GIBSON DUNN

Annual ERISA Litigation Outlook and 2022 Review

Client Alert | March 21, 2023

2022 was another busy year for Employee Retirement Income Security Act ("ERISA") litigation, and practitioners saw regulatory changes and challenges as well as several impactful decisions by the federal appeals courts in this space.

This year's annual ERISA litigation update covers important legal decisions and developments from the past year in order to assist plan sponsors and administrators navigating the ever-evolving ERISA landscape.

Section I begins by analyzing the impact of two notable decisions from the United States Supreme Court—*Hughes v. Northwestern University* and *Dobbs v. Jackson Women's Health Organization*. *Hughes* concerns the standard of review in ERISA excessive-fee litigation, and *Dobbs* addresses Constitutional protections for abortions. We address below the ways in which both decisions have had far-reaching impacts on employer-sponsored retirement and health-care benefits.

Section II builds on our analysis in the 2021 ERISA Litigation Update by providing further guidance on how the courts of appeals are assessing the enforceability of ERISA plan arbitration provisions.

Section III then explores other noteworthy legal developments for ERISA-governed retirement plans, including the Seventh Circuit's guidance concerning the implications of a plan fiduciary delegating investment decisions over company stock to independent fiduciaries, and the Department of Labor's rule changes concerning environment, social, and governance ("ESG") investing, and the implications of those changes for ERISA plan fiduciaries.

Section IV offers an overview of judicial opinions impacting employer-provided health plans, such as a trade libel suit against Aetna that third-party plaintiffs may try to use as a back door to bring denial of benefits claims, and the Ninth Circuit's recent decision to reject a facial challenge to medical-necessity guidelines.

And finally, **Section V** looks ahead to key ERISA issues and cases that we expect to see litigated this year.

I. Key Supreme Court Decisions

The United States Supreme Court decided two cases in 2022 with significant implications for ERISA plans and their sponsors and administrators. In *Hughes v. Northwestern Univ*., 142 S. Ct. 737 (2022), the Court emphasized, in determining whether ERISA plaintiffs stated a plausible claim of fiduciary breach, that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" while applying "the pleading standard discussed in" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Supreme Court also issued its landmark decision in *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973), and removing constitutional

Related People

Karl G. Nelson

Heather L. Richardson

Geoffrey Sigler

Katherine V.A. Smith

Matthew S. Rozen

Jennafer M. Tryck

Alex Bruhn

Claire Piepenburg

Zachary B. Copeland

Andrew Gorin

Michelle Lou

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

protections for abortion care. We address below the implications of these cases for plan administrators and sponsors.

A. *Hughes v. Northwestern University* and Its Subsequent Interpretation by Courts of Appeals

As we addressed in our 2021 update, the pleading standard in ERISA "excessive fees" fiduciary breach suits is a key—and frequently contested—issue for ERISA litigants. In *Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022), the Supreme Court reiterated that a plaintiff alleging ERISA claims must still satisfy the pleading standard set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In reiterating that standard, the Court also directed that when a district court reviews a pleading challenge in an ERISA fiduciary breach suit, it must conduct a "context-specific inquiry" into whether the plaintiff plausibly alleges that plan fiduciaries failed to act prudently. The Court also underscored the importance of affording deference to plan fiduciaries, noting the difficult tradeoffs that often come with making these types of decisions. *Hughes*, 142 S. Ct. at 742. The Court's narrow holding left open whether simply alleging a difference in performance of differently managed investments is enough to state a claim of fiduciary imprudence under ERISA. In the year since the *Hughes* decision, the courts of appeals and district courts have weighed in on this issue, with several notable decisions providing guidance for litigants on both sides of ERISA fiduciary breach claims.

In *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022), the Sixth Circuit held that merely pointing to passively managed investment funds that have outperformed actively managed funds does not plausibly plead imprudence. *Id*. at 1166. In *Smith*, the plaintiff sued her employer for offering several actively managed investment options when index funds available on the market offered higher returns and lower fees. *Id*. at 1164. The plaintiff pointed to three-year and five-year performance for various funds to support her allegations that CommonSpirit acted imprudently, in violation of ERISA. Chief Judge Sutton disagreed, writing for the panel that "[m]erely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision . . . that breaches a fiduciary duty." *Id*. at 1166. Such allegations did not meet the pleading standards established in *Ashcroft* and *Twombly*. *Id*. at 1165–66. Furthermore, as the Supreme Court noted in *Hughes*, "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," and courts "must give due regard to the range of reasonable judgements a fiduciary may make based on her experience and expertise." *Id*. at 1165 (quoting *Hughes*, 142 S. Ct. at 742).

In *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022), the Seventh Circuit similarly affirmed dismissal of an excessive fees suit, while also signaling its view that *Hughes* has not materially changed the pleading standard for ERISA claims. *Id*. at 581. In *Albert*, the plaintiff claimed that his former employer acted imprudently because its plan's administrator, recordkeeper, and advisor charged "unreasonably high fees," and because his employer failed to select service providers who charged lower fees. *Id*. at 573. The Seventh Circuit found these allegations insufficient to state a claim, concluding that the plaintiff overstated the significance of *Hughes*. *Id*. at 579. The panel explained that *Hughes* merely rejected the Seventh Circuit's holding in that case that "offering a mix of high-cost and low-cost investment options in a plan insulated fiduciaries from liability." *Id*. at 579–80. The court concluded that limited holding should not be construed to require fiduciaries to regularly solicit bids from service providers or stop providing high-cost investment options. *Id.* at 579. Thus, the court explained that *Hughes* "does not have any bearing" on the analysis of claims where the plaintiff fails to allege that fees charged are excessive relative to the particular services received in return. *Id.* at 580.

In *Matousek v. MidAmerican Energy Co*., 51 F.4th 274 (8th Cir. 2022), the Eighth Circuit reiterated that in order to plead ERISA imprudence based on a contention of imprudent

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

investment options, plaintiffs must provide "meaningful benchmark[s]" for comparison. *Id*. at 280. In that case, the plaintiffs sued their employer alleging that its investment committee incurred excessive recordkeeping costs and failed to remove imprudent investments. *Id*. at 278. Looking to *Hughes*, the court acknowledged that fiduciaries "normally have a continuing duty of some kind to monitor investments and remove imprudent ones." *Id*. at 280 (quoting *Hughes*, 142 S. Ct. at 741). However, on both counts, the court took issue with the plaintiffs' failure to identify meaningful benchmarks for the court to compare to the allegedly imprudent fees and investments. Applying *Iqbal*, the court found that the industry averages plaintiffs relied upon were not "like-for-like comparison[s]" with the challenged fees and investments. *Id*. at 278–79. Plaintiffs therefore failed to state an imprudence claim. *Id.* at 279–82.

