AMERICAN BENEFITS COUNCIL

July 7, 2020

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

The Honorable Kate S. O'Scannlain
Solicitor of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Retirement Plan Lawsuits Inhibiting Economic Recovery, Contrary to Executive Order

Dear Secretary Scalia and Solicitor O'Scannlain:

Because of the coronavirus pandemic, American businesses and workers have been operating for the past few months in the midst of simultaneous and unprecedented health and economic crises. In light of these challenges, the American Benefits Council ("the Council") was heartened to see that, on May 19, 2020, the President issued Executive Order 13924, Regulatory Relief to Support Economic Recovery ("the Order").[1]

SUMMARY

Executive Order

The Order directs federal agencies to provide relief, as appropriate, from regulations that may inhibit economic recovery. Additionally, the Order directs federal agencies to "give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances." The Council strongly supports these objectives and believes that the Order provides an excellent opportunity for the government and private sector to work together to eliminate new and existing challenges that slow economic growth.

[1] 85 Fed. Reg. 31353 (May 22, 2020).

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Explosion of Baseless Litigation

With these objectives in mind, we would like to highlight a key issue that has, in recent years, created an unnecessary drain on the American economy: a damaging wave of complex class action lawsuits brought against American companies that offer their employees a 401(k)-style participant-directed defined contribution retirement plan and the service providers that support such plans. This baseless litigation is damaging the private retirement savings system and the American economy more generally.

Action Under the Order to Curtail Such Litigation

Consistent with the Order, the Council believes that the U.S. Department of Labor (DOL) should, through the Solicitor's Office and in partnership with the U.S. Department of Justice (DOJ), support economic recovery and growth by providing guidance that will assist the courts in evaluating the merits of this litigation.

Specifically, we request that the Solicitor of Labor, in partnership with DOJ, issue Statements of Interest urging courts to uphold the federal pleading standards in the case of class action lawsuits challenging the fees paid to service providers, investment management fees, and performance of investments selected for defined contributions plans, since so many of these cases are being filed based on vague generalities, and without alleging any specific wrongdoing.

Existing Supreme Court precedent prohibits lawsuits that lack a factual basis from proceeding past the pleading stage and instructs lower courts to dismiss these baseless claims. Statements of Interest from DOL emphasizing these existing standards would assist courts in their review of ERISA claims challenging the fees and performance of retirement plan investments, and protect participants and plans from the baseless and expensive litigation that is doing so much harm to the retirement system and the economy.

This action by DOL would be similar to the Statement of Interest recently submitted by DOL and DOJ on September 13, 2019, in the case of *Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program.*[2] The government's Statement of Interest in that case said:

> The United States submits this Statement of Interest for the purpose of advancing a correct and uniform interpretation of the extent of ERISA preemption and in order to further Congress's intent of promoting the voluntary establishment of employer-sponsored retirement plans with nationally uniform standards of administration. See 29 U.S.C. § 1144(a).

[2] *Howard Jarvis Taxpayers Assn. v. California Secure Choice Ret. Sav. Program*, 218CV01584MCEKJN, 2020 WL 1157924 (E.D. Cal. Mar. 10, 2020) (appeal filed Apr. 03, 2020).

DOL's Statements of Interest should explain ERISA's fiduciary standards, which as discussed below, are supposed to be judged on a fiduciary's process, not on a fiduciary actually selecting the lowest cost or highest performing investments with the benefit of hindsight. In this regard, the Statements of Interest should discuss existing Supreme Court precedent requiring any complaint to set forth specific facts regarding failures in the fiduciary process, rather than merely reciting the legal elements of a cause of action or making conclusory allegations about an employer's violation of the law.

Employer resources that are spent on defending frivolous class action lawsuits cannot, in support of our nation's economic recovery, be used to hire new employees or provide other benefits to existing employees. Accordingly, in the context of the current crises, we believe it is more important than ever to solve this problem, and DOL is uniquely situated to do so.

