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**NATIONALLY-RECOGNIZED.** Our attorneys serve as officers and governing board members to the country's premier employee benefits industry associations, and routinely write for their publications and speak at their conferences.

## TRUCKER ♦ HUSS

A PROFESSIONAL CORPORATION  
ERISA AND EMPLOYEE  
BENEFITS ATTORNEYS

135 Main Street, 9th Floor  
San Francisco, California 94105-1815

15760 Ventura Blvd, Suite 910  
Los Angeles, California 91436-2964

329 NE Couch St., Suite 200  
Portland, Oregon 97232-1332

Tel: (415) 788-3111  
Fax: (415) 421-2017  
Email: [info@truckerhuss.com](mailto:info@truckerhuss.com)  
[www.truckerhuss.com](http://www.truckerhuss.com)

## Rash of Recent Lawsuits Focus on BlackRock Indexed Target Date Options: Even Low-Cost Funds Are Being Attacked

DYLAN RUDOLPH and  
JOSEPH FAUCHER

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Over the past several weeks, a single law firm, Miller Shah, LLP, has filed nearly a dozen lawsuits against fiduciaries of defined contribution plans that offer the BlackRock LifePath Index target date funds ("BlackRock Funds"). The cases represent a shift in approach relative to earlier waves of ERISA litigation. While cases in this area have largely targeted investment options that plaintiffs claimed were overpriced "actively managed" funds, the BlackRock Funds are passively managed funds tied to mutual fund indices, and, as a result, carry lower overall expense ratios relative to their actively managed cousins.



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## Trucker ♦ Huss Director Mary Powell Inducted as a Fellow of the American College of Employee Benefits Counsel



*From left:  
Charles Storke,  
Mary Powell  
and Brad Huss*

**Trucker Huss, APC is pleased to announce Director Mary Powell was inducted by the Board of Governors of the American College of Employee Benefits Counsel (ACEBC) as a Fellow in the College at the College's Annual Dinner held at the Chicago Club (Chicago, IL) on September 17, 2022.**

The ACEBC is an invitation-only organization of nationally recognized employee benefits legal experts with twenty or more years of experience. Selection as a Fellow reflects the Board's judgment that a nominee has made significant contributions to the advancement of the employee benefits field.

[Mary Powell](#) has over two decades of experience in all aspects of employee benefits, and is lauded by Chambers as having "exceptional client management skills" and a "very diligent and detail-oriented" approach.

What has become colloquially known as "excessive fee" litigation has proven to be both stubbornly persistent and consistently evolving; in fact, that name itself may need to be revisited now that even low-cost indexed funds are in the plaintiffs' crosshairs. For almost two decades, these "excessive fee" lawsuits have been filed against fiduciaries of defined contribution plans throughout the country, asserting that plan fiduciaries selected investment options which were both overpriced and poorly performing, among other claims. One frequently repeated theory of liability in those cases was that actively managed investment funds did not perform well enough to justify their

higher investment management fees (as compared to passively managed funds) and, therefore, should have been removed from a plan's investment lineup.

### Target Date Investment Options

The BlackRock Funds are target date investment options, which "target" a participant's anticipated retirement year and adjust the risk/reward strategy of their underlying investments based on a participant's proximity to that retirement year. Where a target date fund uses an indexed strategy, as the BlackRock Funds do, the underlying

investments track market indices based on investment type, such as large cap growth, large cap value, small cap growth, small cap value, etc. These types of funds are designed to track the market generally, rather than attempt to outperform the market based on complex financial assessments — as so-called “actively managed” funds do. The additional complexity associated with active management typically comes at a comparatively higher price.

Under a traditional target date model, a participant’s retirement assets are invested in riskier underlying investments, like equities, the farther away they are from their target retirement year (i.e., early in their career). The thinking is that participants can tolerate more risk when they are younger, which hopefully results in greater returns. Then, as participants approach retirement, the underlying investments in their chosen fund move gradually toward lower risk investments, like fixed income bond funds, because the low-risk investments are safer and in line with the lower risk tolerance of a participant who is near retirement.

