

Is Your Company's 401(k) Plan as Good as It Could Be?

In light of a recent SCOTUS ruling, this is a good time to double-check.

Provided by Benedict A. Mitchell Jr.

How often do plan sponsors check up on 401(k)s? Not as often as they should, perhaps. A recent legal development seems to call for greater supervision of these plans from employers – a degree of supervision many have not routinely provided.

A major lawsuit has been resolved concerning investment selection & fees. In May, the Supreme Court decided *Tibble v. Edison International*, No. 13-550. It ruled that under ERISA, a plaintiff may timely initiate a claim for violation of fiduciary duty by a plan sponsor within six years of the breach of an ongoing duty of prudence in investment selection.¹

Specifically, some beneficiaries of the Edison 401(k) Savings Plan took Edison International to court, seeking damages for losses and equitable relief. Twice, the plaintiffs argued, the plan sponsor had added higher-priced funds to the plan's investment selection when near-identical, lower-priced equivalents were available.¹

Justice Stephen Breyer, stating the opinion of the unanimous Court, wrote that retirement plan fiduciaries have a "continuing duty — separate and apart from the duty to exercise prudence in selecting investments at the outset — to monitor, and remove imprudent, trust investments."^{1,2}

Do you see more lawsuits emerging as a consequence of this ruling? It does seem to invite them. The above language implies that the investment committee created by a plan sponsor shoulders nearly as much responsibility for monitoring investments and fees as a third-party adviser. Most small businesses are not prepared to benchmark processes and continuously look for and reject unacceptable investments.

Do you have high-quality investment choices in your plan? While larger plan sponsors have more "pull" with plan providers, this does not relegate a small company sponsoring a 401(k) to a substandard investment selection. Employees are smart and will ask questions sooner or later.

Are your plan's investment fees reasonable? Employees can deduce this without checking up on the Form 5500 you file – there are websites that offer some general information as to what is and what is not acceptable. Most retirement savers read up on this with time, and most know (or will know) that a plan with administrative fees pushing 1% is less than ideal.

Are you using institutional share classes in your 401(k)? This was the key issue brought to light by the miffed plan participants in the *Tibble v. Edison International* case. When Edison

International added a collection of mutual funds to its 401(k) plan in 1999, it chose to offer plan participants retail shares in six of those funds rather than institutional shares.³

Edison International saved about \$8 million in administrative expenses with that move – but there was a cost for that savings, and it was passed on to plan participants. They ended up paying higher fees on those investments, for retail shares have markedly higher fees than institutional shares. It is not unusual for the difference to exceed a tenth of a percent. This may not seem like much to quibble about in the present, but the impact on retirement savings over time can be significant.³

When was the last time you reviewed your 401(k) fund selection & share class? Was it a few years ago? Has it been longer than that? Why not review this today? It is part of your fiduciary duty to your employees to do so.

You certainly do not want a lawsuit brought against your company charging that you neglected a core responsibility of sponsoring a 401(k) plan. The Supreme Court decision on *Tibble v. Edison International* may inspire similar legal action from disgruntled plan participants. Do your best to avoid it – call in a financial professional to help you review your plan’s investment offering and investment fees.

Florida Benefit Specialists

Primary Address: (North Florida Office) 2233 NW 41st Street, Suite 700-A, Gainesville, FL. 32606

(South Florida Office) 6451 North Federal Highway, Suite 1201, Fort Lauderdale, FL. 33308
Cellular Phone: 954-461-5502 Toll Free: 888-236-9894 Ext.1. Fax: 888-236-9894

Benedict A. Mitchell Jr. is registered with and securities offered through Kovack Securities, Inc. Member FINRA/SIPC. 6451 N. Federal Highway, Suite 1201, Ft. Lauderdale, FL 33308 (954) 782-4771. Advisory services offered through Kovack Advisors, Inc. Florida Benefit Specialists is not affiliated with Kovack Securities, Inc./ Kovack Advisors, Inc.
<http://www.floridabenefitspecialists.com/> bmitchell@ksifa.com

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Citations.

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2 - ebn.benefitnews.com/news/retirement/scotus-decision-opens-door-to-more-401k-lawsuits-2746418-1.html [5/18/15]

3 - money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2014/03/31/how-the-supreme-court-could-stop-the-401-k-rip-off [3/31/14]