Morgan Stanley

ERISA Litigation Update

2025 Q4

The Morgan Stanley ERISA Litigation Update seeks to provide an overview of recent, relevant cases which may impact your responsibilities as a plan sponsor and/or plan fiduciary.

I. 2025 Recap & Expectations for 2026

2025 was an important year for 401(k) plan fee litigation. The plaintiffs' bar brought scores of new class action lawsuits, including new claims related to the use of plan forfeitures, pension risk transfers, and stable value fund investments. But the most important development of last year was undoubtedly the Supreme Court's decision in *Cunningham v. Cornell*, which made it more difficult for defendants to dispose of meritless claims at the early stages of litigation.

Cunningham involved claims that plan fiduciaries, among other things, engaged in transactions prohibited by ERISA when selecting recordkeepers for their 403(b) plan. The stringent prohibited transaction rules under ERISA broadly prohibit most transactions with plan service providers but there are a series of exemptions that provide relief with respect to many common transactions from these rules, provided the parties satisfy certain conditions and requirements set forth under such exemptions (*e.g.*, reasonable fees). The Supreme Court was asked to decide whether plaintiffs alleging a prohibited transaction must plead only that the transaction was prohibited – a low bar – or whether they also have to allege that no prohibited transaction exemption applies.

The Supreme Court decided in *Cunningham* that plaintiffs need only allege a prohibited transaction occurred, not that an exemption was unavailable with respect to the challenged transaction. The practical effect of the decision is to make it considerably easier for prohibited transaction claims to survive a motion to dismiss, resulting in expensive and time-consuming discovery. While the Supreme Court ruled in favor of the plaintiffs, the industry reaction appears to echo Justice Brett Kavanaugh's sentiments expressed during oral arguments heard in January 2025 – that it "seems nuts" that the mere fact of hiring an outside retirement plan service provider could qualify as a prohibited transaction under ERISA. The Supreme Court further acknowledged its decision could cause an "avalanche" of litigation but took the position that the Court lacks the authority to change the law. In that regard, the Supreme Court suggested some tools lower courts could use to weed out frivolous claims, but noted only Congress can truly address the issue. *Cunningham* is a procedural setback for all defendants in ERISA class action lawsuits, but the full impact of the decision will likely come into better focus over the course of 2026 as litigants and the lower courts grapple with the issues.

Despite the decision in *Cunningham,* 2025 ended with positive news for defendants as the Department of Labor (the "DOL") signaled its willingness to intervene in defense of plan fiduciaries and sponsors. The DOL has been increasingly vocal about the agency's concern with unchecked ERISA litigation, and Daniel Aronowits, the Assistant Secretary for the Employee Benefits Security Administration, vowed during his confirmation hearing to "end regulation through litigation" by using the tools at the agency's disposal to support fiduciary defendants and reduce overall litigation risk.

One of the ways the DOL is supporting defendants in ERISA litigation is by submitting *amicus* briefs in key cases, sometimes expressly reversing longstanding agency positions. The DOL has a history of submitting *amicus* briefs to make courts aware of the agency's views on important legal issues. Historically, the DOL's briefs have largely been filed in support of plaintiffs or in defense of the agency's own jurisdiction. The new, pro-defense *amicus* briefs reflect a notable shift for the DOL, and these briefs are already having an impact on the retirement industry. As discussed in more detail below, the plaintiffs in *Pizarro v. The Home Depot* dropped a petition for Supreme Court review of their case after the DOL submitted an *amicus* in support of the defendants.

II. Key Procedural Developments in ERISA Litigation

A. Burden of Proof on Loss Causation

A key issue in ERISA litigation pertains to disputes over who must prove loss causation in ERISA fiduciary breach claims – plaintiffs or the defendants – and courts have issued inconsistent rulings on this threshold question. The First, Second, Fourth, Fifth and Eighth Circuits each held that once a plaintiff proves that a breach and loss occurred, the burden shifts to the defendant to prove such losses were not caused by such breach. However, the Eleventh Circuit held in **Pizarro v. Home Depot** ***that the plaintiff must demonstrate that a fiduciary breach caused a loss to the plan, a position supported by the DOL in an amicus brief filed in this case at the Supreme Court level.***

A key issue in ERISA litigation is which party has the burden of proving that a fiduciary breach resulted in a loss to a plan. Shifting the burden of proof to defendants to disprove loss causation encourages plaintiffs (and plaintiffs' firms) to pursue cases in which there is little to no loss caused by a fiduciary breach, resulting in the defense of these ERISA cases becoming more time-consuming and expensive for defendants.