By contrast, in *Kong v. Trader Joe's Co*., 2022 WL 1125667 (9th Cir. Apr. 15, 2022), the Ninth Circuit relied on *Hughes* and found plaintiffs' allegations sufficient to proceed to discovery. There, plaintiffs alleged, in relevant part, that the defendant offered a number of mutual funds in higher-cost share classes when lower-cost share classes were available on the market. *Id.* at *1. The share classes were alleged to be identical in every way except for the higher fees. In permitting plaintiffs' claims to proceed, the Ninth Circuit acknowledged the Supreme Court's guidance in *Hughes* that the inquiry into plaintiffs' allegations should be context specific, but concluded that allegations in that instance were sufficient to withstand the defendant's pleadings challenge. *Id*.

Similarly, in *Davis v. Salesforce.com, Inc*., 2022 WL 1055557 (9th Cir. Apr. 8, 2022), the plaintiffs alleged that for nine of defendants' chosen investment funds, the more expensive share classes "were the same in every respect other than price." *Id*. at *1. As in *Kong*, the court found these allegations sufficient to state a claim, rejecting at the pleading stage defendants' explanation that the less expensive share classes served a different purpose in the plan, and were thus not identical. *Id*. at *1–2.

The Tenth Circuit is likely to be the next court to wade into the post-*Hughes* waters with *Matney v. Barrick Gold of North America*, No. 22-4045 (10th Cir. May 20, 2022), currently pending before the court. *Matney* involves an appeal from former employees of a mining company seeking to revive their claims alleging mismanagement of their 401(k) plan. The plaintiffs brought the proposed class action against the company, its board of directors and its benefits plan in April 2020, alleging the company kept subpar options in the 401(k) plan, despite having access to funds that were cheaper and performed better. The plaintiffs appealed from an April 2022 ruling dismissing the suit. The district court concluded that plaintiffs failed to provide a meaningful benchmark and attempted, unsuccessfully, to leap from the "mere possibility" of misconduct to plausibility. *See Matney v. Barrick Gold of North America*, 2022 WL 1186532 at *12 (D. Utah Apr. 21, 2022).

Ultimately, these decisions from the circuit courts of appeals interpreting *Hughes* confirm that the Supreme Court's decision was narrow and that ERISA litigants will be held to the pleading standard established in *Iqbal* and *Twombly.*

B. Benefits Administration Post-*Dobbs*—Considerations for Employers Looking to Provide Abortion-Related Care Benefits

On June 24, 2022, the Supreme Court issued its landmark decision in *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973), and removing constitutional protections for abortion care. Although not framed as an ERISA decision, *Dobbs* caries significant implications for ERISA plans. For example, with the nationwide rollback of *Roe*, employers must now contend with state and local laws creating potential liability for plan sponsors and administrators providing coverage for the cost of abortion-related care. For example, Texas and Oklahoma have passed "bounty hunter" style laws that create a private cause of action against any person or entity that "aids or abets" the performance or inducement of an abortion, including by paying for or reimbursing the costs. Several other states have criminalized the act of performing or

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

inducing an abortion. These laws also leave open the potential for civil and criminal penalties for employers that offer abortion-related health care coverage, benefits, or travel reimbursement.

Benefits administration in a post-*Dobbs* landscape is not simple, and employers involved in this area should be aware that they are wading into an unsettled, highly politicized issue. *Dobbs* raises several important considerations for employers seeking to provide abortion-related health coverage for employees facing restricted access to abortion care and related protections. When considering whether to provide abortion-related benefits to employees, employers may want to consider what degree of protection, if any, ERISA preemption may offer their employee benefits plans from state legislation and regulation. Employers should also be aware of their obligations under HIPAA and other privacy laws when dealing with private health information for plan administration purposes, especially in jurisdictions where law enforcement may seek disclosure of that information in furtherance of prosecuting abortion-related activity.

ERISA Preemption: The Supreme Court's *Dobbs* decision raises novel ERISA preemption questions, including whether ERISA preemption may limit a state's ability to extend civil and/or criminal liability to an employer's offering of abortion-related care or travel funding through an employer-sponsored, ERISA-governed health plan. As with many ERISA issues, the law on preemption is not straightforward, and its application may vary depending on whether the state law is civil or criminal. *See* 29 U.S.C. § 1144(b)(4).

As background, in order to foster national uniformity in benefits administration, ERISA generally preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). "A state law relates to an ERISA plan 'if it has a connection with or reference to such a plan.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). And the state law has a "connection with" an ERISA plan if that law "interferes with nationally uniform plan administration." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016).

However, ERISA preemption does not extend to generally applicable state criminal laws. *See* § 1144(b)(4). While there is little case law interpreting the "generally applicable" language in Section 1144(b)(4), courts have taken the view that Congress intended the words "generally applicable" to refer to criminal laws that apply to general conduct like larceny and embezzlement. *Walker v. CIGNA Ins. Grp.*, Nos. 99-3274, 99-3576, 2000 WL 687738, at *2 (E.D. La. May 26, 2000) (quoting *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1506 (9th Cir. 1993)). Although there are currently no state laws that expressly *criminalize* aiding-and-abetting an abortion (in contrast to current state laws that carry potential civil penalties for aiding-and-abetting), ERISA preemption might not apply to such laws if passed in the future.

Impact of Privacy Considerations: Another concern for employers post-*Dobbs* is the potential for state and local law enforcement to seek personal data in order to facilitate prosecutions in jurisdictions that have attached civil and criminal liability to abortion-related acts. Employee personal data that employers might potentially have access to—*e.g.*, health records, financial records, geolocation information, and electronic communications—might all be collected and used as evidence.

