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Don't Forget your Fiduciary Duties

On January 24, 2022, the US Supreme Court, in *Hughes v. Northwestern University,* unanimously reaffirmed the ongoing duty of prudence, as set forth in ERISA, that each retirement plan fiduciary must exercise. In this case, the plaintiffs alleged that Northwestern University violated ERISA's duty of prudence in several key ways:

1. The plan fiduciaries for Northwestern's employee retirement plans failed to monitor and control recordkeeping fees thereby resulting in higher fees to plan participants;
2. The Northwestern employee retirement plans offered expensive "retail" share classes for a number of the mutual funds and annuities available in the plan even though almost identical and cheaper shares classes were available; and
3. The Northwestern employee retirement plans were confusing to plan participants because they offered over 400 investment options.

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The Supreme Court heard this case in December 2021 after the US Court of Appeals for the 7th Circuit affirmed the lower court's decision to dismiss the case based on the premise that the participants in Northwestern's retirement plans had the choice to select which investments they wanted to include in their retirement accounts. The Supreme Court ultimately determined the 7th Circuit erred in its analysis because it did not engage in a "context-specific inquiry of the fiduciaries' continuing duty to monitor investments and to remove imprudent ones as articulated in *Tibble v. Edison Int'l,* 575 U.S. 523" and then vacated and remanded this case back to the lower courts for "further proceedings consistent with this opinion."

This decision is one that all employers offering retirement plans to their employees should be aware of and it bears watching how the lower courts will again address this case. At a minimum, this decision reminds those charged with overseeing employer-sponsored retirement plans that they have an obligation to regularly monitor all the investment choices available inside their plan and to remove those that no longer remain prudent. Also, offering a multitude of investment options to plan participants does not alone absolve the plan sponsor from upholding its ongoing duty of prudence. In other words, it is a bad idea for an employer to set it and forget it when it comes to the investment choices offered inside their retirement plan. Rather, and as noted by Justice Sonia Sotomayor, "the employer's duty extended beyond simply providing the lower-cost funds alongside identical funds that charged higher fees. … Even in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options."

This ruling is also a reminder to all retirement plan sponsors of the many critically important obligations they owe to their plan participants. If you offer a retirement plan to your employees and you have not reviewed or updated your plan recently, you should consider doing so. If you are looking for help with this project, BLBB's Retirement Plans service can be of assistance.

More specifically, we can help you identify and address the issues raised in this decision, including high recordkeeping and investment fees, a confusing plan with far too many choices, and the continued inclusion of inappropriate investment vehicles. Our approach to the design, management, and ongoing maintenance of employer-sponsored retirement plans involves helping you provide lower-cost, high quality investment choices in a tech-forward retirement plan that is easy to use. Our solutions strive to put plan sponsors and participants at ease with the knowledge that their program is not only a reliable and high-quality benefit plan, but also a cost-effective tool that can help employers attract and retain employees in what has become a very competitive labor market.

As a fiduciary, BLB&B Advisors also offers clients a disciplined and well-documented approach to the regular reviews that are required of retirement plan processes and investments. This formal approach to a plan sponsor's fiduciary duties provides a welcomed measure of assurance to management who may be concerned about the liabilities associated with offering and overseeing a qualified retirement program.

If you would like more information about our unique retirement plan solutions or a competitive quote, please reach out to our Director of Retirement Plans, Ed Barnes, at edbarnes@blbb.com or call him at 215.643.9100.

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