

February 10, 2026

# EMPLOYEE BENEFIT PLANS: ERISA LITIGATION TRENDS & DEVELOPMENTS

GIBSON DUNN

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# Today's Speakers



[Ashley E. Johnson](#) is a partner in the Dallas office of Gibson Dunn, where she is Co-Chair of the firm's ERISA Litigation Practice Group and a core member of the firm's Labor and Employment Practice Group. Her practice focuses on ERISA litigation, including high-stakes class actions involving retirement and health and welfare plans, as well as related workplace benefits disputes. Ashley represents employers and plan fiduciaries in trial and appellate courts nationwide, with an emphasis on legal strategy, dispositive briefing, and oral argument on complex statutory, fiduciary-duty, and prohibited-transaction issues.



[Jennafer Tryck](#) is a partner in the Orange County office of Gibson Dunn. She is a member of the Firm's Litigation, ERISA Litigation, Labor and Employment, Insurance and Reinsurance, and Class Actions Practice Groups, and represents clients across a variety of industries, including manufacturing, telecommunications, health care, and higher education. Jennafer specializes in defending plan sponsors and insurers in high-stakes ERISA litigation in the trial courts and on appeal. She has represented clients in a wide range of single-plaintiff and class-action matters, including defending employers against excessive fee and prohibited transaction claims, actuarial equivalence claims, tobacco surcharge claims, and 401(k) plan forfeiture claims. In addition to litigation defense, Jennafer also advises clients on limiting litigation exposure for ERISA and non-ERISA benefit plans.



[Sean Feller \(Webcast Moderator\)](#) is a partner in Gibson Dunn's Century City office. He serves as Co-Chair of the firm's Executive Compensation and Employee Benefits Practice Group. His practice focuses on all aspects executive compensation and employee benefits. His practice encompasses tax, ERISA, accounting, corporate, and securities law aspects of equity and other incentive compensation plans; qualified and nonqualified retirement and deferred compensation plans and executive employment and severance arrangements. Sean has been recognized by his peers as one of *The Best Lawyers in America* in the area of Employee Benefits (ERISA) Law. In 2020 and 2022, he was ranked by *Chambers USA* as a Leading Lawyer in Los Angeles in the area of Employee Benefits and Executive Compensation.

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# FIDUCIARY BREACH LITIGATION