The First, Second, Fourth, Fifth, and Eighth Circuits have each held that once a plaintiff proves a breach and loss, the burden shifts to the defendant to prove that the loss was not caused by the alleged breach. However, the Eleventh Circuit held in *Pizarro v. Home Depot* that the plaintiff must demonstrate that a fiduciary breach caused a loss to a plan.

The plaintiffs in *Pizarro* appealed to the Supreme Court, and the DOL submitted an *amicus* brief arguing the Eleventh Circuit's view is correct and should be upheld. In its brief, the DOL acknowledged that its position is a reversal of the government's position in earlier cases but stated that "[f]ollowing the change in Administration… the government has reviewed its position and concluded that the… better [view]… leav[es] the burden of proving causation on ERISA plaintiffs." Shortly after the DOL submitted its *amicus* brief, the plaintiffs in *Pizarro* dropped their appeal to the Supreme Court. The DOL then issued a statement quoting Solicitor Jonathan Berry stating, the plaintiffs' "decision speaks volumes. The plaintiffs chose to abandon their petition rather than risk Supreme Court review after [the DOL] urged the Court to hear the case and reject the plaintiffs' legal theory."

B. Pleading "Meaningful Benchmarks"

The Supreme Court is considering whether it will hear Johnson v. Parker-Hannifin Corp. to address the "meaningful benchmark" pleading standard. The DOL filed an amicus brief supporting the defendants in **Parker-Hannifin v. Johnson*****, explaining that permitting plaintiff's flawed comparisons to a broad market index without an apples-to-apples comparison subjects fiduciaries to improper hindsight bias – instead of focusing on the fiduciary's adherence to***

procedural prudence at the time of its investment decision – and encourages the continued filing of meritless ERISA-related lawsuits.

One of the most important defenses in fee litigation is that the plaintiffs did not sufficiently plead facts about the reasonableness of fees for a court to infer that there was a breach of fiduciary duty. In the context of challenges to plan investment options, the Seventh, Eighth, Ninth, and Tenth Circuits have held that a plaintiff must allege a "meaningful benchmark" to the challenged investment the plaintiff's claim underperformed. Under this standard, a plaintiff must plead facts showing that "benchmark" funds share similar strategies, risk profiles, and objectives as the challenged investment. This standard is often described as an "apples-to-apples" comparison. Many courts have also applied a "meaningful benchmark" requirement for challenges to plan recordkeeping fees.

Although a majority of courts have adopted a meaningful benchmark standard, the Sixth Circuit held in *Parker-Hannifin Corp. v. Johnson* that while "[a] meaningful benchmark may sometimes be one part of an imprudence pleading…. it is not required," and in any event, a broad "market index" can serve as an "inherently… meaningful benchmark." The defendants petitioned the Supreme Court for review of the Sixth Circuit's decision, and the Supreme Court solicited the DOL's view on the case.

The DOL submitted an *amicus* brief in December 2025 in *Parker-Hannifin v. Johnson*, arguing the Sixth Circuit erred by not requiring the plaintiff to plead a meaningful benchmark and by concluding that a broad market index was a sound basis for comparison. The brief explains that permitting comparisons to a broad market index without an apples-to-apples comparison subjects fiduciaries to improper hindsight bias and fails to screen out meritless lawsuits. The Supreme Court has not yet accepted or denied the petition for review.

