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MARCH 3, 2022 | PUBLICATION

Client Alert: Plan Sponsors on Alert After Recent Supreme Court Decision

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On January 24, 2022, the U.S. Supreme Court handed down an important decision affecting plan fiduciaries who select investment options available to participants in a self-directed employee retirement plan (such as a 401(k) savings plan). In *Hughes v. Northwestern University*, the Supreme Court held that merely offering participants a wide variety of investment options is not enough to meet a fiduciary's duty to offer prudent investments. While the *Hughes* decision makes it somewhat easier for plaintiffs to challenge high-cost fund options, it is not a complete or sweeping victory for participant plaintiffs.

In the *Hughes* case, disgruntled plan participants claimed that Northwestern University's (Northwestern) plan committee violated their fiduciary duties in several ways, including: (1) failing to monitor and control fees they paid for recordkeeping, (2) allowing the plan to offer retail shares that generally carried higher fees than those of institutional shares offered by the same investment services provider, and (3) offering an excessively large number of investment options, which caused participant confusion and led to poor investment decisions. With respect to the second complaint, Northwestern offered a defense that when the plan offered participants a wide range of mutual fund investments, some of which were relatively inexpensive, the plan committee fulfilled its fiduciary obligations even if some of the other offered funds charged higher fees. The District Court and Seventh Circuit agreed with Northwestern's position, but the Supreme Court found that it was not enough for fiduciaries to ensure there were low cost options included within a wide menu. Instead, the Court held that plan fiduciaries have the specific duties to monitor *every* investment option offered in a plan and to remove imprudent options. The Supreme Court vacated the Seventh Circuit's ruling and remanded the case to the lower court for further consideration of the specific facts of the allegedly excessive fees or improper investments. The *Hughes* decision precludes plan fiduciaries from using such a defense, and Northwestern and other employers must show that offering high-cost investments is prudent under a "context-specific inquiry" or prove that each offered investment is a prudent investment.

Prudence is always key in the context of selecting investment options for plan participants. The Employee Retirement Security Act of 1974, as amended (ERISA), requires plan committees to discharge their duties "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct on enterprise of like character and with the same means." Under prior court decisions (such as *Tibble v. Edison International* in

2015), a plan committee must follow a prudent, well-reasoned process when selecting which investment options are offered to plan participants.

Plan fiduciaries can still prove that a properly selected menu of investments meets the ERISA standard, and we can advise on how the *Hughes* decision affects your specific Plan's ability to meet that standard. If you sponsor a self-directed 401(k) plan, you should discuss the Supreme Court's decision in *Hughes* at your next plan committee meeting to ensure that your plan's investment options are prudently offered to plan participants. If you would like to know more about your fiduciary responsibilities in today's regulatory environment and how to structure your retirement plan's administration to best protect the plan sponsor, please contact one of the members of our Employee Benefits Group listed above.