Employer-sponsored group health plans are subject to HIPAA's Privacy Rule. 45 C.F.R. § 160.103(1)(ix). Under the rule, employer plans may use protected health information ("PHI") to administer benefits but must also abide by HIPAA regulations to avoid disclosure. *Id*. § 164.504(f)(1). Notably, the Privacy Rule provides several exceptions, including access for law enforcement. This exception permits covered entities to disclose data to law enforcement officials pursuant to a court order, warrant, grand jury subpoena, or administrative subpoena meeting certain conditions.

In "direct response" to the *Dobbs* decision, the U.S. Dep't for Health and Human Services issued relevant guidance on the disclosure of information related to reproductive care and

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

HIPAA's Privacy Rule. *See* U.S. Dep't of Health & Human Servs., Press Release, HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on Roe (June 29, 2022). The guidance directs that covered entities, and to some extent, their business associates, "can use or disclose PHI, without an individual's signed authorization, *only* as expressly permitted or required by the Privacy Rule." U.S. Dep't of Health & Human Servs., HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care (June 29, 2022). The guidance also analyzes three situations where the Privacy Rule permits, but does not necessarily require, covered entities to disclose PHI without an individual's authorization: (1) disclosures required by law; (2) disclosures for law enforcement purposes; and (3) disclosures to avert a serious threat to health or safety. *Id.* Specifically, the guidance is intended to clarify that disclosures of PHI for purposes not related to health care—such as disclosures to law enforcement—are "permitted only in narrow circumstances tailored to protect the individual's privacy and support their access to health care, including abortion care." U.S. Dep't of Health & Human Servs., Press Release.

Gibson Dunn attorneys are continuing to monitor legislative, judicial, and regulatory developments in this rapidly changing area and are prepared to advise and assist employers in navigating this complex space.

II. Arbitrability of ERISA Benefits Claims

The arbitrability of ERISA Section 502(a)(2) fiduciary-breach claims continues to be a hotly litigated issue. As we detailed in our 2020 and 2021 year-end updates, the Ninth Circuit's watershed decision in *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019), overturned decades of case law that had held that ERISA fiduciary-breach suits could not be arbitrated. *Id.* at 1111–12. Reacting to *Dorman*, companies increasingly began incorporating arbitration provisions into their ERISA plans and courts across the county have since faced a jumble of complicated arbitration issues. As we reported in last year's ERISA update, courts have grappled with questions related to the scope, enforceability, and application of arbitration provisions. And, unsurprisingly, courts have taken different tacks in addressing these issues.

For example, as we reported last year, in *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 615 (7th Cir. 2021), the Seventh Circuit held that an arbitration provision was not enforceable because it improperly foreclosed remedies that ERISA "expressly permit[s]." *Id.* at 623. Then, in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021), the Second Circuit declined to assess the enforceability of a similar arbitration provision, concluding instead that plaintiff's claims did not fall within the provision's scope. *Id.* at 175–76.

This year, the Sixth and Tenth Circuits weighed in on this issue, declining to compel arbitration of plaintiffs' Section 502(a)(2) fiduciary breach claims despite their agreements to arbitrate.

In the Sixth Circuit case, *Hawkins v. Cintas Corp.*, 32 F.4th 625 (6th Cir. 2022), plaintiffs alleged that their employer "breached the fiduciary duties it owed to the company's retirement plan." *Id.* at 627. The court acknowledged that the plaintiffs had signed employment agreements containing arbitration provisions, but after surveying case law from other courts of appeals, it concluded that "[t]he weight of authority and the nature of § 502(a)(2) claims suggest that these claims belong to the plan, not to individual plaintiffs." *Id.* The court explained that plaintiffs "are seeking Plan-wide relief through a statutory mechanism that is designed for representative actions on behalf of the Plan." *Id.* at 635. "Therefore, the arbitration provisions in these individual employment agreements—which only establish the Plaintiffs' consent to arbitration, not the plan's—do not mandate that these claims be arbitrated." *Id.* at 627. On January 9, 2023, the Supreme Court denied certiorari in *Hawkins*.

The Tenth Circuit followed the Sixth Circuit's lead in *Harrison v. Envision Mgmt. Holding,*

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

Inc. Bd. of Dirs., 59 F.4th 1090 (10th Cir. 2023), affirming a district court's ruling invalidating a plan arbitration provision because it prevented participants from effectively vindicating their rights to pursue plan-wide remedies under ERISA. The panel explained that "[i]f the Sixth Circuit is correct" that Section 502(a)(2) claims "should be thought of as Plan claims, not [the plaintiff's claims]," then an arbitration agreement's provision prohibiting "a claimant [from] proceeding in a representative capacity is inconsistent with, and prevents a claimant from effectively vindicating the remedies afforded by" Section 502(a)(2). *Id.* at 1106. In other words, because the arbitration provision in *Harrison* required all claims to be arbitrated on an individual basis, and because Section 502(a)(2) was interpreted by the court to provide a statutory mechanism for seeking plan-wide claims, the arbitration provision was invalid as precluding participants from pursuing relief otherwise available to them under ERISA.

Currently, two other cases centering the issue of arbitrability of Section 502(a)(2) claims are pending before the Second and Third Circuits. *See Cedeno v. Argent Tr. Co.*, No. 21-2891 (2d Cir. Nov. 22, 2021); *Henry v. Wilmington Tr. NA*, No. 21-2801 (3d Cir. Oct. 1, 2021). We anticipate that the arbitrability of Section 502(a)(2) claims will continue to be a focal point of litigation across the country this year.

III. Further Important Developments Concerning ERISA-Governed Retirement Plans

In addition to litigation concerning pleading standards and arbitrability, other legal and regulatory changes in 2022 had significant impact on ERISA-governed retirement plans. Notably, the Seventh Circuit issued an important decision in *Burke v. Boeing Co.*, 42 F.4th 716 (7th Cir. 2022), concerning the implications of a plan fiduciary delegating investment decisions over company stock to independent fiduciaries, and the Department of Labor announced its final rule concerning consideration of ESG factors in plan investing.

