

401(K) Plan Sponsors and Fiduciaries Face an Alarming Number of Stable Value Fund and Other Class Action Lawsuits

Article By:

Anne S. Becker

Todd A. Solomon

In the last several months, plaintiffs have filed multiple class action lawsuits against plan sponsors, plan fiduciaries and stable value fund providers. These lawsuits, which have involved 401(k) plans sponsored by large corporations, have alleged that:

1. Plan fiduciaries breached their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (ERISA), by investing in poorly performing stable value funds, failing to monitor the investments during periods of poor performance and high fees, and improperly benchmarking stable value funds against other lower cost and higher yielding investment options; and
2. Stable value fund providers violated their fiduciary duties under ERISA by offering imprudent, low-yielding investments and charging inappropriately high fees.

These lawsuits have also included allegations that plan fiduciaries breached their fiduciary duties of loyalty and prudence under ERISA by:

1. Causing plans to pay unreasonably high investment management fees when compared to available lower-cost alternatives such as institutional share classes, collective trusts and separate accounts; and
2. Failing to monitor the asset-based and other fees charged by plan record keepers (revenue sharing) to account for economies of scale. Some complaints have alleged that adequate monitoring should include a periodic competitive bidding process.

Plan sponsors and plan fiduciaries face a particularly difficult bind with respect to the offering of a stable value investment option as, ironically, they have been challenged for offering stable value funds and equally for not offering them. For example, in addition to the stable value fund allegations

described above, plaintiffs have sued some plans for failing to offer stable value funds, because money market funds—a fixed income investment alternative—have produced historically low returns. In fact, such lawsuits note that most large 401(k) plans offer stable value funds and criticize plan sponsors for their failure to conform.

As a result of this wave of lawsuits, plan sponsors and plan fiduciaries should evaluate the process they use to decide to invest in stable value funds, as well as the process they use to monitor investment management and recordkeeping fees more generally. Plan sponsors and plan fiduciaries must carefully select expert investment advisers and understand the expert's advice before applying it. Plan fiduciaries that do not currently offer a stable value investment option should examine their fund lineups to ensure that the lineups provide an adequate fixed income investment at a reasonable cost to plan participants.

In addition, plan sponsors and plan fiduciaries should establish and maintain an investment policy, which they should use to rigorously monitor investment options and related fees. Plan fiduciaries should also document the process for making fiduciary decisions and be able to demonstrate that they considered quality, service and price in selecting and monitoring investment options. This documentation of the investment selection and monitoring process is crucial to defending against the recent onslaught of stable value fund and other related lawsuits.

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National Law Review, Volume VI, Number 153

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