Does Tibble Really Cause Trouble for Employers with 401(k) Plans?

Labor & Employment Law Update

on June 1, 2015

The articles claiming the U.S. Supreme Court decision in *Tibble v. Edison International* are plentiful. Each one seems to claim with a great sense of urgency that a new increased liability is now imposed on employers. If you read enough of them, the sky seems to be falling on all those who operate and administer 401 (k) plans. In reality, most of these articles appear to be quoting language from the decision completely out of context. Where an employer has been advised properly, *Tibble* should not require any change in the administration of an employer's 401(k) plan.

In *Tibble*, the Supreme Court basically made a decision about the statute of limitations and how it should be applied in the context of a lawsuit relating to 401(k) plan administration brought under ERISA. The Supreme Court reviewed whether a "continuing duty" tolled the participants' lawsuit (contrary to what the lower courts had determined). In the end, the Supreme Court decided that a lawsuit filed in 2007 criticizing mutual funds selected back in 1999 (more than 6 years ago), could go forward. Essentially, the lawsuit could go forward based on the theory that the employer didn't just act when it selected the mutual funds, the employer also acted each time a decision was made to maintain that selection.

In its fairly brief written opinion, the Supreme Court stated absolutely nothing about what the scope of an employer's "continuing duty" was. In fact, the Court was pretty clear that their decision did not speak to that issue: "The parties disagree, however, with respect to the scope of that responsibility. Did it require a review of the contested mutual funds here, and if so, just what kind of review did it require?" The Court went on to state, "We express no view on the scope of respondents' fiduciary duty in this case. We remand for the Ninth Circuit to consider petitioner's claims that respondents breached their duties within the relevant 6-year period under §1113, recognizing the importance of analogous trust law."

Common sense should have dictated to most employers that they cannot simply set up a 401(k) plan and then stick their head in the sand for the rest of the plan's existence. In addition, experienced ERISA counsel and 401(k) plan advisors have long been advising employers of this continuing duty and advocating for periodic

review.

In the end, as *Tibble* does not provide any insight at all on the appropriate scope of the periodic review each employer should undertake, the *Tibble* decision is not going to be a reason or basis for diligent employers with 401(k) plans to change existing practices. That said, if an employer hasn't yet been advised to undertake periodic review of their 401(k) plan, that employer may want to consider seeking out a different source for advice on the administration of their plan.

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