A. Seventh Circuit Decision Provides Guidance to Plan Fiduciaries Regarding Delegation of Investment Decisions to Third Parties

In *Burke v. Boeing Co.*, 42 F.4th 716 (7th Cir. 2022), the Seventh Circuit held that Boeing was insulated from liability in an ERISA lawsuit alleging that the company unlawfully inflated its stock price by hiding issues with its 737 Max jets because the company had handed off fiduciary responsibilities for managing the company's employee stock ownership plan to an independent investment manager. Plaintiffs were participants in Boeing's 401(k) Plan whose savings had been invested in the Boeing Stock Fund. *Id.* at 721. In late 2019, Boeing's stock price fell substantially after its 737 Max series of airliners was grounded worldwide due to safety issues. *Id.* at 720. Plaintiffs contended that Boeing breached its fiduciary duties by failing to disclose the 737 Max's safety issues. *Id.* at 722, 727. The Seventh Circuit affirmed the district court's dismissal of the plaintiffs' claims. *Id.* at 720. Importantly, the court held that Boeing had no fiduciary duty with respect to managing the investments in the Boeing Stock Fund, because Boeing had delegated, through its plan investment committee, the "exclusive fiduciary authority and responsibility" for choosing and managing the investments of the Boeing Stock Fund to an independent, third-party investment manager. *Id*.

The plaintiffs argued that any duty not expressly delegated to the third party remained Boeing's duty—including "the duty to make public disclosures of nonpublic information" based on federal securities law. *Burke*, 42 F.4th at 727. The Seventh Circuit disagreed, however, stating that ERISA does not "impose[] such a duty that would be layered on top of federal securities laws governing public disclosures of information material to investors." *Id.* The court explained that the "delegation to [the independent fiduciary] anticipated exactly this sort of case, in which Boeing insiders would be accused of facing conflicting fiduciary loyalties." *Id.* at 728. Boeing could not be held liable for breaching fiduciary duties that it "simply did not have." *Id.*

Finally, plaintiffs argued that ERISA, as opposed to federal securities law, included a non-

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

delegable duty to disclose non-public information to Plan participants. *Burke*, 42 F.4th at 728–29. The Seventh Circuit again disagreed because plaintiffs failed to provide evidence of "either an intentionally misleading statement, or a material omission where the fiduciary's silence can be construed as misleading," as required under ERISA. *Id.* at 729 (citation and internal quotation marks omitted).

A number of similar cases have been filed and litigated over the last several years, and the *Burke* decision is consistent with other rulings in the area. As the court recognized, independent fiduciaries "can serve a valuable and legitimate purpose in managing" the potential conflict between a company's duties to its shareholders and its plan participants that may arise in connection with company stock funds. *Burke*, 42 F.4th at 732. Importantly, however, companies must still exercise their duties of prudence and loyalty in selecting the independent third party and delegating the investment-related duties—an area that could give rise to future litigation.

B. An Update on the Department of Labor's ESG Rulemaking

As we discussed in our update last year, the Department of Labor ("DOL") has been actively engaged in rulemaking concerning environmental, social, and governance ("ESG") investing for the better part of a decade. On November 22, 2022, the DOL released its final rule (the "2022 Rule"), supplanting two Trump-era rules, and stating that "fiduciaries may consider climate change and other [ESG] factors when they make investment decisions and when they exercise shareholder rights, including voting on shareholder resolutions and board nominations." U.S. Dep't of Labor, Emp. Benefits Sec. Admin. ("EBSA"), Fact Sheet, Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.

The 2020 Rules: To understand the import of the 2022 Rule, some additional background is required with regard to the regulatory landscape prior to its publication. In November 2020, the DOL published a final rule adopting amendments to 29 C.F.R § 2550.404a-1, commonly referred to as ERISA's Investment Duties regulation. *See* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Nov. 13, 2020) (hereinafter, the "2020 ESG Rule"). Then, in December 2020, the DOL published a related final rule which also adopted amendments to the Investment Duties regulation. *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658 (Dec. 16, 2020) (hereinafter, the "2020 Proxy Rule"). Together, these rules (the "2020 Rules") sought to address concerns that fiduciaries would subordinate the interests of plan participants and beneficiaries to non-pecuniary objections, in violation of the duties of prudence and loyalty. *See* 85 Fed. Reg. at 72873 and 81658.

The 2020 ESG Rule required plan fiduciaries to select investments and make investment decisions based solely on consideration of pecuniary factors, as defined in the regulation. 85 Fed. Reg. at 72851. Although the preamble to the 2020 ESG Rule stated that ESG considerations could at times be appropriate pecuniary factors—including significant environmental risk and troubled corporate governance—the regulatory text itself included no reference to SG factors and the DOL declined to opine that ESG factors are necessarily pecuniary. *Id*. at 72858. Significantly, the 2020 ESG Rule stated that in no circumstances could any investment fund or product be added as a qualified default investment alternative ("QDIA") if its "investment objectives, goals, or principal investment strategies include, consider, or indicate the use or one or more non-pecuniary factors." *Id*. at 72865. The DOL adopted this "heightened prophylactic approach" for QDIAs because it would be inappropriate for participants in QDIAs, who tend to have "less investment experience and sophistication than more active investors," to be defaulted into a retirement savings fund that may have "other objectives absent their affirmative decision." *Id*. at 72866.

Finally, the 2020 ESG Rule provided that non-pecuniary factors could be considered by fiduciaries in selecting investments or an investment course of action only as tiebreakers,

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

when investment alternatives were indistinguishable based solely on pecuniary factors. 85 Fed. Reg. 72862. This tiebreaking standard required fiduciaries to document their decision. *Id*.

The 2020 Proxy Rule concerned plan fiduciaries' ERISA obligations when voting proxies and exercising other shareholder rights in connection with plan investments in shares of stock. 85 Fed. Reg. 81658. The 2020 Proxy Rule stated that fiduciaries were not required to vote every proxy or exercise every shareholder right. *Id*. at 81663. However, when voting proxies or exercising shareholder rights, plan fiduciaries were required to thoroughly document the decision. *Id*. at 81669. And where fiduciaries delegated the authority to manage shareholder rights to third-parties, the 2020 Proxy Rule imposed separate monitoring obligations. *Id*. Last but not least, the 2020 Proxy Rule created safe harbor provisions, permitting the adoption of uniform proxy voting policies. *Id*. at 81672.