The pleading standard in ERISA cases is particularly important given the costs of defending ERISA class actions and the high percentage of cases that settle. Plaintiffs often base lawsuits on flawed comparisons, which may be allowed to proceed if there is no requirement that the comparisons are a meaningful benchmark. The DOL's position, if adopted by the Supreme Court, would help discourage meritless lawsuits and increase the likelihood that they are dismissed before costly discovery expenses are incurred.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- In light of the importance court rulings place on maintaining rigorous processes related to a fiduciary's selection and monitoring of investment options available to participants as well as appointments of plan providers (also known as "procedural prudence," which focuses on the process utilized by a fiduciary rather than the ultimate performance or outcome of such decisions), consider establishing, maintaining and periodically reviewing formal, clearly documented processes utilized by plan fiduciaries when making investment-related and/or service provider decisions for the plan, including, but not limited to, any metrics or benchmarks used by plan fiduciaries to determine the reasonableness of any such service provider's fees.
- Consider, in such processes, documenting a plan fiduciary's reasonable actions in its investment decisions and selection of service providers, as applicable, under the circumstances facing the fiduciary at such time, to demonstrate both procedural prudence and the fiduciary's basis for such decisions.
- Fiduciaries should keep records of not only the decisions made but also the rationale, including any research conducted, RFP discussions or outcomes, and/or expert recommendations (including, if applicable, in meeting minutes).

III. Stable Value Fund Litigation

In 2025 alone, plaintiffs filed 30 lawsuits alleging that plan fiduciaries breached their duties under ERISA by offering or retaining stable value funds in a plan's investment line-up that had lower credit ratings or produced lower returns than other investment options. Several courts have dismissed these claims in favor of defendants, finding that plaintiffs failed to plead a specific and relevant comparison to support their allegations that fiduciaries breached their duties under ERISA by retaining a purported underperforming stable value fund as an investment option in their retirement plans. Courts continue to emphasize the importance of procedural prudence at the time of a fiduciary's investment decision.

In 2025, plaintiffs' firms began targeting stable value funds as part of the broader wave of ERISA defined contribution ("DC") plan litigation. The volume of filings is significant—30 cases in 2025. These cases generally allege that plan fiduciaries acted imprudently, violating their fiduciary duties under ERISA by retaining stable value options within a retirement plan's investment menu that allegedly produced lower returns or less favorable crediting rates than other available capital-preservation or fixed-income investments, or that involved unreasonable fees or insurer compensation.

Stable value funds periodically credit accounts with interest, and the interest rate is adjusted from time to time based on market conditions. Stable value rates often lag market rates or are smoothed over time to reduce rate volatility. Consequently, stable value funds may appear to underperform money market funds where interest rates rise as has happened recently, creating fodder for litigation.

Courts have shown skepticism toward plaintiffs' performance comparisons that ignore the primary purpose of stable value funds—capital preservation and return stability rather than yield maximization—or that compare stable value products to dissimilar investment types. At the same time, courts continue to emphasize that fiduciary liability turns on the quality of the decision-making and monitoring process at the time of a fiduciary's investment decision, and not on whether a stable value fund outperformed alternative investment options in hindsight.

Courts recently granted defendants' motions to dismiss in stable value claims in several lawsuits. In *Grink v. Virtua Health, Inc.*, plaintiffs alleged that Virtua breached its duty of prudence by retaining the stable value account as an investment option in the retirement plan despite its underperformance relative to other investments. Virtua filed a motion to dismiss, arguing that the plaintiffs did not allege adequate comparators to the stable value fund at issue. The court granted the defendants' motion to dismiss on the stable value fund claims, finding that the plaintiffs failed to allege a meaningful benchmark for the challenged product. The plaintiffs had identified two "less risky" and "better performing" investments, but provided no factual support for the claim that these alternatives were "substantially identical" investments to the challenged stable value fund.

The court in *Clinton v. Baxter International, Inc.* reached a similar conclusion. In *Clinton*, the plaintiff alleged that the plan sponsor and investment committee violated their fiduciary duties by selecting and retaining a stable value fund investment "despite poor performance in relation to other comparable investments." In their motion to dismiss, defendants argued that the plaintiff failed to allege meaningful benchmarks to support the plaintiff's claims. As in *Grink*, the court granted the defendants' motion to dismiss. While the funds selected by the plaintiff as comparisons to the stable value funds passed muster in terms of "core similarities," the plaintiff failed to show "that there were year-in-year-out better-performing alternatives." The court found that it was not enough to rely on "a rotating cast of other funds with higher crediting rates."