The path on which the underlying investments move from riskier to safer investments is called the “glidepath.” Some funds adopt a more conservative “to retirement” glidepath, which runs “to” the target retirement year. Other funds are managed on a “through” glidepath, which runs “through” the retirement year and continues to adjust risk/reward strategies past a participant’s retirement and through the investor’s anticipated lifetime. The thinking with a “through” glidepath is that participants may have some risk tolerance after retirement to look for potential higher returns in the years after they retire (especially since participants are, on average, living longer than in the past).

When these two variations of target date funds are compared based on performance alone, a “through” glidepath fund may generate increased returns over a fixed time period because they will have more high risk/reward funds for a longer time period than a “to” glidepath fund. That is especially possible when both funds have underlying investments that track market indexes, as the BlackRock Funds do, and the time period at issue is a period of positive market performance. That calculus would change during a period of a market downturn.

## Recent Cases Targeting the BlackRock Funds

In these recent cases targeting the BlackRock Funds, the plaintiffs claim that plan fiduciaries breached their fiduciary duties by offering the BlackRock Funds as an investment option and, commonly, making the BlackRock Funds the Plan’s “Qualified Default Investment Alternative” (QDIA). A QDIA is an investment in which participants’ assets are invested by “default” if they do not specify how they want their assets invested. The majority of the allegations in these cases are nearly identical.

To support their claims, the plaintiffs allege that the BlackRock Funds performed worse than other mutual fund target date alternatives in the market during the relevant period. In their complaints, the plaintiffs present a host of performance data, which they claim tracks the performance of the BlackRock Funds relative to supposed “comparator” funds for different time periods. They further claim that the BlackRock Funds used risk allocation strategies (i.e., a “to” glidepath) that made the BlackRock Funds perform worse than the other target date investments employing a “through” retirement philosophy during fixed periods of time.

The claims in these cases are atypical of claims usually asserted by ERISA plaintiffs because the allegations in the BlackRock cases are focused on *performance* alone, and not the funds’ cost. Further, because the primary focus of previous plaintiffs has been on the investment options’ costs, the focal point of litigation has traditionally been actively managed investment options and the claim that the options were overly priced, in addition to being poorly performing. The complaints in the BlackRock cases appear to concede that the passively managed BlackRock Funds were not overpriced.

These claims have not yet been tested through motion practice, and we will need to wait to see whether courts find them plausible. Aside from apparent contradictions between claims targeting *low-cost* investments vs. the typical claims in this area which attack cost, these cases ask courts to find that the BlackRock Funds were imprudent *per se*. Such a finding would impact nearly 10% of the market for target date options, by the plaintiffs’ own admissions, and finding that plan fiduciaries breached

their duties by merely including such a popular option would be an extreme result.

While it remains to be seen whether cases targeting fiduciaries that selected BlackRock Funds as plan investment options will survive scrutiny, plan committees and other fiduciaries should still take note and guide their decision-making accordingly. What was true before remains true now: the law does not require fiduciaries to be prescient. Rather, it requires them to carry out their duties prudently, and to engage in an appropriate process in deciding what investments to offer their plan participants. Demonstrating

a prudent process almost always means asking appropriate questions, getting answers to those questions, and documenting the process along the way. Fiduciaries should not assume that selecting low-cost passively managed investment options will insulate them from liability. Instead, they should assume that *any* investment decision they make could be challenged in court. Because no fiduciary can control how the markets will behave, they should always take pains to follow — and document — a scrupulous process in selecting and monitoring plan investments.

## Searching for Missing Retirement Plan Participants

BARBARA PLETCHER

SEPTEMBER 2022

Over the years, the Department of Labor (DOL), the Pension Benefit Guaranty Corporation (PBGC), and the Internal Revenue Service (IRS) have published guidance regarding acceptable methods of searching for missing participants in tax-qualified retirement plans governed by the Employee Retirement Income Security Act (ERISA). The Chart below is designed to highlight similarities and differences in the guidance provided by these agencies. In 2021 the DOL published subregulatory guidance (see Trucker Huss [“Missing Participants: The Search Continues”](#)), which includes what the DOL deems to be “best practices.” While awaiting additional formal guidance, plan fiduciaries should consider documenting the method(s) currently used to search for missing participants, how and why each method was selected, and results generated by the method(s) selected.