THE GROWING PROBLEM FACING EMPLOYERS AND THE ECONOMY

An Explosion of Baseless Litigation Challenging 401(k) Investment Fees and Performance

In recent years, retirement plan sponsors and retirement industry service providers have increasingly become the targets of complex class-action lawsuits challenging the fees and performance of investments selected for 401(k)-style participant-directed defined contribution plans. Dozens of new lawsuits are filed each year, and each new lawsuit, even if unsuccessful, is costly to defend. This is (1) a significant concern for employers considering whether to adopt or enhance a retirement plan, (2) a drain on the private retirement system, and (3) a very substantial cost of doing business in this country.

From the period of 2009 to 2016, attorneys representing plaintiffs in breach of fiduciary duty lawsuits are estimated to have collected roughly $204 million for themselves, while only securing an average per participant award of $116.[3] This trend has only become worse in more recent years. For example, in 2019 alone, settlements from lawsuits challenging the fees associated with 401(k)-style retirement plans are estimated to have cost $193 million, with an average deal of about $12 million.[4] These costs are all the more damaging in light of the economic challenges created by the coronavirus pandemic.

Class-action plaintiffs' attorneys are filing lawsuits against the sponsors of 401(k)-style participant-directed defined contribution retirement plans, and their service

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[3] Tom Kmak, *Fiduciary Benchmarks: Protect yourself at all times,* DC DIMENSIONS (Summer 2016).

[4] Jacklyn Wille, *ERISA Class Settlements Rebounded to $449 Million in 2019*, BLOOMBERG LAW (December 26, 2019), https://news.bloomberglaw.com/employee-benefits/erisa-class-settlements-rebounded-to-449-million-in-2019.

providers, alleging that plan fiduciaries breached their duties by selecting poor-performing and expensive investment options for their retirement plans' investment lineups. This litigation trend, which started and has continued in the context of large 401(k) plans, has spread to smaller plans. In 2016, for example, multiple plans with fewer than $25 million in assets were targeted. In addition, this trend is no longer just limited to sponsors of 401(k) plans. Many of the country's top private universities have been the targets of claims attacking how they select and retain investments as part of their university-sponsored 403(b) plans.

This spike in litigation is not the result of an organic groundswell of disaffected employees and retirees. Rather, it is the creation of plaintiffs' attorneys that may be driven by the large dollar amounts that can be collected from the employer-sponsored retirement plan system, and the belief that many large employers will settle litigation if class-action plaintiffs' claims survive a motion to dismiss and reach discovery.

In some of those cases, employers have chosen to reach multi-million-dollar settlements rather than proceed with what can be even more expensive litigation, in addition to a diversion of company energy and resources away from the business. According to one study, the cost of defending a breach of fiduciary duty lawsuit through the motion to dismiss stage can cost up to $750,000, and discovery can cost affected companies between $2.5 and $5 million dollars.[5] As noted, even if plaintiffs are successful in reaching a settlement, a significant portion of the settlement amount ultimately ends up in the pockets of the plaintiffs' attorneys, not the accounts of retirement investors.

For many of our member companies, the top issue in the retirement space is this proliferation of lawsuits and sources of potential liability. Our members want to do the right thing, as well as provide benefits that lead to retirement security, but increasingly there is not a safe path to take to avoid baseless lawsuits.

Plaintiffs' Attorneys Using Cookie-Cutter Complaints Without Factual Foundations

Attorneys pursuing breach of fiduciary duty claims against retirement plan sponsors and service providers often commence litigation by filing complaints with few, if any, specific facts regarding how or why a plan fiduciary selected or retained investments for the plan. Plaintiffs' attorneys have successfully pursued class-action claims by filing literal "cookie-cutter" complaints that state the legal basis for their claims in vague generalities. It has not been uncommon to see multiple complaints filed within days of one another that are functionally identical, except for the names of the parties, the investments' performance and costs, and the duration for which such investments were made available by the plan. *This is why we refer to the lawsuits as baseless; the plaintiffs'*

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[5] LOCKTON COMPANIES, Fiduciary Liability Claim Trends (February 2017), http://www.lockton.com/whitepapers/Boeck_Fiduciary_Liability_Claim_Trends_Feb_2017.pdf.

lawyers have no evidence of wrongdoing and they are simply looking to survive the motion to dismiss and earn a big payday by settling.