With several motions to dismiss pending as of year-end, we are likely to see additional rulings on stable value investment challenges in the first half of 2026. While some of these lawsuits may get past the pleading stage, these challenges do not appear well-positioned to withstand more exacting scrutiny in later phases of litigation. Stable value fund litigation is likely to remain an active area in DC plan lawsuits in 2026.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Consider documenting a plan fiduciary's reasonable actions in its selection of an investment option under the circumstances facing the fiduciary at the time of such investment decision in such processes to demonstrate both procedural prudence and the basis for each investment decision.

IV. Plan Forfeiture Litigation

Although long-standing IRS guidance and ERISA permit the use of plan forfeitures to offset employer contributions to a plan, plan forfeiture litigation continues to gain steam. Mounting complaints generally allege that when there is discretion on whether to use plan forfeitures to offset employer contributions to the plan instead of to reduce plan expenses, the respective plan fiduciary has breached its fiduciary duties of loyalty and prudence under ERISA by failing to use plan assets for the benefit of participants. However, recent court rulings in these lawsuits indicate the tide is turning in favor of employer defendants. The DOL recently filed three new amicus briefs in support of defendants – further signaling the DOL's agreement with defendants in these plan forfeiture lawsuits.

Class action lawsuits challenging the use of plan forfeitures in DC plans continued through the end of 2025. In these cases, plaintiffs allege that plan fiduciaries breached their duties by using forfeitures to offset future employer contributions rather than to reduce plan expenses.

A plan forfeiture occurs when a participant's plan balance is forfeited due to events set forth in the plan document. Most commonly, plan forfeitures occur when participants separate from employment before becoming fully vested in employer contributions. Longstanding IRS and Treasury Department guidance indicates that such use of forfeitures is permitted and forfeitures may be used to either pay plan administrative expenses or be used to satisfy the employer's matching contribution obligations under the plan; provided the plan document permits such uses of forfeitures. Plaintiffs have recently targeted this practice and alleged that fiduciaries violated ERISA by exercising discretion to use forfeitures to offset the employer's matching contributions to the relevant plans, which plaintiffs argue are an impermissibly use of such forfeitures for the employer's benefit.

Notably, all motion to dismiss rulings issued in the fourth quarter of 2025 were granted in favor of defendants in the following seven lawsuits: *Polanco v. WPP Group USA, Inc*.; *Del Bosque v. Coca Cola Southwest Beverages LLC; Hernandez v. AT&T Services, Inc*.; *Brown v. Peco Foods, Inc.; Garner v. Northrop Grumman Corp*oration; *Brewer v. Alliance Coal, LLC*; and *Donelson v. Meijer*. In most of these cases, forfeiture claims were eliminated entirely through (i) plaintiffs' abandonment of such claims in an amended complaint, (ii) the court's dismissal with prejudice (meaning the case cannot be refiled), or (iii) a court's final judgment without appeal (meaning the court's decision is final and cannot be challenged in a higher court). Only one appeal was filed with respect to the foregoing dismissals, but the appeal was untimely filed, and the request for an extension remains pending.

While the tide of forfeiture litigation favors employer defendants, the plaintiffs' bar continues to file new lawsuits. Five new forfeiture cases were filed in the fourth quarter of 2025: *Sigala v. CommonSpirit Health*; *Beroset v. Duke University*; *Perez v. Liberty Mutual Group*; *Clark v. Centene Corporation*; *and Smith v. Humana, Inc*.