*The following search method “codes” are used in the Chart on pages 5 and 6:*

- Code “A”** = Use Certified Mail
- Code “B”** = Search records of (i) Company, (ii) plan, and (ii) related plan(s) such as life insurance
- Code “C”** = Use free search methods, such as social media and public data bases (e.g., tax records, real estate records and obituaries)
- Code “D”** = Use paid search methods, such as a commercial locator service or a credit reporting agency
- Code “E”** = Contact named beneficiary

GUIDANCE	Search Method(s) Referenced in Guidance (see codes on page 4)	COMMENTS
<p>1. <a href="#">DOL FAB 2014-01</a></p> <p>This Field Assistance Bulletin was prepared to address issues raised by terminating defined contribution plans.</p>	<p><b>A, B, C, D, E</b></p>	<p>Use methods coded as A, B, C, &amp; E. Then, if needed, and if cost is reasonable given the value of the account, use method coded as D.</p> <p>This FAB also states that “Plan fiduciaries must be able to demonstrate compliance with ERISA’s fiduciary standards for all decisions made to locate missing participants and distribute benefits on their behalf. If audited, plan fiduciaries could demonstrate compliance using paper or electronic records.”</p>
<p>2. <a href="#">Appendix 2 of PBGC Filing Instructions for PBGC-Insured Single Employer Defined Benefit Plans Terminating on or after January 1, 2018</a> (available on PBGC website pg. 17)</p> <p>See also <a href="#">PBGC Regulation 4050.104</a></p>	<p><b>B, C, D, E</b></p>	<p>PBGC defines “diligent search” for participants in terminating defined benefit plans as follows:</p> <p>OK to use only commercial locator service (coded as D above), regardless of size of benefit.</p> <p>OK to use only “records search” if participant’s benefit is \$50/month or less. “Records search” includes methods coded as B, C, and E, above.</p>
<p>3. <a href="#">Appendix 2 of Missing Participants Program Filing Instructions for Defined Contribution Plans Terminating on or after January 1, 2018</a> (available on PBGC website pg. 15)</p> <p>See also <a href="#">PBGC Regulation 4050.204</a></p>	<p><b>A, B, C, D, E</b></p>	<p>PBGC defines “diligent search” for participants in terminating defined contribution plans as follows:</p> <p>A diligent search is one that satisfies regulations and other applicable guidance issued by the Department of Labor under section 404 of ERISA.</p> <p>In footnotes to the Preamble of 2017 PBGC regulations, the PBGC has indicated that this definition currently refers to DOL FAB 2014-01 (item 1 of this Chart, above).</p> <p>See PBGC Missing Participant Regulations at 82 Fed. Reg. 60800, 60806 (Footnote 20) and 60822 (Footnote 26).</p>
<p>4. IRS Audit Guidelines <a href="#">IRM 4.71.1.4(15) 02-25-22</a></p> <p>(See also IRS Snapshot discussed in item 5, below)</p>	<p><b>A, B, C, D</b></p>	<p>Diligent search is defined to include all of (i), (ii) and (iii) below:</p> <p>(i) Search for alternate contact information (address, telephone, email, etc.) contained by plan, related plan, plan sponsor &amp; publicly available records or directories, and</p> <p>(ii) Use commercial locator service, credit reporting agency, or proprietary internet search tool, and</p> <p>(iii) Certified mail to last known address and any other alternate address found.</p>