The 2022 Rule: In March 2021, following direction from the Biden Administration, the DOL issued an enforcement policy statement under ERISA stating that, until the publication of further guidance, the DOL would not enforce the 2020 Rules. U.S. Dep't of Labor, ESBA, Statement Regarding Enforcement of Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans (Mar. 10, 2021). In the fall of that same year, the DOL published a Notice of Proposed Rulemaking to amend the "Investment Duties" regulation. *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 85 Fed. Reg. 57272, 57276 (proposed Oct. 14, 2021). Then, in November 2022, the DOL announced the final rule. 85 Fed. Reg. 73822 (to be codified at 29 C.F.R. § 2550.404a-1). The DOL's stated rationale for the change was that the 2020 Rules "created uncertainty for ERISA fiduciaries around considering climate change and other ESG factors in investment decisions," which in turn deterred fiduciaries from improving investment portfolio resilience or acting as other investors would in order to enhance investment value and performance. U.S. Dep't of Labor, EBSA, Fact Sheet, Final Rule, at 3. *See also* 85 Fed. Reg. at 73826.

Notably, the final 2022 Rule omits proposed language suggesting that evaluating an investment "may often require" fiduciaries to account for ESG factors. *Id*. at 73830–31. This omission clarifies that the 2022 Rule does not mandate consideration of ESG factors in all investment decisions or favor ESG investment. *Id*. at 73831. ESG factors should not be treated differently from any other relevant investment consideration, and the weight given to any one factor should mirror its impact on risk and return. *Id*.

In other words, the 2022 Rule does not change the principle at the center of the "Investment Duties" regulation: that plan fiduciaries are obligated by the duties of prudence and loyalty under ERISA to focus investment decisions on relevant risk-return factors. However, the 2022 Rule expands the definition of risk-return factors beyond solely "pecuniary" considerations and expressly includes ESG factors as potential components of a risk-return analysis, as well as any other factors the fiduciary "reasonably determines" to be relevant to a risk-return analysis. *See* 29 C.F.R. § 2550.404a-1(b)(4).

Another small but noteworthy change made by the 2022 Rule is the addition of the term "or menu" clarifying "the portfolio." *See* 29 C.F.R. § 2550.404a-1(b)(2) ("'[A]ppropriate consideration' shall include, but is not necessarily limited to: a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties) or menu . . ."). The DOL further clarifies that the determination factors at § 2550.404(b)(2)(i) apply to menu construction, while the factors at § 2550.404(b)(2)(ii) do not. 85 Fed. Reg. at 73830. This change further emphasizes menu construction as a fiduciary act subject to the fiduciary duties of loyalty and prudence. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S.Ct. 737, 742 (2022) ("[P]lan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options.").

Next, the 2022 Rule softens the tiebreaker standard, loosening restrictions imposed by the

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

2020 ESG Rule as to the types of collateral benefits fiduciaries may consider. *See* 29 C.F.R. § 2550.404a-1(c)(2). The DOL emphasized that fiduciaries are not *required* to use the tiebreaker standard when selecting investments. *See* 85 Fed. Reg. at 73836–37; *see also* 29 C.F.R. § 2550.404a-1(c)(2) ("If a fiduciary prudently concludes that competing investments . . . equally serve the financial interests of the plan . . . the fiduciary is *not prohibited* from selecting the investment . . . based on collateral benefits other than investment returns.") (emphasis added). However, a fiduciary may not accept "expected reduced returns or greater risk" in order to secure collateral benefits. *Id*. The 2022 Rule also lifts the documentation requirements for fiduciaries who choose to employ the tiebreaker standard, applying the same general prudence standard in this context as to all other investment decisions. *See* 85 Fed. Reg. at 73860.

The 2022 Rule also provides that fiduciaries may consider participant preferences, and act upon those preferences, without violating the duty of loyalty, so long as the resulting investment is otherwise prudent. 29 C.F.R. § 2550.404a-1(c)(3). This provides fiduciaries with flexibility to consider plan participants' nonpecuniary preferences—such as policy or social preferences—when making investment decisions for participant-directed plans, which could enhance plan participation and contribution rates. *See* 85 Fed. Reg. at 73842.

Finally, the 2022 Rule eliminates the blanket prohibition imposed by the 2020 ESG Rule on QDIA status for investments that consider ESG factors as part of their investment objectives, regardless of a fiduciary's reasons for selecting the investments. *See* 85 Fed. Reg. at 73843. The prior restriction effectively prevented fiduciaries from selecting QDIA offerings that incorporated collateral benefits, even when the fund is otherwise prudent and superior to competing options. *Id.* This change means that, under the 2022 Rule, a fiduciary may choose a QDIA with collateral benefit considerations as part of an investment menu. The 2022 Rule returns the selection of QDIAs to the same legal standards as other defined contribution plan investments.

The Rule at Risk: The 2022 Rule has had a number of notable detractors. On January 26, 2023, attorneys general from 25 states (the "State Plaintiffs") filed a lawsuit in the Northern District of Texas, seeking to prevent the Rule from taking effect. The State Plaintiffs argue that the Rule oversteps the DOL's authority under ERISA and is arbitrary and capricious, in violation of the Administrative Procedure Act. *Utah v. Walsh*, No. 23-16, Compl. for Decl. and Inj. Relief ¶¶ 4–5, ECF No. 1. Specifically, the State Plaintiffs complain that the Rule conflicts with ERISA's exclusive purpose requirements, which obligate fiduciaries to consider only financial benefits and not any nonpecuniary benefits. *Id*. ¶ 126. The State Plaintiffs claim Article III standing, alleging harms in the form of lowered tax revenue, reduced investments in the fossil fuel industry, diminished economic well-being for residents, and special solicitude. *Id*. ¶¶ 60–63. Private parties also joined the suit, claiming they will lose the protections put in place by the prior rules and be forced to expend additional time and resources monitoring and reviewing recommendations from advisers without the benefit of the "clearer" regulations limiting the focus to purely pecuniary considerations. *Id*. ¶¶ 46, 53, 57.

A second lawsuit, *Braun v. Walsh*, No. 23-234, Compl., ECF No. 1, was filed in late February in the Eastern District of Wisconsin. The *Braun* plaintiffs, who both participate in ERISA-regulated retirement plans, argue that the Rule violates ERISA and exceeds the statutory authority granted to the Secretary of Labor and DOL. *Id*. ¶¶ 119–20.