01

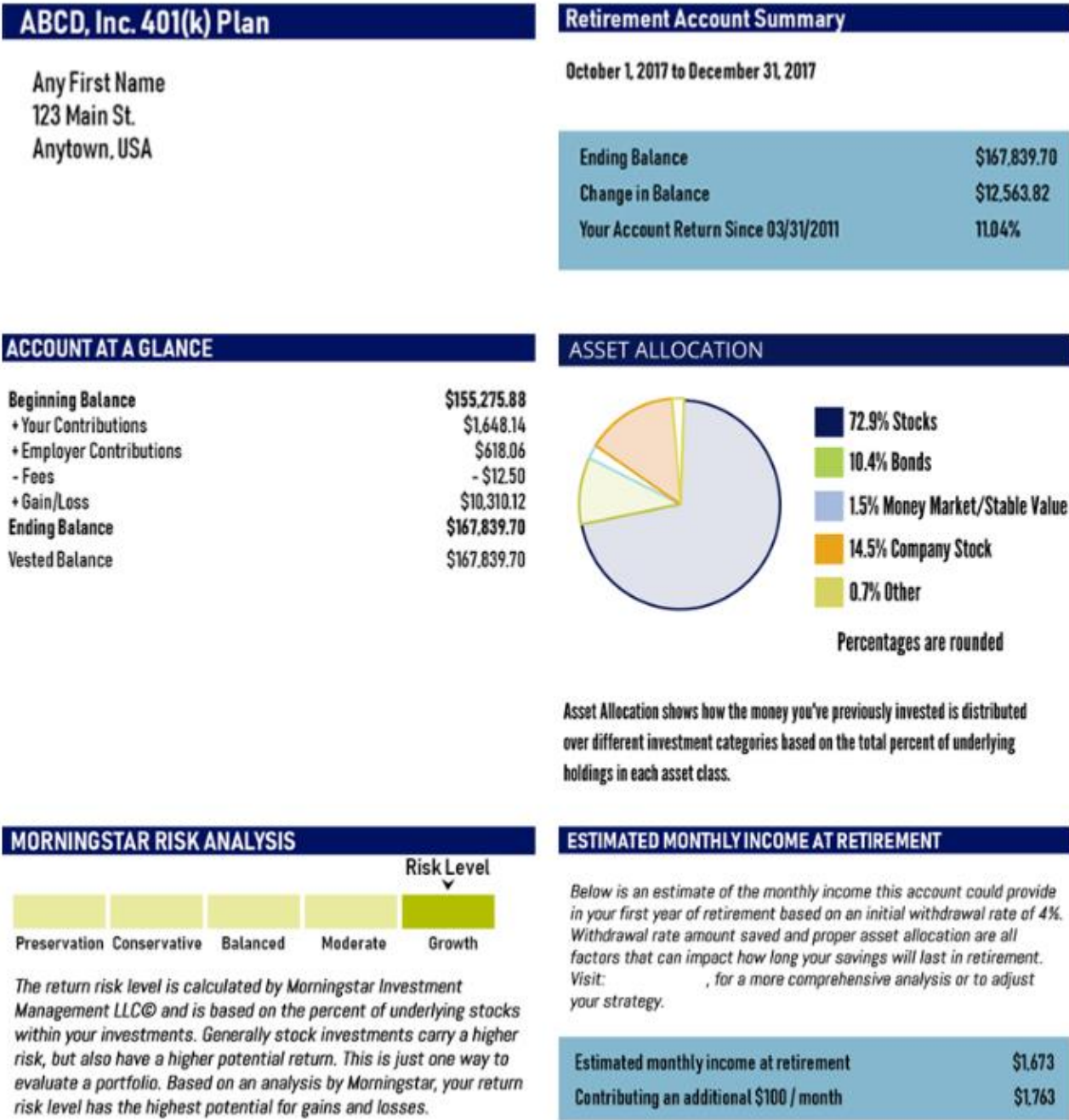


# Excessive Fee Claims

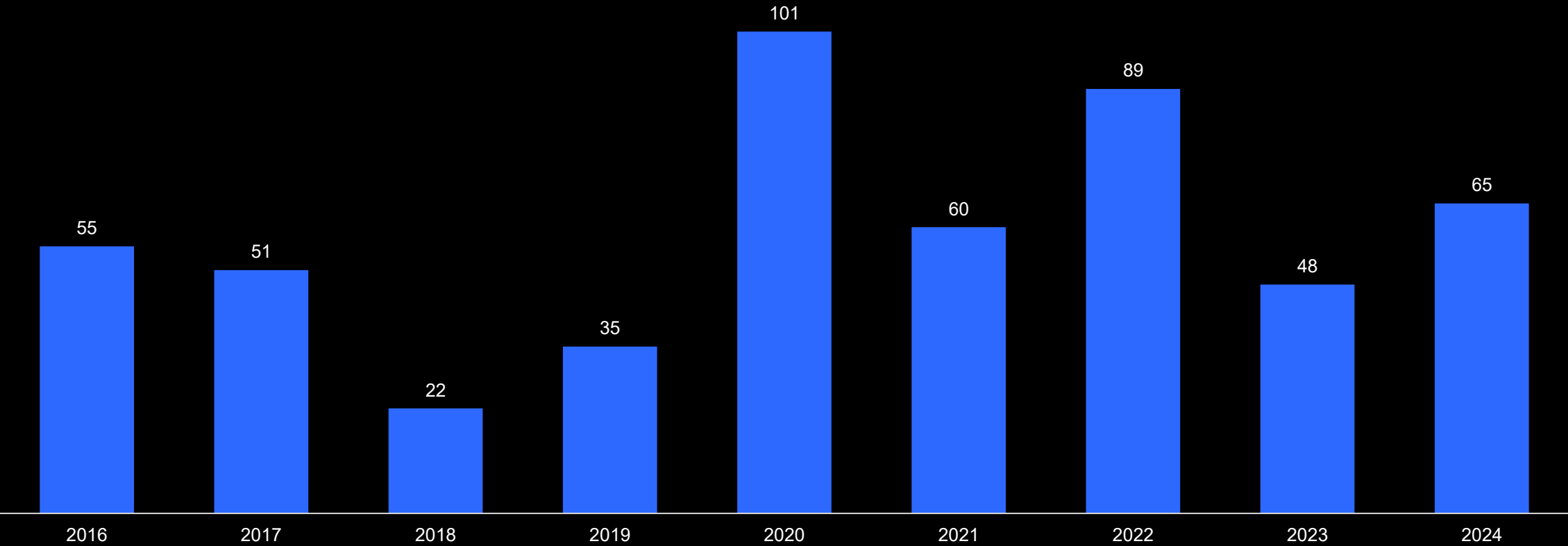
Two theories—

Plan fiduciaries cause participants to pay too much in fees for **plan administration**.

Plan fiduciaries offer **investments** in a 401(k) plan that are too expensive.



# Excessive Fee Litigation Since 2016



# Cases Concerning 401(k) Plan Forfeiture Accounts

Plaintiffs allege that defendants violate ERISA by **using 401(k) forfeitures to reduce company contribution costs**, as opposed to defraying plan administrative expenses for participants.



**Honeywell**



**intuit**



# Cases Concerning 401(k) Plan Forfeiture Accounts

*Perez-Cruet v.  
Qualcomm (S.D. Cal.)*

*Hutchins v. HP Inc.  
(N.D. Cal.)*

The district courts **initially divided** on the viability of plaintiffs' theory.

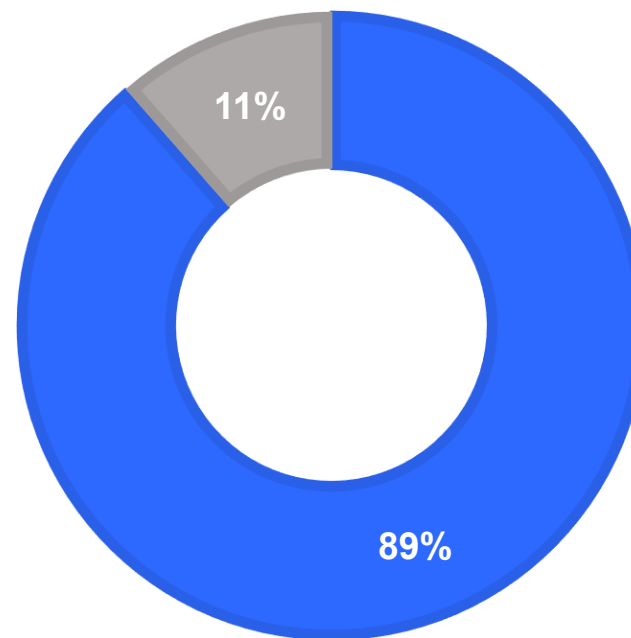
- In *Perez-Cruet*, the U.S. District Court for the Southern District of California denied defendants' motion to dismiss based on allegations that defendants put their own interests over those of plan participants.
- In *Hutchins*, the U.S. District Court for the Northern District of California granted defendants' motion, finding:
  - defendants **undisputedly complied with the plan's terms**, which allowed use of forfeitures to offset employer contributions; and,
  - the plaintiff was **not entitled to the payment of administrative costs** under ERISA.

## Cases Concerning 401(k) Plan Forfeiture Accounts

Majority of courts now **rejecting** plaintiffs' theory

OUTCOMES OF FIRST 35 CASES TO REACH  
DECISIONS ON MOTIONS TO DISMISS

■ Motion Granted ■ Motion Denied



**Eight cases** now on appeal to Third, Fourth, Sixth, Eighth and Ninth circuit courts

# Tobacco Surcharge Litigation

- Plaintiffs allege that **surcharges added to tobacco users' health care premiums** are not compliant with federal laws such as ERISA, the Affordable Care Act (ACA), and the Health Insurance Portability and Accountability Act (HIPAA).
- Early decisions suggest courts may allow at least some of plaintiffs' claims to **proceed to discovery**.
- Concern that wellness programs do not allow participants to **recoup all fees**, including those paid before participating in a cessation program.
- Some cases have settled with per capita amounts ranging from **~\$300 - \$600 per class member**.

