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A Look at 2022: Legislative and Regulatory Updates for Qualified Plan and Health and Welfare Plans

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Employee Benefits Academy
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Kelly practices in the tax group with a concentration in the area of executive compensation and employee benefits.

She has worked with both public and private companies on an array of employee benefit matters, focusing on qualified retirement plans, health and welfare plans and executive compensation arrangements. Her experience includes helping clients navigate and comply with the complex and numerous legal requirements associated with the administration of equity compensation and employee benefit plans and advising companies on fiduciary duties with respect to qualified retirement plans.

She works with entities on all stages of benefit plan matters, including advising companies on the design and implementation of new plans, drafting documents, counseling companies on the maintenance and correction of plans and finally, assisting in merging or termination of plans. She is experienced in design and implementation of employee stock ownership plans (ESOPs) as well as ESOP transactions.

Upcoming 2022 Webinars

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- **Upcoming 2022 webinars**:
  - **March 24**: Mental Health Parity and Consolidated Appropriations Act Transparency Rules
  - **May 26**: Investment Policy Basics and Considerations for 401(k) plans
  - **July 28**: Phased Retirement and Similar Employment Contributions
  - **September 22**: Cafeteria Plan Non-Discrimination Testing
  - **November 17:** End of Year Benefits "To-Do" List
  - Sign up here: **Employee Benefits Academy Webinar Series - Subscribe**

A Look at 2022 Agenda

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- Qualified Retirement Plans
  - Potential Legislative Updates
  - Regulatory Updates/Actions
  - Notable deadlines for 2022
- Health and Welfare Plans
  - ACA reporting
  - No Surprise Billing Act
  - Transparency in Coverage
  - New ERISA Disclosure Requirements
  - Covering OTC covid tests
- Brief Discussion of Notable Supreme Court Cases

Qualified Retirement Plans

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- Possible Legislative Changes for 2022
  - The RISE Act
  - Backdoor Roth changes
  - Additional Pension Smoothing Changes
- Regulatory Changes
  - Fiduciary Rule/Enforcement
  - Private Equity
  - Form 5500 audit changes
- Notable deadlines for 2022
- Pending regulations

Possible Legislative Changes to Retirement Plans

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- SECURE Act 2.0 passed House Ways and Means Committee in May 2021
- House Education and Labor Committee approved the Retirement Improvement and Savings Enhancement (RISE) Act in November 2021
- There are also two bills in the Senate (Retirement Security and Savings Act) and Improving Access to Retirement Savings Act but haven't been considered by the Senate Committee
- Retirement considerations in the bills include:
  - Raise the minimum required distribution age to 75 by 2032
  - Individuals with less than $100,000 in total retirement savings are not subject to MRD rules
  - Reduce penalty for failing to take MRD to 25%
  - Establish online, searchable "Retirement Lost and Found" database at DOL to help workers locate any lost retirement savings

Possible Legislative Changes to Retirement Plans Cont.

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- Build Back Better Legislation
  - Eliminate back-door Roth conversions for any income level participant
  - Single tax filers more than $400k/married couples more than $450k cannot have more than $10 million in aggregate retirement assets (including IRA/defined benefit/defined contribution)

Infrastructure Bill

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- Pension smoothing provisions: Extends the end of the stabilization period for plan years beginning after 2021:
  - For 2020-2030: applicable minimum percentage is 95% and maximum is 110%
  - Minimum percentage changes each year 2031-2034
  - After 2034: applicable minimum percentage is 70% and applicable maximum percentage is 130%
  - Changed the mandatory extension for IRS deadlines for federally declared disasters:
    - Deadline is 60 days after the later of the earliest incident date specified in the disaster declaration or the date the disaster declaration was issued

Regulatory Updates for Retirement Plans

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- Department of Labor
  - Fiduciary Rule/enforcement
  - Private Equity Investments
  - DOL updated guidance on environmental, social and governance (ESG) considerations & fiduciary duty
  - Not discussed, but note Cybersecurity rules
- New Audit Standards for Form 5500 filings

DOL Guidance – Fiduciary Rule

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- Recent Background on DOL Fiduciary Rule
  - December 2020 – DOL released PTE 2020-02, "Improving Investment Advice for Workers & Retirees"
  - PTE 2020-02 reinterpreted and broadened the five-part test under DOL's 1975 regulation defining who is an investment advice fiduciary
  - DOL restored the five-part test as a consequence of the Fifth Circuit's 2018 decision vacating the DOL's 2016 publication of a new standard and much broader definition of investment advice fiduciary

DOL Guidance – Fiduciary Rule Cont.

