



# Tides Have Turned: 4 Key Takeaways for Employers as Labor Department Clears Way for ESG-Focused Investment Options

Insights

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The tides can turn quickly in the world of workplace law, and employers who operate as plan fiduciaries for their employees' retirement investments can now shift their thinking thanks to the latest development. While the Department of Labor opined just two years ago that considering environmental, social, or governance (ESG) factors in making plan investment decisions was unlikely to ever be consistent with ERISA fiduciary duties, the agency just issued a new rule on November 22 that changes the equation. After a flood of opposition, a presidential election, and a tidal wave of public comments, the DOL reevaluated its position and provided much needed clarity with the new rule. Specifically, it allows ESG to play an important role in selecting between otherwise financially prudent investment options. Further, the rule confirms that plan fiduciaries can properly consider participant requests to have socially conscious investment options. What are the four key takeaways you need to know about the latest development?

## New Rule Provides Crucial Guidance

The new guidance provides the following examples of ESG-related factors that can be taken into consideration by plan fiduciaries without running afoul of compliance rules.

- climate-related factors, such as a corporation's exposure to the real and potential economic effects of climate change;
- the impact on the company operations resulting from government climate change mitigation regulations and policies;
- corporate governance practices including board composition, executive compensation, transparency, and accountability;
- a corporation's avoidance of criminal liability;
- a company's compliance with labor, employment, environmental, tax, and other applicable laws;
- an organization's workforce diversity initiatives; and
- the entity's general labor relations and workforce practices.

## 4 Takeaways to Keep in Mind

The four most significant takeaways for plan fiduciaries from this new rule are the following:

1. You can confidently incorporate appropriate consideration of ESG into your investment selection process.
2. However, you must continue to focus first on relevant risk-return factors. The rules provide that ESG considerations should never result in sacrificed investment returns or increased investment risks.
3. Your investment lineup should be reviewed under the guidance of a trusted investment advisor on a regular basis – at least quarterly.
4. You should document a deliberate decision-making process as you choose your investment options. This remains key to a successful defense against fiduciary breach claims. Your investment committee meeting minutes should detail why and how the investment option was selected and include a comprehensive investment analysis of each option you considered.

## **Conclusion**

We will continue to monitor developments and provide updates as events warrant. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Benefits and Tax Practice Group.

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