Essentially, law firms are employing a "shotgun" approach to litigation and hoping that at least some of their claims hit the mark. As further discussed below, we believe that these complaints, which fail to identify a breach of fiduciary duty with any specificity, do not satisfy the well-settled pleading standards that are applicable in federal courts under existing Supreme Court precedent and should not be able to survive a defendant's motion to dismiss for failure to state a claim.

Although some courts have properly identified this problem and granted employers' motions to dismiss, many other courts have allowed these claims to proceed past the pleading stages into costly discovery.

ERISA's Fiduciary Standards Evaluate Process, Plaintiffs' Complaints Compare Results

Under ERISA Section 404, fiduciaries are bound to act "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 of an enterprise of like character and with like aims." ERISA Section 404 is generally understood to be a statutory expression of the common law duty of prudence imposed on fiduciaries.

When evaluating whether a fiduciary has satisfied its duty of prudence, reviewing courts are only supposed to consider the fiduciary's conduct at the time of the investment decision without the benefit of hindsight. This notion, which is primarily derived from the common law of trusts, requires reviewing courts to evaluate the fiduciary process leading up to a given investment decision and ask whether the fiduciary followed a prudent process. The prudence standard is a test of conduct, not investment results.

As a corollary to this standard, it is a well-recognized principle of law that fiduciaries are not required to always select the lowest cost investments or the investments that have had the most favorable past performance. This is true for several reasons:

- Future performance, without unjustified risks, is the objective under ERISA, not the lowest possible fees or favorable past performance. Fees and past performance are just two factors to consider, among many others, in a prudent process to identify investments for the future.

- More fundamentally, a claim against an ERISA fiduciary is required to be based on an allegation that the investment selection process was not prudent or in accordance with ERISA. If a plaintiff is unable to show that a fiduciary's decision-making process was somehow flawed, the plaintiff cannot succeed on a claim for breach of fiduciary duty. Standing alone, a plaintiff cannot successfully argue that a fiduciary breached its duties by merely pointing to the fact that other similar investments performed better in the past or cost less than the investments actually selected by the fiduciary. Any such standard would elevate past performance and/or fees over a prudent evaluation of investments. This could have disastrous results, such as fiduciaries always investing in options that just enjoyed a major run-up and may be facing a correction.

- Prudence under ERISA is based on what a person with "like aims" would decide. A legitimate "aim" of plan sponsors and fiduciaries is the desire to provide participants with more choices and/or better services, which can cost more. The recent avalanche of class-action litigation is an attack by the plaintiffs' bar on the notion that sponsors and fiduciaries can properly choose to provide their participants with more choices or better service. From the perspective of most of the complaints that have been filed, any investment decision that does not focus exclusively on what is cheapest from a fee perspective is allegedly imprudent. This perspective does great harm to the system, which is designed to permit, and indeed require, fiduciaries to consider all relevant information in making their investment decisions.

- Further, ERISA requires fiduciaries to make decisions based on what is "solely in the interest" of the participants of the plan. The plaintiffs' bar has attempted to impose its narrow view that the "sole interest" of the participants is always the lowest possible fee, to the exclusion of any other considerations (for example, better service and more choice). What is in the "sole interest" of the participants necessarily varies from plan to plan. Nothing in ERISA or its jurisprudence dictates that the "sole interest" of the participants is, universally, the lowest possible fee.