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- Individuals who are considered an investment advice fiduciary ("IAF") must meet the PTE 2020-02 exemption to avoid a prohibited transaction
  - Exemption specifically includes investment advice on rollovers and how to invest assets within a plan or IRA
- PTE 2020-02 became effective February 16, 2021
  - But - FAB 2018-02, DOL would not pursue prohibited transaction claims against IAFs through December 20, 2021 if IAF worked diligently and in good faith to comply with the "impartial code standards"
    - Impartial code standards:
      - Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components: prudence and loyalty;
        - Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
        - Under the loyalty standard, advice providers may not place their own interests ahead of the interests of the retirement investor, or subordinate the retirement investor's interests to their own;
      - Charge no more than reasonable compensation and comply with federal securities laws regarding "best execution"; and
      - Make no misleading statements about investment transactions and other relevant matters.

DOL Guidance – Fiduciary Rule Cont.

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- October 25, 2021 – DOL issued FAB 2021-02 to provide additional extension of temporary enforcement relief
- FAB 2021-02 specifically extends:
  - For period from December 21, 2021-January 31, 2022:
    - DOL will not pursue PT claims against IAFs who are working diligently and in good faith to comply with the impartial conduct standards for transactions exempt in PTE 2020-02 or treat IAFs as violating the applicable PT rules
  - For period from December 21, 2021-June 30, 2022:
    - DOL will not pursue PT claims against IAFs who are otherwise in compliance with PTE 2020-02 but have not complied with the specific documentation and disclosure requirements for rollovers in PTE 2020-02
  - Effective February 1, 2022:
    - All other requirements (except the ones described above) of PTE 2020-02 are subject to full enforcement

DOL Guidance – Private Equity Investment

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- June 2020, DOL released an information letter setting forth the DOL's position on ERISA fiduciary duties regarding the use of private equity investments as a component of a professionally managed asset allocation fund offered as an investment option for participants in DC plans*
  - Provided that a fiduciary would not breach its duties under ERISA by offering such an investment option as long as the fiduciary meets the requirements set out in the letter (such as):
    - Engage in an objective, thorough, and analytical process that evaluates anticipated opportunities for investment diversification and enhanced investment returns, as well as the complexities associated with the PE component.
    - Compare the fund with funds that do not include PE
    - Secure sufficient information to understand the investment and its attendant risks, prior to making the investment.
    - Determine that an investment that includes PE is, among other things, prudent and made solely in the interest of the plan's participants and beneficiaries

* *Guidance does not allow direct investments of PE investments by plan participants*

DOL Guidance – Private Equity Investment Cont.

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- December 21, 2021: DOL issued a "supplement statement" on the June 2020 information letter
  - Reasoning for supplement:
    - DOL received questions/reactions from a range of stakeholders regarding the letter
      - Agreed that Information Letter stating the claimed benefits of PE investments reflected the perspective of the PE industry and
      - The representations were not balanced with counter-arguments and research data from independent sources
      - SEC issued a Risk Alert in response to letter – conflict of interest, fees and expenses and policies and procedures relating to material non-public information
    - "To ensure that plan fiduciaries do not expose plan participants and beneficiaries to unwarranted risks by misreading the letter as saying that PE – as a component of a designated investment alternative – is generally appropriate for a typical 401(k) plan."
    - Letter should apply only to plan-level fiduciary who has experience evaluating PE investments in DB plans to diversify investment risk may be suited to analyze these investments for a participant directed account plan, with assistance of a qualified fiduciary investment adviser