In January, the DOL filed three *amicus* briefs in support of plan sponsor defendants. On January 8, the DOL filed an *amicus* brief in *Wright v. JPMorgan Chase & Co*. In its brief, the DOL argued that using forfeitures to offset future employer contributions is a permissible and well-established practice under ERISA, and that the statute and regulations permit forfeitures to be applied in multiple ways, absent plan terms to the contrary. The DOL further argued that, if accepted, plaintiffs' theory would impose a requirement on plan fiduciaries obligating them to maximize participant account balances at all times. On January 23, the DOL filed an *amicus* brief in *Cain v. Siemens*, reiterating and expanding upon its arguments in *Wright*. Though

acknowledging that the allocation of forfeitures is a fiduciary act, the DOL emphasized that the decision of how to use forfeitures is a settlor function (as opposed to a fiduciary function) and, accordingly, plaintiffs cannot adequately set forth a claim of fiduciary breach with respect to such settlor decisions. The DOL filed another forfeiture case *amicus* brief in *Barragan v. Honeywell International Inc.* on January 30 making similar arguments.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Identify and review any forfeiture provisions set forth in plan documents with ERISA counsel and discuss whether any modifications are necessary regarding the exercise of discretion related to the use of forfeitures to reduce or eliminate the type of discretion over the assets that could form the basis for an ERISA fiduciary breach claim.
- Plan sponsors should review their plan forfeiture language to determine if the plan authorizes the use of forfeitures for employer contributions and to ensure that any ordering rules set forth in the plan document are followed (e.g., some plans require plan expenses be paid prior to offsetting employer contributions).
- If the clear intent of the plan document is for plan sponsors to use plan forfeitures primarily to offset employer contributions, plan sponsors should consider whether any modifications are needed to the plan document to remove discretion and optionality related to forfeiture use. Consider incorporating ordering rules into the plan document that clearly prioritize and/or define the circumstances in which plan sponsors may use forfeitures to offset employer contributions in lieu of using such forfeitures to pay plan administrative expenses, so that the plan sponsor does not have any discretion or optionality as to how such forfeitures are used (including, if desired, so that offsetting employer contributions is the first or only permitted use).

V. Proxy Voting

The United States District Court for the Northern District of Texas found the defendants breached their fiduciary duty of loyalty – but not the fiduciary duty of prudence – in* Spence v. American Airlines, Inc. *The decision is the first to apply ERISA's fiduciary rules to investment and proxy voting decisions taking into ESG factors into consideration.

In 2025, a court in the Northern District of Texas issued a decision in *Spence v. American Airlines* holding that fiduciaries breached their duties by failing to monitor their investment managers' proxy voting practices. The decision was the first to find a fiduciary breach under ERISA related to proxy voting, and the decision was critical of consideration of environmental, social, and governance investment ("ESG") factors by plan fiduciaries. The court issued its final judgment in *Spence v. American Airlines* in late 2025, denying the plaintiffs monetary damages but requiring the plan fiduciaries to comply with new procedural and transparency rules with respect to proxy voting. The court is now focused on post-judgment issues, including discussions around the scope of the new rules and attorneys' fees.

When the plaintiffs filed the lawsuit, they initially claimed that the plan offered investments that impermissibly took non-pecuniary factors, such as ESG factors, into account in plan investment decisions. However, the plan did not have any such investments, and the complaint was subsequently amended to allege that fiduciaries failed to monitor the plan's investment manager's (BlackRock's) consideration of ESG factors when voting proxies on behalf of the plan. The court reasoned that fiduciaries breached their duty of loyalty by allowing the plan sponsor's corporate commitment to ESG policies to influence their oversight of Blackrock. The court also highlighted alleged conflicts of interest arising from BlackRock holding a material share of the plan sponsor's equity and debt.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Review the proxy voting policies of any investment managers hired to provide services to a plan to ensure that the voting decisions are made in the best interest of the plan.

- Plan fiduciaries should carefully review the documentation they receive from managers about how proxy votes are determined to conclude whether third-party service agreements accurately reflect participant interests.
- Establish, maintain, and periodically review formal, documented procedures regarding the plan fiduciary's prudent selection and monitoring of plan service providers, including, but not limited to, any metrics or benchmarks used by plan fiduciaries to determine the reasonableness of any such service provider's fees.

VI. Pension Risk Transfers

The DOL has weighed in on a PRT-related lawsuit, filing an amicus brief in support of the defendant in* Konya v. Lockheed Martin Corporation, *emphasizing the permissibility of PRTs under ERISA.* Lockheed *is the first lawsuit alleging violations of ERISA regarding a plan sponsor's decision to effectuate a PRT and its accompanying selection of an annuity provider to reach the federal court of appeals level and the ruling in this case will shape how courts' treat PRT litigation moving forward.

