes to the Law



Monitor and Evaluate Third-Party Administrator Performance



Monitor and Evaluate Reasonableness of Fees



Monitor and Evaluate Investment Performance



Questions?

Thank you



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