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Labor and Employment Alert: Monitor 401(k)s, Or Else - Supreme Court Overturns Tibble v. Edison International

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On May 18, 2015, the U.S. Supreme Court unanimously held in the case of *Tibble v. Edison International* that fiduciaries of an ERISA plan have a continuing duty to monitor investments and to remove imprudent ones. This decision continues a recent trend in which the Court has demonstrated its willingness to overturn courts of appeals in ERISA cases.

The *Tibble* case was filed in 2007 on behalf of participants and beneficiaries of the Edison International 401(k) Savings Plan, a defined contribution plan. The plaintiffs alleged that the plan's fiduciaries had breached their fiduciary duty to the plan participants and beneficiaries in selecting six retail mutual funds, when cheaper institutional class alternatives were available. Many mutual funds offer multiple classes where the investment fee is lower for more sophisticated investors (who presumably will need less handholding). Three of the funds were initially selected in 1999 (more than 6 years before the lawsuit was filed) and the other three were selected in 2002 (within the 6 year statute of limitations).

As you may recall, breach of fiduciary duty claims under ERISA are subject to a six year statute of limitations. The District Court and Court of Appeals for the Ninth Circuit agreed that the claims regarding the 1999 selection of funds were time barred. The Ninth Circuit reasoned that to avoid the statute of limitations the plaintiffs were required to show a significant "change in circumstances" that would trigger an obligation on the part of the fiduciaries to reconsider (and possibly change) the investments.

The Supreme Court rejected this "change in circumstances" standard and reminded courts that ERISA's fiduciary duty "is derived from the common law of trusts." The Court held that under ERISA, as under trust law, there is "a continuing duty –separate and apart from the duty to exercise prudence in selecting investments at the outset – to monitor, and remove imprudent, trust investments."

The Court left for lower courts to determine what the duty to monitor actually entails. For plan sponsors and fiduciaries, this decision should serve as a reminder that the work of a fiduciary does not end once an investment is selected. Plan fiduciaries should dust off their investment policies and make sure that they are evaluating the fund class selection when they review qualitative measures (like the manager turnover) and quantitative measures (like investment performance). Fiduciaries can be personally liable for keeping a well performing fund if they are paying too much for it and cannot demonstrate that they prudently monitored the plan's investments and costs. For the ERISA practitioner, the *Tibble* decision expands the scope of what actions may be challenged through a breach of fiduciary duty claim and reduces the likelihood of such claims being resolved on a motion to dismiss based upon a statute of limitations argument. You will be forced to prove your prudent process; plan accordingly.