It is common for plan sponsors to "de-risk" their defined benefit plans by purchasing annuities to satisfy the benefits for some or all of the plan participants, such transactions typically being referred to as pension risk transfers ("PRTs"). PRTs result in the transfer of the benefit obligation from the plan sponsor to one or more insurance companies, which become responsible for paying out the monthly pension benefits.

Employers seeking to terminate their pension plan generally must purchase irrevocable annuities for participants that fully transfer the plan's obligations to the insurer, and the number and size of PRT transactions has increased significantly over the past few years as economic conditions have made plan terminations more attractive. However, the increased PRT activity has attracted the attention of the plaintiffs' bar, and there are now approximately two dozen ERISA class actions alleging fiduciaries breached their duties under ERISA by selecting insurers that were allegedly less secure than other providers.

On January 9, 2026, the DOL weighed in on PRT litigation by filing an *amicus* brief with the Fourth Circuit of Appeals in *Konya v. Lockheed Martin Corporation*. The DOL's *amicus* emphasized that ERISA expressly permits PRTs and that annuity buyouts have been used for decades without evidence of participant benefit losses attributable to insurer default. The DOL framed these cases as inconsistent with ERISA's fiduciary standards and argued that plaintiffs failed to demonstrate an injury as their theories rely on speculative future harms rather than actual losses. The DOL further emphasized that fiduciary obligations are process-focused. Interpretive Bulletin 95-1, which the DOL promulgated to guide employers when selecting an annuity provider, is intended to promote careful and reasoned decision-making, not to impose liability based on hindsight comparisons.

Because *Lockheed* is the first of several similar lawsuits to reach a federal court of appeals, its resolution may shape how courts address standing, fiduciary process, and permissible risk management in future PRT challenges.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Plan sponsors and fiduciaries may want to separately review, consider, and document settlor versus fiduciary functions and decisions when de-risking a plan and/or executing a PRT, including when selecting an insurer. If/when selecting an insurer, plan sponsors must perform due diligence into the insurance market and the particular insurer options, and must select the "safest available annuity" provider per the DOL's Interpretive Bulletin 95-1, including after weighing six crucial factors identified by the DOL. Plan sponsors may wish to engage an independent fiduciary to carry out the insurer due diligence, analysis and selection.
- In all events, the process carried out by the plan sponsor and fiduciary, including if/when selecting an insurer, is key for defending ERISA fiduciary breach claims and so should be conducted in consultation with ERISA counsel and should be well-documented.

VI. Fiduciary Delegations

Plan fiduciaries may not necessarily be liable for those investment decisions made by an investment manager the fiduciary has appointed to exercise discretion and manage plan assets, provided the plan fiduciary adheres to its fiduciary duties in prudently selecting and monitoring such service providers.

ERISA permits plan sponsors and fiduciaries to delegate discretionary authority for the day-to-day management of plan assets to one or more investment managers (often referred to as a "3(38) investment manager"). The plan fiduciary remains responsible for prudently selecting and monitoring the investment manager, but the delegation otherwise shields the fiduciary from liability with respect to the investment manager's investment decisions made on behalf of the plan. For example, in *Wanek v. Russell Investments*, a federal district court dismissed claims against the plan sponsor and fiduciary, in large part, due to the delegation of their authority to the investment manager. Plaintiffs' complaint alleged that both the plan fiduciary and the investment manager breached their duties under ERISA by, among other things, selecting the investment manager's own target date funds as investment options for the $1.9 billion 401(k) plan. The court concluded the plan fiduciary satisfied its duties under ERISA by following a prudent, well-documented process for selecting and monitoring the investment manager and dismissed the claims. However, the court allowed certain claims against the manager to proceed, holding that evidence surrounding a potential conflict of interest (*e.g.*, due to the selection of proprietary funds) created a "genuine issue of material fact" that must be resolved at a trial.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Establish, maintain, and periodically review formal, documented procedures regarding the plan fiduciary's prudent selection and monitoring of plan service providers, including, but not limited to, any metrics or benchmarks used by plan fiduciaries to determine the reasonableness of any such service provider's fees.
- Consult with ERISA counsel to discuss whether to include language in such procedures that would obligate plan fiduciaries to conduct periodic RFPs related to such service providers to assist such fiduciaries in their prudent selection and monitoring obligations.

