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New ERISA Fiduciary Breach Claims Being Brought Over BlackRock Funds

A series of new lawsuits claim that investment fiduciaries have violated their ERISA duties involving their selection of the BlackRock LifePath target date funds (the "BlackRock TDFs"). The claims have been brought by the same law firm – Miller Shah. Contrary to many recent "excessive fee" cases, which claim that fiduciaries allowed investments in the plan with fees that are too high, these new cases argue the inverse. The complaints allege the "[d]efendants appear to have chased the low fees charged by the BlackRock TDFs without any consideration of their ability to generate return."

The cases are a reminder to ERISA investment fiduciaries that each and every fund in a plan's investment line-up must be fully approved and monitored on an ongoing basis to determine that the investment is a prudent selection for plan participants. Additionally, fiduciaries must consider all relevant facts and circumstances when selecting investments for participants to choose from. The fees assessed by the investment are only one of those relevant factors.

A Summary of the Claims

BlackRock is not a defendant in any of the cases. Instead, the complaints are lodged against plan fiduciaries that have selected the BlackRock TDFs as an investment option for participants to choose from, or as a qualified default investment alternative for participants that have not made an affirmative investment direction. The defendants in the suits are large companies, many of them household names. They include Microsoft, Capital One, Citigroup and Black & Decker.

Rather than focusing on the fees associated with the BlackRock TDFs, the claims focus on their performance. The complaints allege that the BlackRock TDFs, which use a passive investment approach, significantly underperformed other available target date funds from Vanguard, T. Rowe Price, American Funds and Fidelity. All of the complaints are substantially identical. In essence, they argue that "[i]t is apparent . . . that Defendants failed to scrutinize the performance of the BlackRock TDFs against any of the more appropriate alternatives in the TDF marketplace to determine whether the expected performance of the BlackRock TDFs could support their continued retention in the Plan."

The complaints contain pages and pages of comparative results intended to show how badly the BlackRock TDFs have underperformed. None of the complaints contain any precise allegations relating to the specific decision making process followed by the plans' fiduciaries, or how that process was imprudent. They simply imply that no prudent investment selection process could

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have possibly resulted in the selection or continued use of the BlackRock TDFs. "Any objective evaluation of the BlackRock TDFs would have resulted in the selection of a more consistent, better performing, and more appropriate TDF suite."

Reaction to the Claims

The claims have created some confusion among retirement plan fiduciaries and advisors. Most plan fiduciaries and advisors have followed very closely the recent excessive fee claims arguing that plan fiduciaries have disregarded the level of fees being charged by investments and service providers. This new wave of claims that the consideration of fees is being given too much weight are in direct opposition to the original wave of 'excessive fee' claims. This impresses on plan fiduciaries and advisors that plaintiffs can find wrong in any decision or outcome but serves to emphasize the importance of the bedrock of fiduciary risk mitigation: the prudent process. .

These new lawsuits involving the BlackRock TDFs have left many fiduciaries asking – If plan fiduciaries could be sued for using the BlackRock TDFs, what investment is safe? Between the excessive fee cases and these new BlackRock cases, ERISA fiduciaries should review the basics of the duties owed to plan participants and beneficiaries.

Following a Prudent Process

The DOL has always argued that when making fiduciary decisions, fees and expenses should not be considered in a vacuum. The DOL takes the position that expenses are only one part of the bigger picture, including investment risks and returns and the extent and quality of services provided. So when making decisions, fiduciaries must consider fees as one relevant factor to consider, but not the only relevant factor.

The complaints do nothing more than compare the BlackRock TDFs with other funds that have allegedly performed much better. But courts have never applied fiduciary liability in that manner. When an investment fiduciary chooses Fund A over Fund B, a claimant cannot show a fiduciary breach simply by pointing out – in retrospect – that Fund B turned out to perform better than Fund A. Courts do not apply the duty of prudence with 20/20 hindsight. Instead, they look to see if an investment selection was prudent based on all the relevant factors at the time the decision was made. While fiduciaries have an ongoing duty to monitor the plan investments, courts will not conclude that a fiduciary breach has occurred simply because a different fund ended up performing better than the fund that was selected.

Additionally, ERISA imposes a duty of loyalty. All fiduciary decisions must be made considering only the best interests of participants and beneficiaries. It's understandable that no ERISA fiduciary wants an investment in their line-up that makes them a target for litigation. However, if a plan currently has the BlackRock TDFs as an option (or a default), any decision to keep or remove those funds cannot be based simply on the fiduciary's desire to avoid getting sued. Before making the

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decision to remove the BlackRock TDFs from the plan, the fiduciary should consider only whether the investment is prudent, based on all the relevant factors, including fees, risk level, performance against a benchmark and a review of the strategy and management of the funds.

Gallagher Insight

Fiduciaries should not allow the current state of ERISA litigation to knock them off a time tested path. Your investment policy statement (IPS) should lay out the prudent process you should be following in selecting and monitoring plan investments, as well as the factors you should consider. Always follow the procedures specified in your IPS. Additionally, the IPS should be periodically reviewed to help ensure that it properly documents the steps you take and standards you apply relating to investment decisions.

If your plan offers the BlackRock TDFs, resist any knee-jerk reactions or decisions. The choice to remove any funds from your plan's investment line-up should not be driven by your personal interests as a fiduciary. Instead, the decision to keep or remove any funds must be made after a careful consideration of all the relevant factors, and in consideration of your IPS and in consultation with your investment advisors. Upon review, fiduciaries may conclude that the BlackRock TDFs measure up better than the lawsuits claim. Any decision to keep or remove the funds should be carefully documented to clearly indicate why the decision was made, and what factors were considered.

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