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RECENT SUPREME COURT CASE HIGHLIGHTS

FIDUCIARY DUTIES WHEN SELECTING 401(K) PLAN INVESTMENTS

If you are responsible for selecting the mutual funds offered in your company's 401(k) plan, pay attention. If you choose a more expensive fund, or don't explain why you made the choice you did, your decision could land you in hot water.

On May 18, 2015, the United States Supreme Court issued an opinion in the case of *Tibble, et al. v. Edison International, et al.*

The plaintiffs in *Tibble* sued the individuals within their company who selected the investment options in their company's 401(k) plan for breach of fiduciary duty because they selected six mutual funds that were more expensive than six identical institutional-class mutual funds that were also available.

The six mutual funds at issue were "retail-class" mutual funds which contained higher management and administrative costs than "institutional-class" mutual funds. Since the 401(k) plan held a large amount of money, it was considered an institutional investor and therefore had access to institutional-class mutual funds with lower costs to the participants. The Court stated: "[The 401(k) plan participants] asked, how could [the fiduciaries] have acted prudently in offering the six higher priced retail-class mutual funds when [the fiduciaries] could have offered them effectively the same six mutual funds at the lower price offered to institutional investors like the [401(k)] plan?" The District Court agreed with the 401(k) plan participants, writing that the fiduciaries had "not offered any credible explanation" for offering retail-class, *i.e.*, higher priced mutual funds that "cost the plan participants wholly unnecessary [administrative] fees..."

Key Takeaways:

For anyone involved in selecting the investment options that are offered in your company's retirement plan, the three key takeaways from this case are:

(1) Your ERISA fiduciary duties include the obligation to make sure that the investment options offered in your company's 401(k) plan ***do not contain excessive management and administrative costs.*** This duty is not simply fulfilled at the time the investment options are initially selected. Rather, ***you must conduct periodic reviews of the investment options*** to ensure that the best value continues to be being offered to participants in the 401(k) plan.

(2) Where the assets of your company's 401(k) plans are large enough to open the opportunity to offer institutional-class investment options or to otherwise negotiate lower management and administrative costs, ***you must either offer the lower-cost investment options or document your reasoning for choosing to offer higher-cost investment options.***

(3) As always, it remains vital that you ***carefully document your reasoning for selecting the investment options that you choose to offer in your company's 401(k) plan.***

We invite your specific questions and encourage you to contact Jason Luter to learn how to best comply with your fiduciary obligations. Please contact him at jluter@grayreed.com or 469-320-6076.