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ERISA-Related Lawsuits Beg the Question: How Much Is Too Much?

How much is too much?

Recent Employee Retirement Income Security Act (ERISA)-related lawsuits have made the question "top of mind" for many in our industry.

In one case, the Trader Joe's grocery chain has been charged with "breaching its ERISA fiduciary duties in the management, operation and administration of the Plan."

The plaintiffs charge that the $1.6 billion-plus plan, which has over 46,000 participants, had "tremendous bargaining power to demand low-cost administrative and investment management services and well-performing, low-cost investment funds." Instead, they maintain, the fiduciaries "chose inappropriate, higher-cost mutual fund share classes and caused the Plan to pay unreasonable and excessive fees for recordkeeping and other administrative services."

The suit also cites Trader Joe's decision to pay for Capital Research's recordkeeping services by offering retail investor share classes of American Funds mutual funds instead of lower priced institutional class shares, maintaining that the recordkeeping fees paid amounted to about $140 per participant, while "a reasonable recordkeeping fee for the plan is $40 per participant."

In another instance, a proposed class action complaint has been filed in the U.S. District Court for the Middle District of Tennessee against Ardent Health Services, its board of directors and more than 30 individual fiduciary defendants, both named and unnamed.

That complaint alleges that the nearly $1 billion plan's fiduciaries failed to objectively and adequately review each investment option within the plan. "The plan had substantial bargaining power regarding the fees and expenses that were charged against participants' investments," it says. "Defendants, however, did not try to reduce the plan's expenses or exercise appropriate judgment to scrutinize each investment option that was offered in the plan to ensure it was prudent."

And in December, fiduciaries of M&T Bank's 401(k) plan reached a $20,850,000 settlement agreement over a lawsuit alleging that eight of the plan's 23 designated investment alternatives were M&T Bank proprietary mutual funds that cost significantly more than similar funds and performed worse.

That suit also alleged that the plan failed to use its bargaining power as a large institutional investor to obtain the lowest-cost class of shares available, and failed to prudently monitor the plan to determine whether it had invested in the cheapest possible share class.

Such eventualities can be disconcerting — to say the least — to a plan sponsor if they know they can be sued for such supposed mishandling. And to be sure, some ERISA-related lawsuits have merit. If a plan sponsor is truly asleep at the switch when it comes to monitoring their plan's performance — if, for instance, its value grows to the point where it qualifies for a higher share class — or, worse, is deliberately negligent or deceitful, then obviously a court of law should be their ultimate destination.

Plainly put: If a fiduciary of plan is not actively assessing who is being paid, what amount they are being paid, and how those payments are being made, then they have not fulfilled their fiduciary duty vis-à-vis the plan's participants.

But in some cases, the lawsuits are simply frivolous, apparently filed in the hopes that a plan sponsor will in effect panic and pay a sum rather than face the bad publicity such a lawsuit can cause.

When acting as an investment fiduciary, we undertake a diligent process of researching, selecting and monitoring the funds in a given retirement plan, and update our records on a regular, scheduled basis. And we certainly advise all those working in a fiduciary capacity to keep copious records of their actions.

No one wants to overpay for something. But just because one particular option is the cheapest does not necessarily mean it is the right one for every situation.

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