DOL Guidance – Investment in ESG Funds

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- In October, 2020, the Trump Administration DOL issued a final rule that required plan fiduciaries to focus on "pecuniary" factors in selecting investment alternatives, including ESG funds
  - The rule did not preclude the inclusion of ESG funds, but did require plan fiduciaries to select the funds based on economic (rather than social or other) considerations; non-financial considerations could be used as a "tie-breaker" for ESG funds, so long as the pecuniary/economic factors were satisfied
  - During the Fall of 2020, the DOL began aggressively enforcing the rule through audits of plans that included ESG funds

DOL Guidance – Investment in ESG Funds Cont.

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- Trump Administration DOL issued proposed rules on ESG investing in March 2020
- Shortly after the Biden Administration took office, it announced that it would not enforce the Trump Administration rule on ESG funds
- In October 2021, the DOL issued proposed rules – called "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights"
  - Indicates Biden administration's support of ESG investing
  - DOL proposed rule states that a fiduciary duty of prudence may often require an evaluation of the economic effects of climate change and other environmental, social or governance factors on the particular investment
  - Climate change related factors, governance factors, workplace practices can be material to fiduciary's analysis
  - QDIA permitted to consider ESG factors

New Audit Standards

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In 2015, DOL examined quality of audits performed for 5500s and found major deficiencies in auditing procedures and reporting

- In response, AICPA implemented Auditing Standard SAS 136
- Originally effective for financial statements for periods ending on or after December 15, 2020, due to pandemic, it was delayed to December 15, 2021
- AICPA issued FAQs with illustrations in August 2021
- Requires audit reports to be more substantial and comprehensive that prior requirements

New Audit Standards Cont.

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SAS No. 136 Changes:

- Limited scope audit now called “ERISA 103(a)(3)(C) audit” and no longer have scope limitation
- Plan sponsor must provide a written statement that they can elect the ERISA 103(a)(3)(C) audit and acknowledge that all conditions are met
- Plan sponsor must acknowledge in writing its responsibility for maintaining a current plan document and amendments, that they have maintained sufficient participant records in order to determine benefits currently due or that will become due, provide auditor with substantially completed draft Form 5500
- Require auditors to communicate “reportable findings”, defined as one or more of the following:
  - An identified instance of noncompliance or suspected noncompliance with laws or regulations,
  - A finding arising from the audit that is, in the auditor’s professional judgment, significant and relevant to those charged with governance regarding their responsibility to oversee the financial reporting process,
  - An indication of deficiencies in internal control identified during the audit that have not been communicated to management by other parties and that, in the auditor’s professional judgment, are of sufficient importance to merit management’s attention.

Notable Deadlines for 2022

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June 30th: Deadline to provide lifetime income illustrations on quarterly statements for participant directed plans

July 31st: Adopt a pre-approved defined contribution plan

New ESOP pre-approved documents available

If necessary, file for determination letter for pre-approved plan that has significant changes

October 15th: Deadline to provide lifetime income illustrations for non-participant directed plans

December 31st: Adopt amendments for SECURE Act and CARES Act

Quick Regulatory Agenda Updates

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PBGC:

- Final Rule Stage:
  - Clarifications and codifies policies in PBGC's benefit payments and valuation regulations
  - Adjustment of civil penalties for inflation
  - Special financial assistance from the PBGC for plan sponsors of financially troubled multiemployer defined benefit plans under ARPA
- Proposed Rule Stage:
  - Update the interest, mortality, and expense load assumptions used to determine the present value of benefits under the asset allocation regulation (for single-employer plans) and for determining mass withdrawal liability payments (for multiemployer plans)
  - Clarify and codify policies on the determination of guaranteed benefits for participants in multiemployer plans
  - PBGC rule on recovery of overpayments to participants
  - Codify PGBC policy for assessing and waiving penalties for failure to provide certain required notices

Quick Regulatory Agenda Updates Cont.