VII. Alternatives Investments in DC Plans

The Supreme Court recently announced that it will once again consider* Anderson v. Intel Corp.*, regarding the inclusion of alternative asset investments in a 401(k) plan. Courts continue to focus on the importance of procedural prudence in plan investment decisions, including with respect to the inclusion of alternative asset investments in retirement plans. However, due to the lack of clear guidance on fiduciary standards related to the inclusion of such investments, fiduciaries may face litigation exposure, absent regulatory guidance on this issue. Forthcoming DOL guidance will address how a fiduciary may satisfy its duties under ERISA when selecting alternative assets as an investment option for a plan. The DOL submitted its proposed rule to OMB in January 2026, although the content of the proposal remains unknown while still under review by OMB.

The Supreme Court recently announced that it would once again consider arguments in *Anderson v. Intel Corp. Investment Policy Committee,* a case largely about a 401(k) plan's investment in alternative asset classes. Plaintiffs claim that the fiduciaries of Intel's DC plan acted imprudently by offering and retaining custom target-date funds that included allocations to private equity and hedge funds.

Anderson has been making its way through the courts for nearly six years. The case has been closely watched as it is one of the first lawsuits involving claims related to a fiduciary's inclusion of private funds in a 401(k) plan. The litigation began in 2019 when a former Intel employee filed a complaint alleging, among other things, that the plan fiduciaries violated ERISA when they restructured their target date funds to include allocations to private equity and hedge fund investments. The Supreme Court first weighed in on the case in 2020, clarifying the "actual knowledge" standard that governs ERISA's three-year statute of limitations. After

the Supreme Court found in favor of the plaintiffs, the litigation continued in the lower courts. In May 2025, the Ninth Circuit affirmed a district court decision finding that the plaintiffs failed to show that the plan's custom target date fund underperformed its benchmark. The Ninth Circuit Court emphasized that the duty of prudence turns on whether plan fiduciaries follow appropriate processes to evaluate investments, rather than whether they got the decision "right" – referred to as "procedural prudence." More specifically, the court emphasized that a plaintiff cannot just allege that fiduciaries could have obtained better results through a different investment option and instead, a plaintiff needs to cross the line from possibility to plausibility to get past the pleading stage and into discovery. The court affirmed the district court's holding that plaintiffs failed to state a claim for breach of the duty of prudence because they did not set forth allegations from which the court could infer that an inadequate process led the fiduciaries to select hedge fund and private equity investments that were inappropriate for the plan. The Supreme Court has now agreed to hear the case.

For plan advisers and fiduciaries, the outcome of *Anderson* matters because it may shape how courts evaluate prudence claims involving alternative investments, particularly with respect to benchmarking, performance comparisons, and the sufficiency of a fiduciary's decision-making process (procedural prudence). Depending on how the Supreme Court frames the applicable pleading and proof standards, the decision could either strengthen existing protections against hindsight-driven challenges or lower the threshold for claims targeting plans that offer more sophisticated investment options.

There has also been a surge regulatory activity and attention around the use of alternative investments in DC plans. President Trump issued Executive Order 14330 last year to direct the DOL to craft new rules or guidance to facilitate investment in alternative asset classes. The DOL also rescinded guidance expressing concerns about private equity and digital asset investments, and the agency issued Advisory Opinion 2025-04A to clarify the use of lifetime income investments as plan defaults. The DOL recently submitted a proposal pertaining to Executive Order 143330 to the White House's Office of Management and Budget ("OMB"), although the terms of the proposal remain unknown until released by OMB.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Establish, maintain, and periodically review formal, documented procedures related to a plan fiduciary's process in making investment decisions and selecting an investment line-up for 401(k) plans.
- Consider employing additional protective measures when selecting alternative asset investments supporting a plan fiduciary's inclusion of such alternative assets as investment options in a 401(k) plan, such as ensuring transparency in a plan fiduciary's decisions and processes related to plan investments in alternative assets (whether directly or indirectly through a fund) through additional documentation setting forth the reasoning as to why a plan fiduciary determined that such investments were appropriate and prudent to include in the plan's investment line-up at the time of its investment decision to demonstrate both procedural prudence and the basis for each investment decision.
- Consider the varied objectives and risk tolerances of a 401(k) plan's underlying participants when selecting the plan's investment options.
- Review any guidance (formal or informal) issued by the DOL – including a potential fiduciary safe harbor – in connection with the agency's forthcoming guidance on how fiduciaries may comply with their fiduciary duties under ERISA when considering the inclusion of alternative asset investments in retirement plans.

