

HOW PLAN SPONSORS CAN AVOID U.S.-STYLE LAWSUITS OVER DC FEES

By *Sara Tatelman*

When staffers on the comedy show *Last Week Tonight* joined a new 401(k) plan, they were set to pay 1.69 per cent in administrative expenses, host John Oliver said in a June 2016 episode about retirement planning.

On top of that were broker fees, which were one per cent for the first year and 0.5 per cent after that. If each of the 35 employees contributed \$6,000 per year for 30 years, the show's researchers calculated, the broker alone would take in more than \$1 million.

"Think of fees like termites," Oliver said in the episode. "They're tiny, they're barely noticeable and they can eat away your fucking future."

Embarrassed, production company Avalon Television cut ties with, and paid all employees' fees to, both the plan provider and the broker. Staffers haven't sued, but if they do, Avalon will be in good company: Safeway Inc., Walmart Stores Inc. and Yale University are just some of the high-profile U.S. employers that have faced class action lawsuits for excessive 401(k) fees.

Canada has yet to see such lawsuits, partially because the defined contribution market in the United States is more mature, says Mark Firman, a pension lawyer in Toronto. But when that kind of litigation arrives, diligent employers shouldn't have a problem defending themselves.

"Canadian pension law is focused on process, not outcomes," says Firman. "Having a good process in place for identifying fees, disclosing them, doing what you can to ensure your members have preferential fees and documenting your actions can create a full legal defence, irrespective of whether you succeed in getting a discount at all."

There isn't a prescribed frequency at which plan sponsors must renegotiate fees, although Firman

suggests an annual review, if not each time the plan adds or removes a new investment option.


Plan sponsors should also be up front about exactly which fees apply to which services and how they'll erode the account balance over time, says Firman, adding that while employers need to make the information clear and available, they don't have to quiz employees to make sure they're up to speed.

In the United States, many employers facing fee-based lawsuits have settled because they couldn't show they'd done the necessary diligence in selecting investment options for their staff, says Paul Litner, a partner at Osler Hoskin & Harcourt LLP.

An exception, he says, is the recent dismissal — with leave to amend — of a class action by employees of Chevron Corp. Phyllis Hamilton, chief judge for the U.S. District Court in Oakland, Calif., ruled plan sponsors could consider factors other than price when selecting retirement investment options.

"In particular, where, as here, a plan offers a diversified array of investment options, the fact that some other funds might offer lower expense ratios is not relevant, as [the Employee Retirement Income Security Act] does not require fiduciaries to 'scour the market to find and offer the cheapest possible funds (which might, of course, be plagued by other problems),' " wrote Hamilton. While the plaintiffs have since amended the claim, none of the allegations have been proven in court.

The ruling shows an employer's 401(k) choices don't have to be perfect, says Litner. "It's a question of judging whether the decision they took at the time was reasonable, based upon the diligence they did, the facts that were known at the time."

Janice Holman, a principal at Eckler Ltd., agrees. "As long as [an employer] can justify through their due diligence that the fund offers value for the fee that it charges, whether that be through enhanced returns, reduced risk, access to an asset class or sector of the market that's not available elsewhere, I think that's fine to offer a fund that's a little bit more expensive." 

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A LOOK AT THE CASE AGAINST CHEVRON

\$19 billion

Assets in the Chevron employee savings investment plan

40,000

Number of participants with account balances in the plan



31

Number of investment options available in Chevron's 401(k) plan as of Dec. 31, 2014

\$20 million

Amount the plaintiffs allege plan members lost in retirement savings through "unnecessary expenses"

Source: Amended statement of claim in *Charles E. White v. Chevron Corp.*