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IRS/Treasury

- Final Rule Stage:
  - Individual statement requirements to participants who separate from service with a deferred vested benefit
  - Code Section 417 minimum present value requirements applicable to certain defined benefit pension plans in order to update the regulations for changes made by the Pension Protection Act of 2006
  - Nondiscrimination Relief for Closed Defined Benefit Plans
- Proposed Rule Stage:
  - Further guidance on Section 409A
  - Proposed regulations implementing certain provisions of SECURE Act, which modify certain aspects of the rules governing safe harbor 401(k) plans and require that long-term part-time employees be eligible for401(k) plans
  - Determination of Governmental Plan & Church Plan Status
  - Guidance on Rules Applicable to IRAs Under Sections 408 and 408A
  - ESOP proposed regulations
  - Guidance on the Timing of the Use or Allocation of Forfeitures in Qualified Retirement Plans
  - Guidance on 401(a)(9) Required Minimum Distributions

Quick Regulatory Agenda Updates Cont.

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DOL/EBSA

- Final Rule Stage:
  - Voluntary Fiduciary Correction Program to expand scope and streamline certain corrections
  - Lifetime Income Illustrations for pension benefit statements
  - Abandoned plan programs
- Proposed Rule Stage:
  - Provider nondiscrimination requirements for group health plans and health insurers
  - Mental Health Parity and Addiction Equity Act
  - Surprise Billing Requirements
  - Prescription Drug Reporting Requirements

Welfare Benefit Plans

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- ACA reporting update
- Consolidated Appropriations Act of 2021:
  - No Surprise Billing Update
  - Transparency in Coverage Update
- New fee disclosure rules
- Coverage of OTC Covid tests

Health Care Reporting – ACA Update

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- Forms 1094-C and 1095-C must be reported to the IRS as in prior years
  - Deadline to file with IRS is February 28, 2022 (paper) or March 31, 2022 (electronic) – no change
  - Original deadline to provide 1095 forms to individuals: January 31, 2022
    - IRS proposed regulations issued November 22, 2021 would provide automatic extension to March 2nd
    - The proposed regulation deadline is immediate – so deadline for 2022 is extended to March 2nd
  - Eliminated the good faith relief from ACA reporting penalties
  - Proposed regulations allow 1095-B forms to be distributed via alternative method:
    - Post a clear and conspicuous notice (in all caps: "IMPORTANT HEALTH COVERAGE TAX DOCUMENTS") on its website that individuals may receive a copy of their 1095-B form upon request and provide specific information with the notice
    - Keep notice posted until October 15th of the year following the calendar year in which the form relates
    - Provide form to individuals who request it within 30 days

Consolidated Appropriations Act (CAA) of 2021

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- December 2020: Consolidated Appropriations Act was passed
- Implemented several provisions requiring more transparency for health care providers and health plans
  - Surprise Medical Billing Protections: Effective 1/1/2022:
    - Plans and providers cannot bill patients more than in-network cost-sharing amounts for emergency care and certain non-emergency situations where the patient doesn't have the ability to choose an in-network provider
    - Required to inform patients about the surprise medical billing protections
      - Certain circumstances, an out-of-network provider can bill a patient more than in-network cost-sharing, but must provide notice of network status, estimate of charges and obtain patient's written consent prior to care
    - If provider disputes payment from the health plan, it must go through a specific independent dispute resolution process conducted by an unbiased entity approved by the federal government

Consolidated Appropriations Act (CAA) of 2021 Cont.