VIII. Table of Authorities

- *Anderson v. Intel Corp. Inv. Pol'y Comm.*, No. 22-16268 (9th Cir. Aug 22, 2022)
- *Barragan v. Honeywell Int'l Inc.*, No. 25-02609 (3d Cir. Aug 22, 2025)
- *Beroset v. Duke Univ.*, No. 1:25-cv-00919 (M.D.N.C. Oct. 9, 2025)
- *Brewer v. Alliance Coal, LLC*, No. 4:24-cv-00406, Dkt. No. 58 (N.D. Ok. Dec. 9, 2025)
- *Brown v. Peco Foods, Inc.,* No. 3:25-cv-00491, 2025 WL 3210857 (S.D. Miss. Nov. 14, 2025)
- *Cain v. Siemens Corp.*, No. 25-02564 (3d Cir. Aug 19, 2025)
- *Clark v. Centene Corp.*, No. 3:25-cv-09743 (N.D. Cal. Nov. 12, 2025)
- *Clinton v. Baxter Int'l, Inc.*, 2025 WL 3470685 (N.D. Ill. Dec. 3, 2025)
- *Cunningham v. Cornell*, 145 S. Ct 1020 (2025)
- *Del Bosque v. Coca Cola Sw. Beverages LLC*, No. 3:25-cv-01270, 2025 WL 3171326 (N.D. Tex. Nov. 13, 2025)
- *Donelson v. Meijer*, No. 1:25-cv-1156, 2025 WL 3754241 (W.D. Mich. Dec. 29, 2025)
- *Garner v. Northrop Grumman Corp.*, No. 1:25-cv-00439, Dkt. No. 62 (E.D. Va. Dec. 4, 2025)
- *Grink v. Virtua Health, Inc.*, 2025 WL 3485686 (D.N.J. Dec. 3, 2025)
- *Hernandez v. AT&T Servs., Inc.*, No. 2:25-cv-676, 2025 WL 3208360, (C.D. Cal. Nov. 14, 2025)
- *Konya v. Lockheed*, No. 25-02061 (4th Cir. Sep 9, 2025)
- *Parker-Hannifin Corp. v. Johnson,* No. 24-1030 (6th Cir. Nov. 20, 2024)
- *Perez v. Liberty Mutual Grp., Inc.*, No. 4:25-cv-08775 (N.D. Cal. Oct. 14, 2025)
- *Pizarro v. Home Depot*, No. 20-90023 (11th Cir. Oct. 5, 2020)
- *Polanco v. WPP Grp. USA, Inc.*, No. 1:24-cv-09548, 2025 WL 3003060 (SD.N.Y. Oct. 27, 2025)
- *Sigala et al v. CommonSpirit Health,* No. 2:25-cv-00153 (E.D. Ky. Oct. 8, 2025)
- *Smith v. Humana, Inc.*, No. 3:25-cv-00727 (W.D. Ky. Nov. 12, 2025)
- *Spence v. American Airlines, Inc.*, 4:23-cv-00552 (N.D. Tex. Sept. 30, 2025)
- *Wanek v. Russell Invs. Tr. Co.*, No. 2:21-cv-00961 (D. Nev. Sept. 25, 2025)
- *Wright v. JPMorgan Chase & Co.*, No. 25-4235 (9th Cir. Jul 9, 2025)

Disclosures:

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