*Chart continues on page 6*

GUIDANCE	Search Method(s) Referenced in Guidance (see codes on page 4)	COMMENTS
<p>5. IRS Issues Snapshot: <a href="#">“Minimum Distributions for Missing Participants and Beneficiaries of Retirement Plans”</a></p> <p>(See also IRS Audit Guidelines discussed above)</p>	<p><b>A, B, C, D</b></p>	<p>Snapshot confirms statement in IRS Audit Guidelines (see item 4 of this Chart, above) that if a recipient of a required minimum distribution cannot be located after a diligent search, failure to make the distribution will not cause the plan to be disqualified.</p>
<p>6. IRS Employee Plans Compliance Resolution System (EPCRS)</p> <p><a href="#">Section 6.02(5)(d) of IRS Revenue Procedure 2021-30</a> (pg. 34)</p>	<p><b>A, C, D</b></p>	<p>If initial mailing to last known address is unsuccessful, reasonable actions to locate missing individual include, but are not limited to, certified mail to last known address, and, if that is unsuccessful, an additional search method, such as a commercial locator service, a credit reporting agency, or Internet search tools. Depending on the facts and circumstances, the use of more than one of these additional search methods may be appropriate.</p> <p>This IRS Revenue Procedure specifically provides that “A Plan Sponsor will not be considered to have failed to correct a failure due to the inability to locate an individual if reasonable actions to locate the individual have been undertaken in accordance with this paragraph; provided that, if the individual is later located, the additional benefits are provided to the individual at that time.”</p>
<p>7. At a 2017 meeting of the ERISA Advisory Council, a DOL representative suggested two additional methods for locating missing individuals</p>		<p>The additional methods suggested were (i) soliciting updated contact information from co-workers of missing individuals, or (ii) contacting individuals using their last known cell phone number, since many individuals keep the same cell phone number after moving.</p> <p>Note: Contacting co-workers could raise privacy concerns.</p>
<p>8. DOL Publication entitled <a href="#">“Missing Participants — Best Practices for Pension Plans”</a> dated January 12, 2021</p>	<p><b>A, B, C, D, E</b></p>	<p>This publication restates methods described in items 1 through 7 of this Chart. In addition, it emphasizes ongoing maintenance of plan census information while the participant remains employed, and as part of the “exit processes for separating or retiring employees.”</p> <p>Practical communication strategies are included (e.g., “clearly marking envelopes and correspondence with the original plan or sponsor name for participants who separated before the plan or sponsor name changed”).</p> <p>The publication suggests use of the “National Registry of Unclaimed Retirement Benefits” and the “Social Security Death Index.”</p> <p>Also included is a disclaimer, which reads as follows:  “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.”</p>

## FIRM NEWS

On August 9, **Mary Powell** and **Sarah Kanter** presented a Trucker Huss Webinar: *Providing Benefits for Abortion Services Post-Dobbs — Ways to Protect the Plan Sponsor*. The webinar addressed issues that have arisen since plan sponsors began enhancing the abortion service benefits in their health plans.

On August 24, **Clarissa Kang**, **Angel Garrett** and **Dylan Rudolph** presented a Strafford Live Webinar on ERISA Class Action litigation entitled, *Defending ERISA Class Actions Amid an Evolving Litigation Landscape: Best Practices for Counsel and Fiduciaries*.

On August 24, **Mary Powell** spoke with host Jeff Hayden on KALW's weekly broadcast, *Your Legal Rights*. Mary's topic was *Abortion Services and Employee Health and Benefits Plans After Dobbs*. To listen to the program:

[www.kalw.org/show/your-legal-rights](http://www.kalw.org/show/your-legal-rights)

On September 29, Mary will speak at the ABA's 2022 Virtual Health and Welfare Benefit Plans National Institute on *Abortion and Abortion-Related Travel Post-Dobbs Benefits*.

On October 27, Mary will be speaking at the Western Pension & Benefits Council San Francisco Chapter Meeting on: *Providing Benefits on Abortion Services Post-Dobbs*. The event will be in-person.

On September 13, **Robert Gower** presented on the current ERISA fiduciary landscape at the 2022 Defined Contribution Institute in Half Moon Bay, California.

On September 27, Robert also presented a legislative update at the Retirement Plan Advisor Summit — West 2022 Conference in Los Angeles.

On October 11, **Angel Garrett** will speak at an ABA JCBE event: *Hot Topics In Health And Welfare Plan Litigation*. The panel will discuss the implications of *Dobbs v. Jackson Women's Health Organization*, new developments regarding fiduciary claims litigation, and updates on litigation involving COBRA and mental health parity, among other topics.