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- CAA also passed several health plan price transparency rules
  - Cannot enter agreement that prohibits disclosure of certain cost information (gag clause)
  - Mental Health Parity and Addiction Equity Act (focus of March webinar)
  - Disclosure about direct and indirect compensation for brokers and consultants
  - Reporting on drug prices
- October 29, 2020: DOL/HHS/Treasury published final regulations for The Transparency in Coverage (TiC) rule
  - Requires most health plans and issuers in individual and group commercial markets to disclose cost-sharing estimates and publicly post certain pricing information
  - Also focus of March webinar

Transparency in Coverage

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- August 21, 2021: DOL/HHS/Treasury issued FAQs on CAA and provided delayed effective date for some requirements
  - Next two slides provides specific requirements and new effective dates
- Two lawsuits filed in August 2021 challenging parts of the rule
  - Lawsuits claim the provisions that require disclosure of machine-readable files and prescription drug pricing violate APA/ACA:
  - US Chamber of Commerce (filed in Texas)
  - Pharmaceutical Care Management Association (filed in DC)

CAA Transparency in Coverage & No Surprises Billing Act Compliance Dates

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Requirement	Effective Date
Publish machine readable files relating to prescription drug pricing	Delayed pending future rulemaking.
Publish machine-readable files of in-network rates and out-of-network allowable amounts and billed charges	Deferred enforcement until July 1, 2022.
Price comparison tools available via phone and on plan or issuer's website	Delayed. Now effective for plan years beginning on or after January 1, 2023.
Advanced Explanation of Benefits ("EOB")	Delayed pending future rulemaking.
Report pharmacy benefit and drug cost information, including expenditures, the 50 most frequently dispensed brand drugs, total paid claims for said drugs, and the impact of rebates on premiums and fees	Deferred enforcement pending further guidance or regulations, but should be prepared to report by December 27, 2022.

**chart created by Michelle Lewis, associate at HAK*

CAA Transparency in Coverage & No Surprises Billing Act Compliance Dates, con't

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Requirement	Effective Date
Updated ID cards that include the applicable deductibles, any applicable out-of-pocket maximum limitations, and a telephone number and website address for individuals to seek consumer assistance	No change. January 1, 2022.
Maintain accurate provider directories	No change. January 1, 2022.
Continuity of care provisions when terminations of a contractual relationship results in changes in provider or facility network status Prohibition against balance billing without proper notice for certain services	No change. January 1, 2022.
Prohibition against gag clauses in service provider agreements	No change. Already effective December 27, 2020.

Group Health Service Provider Disclosures

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December 20, 2021: DOL issued FAB 2021-23 in response to CAA requiring group health plan brokers and consultants to disclose to group health plan fiduciaries all direct and indirect compensation they expect to receive

- DOL states that it will not issue additional regulations, but applies the current rules of ERISA Section 408(b)(2) disclosures to health plans
  - If disclosures rules are not met, prohibited transaction occurs
- Applies to both fully insured and self-insured group health plans that are entered into, renewed or extended after December 27, 2021
- Service provider must review its services and make a good faith determination whether it is required to make a disclosure and if not, has burden of showing DOL why it was not subject to the rules

Required Coverage of OTC Covid Test

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DOL, HHS and Treasury issued an FAQ on January 10th requiring group health plans and insurers to cover the cost of over-the-counter covid tests starting January 15th

- Direct coverage of OTC covid tests safe harbor for health plans
  - Plan must directly cover the covid test purchased by participant through the plan's pharmacy network, retail directly, including direct to customer shipping program
  - No upfront out of pocket expenditure by participant
  - Cannot impose prior authorization or other medical management requirements
  - Must take reasonable steps to ensure that participants have adequate access to OTC covid tests through an adequate number of retail locations (including in-person and online)

Required Coverage of OTC Covid Test Cont.

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- Direct coverage of OTC covid tests safe harbor for health plan limits the health plan's reimbursement for OTC tests up to $12 per test (or actual cost if less)
- Must allow reimbursement/coverage of up to 8 OTC covid tests per a 30-day period
  - Cannot limit the number of tests reimbursed/covered if ordered by a health care provider
- Health plan can require reasonable documentation of proof of purchase for a claim of reimbursement