Despite these well-established fiduciary legal standards, a number of class-action plaintiffs have been able to advance their breach of fiduciary duty claims by merely pointing to the results of a fiduciary process, using impermissible hindsight, coupled with the absence of any specific factual allegations identifying how the fiduciary failed to conduct a prudent decision-making process. There is virtually never any factual allegation regarding what the fiduciaries considered, or what their aims were, when they made the decisions at issue. For example, the following assertions have successfully been used by plaintiffs to survive a motion to dismiss:

- The fiduciaries chose and failed to remove investments from the plan's lineup when less expensive and better performing investments were available to the plan. *(As discussed above, such allegations reflect a fundamental misunderstanding of ERISA, and as discussed below, fail to satisfy the federal pleading standards, which require a complaint to identify specific flaws in the decision-making process.)*

- The fiduciaries chose to pay an asset-based recordkeeping fee, which is per se unreasonable in comparison to a flat per-participant recordkeeping fee. *(Again, this allegation is not consistent with ERISA, which contains no such per se prohibition, and the claim fails to identify any specific flaws in the decision-making process.)*

- The plan is paying more than a particular amount, per participant (such as $30 per participant, per year) for recordkeeping fees. *(Plaintiffs select and conclusively allege the particular dollar figure – which is invariably lower than what the plan paid – with no factual basis to support the notion that it can or should be used as an upper limit on the amount of recordkeeping fees for that particular plan, or any consideration of what the fiduciaries considered when selecting a particular recordkeeper for the plan).*

- The fiduciaries failed to monitor the plan's investments. *(This argument does not identify any specific flaw in the decision-making process, initial or ongoing. As explained below, it simply restates the elements of the cause of action.)*

- The fiduciaries failed to investigate or consider alternative investment options. *(Again, this argument simply restates the elements of the cause of action without alleging any specific facts.)*

As further explained below, we are concerned that these allegations, in the absence of specific facts describing how a fiduciary failed to conduct a prudent decision-making process, have incorrectly been permitted to get past the pleadings stage in a number of cases, despite the fact that they do not satisfy the standards for evaluating federal pleadings under Federal Rule of Civil Procedure 12(b)(6).

COOKIE-CUTTER RETIREMENT PLAN LAWSUITS FAIL UNDER FEDERAL PLEADING STANDARDS

A motion to dismiss for failure to state a claim upon which relief can be granted is governed by Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss, if successful, can end litigation at the pleading stage before the parties can be compelled to conduct costly discovery. As noted in the ERISA context by the Supreme Court decision in the case of *Fifth Third Bancorp v. Dudenhoffer*,[6] the motion to dismiss for failure to state a claim is "one important mechanism for weeding out meritless claims." Unfortunately, the motion to dismiss for failure to state a claim is not working as the Supreme Court intended to prevent plaintiffs from proceeding with cookie-cutter claims that are vaguely alleging that a plan's fees were not the lowest or an investment alternative available in the marketplace outperformed an investment designated by the plan's fiduciary.

[6] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014).

As discussed below, in order for a plaintiff to survive a motion to dismiss, the complaint must contain ***sufficient factual matters*** to state a claim for relief that is plausible on its face. "The plausibility standard is not akin to a probability requirement, but it asks for ***more than a sheer possibility*** that a defendant has acted unlawfully."[7] In the ERISA context, this would require a plaintiff to plead ***specific facts*** allowing a court to infer that a fiduciary has actually committed a breach by failing to conduct a prudent decision-making process. A simple comparison of investments results is not, and should not be permitted, to be construed or accepted as a sufficient fact to support an allegation of a process breach. And, although a reviewing court must accept all factual allegations in a complaint as true, reviewing courts are not required to accept legal conclusions or other conclusory statements of fact when considering a motion to dismiss. The standard for surviving a motion to dismiss is described by the Supreme Court as follows:

> A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. … [T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation). . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.[8]

The standard for deciding a motion to dismiss for failure to state a claim can be described as a two-step process. First, a reviewing court separates factual allegations from allegations that are not entitled to the assumption of truth (e.g., legal conclusions and mere recitals of the cause of action). Second, the court asks whether the factual allegations, which are accepted as true, state a claim for which the plaintiffs would be entitled to relief.