On October 19, **Sarah Kanter** will be speaking at the Practising Law Institute's "Applying ERISA Fiduciary Rules to Health Plans, Services and Products 2022" on a panel entitled *Fiduciary Implications in the Age of Transparency*. The panel will discuss the new regulatory framework and obligations required of plan sponsors and will review the timelines associated with each disclosure obligation.

On November 11, Sarah will speak at the ABA's 16th Annual Labor and Employment Law Conference. The panel, entitled *Roe v. Wade Overturned: A Morass of Employment Considerations Created by Dobbs. v. Women's Health Organization*, will discuss the challenges faced by employers seeking to support their employees' efforts to secure abortion health care and related services both in and out of benefit plans.

On November 3, at the Queen's Bench Past Presidents Dinner, **Clarissa Kang** will be receiving the Service Award for her work on the Queen's Bench Centennial Celebration. Trucker Huss will sponsor a table.

On November 11, Clarissa will be a moderator/panelist at the ABA's 16th Annual Section of Labor and Employment Law Conference in Washington, D.C. on a panel entitled, *Everything Employment Lawyers Need to Know About ERISA*.

Clarissa has been appointed to serve as a Representative on the ABA's Joint Committee on Employee Benefits from the Tort Trial and Insurance Practice Section (TIPS).

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The Trucker ♦ Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of Benefits Report are posted on the Trucker ♦ Huss web site ([www.truckerhuss.com](http://www.truckerhuss.com)).

Editor: Nicholas J. White, [nwhite@truckerhuss.com](mailto:nwhite@truckerhuss.com)

In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this Benefits Report.

**Adrine Adjemian**

aadjemian@truckerhuss.com  
415-277-8012

**Jahiz Noel Agard**

jagard@truckerhuss.com  
415-277-8022

**Mia Butzbaugh**

mbutzbaugh@truckerhuss.com  
415-277-8073

**Sarah Bowen**

sbowen@truckerhuss.com

**Nicolas D. Deguines**

ndeguines@truckerhuss.com  
415-277-8036

**Joseph C. Faucher**

jfaucher@truckerhuss.com  
213-537-1017

**J. Marc Fosse**

mfosse@truckerhuss.com  
415-277-8045

**Angel Garrett**

agarrett@truckerhuss.com  
415-277-8066

**Robert R. Gower**

rgower@truckerhuss.com  
415-277-8002

**R. Bradford Huss**

bhuss@truckerhuss.com  
415-277-8007

**Ryan Kadevari**

rkadevari@truckerhuss.com  
415-788-3111

**Clarissa A. Kang**

ckang@truckerhuss.com  
415-277-8014

**Sarah Kanter**

skanter@truckerhuss.com  
415-277-8053

**T. Katuri Kaye**

kkaye@truckerhuss.com  
415-788-3111

**Elizabeth L. Loh**

eloh@truckerhuss.com  
415-277-8056

**Brian D. Murray**

bmurray@truckerhuss.com  
213-537-1016

**Kevin E. Nolt**

knolt@truckerhuss.com  
415-277-8017

**Yatindra Pandya**

ypandya@truckerhuss.com  
415-277-8063

**Barbara P. Pletcher**

bpletcher@truckerhuss.com  
415-277-8040

**Mary E. Powell**

mpowell@truckerhuss.com  
415-277-8006

**Catherine L. Reagan**

creagan@truckerhuss.com  
415-277-8037

**Dylan D. Rudolph**

drudolph@truckerhuss.com  
415-277-8028

**Robert F. Schwartz**

rschwartz@truckerhuss.com  
415-277-8008

**Charles A. Storke**

cstorke@truckerhuss.com  
415-277-8018

**Joelle Tavan**

jtavan@truckerhuss.com  
415-277-8059

**Jennifer Truong**

jtruong@truckerhuss.com  
415-277-8072

**Nicholas J. White**

nwhite@truckerhuss.com  
415-277-8016

**PARALEGALS****Shannon Oliver**

soliver@truckerhuss.com  
415-277-8067

**Susan Quintanar**

squintanar@truckerhuss.com  
415-277-8069