On the legislative front, Senate Republicans announced a plan in early February 2023 to reintroduce legislation from last session seeking to overturn the 2022 Rule pursuant to the Congressional Review Act (the "CRA"). Overturning the 2022 Rule using the CRA would prevent the DOL from issuing a new rule in substantially the same form as the disapproved rule, unless specifically authorized by a subsequent law. On February 28, 2023, the House passed a resolution nullifying the 2022 Rule and, on March 1, 2023, the Senate passed the same in a narrow 50-46 vote. On March 20, 2023, President Biden issued a veto on the resolution—the first in his presidency. At this time, it appears unlikely that Congress will reach the two-thirds majority needed in both chambers in order to

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

override the veto.

Gibson Dunn will continue to monitor the broader legal and regulatory landscape surrounding the 2022 Rule, the role of ESG factors, and the impact of these initiatives on plan fiduciaries, financial institutions, and other asset managers.

IV. Developments for Health Plans

ERISA-governed health benefit plans remain an active source of litigation. Although determining whether a particular plan covers a particular treatment for a particular beneficiary often requires individualized determinations that may be better suited for resolution in an individual action, beneficiaries and treatment providers have continued to innovate to identify novel strategies for litigating coverage disputes *en masse*, either through class actions or through actions by providers representing multiple patients. These strategies have met mixed results this year, with courts rejecting novel "reprocessing" class actions in *Wit v. United Behavioral Health*, 58 F.4th 1080 (9th Cir. 2023), and *Berceanu v. UMR, Inc.*, 2023 WL 1927693 (W.D. Wis. Feb. 10, 2023), while allowing a novel trade libel claim to proceed in *Conformis, Inc. v. Aetna, Inc.*, 58 F.4th 517 (1st Cir. 2023). In addition, litigation challenging the Biden administration's regulations implementing the No Surprises Act is likely to have significance consequences for ERISA health plans and their administrations.

A. Courts Limit Novel ERISA Class Actions Seeking "Reprocessing" of Denied Coverage Requests

In two recent and significant decisions, courts rejected attempts by plaintiffs to challenge benefits denials through a "reprocessing" class action—a strategy that gained steam over the past years as a way to challenge ERISA benefits decisions on a class-wide basis. Gibson Dunn represented the defendants in both cases rejecting this approach.

In *Wit v. United Behavioral Health*, the Ninth Circuit rejected a facial challenge to guidelines used to make medical necessity determinations for thousands of different health plans, through which plaintiffs sought "reprocessing" of denied coverage requests rather than seeking to recover benefits, as a way to avoid individualized medical necessity and other issues. *See* 58 F.4th 1080, 1093 (9th Cir. 2023).

The plaintiffs in *Wit* were beneficiaries of a number of ERISA-governed health benefit plans who filed suit on behalf of three putative classes, representing nearly 70,000 coverage determinations under as many as 3,000 different plans. 58 F.4th at 1088. Defendant United Behavioral Health ("UBH") acted as the claims administrator for these plans, and for a subset of plans, also as the insurer. *Id*. The plaintiffs had all submitted coverage requests that UBH denied after applying certain "Guidelines" that UBH had developed to implement the governing plans' coverage criteria—including, among other things, a requirement that treatment be consistent with generally accepted standards of care ("GASC"), and that treatment not fall into other exclusions from coverage. *See id.* at 1088–89. The plaintiffs alleged that UBH breached fiduciary duties and improperly denied benefits by applying Guidelines more restrictive than GASC. *Id.* at 1089. To evade individualized fact questions that otherwise would have precluded class certification, the plaintiffs framed the relevant injury as the use of an unfair "process," and disclaimed any attempt to prove that the use of that Guidelines-based process actually *caused* the improper denial of benefits—seeking instead only "reprocessing" under new Guidelines as relief. *See id.*

Over the course of several years, the district court certified the plaintiffs' requested class, held a bench trial, and entered judgment for the plaintiffs. 58 F.4th at 1090–91. The court concluded that UBH had violated ERISA by employing Guidelines that impermissibly deviated from GASC, and it ordered both prospective injunctive relief for up to ten years—requiring the use of new Guidelines in the future—and "reprocessing" of class

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

members' tens of thousands of past claims under those new Guidelines. *Id*.

The Ninth Circuit reversed in large part. It held first that the district court erred in certifying claims seeking "reprocessing," because that "reprocessing" is not a remedy available under either of the provisions of ERISA on which the plaintiffs relied—29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3). *See* 58 F.4th at 1094. Section 1132(a)(1)(B) allows a plan beneficiary to recover benefits due under an ERISA plan or enforce or clarify his or her rights under the plan. *Id.* The panel held that the plaintiffs' request for "reprocessing," by contrast, is not a remedy in itself, but merely a "means to" another remedy—the recovery of benefits. *Id*. at 1095. As a result, "[a] plaintiff asserting a claim for denial of benefits must therefore show that she may be entitled to a positive benefits determination if outstanding factual determinations were resolved in her favor." *Id.* By certifying the class without requiring such a showing, the district court impermissibly used Rule 23 to enlarge or modify the plaintiffs' substantive rights, in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). *Id.* Plaintiffs' requested "reprocessing" also fell outside the scope of § 1132(a)(3), which provides a cause of action for "'appropriate equitable relief'"—meaning the type of "relief that, traditionally speaking (*i.e.*, prior to the merger of law and equity) were *typically* available in equity." *Id.* (internal citations omitted) (emphasis in original). The panel explained that plaintiffs offered no basis for concluding that reprocessing was relief "typically" available in equity. *Id.*

The panel also rejected on the merits the plaintiffs' principal challenge to UBH's guidelines, concluding that nothing in the applicable plans required UBH to adopt guidelines that conformed to GASC. 58 F.4th at 1096–97. Although the plans each *excluded* coverage for treatment *inconsistent* with GASC, they did not thereby "compel UBH to cover all treatment that is consistent with GASC." *Id*. at 1097.

Finally, the Ninth Circuit held that, contrary to the district court's ruling, absent class members cannot be excused from complying with the Plans' administrative exhaustion requirements. 58 F.4th at 1097. The Ninth Circuit explained that when an ERISA plan specifies that plan beneficiaries must exhaust administrative remedies before seeking relief in Court, courts are required to enforce those contractual requirements, and cannot create judicial exceptions to compliance. *See id.* at 1098.