Although some retirement plan lawsuits filed in recent years might have met this bar, a significant wave of cookie-cutter complaints vaguely challenging plan fees and investment performance have been allowed to proceed past the pleading stage, notwithstanding the fact that the plaintiffs' complaints have been *devoid of any specific factual allegations* that would allow a court to infer that a plan fiduciary breached its fiduciary duties to the plan or its participants by conducting an imprudent decision-making process. Instead, plaintiffs have merely alleged conclusions about the results of a fiduciary decision-making process and other arguments that rely on the benefit of hindsight. Accordingly, we are concerned that the motion to dismiss for failure to state

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[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

[8] *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (internal citations and quotations omitted).

a claim is not properly serving its purposes of "weeding out meritless claims" in the context of ERISA fiduciary breach claims.

REQUEST FOR DOL AND DOJ ACTION: STATEMENTS OF INTEREST IN FEE CASES

In order to help reduce the negative impacts of unwarranted complex class-action litigation against employers that sponsor 401(k)-style participant-directed defined contribution retirement plans, and the service providers that assist them, we are asking the DOL to direct agency resources in a manner that would slow the proliferation of unwarranted and harmful litigation.

Specifically, we request that the Solicitor of Labor, in partnership with DOJ, issue Statements of Interest urging courts to uphold the federal pleading standards in the case of class action lawsuits challenging the fees paid to service providers, investment management fees, and performance of investments selected for defined contributions plans, since so many of these cases are being filed based on vague generalities, and without alleging any specific wrongdoing.

Existing Supreme Court precedent prohibits lawsuits that lack a factual basis from proceeding past the pleading stage and instructs lower courts to dismiss these baseless claims. Statements of Interest from DOL emphasizing these existing standards would assist courts in their review of ERISA claims challenging the fees and performance of retirement plan investments, and protect participants and plans from the baseless and expensive litigation that is doing so much harm to the retirement system and the economy.

This action by DOL would be similar to the Statement of Interest recently submitted by DOL and DOJ on September 13, 2019, in the case of *Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program.* [9] The government's Statement of Interest in that case said:

> The United States submits this Statement of Interest for the purpose of advancing a correct and uniform interpretation of the extent of ERISA preemption and in order to further Congress's intent of promoting the voluntary establishment of employer-sponsored retirement plans with nationally uniform standards of administration. See 29 U.S.C. § 1144(a).

In a similar regard, we believe that the government should file Statements of Interest in the ongoing wave of retirement plan fee lawsuits. We believe that such action would be very beneficial in "advancing a correct and uniform interpretation of ERISA" and "further Congress' intent of promoting the voluntary establishment of employer-sponsored retirement plans." This requested action would provide certainty to plan

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[9] *Howard Jarvis Taxpayers Assn. v. California Secure Choice Ret. Sav. Program*, 218CV01584MCEKJN, 2020 WL 1157924 (E.D. Cal. Mar. 10, 2020) (appeal filed Apr. 03, 2020).

sponsors and fiduciaries on the pleadings standards, promote retirement plan sponsorship, and consistent with the policy announced in Executive Order 13924, deter harmful litigation that impedes economic growth and recovery.

DOL's Statements of Interest should explain ERISA's fiduciary standards, which as discussed above, are supposed to be judged on a fiduciary's process, not on a fiduciary actually selecting the lowest cost or highest performing investments with the benefit of hindsight. In this regard, the Statements of Interest should discuss the need for any complaint to set forth specific facts regarding failures in the fiduciary process, rather than merely reciting the cause of action as fact or making conclusory allegations about an employer's violation of the law. Finally, the Statement of Interest should make clear that complaints that do not meet this standard must be dismissed in order to protect the law, the retirement system, and the economy from the enormous cost of baseless lawsuits.

We appreciate your consideration of our views.

Sincerely,

Lynn D Dudley

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy