COLUMBIA THREADNEEDLE INVESTMENTS®

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Happenings On and Off the Hill

Everything you need to know about current regulation, legislation and litigation

At Columbia Threadneedle Investments, we understand how challenging it is for retirement plan advisors and plan sponsors to stay on top of complex legal and regulatory requirements. To save you time and help you meet your fiduciary obligation, we divide defined-contribution updates into three categories — regulation, legislation and litigation — and explain the impact of each event.

REGULATION

Expanding the fiduciary umbrella: The new Retirement Security Rule

What happened? The Department of Labor (DOL) published a regulatory package intended to update the test for fiduciary investment advice — a five-part test that's been in effect since 1975. Since 2010, the DOL has made several efforts to update the test, including a final regulation published in 2016. When the Fifth Circuit Court of Appeals vacated that final regulation in 2018, the DOL went back to the drawing board:

- 2020: Published a regulation that reinstated the five-part test and provided a prohibited transaction exemption (PTE) that permits financial professionals to provide advice under a prescribed set of conditions
- 2023: Proposed a new regulation, entitled the Retirement Security Rule

What's the latest? On April 23, 2024, the DOL released a final version of the Retirement Security Rule and updates to various PTEs, including PTE 2020-02 (which broadly applies to advice arrangements) and PTE 84-24 (which is like PTE 2020-02 but tailored to independent insurance agents).

What's the fiduciary consideration? The new regulation and PTEs replace the five-part test with a framework intended to address transparency and conflict of interest concerns around distribution, rollover and investment recommendations, including those relating to distribution and rollover proceeds. It will cause more financial professionals, and a broader range of transactions, to fall under the fiduciary umbrella of the Employee Retirement Income Security Act (ERISA).

The new regulation was expected to draw litigation challenges, and the challengers didn't wait long. On May 2, 2024, the Federation of Americans for Consumer Choice and other plaintiffs filed the first challenge in a Texas federal court.[1] Despite that challenge (and others that may follow), the final rule and amendments to the PTEs generally take effect on September 23, 2024, although there is a one-year transition period after the effective date for certain conditions in the PTEs.

Simpler retirement-plan reporting and disclosures on the horizon?

What happened? Plan participants receive a lot of retirement-plan related disclosures, which is a direct result of the abundant retirement-plan reporting that plan sponsors and fiduciaries are required to conduct (e.g., Form 5500, Form 8955-SSA). Section 319 of the SECURE 2.0 Act of 2022 (SECURE 2.0) directed the DOL, the Internal Revenue Service (IRS) and the Pension Benefits Guaranty Corporation (PBGC) to review retirement-plan reporting and disclosure requirements, and then to make recommendations to Congress to simplify those requirements. On January 23, 2024, the DOL published a request for information (RFI) with a response deadline of April 22, 2024.

What's the latest? In April, the three agencies extended the deadline for public comment to May 22, 2024.[2]

What's the fiduciary consideration? SECURE 2.0 requires the three agencies to file a report with Congress by December 29, 2025. This means that fiduciaries will not experience immediate relief from the RFI process.

However, SECURE 2.0 Section 320 provided relaxed disclosure requirements for unenrolled defined contribution participants. Under prior law, an eligible employee was generally considered to be a "participant" for most ERISA disclosure requirements even if the employee had not enrolled or otherwise received contributions under the plan.

SECURE 2.0 amended ERISA and the Internal Revenue Code (the Code) to confirm fiduciaries and plan sponsors need not make disclosures to "unenrolled participants," provided that the participant:

- Receives an annual reminder of the eligibility to participate in the plan
- Is granted access to any document they request

LEGISLATION

One step closer to collective investment trusts (CITs) in 403(b) plans

What happened? Over the last decade, 401(k) plans have experienced a significant increase in their access to CITs, yet the law has prohibited 403(b) plans from offering CITs to their participants. SECURE 2.0 attempted to remedy that inconsistency by making the Code changes necessary to permit CITs in 403(b) plans. However, federal securities laws have continued to prohibit CITs in 403(b) plans.

What's the latest? On March 7, 2024, the U.S. House of Representatives approved a bill[3] that would put 403(b) plans on the same level as 401(k) plans with respect to the use of CITs. The U.S. Senate has not yet formally considered the bill but may do so later in 2024.

What's the fiduciary consideration? Regardless of whether Congress approves the use of CITs in 403(b) plans, the general fiduciary principles remain in place: fiduciaries should consider the costs, benefits and risks of investment options available to a plan.