Final Note- Supreme Court Notables: Hughes v. Northwestern

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- Alleged a breach of fiduciary duty for investment option selection, excessive fees and allowing a financial services provider to serve as record keeper for investment funds it offered
- District Court for the Northern District of Illinois/Seventh Circuit both dismissed the plaintiffs' case
- December 6, 2021 – Oral Arguments at the Supreme Court
- Issue: Under ERISA, a plan fiduciary is required to meet a standard of prudence in administering the plan holding the participant's retirement assets in a defined contribution plan. The 3rd and 8th Circuits have held that a plan participant can adequately plead a breach of fiduciary duty by claiming that the retirement plan charged excessive fees when lover-cost alternatives existed. In this case, the 7th Circuit held that virtually identical pleadings are insufficient to state a claim, because it is necessary to credit the defendant's explanation for not offering lower cost options before allowing a well-pleaded complaint to proceed.
  - Question Presented: Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA

Final Note- Supreme Court Notables: Hughes v. Northwestern Cont.

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- **Supreme Court ruled on January 24, 2022**. Vacated 7th Circuit decision/remanded back to 7th Circuit and held:
- The Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents. Determining whether petitioners state plausible claims against plan fiduciaries for violations of ERISA's duty of prudence requires a ***context-specific inquiry of the fiduciaries' continuing duty to monitor investments and to remove imprudent ones as articulated in Tibble v. Edison Int'l,*** 575 U. S. 523. Tibble concerned allegations that plan fiduciaries had offered "higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available." Id., at 525–526. The Tibble Court concluded that the ***plaintiffs had identified a potential violation with respect to certain funds because "a fiduciary is required to conduct a regular review of its investment.***" Id., at 528. ***Tibble's discussion of the continuing duty to monitor plan investments applies here***.
- Petitioners allege that respondents' failure to monitor investments prudently—by retaining recordkeepers that charged excessive fees, offering options likely to confuse investors, and neglecting to provide cheaper and otherwise-identical alternative investments—resulted in respondents failing to remove imprudent investments from the menu of investment offerings.

Final Note- Supreme Court Notables: Hughes v. Northwestern Cont.

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- In rejecting petitioners' allegations, the Seventh Circuit did not apply Tibble's guidance but instead erroneously focused on another component of the duty of prudence: ***a fiduciary's obligation to assemble a diverse menu of options***. But respondents' provision of an adequate array of investment choices, including the lower cost investments plaintiffs wanted, does not excuse their allegedly imprudent decisions. Even in a defined-contribution plan where participants choose their investments, ***Tibble instructs that plan fiduciaries must conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options***. See id., at 529–530. ***If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty.***
- The Seventh Circuit's exclusive focus on investor choice elided this aspect of the duty of prudence. The court maintained the same mistaken focus in rejecting petitioners' claims with respect to recordkeeping fees on the grounds that plan participants could have chosen investment options with lower expenses. The Court vacates the judgment below so that the Seventh Circuit may reevaluate the allegations as a whole, considering whether petitioners have plausibly alleged a violation of the duty of prudence as articulated in Tibble under applicable pleading standards. ***The content of the duty of prudence turns on "the circumstances . . . prevailing" at the time the fiduciary acts***, 29 U. S. C. §1104(a)(1)(B), ***so the appropriate inquiry will be context specific***. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U. S. 409, 425. Pp. 4–6.

Final Note – Supreme Court Notables: ERISA Industry Committee Petition SC

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- January 20, 2022: ERIC petitioned US Supreme Court to review Ninth Circuits decision dismissing ERIC's challenge to a Seattle health coverage mandate
- Seattle ordinance requires employers in the hotel sector make specified monthly healthcare expenditures on behalf of their local employees
  - Employers comply by creating new ERISA plans, increasing contributions to current ERISA plans or making payments directly to their employees
  - ERIC argued the ordinance violates ERISA
    - Fourth Circuit held these types of ordinances preempt ERISA
    - Ninth Circuit held these types of ordinances do not preempt ERISA
  - Multiple other cities have indicated they desire to implement similar rules

Upcoming Webinars

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Executive Compensation Academy

- Title: Hot Compensation Topics
- When: February 10, 2022
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET

Employee Benefits Academy

- Title: Mental Health Parity and Consolidated Appropriations Act Transparency Rules
- When: March 24, 2022
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET