eBenefits Alert: More than Meets the Eye - The Supreme Court Decides Tibble

May 21, 2015

On May 18, 2015, the Supreme Court handed down its decision in *Tibble v. Edison International*. The issue presented to the Court in *Tibble* was the application of ERISA's six-year statute of limitations for breach of fiduciary duty. The plaintiff in *Tibble* claimed the plan fiduciaries had breached their fiduciary duty by offering a retail share class rather than an institutional share class for certain mutual funds included in the plan's core fund array. Mutual fund retail share classes usually carry a higher expense ratio that their institutional share class counterparts. The Ninth Circuit held that the fiduciary breach claims in the plaintiffs' 2007 lawsuit relating to three mutual funds added to the plan in 1999 were barred by ERISA's six-year statute of limitations.

The plaintiff argued that even if the original selection of the funds was barred by the six-year statute of limitation, the plan fiduciaries had an ongoing duty to monitor the funds' performance, including the funds' fee structure, and that a claim based on that duty to monitor was not time barred. The Supreme Court agreed. Drawing from the common law of trusts—a recurring theme in the Court's ERISA decisions—the Court held that ERISA fiduciaries, like trustees under general trust law, have a "continuing duty of some kind to monitor investments and remove imprudent ones." The Court specifically declined to express a view on the scope of the duty to monitor, holding instead that the timing and nature of any review of a plan's investments depends on the circumstances.

It may seem that the *Tibble* plaintiffs were able to circumvent the statute of limitations by recasting a claim attacking the initial investment decision as a failure to subsequently undo that decision. However, the Court is not espousing a continuing breach theory. The Court makes it clear that the duty to monitor is a fiduciary obligation distinct from an initial investment decision, and the contours of that separate fiduciary duty depends on the facts and circumstances prevailing at any given point in time. Equally clear from the Court's decision is that failing to monitor at all is no longer an option, if it ever was. The *Tibble* decision underscores the need for periodic, diligent review of plan investments, and as with all fiduciary activities, documentation of both decisions to take or not take action. If you have any questions about the Supreme Court's decision or its application to your situation, please contact a member of the Gray Plant Mooty Employee Benefits & Executive Compensation Practice Group.