# **VOLUNTARY INSURANCE BENEFIT LITIGATION**

02

# Voluntary Insurance Benefit Litigation

- New wave of lawsuits filed in **December 2025** target plans offering **voluntary insurance benefits** (life, AD&D, disability, supplemental health), alleging fiduciary breach claims of imprudent selection, excessive premiums, hidden commissions, and failure to monitor insurers and intermediaries.
- Plaintiffs argue plan sponsors exercise discretionary control over **vendor selection, pricing structures, and ongoing oversight**—triggering fiduciary duties under ERISA §§ 404 and 406.
- Claims also target **plan advisors and brokers**.
- Cases filed in late **December 2025**. Courts have yet to weigh in on the viability of plaintiffs' theory.

# PROHIBITED TRANSACTION CLAIMS *POST-CUNNINGHAM*

03

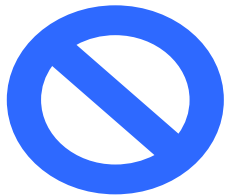


# Prohibited Transaction Provisions

## ERISA §§ 402, 406, and 408

### § 406(a)(1)(C)

Prohibits plan fiduciaries from involving plans and assets in certain kinds of business deals including a prohibition against the “**furnishing of goods, services, or facilities**” between a plan and a “party in interest”



### § 402(14)(B)

A “**party in interest**” of an employee benefit plan includes a “person providing services to such plan”



### § 408(b)(2)

Certain transactions are **exempt** if (1) the arrangement is **reasonable**; (2) the services are **necessary** for the operation of the plan; and (3) no more than **reasonable compensation** is paid for the services



# *Cunningham v. Cornell Univ.*

**Issue presented:** Can a plaintiff state a claim under ERISA's provision prohibiting a plan fiduciary from knowingly engaging in transactions with barred parties, **solely by alleging that such a transaction took place?**

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In the Supreme Court of the United States

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CASEY CUNNINGHAM, ET AL.,  
PETITIONERS,

*v.*

CORNELL UNIVERSITY, ET AL.,  
RESPONDENTS.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE U.S. COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

# Cunningham v. Cornell Univ.

## SUPREME COURT OF THE UNITED STATES

No. 23–1007

CASEY CUNNINGHAM, ET AL., PETITIONERS  
v. CORNELL UNIVERSITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[April 17, 2025]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. §1001 *et seq.*, prohibits ERISA plan fiduciaries from causing a plan to enter into certain transactions with parties in interest. §1106. A separate part of the statute, §1108(b)(2)(A), exempts from §1106’s prohibitions any transaction that involves “[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.” The question presented is whether, to state a claim under §1106, a plaintiff must plead that §1108(b)(2)(A) does not apply to an alleged transaction between a plan and a party in interest. The answer is no. The Court holds that §1108 sets out affirmative defenses, so it is defendant fiduciaries who bear the burden of pleading and proving that a §1108 exemption applies to an otherwise prohibited transaction under §1106.

# *Cunningham v. Cornell Univ.*

The Justices recognized the “untoward practical results” of loosening the pleading standard for prohibited transaction claims, and pointed to “**safeguards**” that courts can use to “**screen out meritless claims before discovery.**”

- Requiring plaintiffs to file a reply to an answer under Federal Rule of Civil Procedure 7, “putting forward specific nonconclusory factual allegations” showing that the § 408 exemptions do not apply.
- Dismissal of suits where plaintiffs do not plausibly allege a concrete injury sufficient to establish Article III standing.
- Exercising discretionary authority to “expedite or limit discovery as necessary to mitigate unnecessary costs.”
- Application of Rule 11 sanctions against parties who lack a good faith basis for their claims.
- Cost shifting under ERISA § 502(g)(1).

