# Summit Group Retirement Planners, Inc.

## Retirement in America Article #9: Two 401(k) Lawsuits Reviewed

### Fiduciary Responsibilities under ERISA

The term "**Fiduciary**", according to the Employee Retirement Income Security Act (ERISA), is clearly defined in the Department of Labor's (DOL) booklet on Meeting Your Fiduciary Responsibilities. Fiduciary status is contingent on the functions that are being performed for a retirement plan, and not just their title. Each qualified retirement plan is required to have at least one fiduciary (person or entity) named in the written plan, or described in the plan as having control over the plan's operation. The plan fiduciaries typically include: trustees, investment advisers, all individuals exercising discretion in administering the plan, the plan's administrative committee, and those who select committee officials.

Fiduciaries that do not follow the standards of conduct outlined below may be personally liable to restore any losses to the plan, or restore any profits made through improper use of the plan's assets as a result of their actions. Although there are ways to mitigate that fiduciary responsibility by selecting advisory teams that will serve as fiduciaries for example, this liability cannot be eliminated by the named plan fiduciary. Under ERISA, plan fiduciaries are responsible for the following:

- Act prudently and solely in the interest of the plan's participants and beneficiaries and with the exclusive purpose of providing benefits to them;
- Carry out their duties prudently;
- Follow plan documents as long as they are consistent with ERISA;
- Provide a diverse lineup of plan investments;
- Prohibits against self-dealing; and
- Determine that expenses paid must be reasonable for services rendered.

## Retirement Plan Lawsuits

Recently, there have been many lawsuits on excessive fees that have emerged, with some now impacting higher education *(Duke University, MIT, New York University, Yale, Vanderbilt, John Hopkins University, and University of Pennsylvania).* We will focus on two lawsuits. One is from the large plan marketplace and one is from the micro plan marketplace.

### Supreme Court of the United States: Tibble Et Al. v. Edison International Et Al

Edison International's 401(k) Plan was considered a large 401(k) Plan with an asset size in excess of a billion dollars. In 2007, petitioners (beneficiaries of the Edison 401(k) Savings Plan) sued the Plan fiduciaries, (respondents) Edison International and others. They sued them to recover damages for alleged losses suffered by the Plan from alleged breaches of respondents' fiduciary duties. The suit was over three investments that were added in 1999 and three investments that were added in 2002. The Petitioners' argument was that the respondents acted

imprudently by offering six higher-priced, retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available. The District Court agreed about the three funds added to the Plan in 2002, stating: "respondents had 'not offered any credible explanation' for offering retail-class, i.e., higher priced mutual funds that 'cost the Plan participants wholly unnecessary [administrative] fees'".

They went on to say that with respect to those mutual funds, respondents had failed to exercise "the care, skill, prudence and diligence under the circumstances" ERISA demands of a fiduciary. The other three investments that were added in 1999 were considered untimely and extended beyond the six year statutory period.

In conclusion, when institutional share classes are available to plan participants, then the plan sponsor (with their fiduciary responsibilities) would look to implement them or would have to justify why they are not utilizing them. For example, the Vanguard 500 Index Investor share class has an expense ratio of: 16 basis points. The Vanguard 500 Index Admiral share class costs five basis points. The Admiral Share class is the less expensive share class and is 11 basis points cheaper for the participant.

**United States District Court of Minnesota: Debbie Damberg and Tony Severson, on behalf of LaMettry's 401(k) Profit Sharing Plan, Plaintiffs. V. LaMettry's Collission, Inc., Steven P. Daniel, and Joanne M. LaMettry, Defendants**

In 2014, the LaMettry's 401(k) Profit Sharing Plan comprised 114 active participants and held approximately $9.2 million in total assets. This lawsuit was from May, 2016. Plaintiffs, on behalf of all similarly situated participants and beneficiaries of the LaMettry's 401(k) Profit Sharing Plan, brought a lawsuit to recover financial losses suffered by the Plan and obtain injunctive and other equitable relief for the Plan from LaMettry's (Plan Sponsor) and their CFO, Steven P. Daniel and President Joanne LaMettry (collective trustees) based on breaching their fiduciary duties.

The lawsuit claimed the Defendants breached their duties under ERISA by: 1) causing the Plan to pay hundreds of thousands of dollars in excessive fees to 3rd party service providers; 2) selecting inappropriate and imprudent mutual fund classes for Plan assets that exposed Plan participants to excessive fees when lower cost options were available for the same set of investments; and 3) selecting investment options that were unnecessarily expensive relative to industry benchmarks and standards.

As fiduciaries (trustees are also fiduciaries), Defendants had broad oversight of and ultimate decision making authority with respect to the management and administration of the Plan and its assets. This included the appointment, removal, and monitoring of other fiduciaries and service providers that they appointed or to whom they assigned fiduciary responsibility. .

## Key Takeaways

As a **plan fiduciary** (plan sponsor, trustee) operating under industry best practices, you should have a documented process in place to review and benchmark your investments on a quarterly basis in accordance with a documented Investment Policy Statement. You should also monitor and benchmark your service providers (Recordkeeper/TPA/Advisor) on a routine basis to ensure you are providing the best value for services rendered for your employees. *Part of this monitoring process is to review the share class of investments that are being utilized to determine if*

*they are being offered in their least expensive format. If they are not, then there must be a process in place that documents and justifies why they are not.*

One way to minimize your fiduciary responsibility, as a Plan Trustee, is to hire an investment advisor to serve as a 3(21) fiduciary or a 3(38) investment advisor. A 3(21) fiduciary monitors the investments and recommends to the Plan Trustee and committee to make investment changes when they deem it necessary. A 3(38) investment manager has the discretion to make investment changes when deemed appropriate based upon a documented process and to inform the Plan Trustee and committee of the finalized changes.

*The DOL is not requiring plan sponsors to have the least expensive, total 401(k) program for their employees. However, they do require that decisions on who plan fiduciaries select as their service providers are based upon a thoroughly documented process that places the needs of employees first and foremost.* When a plan fiduciary works with a friend to service their Corporate Sponsored retirement plan, they expose themselves and the plan to a potential conflict of interest if a judicious and documented process was not followed to select them.

## Further Reading

For further reading about the Retirement Plan Fee Lawsuits and your responsibilities as a Plan Fiduciary, please refer to the References below or contact Summit Group Retirement Planners, Inc. Representative: **267-433-1050** or dfiorenza@sgretirementplanners.com. Summit Group Retirement Planners, Inc. specializes on collaborating with employers on the design, installation, and ongoing servicing needs of their retirement programs.

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## References


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