Following closely on the heels of *Wit*, the United States District Court for the District of Wisconsin reached a similar outcome in *Berceanu. v. UMR, Inc.*, 2023 WL 1927693 (W.D. Wis. Feb. 10, 2023)—a case brought by the same plaintiffs' firm challenging the same set of medical necessity guidelines at issue in *Wit*, which the defendant in *Berceanu*, UMR, borrowed from its affiliate, UBH. In *Berceanu*, the court decertified the class action, holding that individualized issues of Article III standing—*i.e.*, redressability—precluded class treatment of the plaintiffs' claims for reprocessing. 2023 WL 19272693, at *9. Specifically, determining whether class members would benefit from a reprocessing would "require an individual, fact intensive inquiry" and will "vary substantially among class members." *Id*. At base, the court noted that "an order requiring UMR to reprocess plaintiffs' and all class members' rejected claims would result in UMR engaging in a major undertaking with no potential for an actual, concrete benefit to plaintiffs or the class members." *Id*. The court then granted summary judgment in favor of UMR as to the named plaintiffs, echoing the *Wit* panel's conclusion that the challenged guidelines used by UMR need not "track" GASC. *Id*. at *11–13. And even if tracking those guidelines were required, the court concluded that the plaintiffs had not presented any evidence that UMR's guidelines were inconsistent with GASC. *See id*. at *12. Notably, in conducting this analysis, the court explained that its review of UMR's guidelines was limited to the administrative record considered by UMR in denying the claims. *See id*. at *10–11.

The Ninth Circuit's decision in *Wit* and the district court's decision in *Berceanu* reaffirmed traditional limitations on class actions imposed by ERISA, the Rules Enabling Act, and Rule 23, which together preclude the novel facial challenges advanced by the plaintiffs in those cases. As a result, neither UBH nor UMR will be required to reprocess claims for behavioral health services from participants in employee health plans.

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

B. First Circuit Rescues Libel Suit by Device Manufacturer

Plaintiffs' efforts to litigate coverage issues *en masse* fared better in *Conformis, Inc. v. Aetna, Inc.*, 58 F.4th 517 (1st Cir. 2023). There, Aetna—a claims administrator and health insurance provider for ERISA health plans—denied coverage for customized knee implants manufactured by Conformis, after recharacterizing the implants as "experimental and investigational." *See id*. at 526–27. Aetna does not cover or reimburse claims for "experimental or investigational" treatments expect in special circumstances. *Id*. at 526. Conformis brought claims challenging the "experimental and investigational" determination under both ERISA and state law claims for tortious interference with a contractual/business relationship and trade libel, but the district court dismissed the ERISA claims for lack of standing. *See Conformis, Inc. v. Aetna, Inc*., No. 20-CV-10890, 2021 WL 1210293, at *5 (D. Mass. Mar. 31, 2021). At trial, Conformis sought to establish standing under ERISA based on the assignment of claims by a recipient of a Conformis implant who was denied coverage under his Aetna health benefits plan. *Id*. at *3. However, the district court dismissed Conformis's ERISA claims, determining that anti-assignment provisions in the health benefits plan barred the assignment. *Id*. at *4–5. The district court also dismissed Conformis's state law claims for failure to state a claim under state law. *Id*. at *9–10.

On appeal, the First Circuit rescued Conformis's trade libel claims, reasoning that Aetna's revised policy referring to knee implants as "experimental and investigational" plausibly targeted Conformis because the background section to the policy specifically mentioned Conformis's product. *Conformis, Inc.*, 58 F.4th at 529. Further, the panel held that "Conformis plausibly allege[d] that Aetna ignored credible evidence presented to it that called its statement into serious question . . . [a]nd Aetna's abrupt change in policy, without any explanation . . . form[ed] the basis for a plausible inference that Aetna" knew the assertion was false. *Id.* at 536.

The decision thus allows Conformis to use state law—rather than ERISA—to challenge Aetna's determination that Conformis's implants constitute "experimental and investigational" treatments. Under ERISA, a claim administrator's determination that a particular treatment is experimental is typically a function of plan administration (and thus subject to ERISA preemption) and, in applying ERISA's rules for such claims, reviewed under a deferential abuse of discretion standard when the plan has conferred discretion on the administrator to make medical determinations. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989).

Potential plaintiffs, such as manufacturers and providers, may attempt to exploit this decision as a way around ERISA, so benefit plans and their administrators will want to track this case closely to see how the law continues to develop in this area.

C. Court Strikes Agency Rules Limiting ERISA Arbitrators' Discretion to Resolve Payment Disputes

A recent decision regarding the Biden Administration's implementing of the No Surprises Act, Pub. L. No. 116-260, 134 Stat. 2758 (2021), is also likely to have significant implications for ERISA health plans. A federal district court in Texas vacated new agency regulations issued under the Act that attempted to limit patient's healthcare costs by providing an arbitration process to address payment amounts for certain services.

The No Surprises Act responds to concerns that patients sometimes face expensive and unexpected bills for emergency or ancillary services from out-of-network providers, called "surprise bills." The Act, which took effect on January 1, 2022, targets surprise billing by limiting patients' costs for most surprise out-of-network services to the in-network cost-sharing amount prescribed by the patient's insurance. The Act requires insurers and group health plans (including ERISA plans) to calculate patient cost-sharing for these

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

services at the in-network rate, and to make an "initial payment" to the provider. 29 U.S.C. §§ 1185e(a)(1), (b)(1). An out-of-network provider unsatisfied with this initial payment can initiate an arbitration process outlined in the statute. *Id.* § 1185e(c)(2). The Act applies to both self-insured and fully-insured health plans, but defers to state laws that already govern the amounts that fully-insured plans must pay providers for surprise out-of-network services.

The arbitration process begins with 30 days of open negotiation; if no agreement is reached, each party submits a final payment offer and the arbitrator chooses the most reasonable offer. 29 U.S.C. § 1185e(c)(1)–(2). The statute lists factors for arbitrators to consider in making this decision, including: (1) the qualifying payment amount ("QPA"), typically equivalent to the insurer's median in-network rate for similar services in the geographic region as of 2019 (adjusted for inflation); (2) the parties' recent contracted rates and good-faith efforts to reach a network agreement; (3) the parties' market shares; (4) patient acuity; and (5) the quality and scope of services offered by the provider or facility. *Id.* § 1185e(c)(5)(C).