LITIGATION

Cybersecurity: It's a fiduciary issue

What happened? A service provider to multi-employer benefit plans experienced a cybersecurity attack that exposed the personally identifiable information of more than 100,000 participants. An ensuing class action lawsuit sought damages and other forms of relief on behalf of a class of over four million participants.[4]

What's the latest? In March 2024, the parties notified the court that they'd reached a settlement that would require the fiduciary defendants to make an $8.7 million payment and take additional steps including reimbursement for any credit monitoring costs incurred by participants after the breach.

What's the fiduciary consideration? This settlement reinforces (as discussed last quarter) how important it is for fiduciaries to perform regular reviews of service providers' data security safeguards. Recordkeepers and third-party administrators (TPAs) should be asked to provide evidence of their commitments to cybersecurity and safeguarding participants' information.

Benchmarking: Are we comparing apples to apples?

What happened? As plaintiffs have continued to bring lawsuits alleging excessive recordkeeping fees, federal courts have established different standards for the level of detail the plaintiffs must include in their initial complaints. Some impose a more relaxed standard whereby a chart of similarly sized plans — and their corresponding recordkeeping expenses — would suffice. Other courts believe such a chart is not enough; they require additional statements regarding the value of the services provided, which may include some combination of the quantity and quality of those services.

What's the latest? When a Wisconsin federal court dismissed three excessive fee lawsuits[5] on the same day and refused to dismiss two different excessive fee lawsuits[6] several days later, it demonstrated the inexact science of determining the amount of comparative plan data necessary to allow plaintiffs to survive a motion to dismiss.

What's the fiduciary consideration? These five lawsuits don't necessarily differ in terms of whether the fees are reasonable; they differ because the plaintiffs used different information in the various cases, and the court found some of it to be more persuasive than the rest. Plan fiduciaries should consider the last time they benchmarked their recordkeeping and any TPA services and expenses.

The value of the DOL's target-date fund tips

What happened? A long and winding excessive fee lawsuit ended with a California federal court ruling in favor of the defendant fiduciaries. Among the lawsuit's many allegations, the plaintiffs asserted that the plan fiduciaries had breached their fiduciary duties by imprudently selecting and failing to remove the plan's target-date funds.

What's the latest? Following a bench trial, the court ruled that the fiduciaries had not breached their fiduciary responsibilities.[7] The court extensively reviewed the fiduciaries' evidence demonstrating their process for selecting and monitoring the plan's custom target-date funds. The court took note of the fiduciaries' explanation that the funds had been designed to comport with the "Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries," published by the DOL in 2013 (DOL TDF Tips).

What's the fiduciary consideration? The court's opinion reaffirms that fiduciaries' processes — and their ability to document those processes — matter. Fiduciaries should review the DOL TDF Tips and consider:

- How they apply to their plan's current target-date funds
- How they may be reflected in the fiduciaries' ongoing monitoring processes

Fiduciary responsibilities for our health plan?

What happened? In the case of *Lewandowski v. Johnson & Johnson,*[8] former employees filed a class action lawsuit against a large employer, asserting that various officers and representatives of the employer had breached their fiduciary duties with respect to its health plan.

What's the latest? The *Johnson & Johnson* case triggers fiduciary risk concerns regarding a different type of plan than what most employers have considered over the last several years.

What's the fiduciary consideration? In many companies, individuals have administrative and/or fiduciary responsibilities relating to retirement and health and welfare plans. Although this case does not directly implicate those retirement plan fiduciary responsibilities, it may be relevant to those with overlapping duties.

To find out more, call 877.894.3592
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[1] Federation of Americans for Consumer Choice, Inc. v. United States Department of Labor, C.A. No. 6:24-cv-00163 (E.D. Tex. May 2, 2024).

[2] 89 Fed. Reg. 22,971 (Apr. 2, 2024).

[3] Retirement Fairness for Charities and Education Institutions Act (amending the Expanding Access to Capital Act of 2023).

[4] Sherwood v. Horizon Actuarial Services, LLC, Case No. 1:22-CV-01495-ELR (N.D.Ga. May 13, 2022).

[5] Cotter v. Matthews International Corp., Case No. 1:20-cv-1054 (E.D. Wis. Aug. 9, 2023); Guyes v. Nestle USA, Inc., Case No. 1:20-cv-1560 (E.D. Wis. Aug. 23, 2023); Laabs v. Faith Technologies, Inc., Case No. 1:20-cv-1534 (E.D. Wis. Aug. 30, 2023).

[6] Nohara v. Prevea Clinic, Inc., Case No. 2:20-cv-1079 (E.D. Wis. July 21, 2023); Glick v. ThedaCare Inc., Case No. 1:20-cv-1236 (E.D. Wis. July 29, 2023).

[7] Lauderdale v. NFP Retirement, Inc., Case No. 8:21-cv-00301-JVS-KES (C.D. Cal. Feb. 23, 2024).

[8] Case 1:24-cv-00671 (D.N.J. February 5, 2024).

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