## *Cunningham v. Cornell Univ.*

Early decisions suggest courts engaging with **standing/injury** as a first-line screen:

- **Collins v. Ne. Grocery LLC**, No. 24-2339 (2d Cir. Aug. 18, 2025)—Although vacating dismissal a § 406(a) count concerning allegedly excessive fees, the Second Circuit separately held plaintiffs must plausibly allege a **concrete, individualized financial injury** to pursue monetary relief.
- **Taylor v. BDO U.S., P.C.**, No. 1:25-cv-10128 (D. Mass. Aug. 21, 2025)—district court granted motion to dismiss, finding plaintiff failed to plausibly plead an injury stemming from ESOP transaction.

# ISSUES ON THE HORIZON:

## ESG REGULATIONS & PRIVATE EQUITY IN 401(K) PLANS

04



# Department of Labor **ESG** Regulations

- In 2020, the first Trump Administration **issued a final rule** that required plan fiduciaries to select investments and make investment decisions **based solely on consideration of pecuniary factors**.
- The Biden DOL **rescinded the Trump-era rule** in 2022 and issued its own final rule.
- The **2022 Rule** omitted proposed language suggesting that evaluating an investment **“may often require”** fiduciaries to account for ESG factors.
- This omission clarified that the 2022 Rule **does not mandate consideration of ESG factors** in all investment decisions or favor ESG investment.
- Under 2022 Rule, **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.
- Trump Administration has indicated it may **rescind the 2022 Rule**.

# Department of Labor **ESG** Regulations



U.S. Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Ave. NW  
Washington, DC 20530

Tel: (202) 305-8849

May 28, 2025

Via CM/ECF

Lyle W. Cayce, Clerk of Court  
U.S. Court of Appeals for the Fifth Circuit  
F. Edward Hebert Building  
600 South Maestri Place  
New Orleans, LA 70130

RE: *Utab v. Chavez-DeRemer*, No. 23-11097

Dear Mr. Cayce:

On April 25, the government informed the Court that the Department of Labor had determined that it intended to reconsider the rule that is challenged in this case, including by considering whether to rescind the rule. On April 28, the Court directed the government to inform the Court “what specific actions the Department will take, if any, as a result of its reconsideration of the challenged rule—either to maintain the rule or to rescind it.”

This letter responds to that directive. The Department has determined that it will engage in a new rulemaking on the subject of the challenged rule. This rulemaking will appear on the Department’s Spring Regulatory Agenda, and the Department intends to move through the rulemaking process as expeditiously as possible.

Sincerely,

/s/ Daniel Winik  
Daniel Winik

## Alternative Assets in 401(k) Plans

- On August 7, 2025, President Trump issued an Executive Order (EO) directing federal agencies to **expand access to private equity and other alternative investments** in 401(k) and other defined-contribution plans.
- Includes **direct and indirect investments in equity, debt, or other financial instruments** that are not traded on public exchanges, including real estate.
- On September 23, 2025, **DOL issued advisory opinion 2025-04A** concluding that a lifetime income strategy program met the department's requirements to be a qualified default investment alternative under ERISA section 404(c)(5).
- Will see creation of new investment products—e.g., BlackRock has announced plans for a **target-date fund that includes private investments**.

# QUESTIONS?

# 05

# Additional Resources

- Gibson Dunn Client Alert, [U.S. Department of Labor Issues Guidance on Default Investments in Guaranteed Lifetime Income Products in Defined Contribution Plans](#) (October 16, 2025)
- Law360.com, [Gibson Dunn Lawyers Provide Overview of ERISA Pension Risk Transfer Litigation](#) (May 5, 2025)
- Gibson Dunn Client Alert, [The Supreme Court Clarifies Pleading Standards for ERISA Prohibited Transaction Claims](#) (April 25, 2025)
- Gibson Dunn Client Alert, [Dueling Court Rulings Offer Insight into ERISA Lawsuits Targeting Pension Risk Transfers](#) (April 18, 2025)
- Gibson Dunn Client Alert, [Updates on Tobacco Surcharge Class Action Litigation](#) (October 8, 2024)
- Law360.com, [Dueling Calif. Rulings Offer Insight On 401\(k\) Forfeiture Suits](#) (July 17, 2024)
- Gibson Dunn Client Alert, [Annual ERISA Litigation Review and Outlook – 2024](#) (June 18, 2024)

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