In an effort to keep patients' healthcare costs down, the Departments of Health and Human Services, Labor, and Treasury (the "Departments") issued regulations interpreting the scope of arbitrators' discretion in choosing a payment amount. Several of those regulations focused on the QPA factor.

In September 2021, the Departments issued an interim rule that imposed a "rebuttable presumption" in favor of the offer closest to the QPA. Healthcare providers challenged this rule, and in February 2022, a Texas federal district court struck it down, holding that it improperly "place[d] its thumb on the scale for the QPA" and "impos[ed] a heightened burden on the remaining statutory factors." *Texas Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 587 F. Supp. 3d 528, 542 (E.D. Tex. 2022) ("*TMA 1*"). Later that year, another plaintiff successfully challenged a parallel interim rule that applied to air ambulance service providers. *Lifenet, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 6:22-CV-162, 2022 WL 2959715 (E.D. Tex., July 26, 2022); *see also* 29 C.F.R. § 2590.717-2(b)(3).

The Departments then revised the interim rule and in August 2022 issued a final rule, which replaced the express rebuttable presumption in favor of the QPA with a provision instructing arbitrators to *begin* with the QPA and "then consider" other non-QPA factors. 29 C.F.R. § 2590.716-8(c)(4)(iii). The final rule required arbitrators to assess the "credibility" of the non-QPA information before applying it, and prohibited them from "giv[ing] weight" to factors "already accounted for by the QPA." *Id.* § 2590.716-8(c)(4)(iii)(E). Healthcare providers once again challenged the rule, arguing that it improperly limited arbitrators' discretion "by making QPA 'the *de facto* benchmark for out-of-network reimbursement.'" *Texas Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, No. 6:22-CV-372, 2023 WL 1781801, at *6–7 (E.D. Tex. Feb. 6, 2023) ("*TMA II*").

The court agreed with the plaintiffs, holding that the No Surprises Act "plainly requires arbitrators to consider all the specified information in determining which offer to select" without "weigh[ing] any one factor or circumstance more heavily than the others." *TMA II*, 2023 WL 1781801, at *22–23. Because the Act's dispute-resolution process is carried out by independent arbiters, not the agencies themselves, the Departments' interpretations of the evidentiary rules governing the process were not entitled to any special deference. *Id.* at *25–26. And the record in *TMA II* indicated that the Departments' express goal in implementing the rule was "to keep [healthcare] costs down," improperly "tilting arbitrations in favor of insurers." *Id.* at *27–28. Because the Department's rule conflicted with the No Surprises Act (and thereby violated the Administrative Procedure Act), the court vacated and remanded the rules. As of the publication of this newsletter, the time to appeal this decision has not yet expired, so it remains to be seen how the Biden Administration will respond.

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

V. Issues on the Horizon

The world of ERISA litigation will continue to evolve in 2023 and beyond. Among other emerging trends, fiduciaries should be aware of a recent uptick in suits (1) seeking to leverage ERISA fiduciary standards to seek redress for data security and privacy issues, and (2) claiming that fiduciaries acted imprudently in selecting popular, low-fee target-date investments that allegedly underperformed other similar alternatives.

A good example of the recent spate of cybersecurity suits is *Disberry v. Employee Relations Committee of the Colgate-Palmolive Co.*, No. 22-5778, --- F. Supp. 3d ----, 2022 WL 17807122 (S.D.N.Y. Dec. 19, 2022). There, a former Colgate-Palmolive employee filed suit against Colgate's Employee Relations Committee, a Colgate plan trustee, and another firm providing services to the plan after a fraudster allegedly stole assets from her company retirement account. Disberry alleges that the defendants breached their ERISA fiduciary duties by allowing her retirement funds to be distributed to a third party who allegedly stole her identity, despite red flags that should have altered them to the fraud. The court dismissed the trustee from the case in a December 2022 opinion, but it allowed the claims against the other defendants to go forward. *See Disberry*, 2022 WL 17807122 at *11–12 (S.D.N.Y. Dec. 19, 2022). While courts have not yet defined the bounds of potential ERISA fiduciary liability in the cybersecurity context, the issue deserves close attention as cybersecurity threats continue to rise.

As to target-date funds, a single law firm has brought a series of suits against fiduciaries of defined contribution retirement plans offering participants the option to invest in BlackRock Target Date Funds. The BlackRock funds at issue are examples of popular and widespread investments tied to mutual fund indices that adjust the risk/reward strategy of underlying investments relative to a selected "target" retirement date. Unlike the excessive fee suits discussed in Section I.A, *supra*, plaintiffs in these suits allege that the defendants violated their fiduciary duties in offering the BlackRock Target Date Funds because the funds allegedly underperformed relative to other target date fund suites available in the marketplace for a period of time during their relatively long (sometimes decades long) investment horizon. While several of the BlackRock suits have been dismissed, this departure from the usual "excessive fees" playbook warrants close attention, as a ruling against the fiduciaries could raise the specter of liability for selecting a popular and low-fee fund based on that fund's subsequent performance during a narrow, selected time span.

The following Gibson Dunn lawyers assisted in the preparation of this alert: Karl G. Nelson, Heather Richardson, Geoffrey Sigler, Katherine V.A. Smith, Matthew Rozen, Jennafer Tryck, Alex Bruhn, Max E. Schulman, Claire Piepenburg, Zachary Copeland, Tessa Gellerson, Andrew Gorin, Michelle Lou, Beshoy Shokralla*, and Samuel Speers.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or any of the following:

Karl G. Nelson – Dallas (+1 214-698-3203, knelson@gibsondunn.com) Geoffrey Sigler – Washington, D.C. (+1 202-887-3752, gsigler@gibsondunn.com) Katherine V.A. Smith – Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com) Heather L. Richardson – Los Angeles (+1 213-229-7409,hrichardson@gibsondunn.com) Matthew S. Rozen – Washington, D.C. (+1 202-887-3596, mrozen@gibsondunn.com) Jennafer M. Tryck – Orange County (+1 949-451-4089, jtryck@gibsondunn.com)

**Beshoy Shokralla is an associate working in the firm's New York office who is not yet admitted to practice law.*

© 2023 Gibson, Dunn & Crutcher LLP Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice. Please note, prior results do not guarantee a similar outcome.

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

GIBSON DUNN

Related Capabilities

Executive Compensation and Employee Benefits

Labor and Employment

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**