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# The Ninth Circuit Rejects Plaintiffs' Challenge to 401(k) Investments in Private Equity

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On May 22, 2025, the Ninth Circuit affirmed a district court's decision to reject a class action lawsuit brought against fiduciaries of Intel defined contribution retirement plans that challenged the plan managers' decision to invest in hedge funds and private equity (PE) investments. In *Anderson v. Intel Corporation Investment Policy Committee*, the Ninth Circuit supported the DOL's position that offering PE investments as 401(k) investment options is not inconsistent with the fiduciary duties of ERISA.

The Ninth Circuit's decision is instructive to 401(k) plan fiduciaries who are considering investment options that include PE components. In particular, *Anderson* demonstrates that providing detailed disclosures about plan investments to plan participants can help to protect against fiduciary liability. Further, *Anderson* reinforces that claims about investment option performance should require identification of "meaningful benchmarks" of funds with similar risk and investment aims against which the investment option's performance should be measured.

**401(k) Private Equity Investments Background**

PE has long been a component of many defined benefit pension plan portfolios, but lately there has been a growing push to include PE components as part of investment options offered by 401(k) and other defined contribution retirement plans. Asset managers have made the case that PE components of investment options can benefit participants by providing diversification to improve investment returns and risk management. For example, asset managers like BlackRock and Empower recently touted PE investment opportunities for retirement plans.[1]

The Department of Labor (DOL) has issued guidance affirming that PE can potentially be a component of 401(k) plan investment options, but that fiduciaries should be mindful of the special risks that PE investments present. On June 3, 2020, the DOL issued an Information Letter that provided that 401(k) plan investment options could include a PE component and remain consistent with ERISA's fiduciary duties.[2] The Information Letter also discussed risks that plan fiduciaries should keep in mind: "private equity investments tend to involve more complex organizational structures and investment strategies, longer time horizons, and more complex, and typically, higher fees."[3] Further, when a plan offers an investment option with a PE component, fiduciaries should "determine whether plan participants will be furnished adequate information regarding the character and risks of the investment alternative to enable them to make an informed assessment regarding making or continuing an investment in the fund."[4]

The DOL later issued a Supplemental Statement in 2021, clarifying that the 2020 Information Letter did

not "endorse or recommend" PE investments and emphasized the PE investment risks discussed in the Information Letter.[5] The 2021 Supplemental Statement also provided context regarding the application of the 2020 Information Letter, explaining that PE investments for 401(k) plans may involve complex issues that require the plan fiduciaries and their advisors to have experience and expertise to navigate. The DOL cautioned PE investments in other contexts, stating that plan fiduciaries of "small, individual account plans are likely not suited to evaluate the use of PE investments." [6]

**Intel Plans' Use of Private Funds**

The Intel retirement plans were a forerunner in implementing PE fund and hedge fund investments as components in defined contribution investment options. The Intel plans began investing in PE following the financial crisis of 2008, during which many funds that relied more heavily on equity suffered significant losses.[7] To diversify the plans' portfolio of investments and mitigate risk moving forward, Intel's investment committee began increasing its assets held in PE, hedge funds, and commodities. [8] Intel informed its plan participants of its new investing strategy and warned participants that the resulting risk mitigation come at a cost: when market share prices are increasing, the hedge funds and PE funds "would not compare favorably to more equity-heavy funds during bull markets." [9] In 2019, plaintiffs brought a class action lawsuit under ERISA against Intel for a breach of the fiduciary duties of prudence and loyalty based on Intel's decision to invest in hedge funds and PE funds. [10]

The complaint alleged that the plans' investments in PE funds and hedge funds resulted in inferior performance and higher fees than comparable funds. The Ninth Circuit affirmed the dismissal of these claims, concluding that the plaintiff did not plausibly allege a breach of a fiduciary duty. The court found that Intel provided its plan participants with transparent disclosures regarding the investments and the plaintiff failed to allege sufficient facts that funds with PE components were imprudent compared to other comparable investment options.

**Duty of Prudence**

*The Risks of PE*

While PE involves some special risks, such as liquidity risks and longer investment horizons, the court found that Intel fiduciaries did not act imprudently by making PE investments.[11] The court applied the modern portfolio theory as endorsed by the DOL, which prioritizes diversification to manage the individual risks of particular investments.[12] While the risks of a single investment may not be completely eliminated, diversification allows the whole fund to decrease its risk profile. In applying the modern portfolio theory, the court found that pointing the finger at the PE funds without considering how those funds affected the entire portfolio was insufficient to claim that the plan fiduciaries breached their duty of prudence.[13]

The court reasoned that an imprudence claim may be successful if the plaintiff could demonstrate that a plan invested much more a class of risky assets than other plans, but that the plaintiff in this case did not successfully make this argument.[14] Intel specifically identified and disclosed the hedge funds and PE funds it invested in, but the plaintiff did not identify adequate benchmarks for the Intel funds to

support the allegations of underperformance.[15]

*"Meaningful Benchmark" Comparison*

To make a plausible duty-of-prudence claim, the Ninth Circuit found that the plaintiff must provide a "meaningful benchmark" to compare to the plaintiff's 401(k) funds. [16] The purpose of the "meaningful benchmark" requirement is to allow the court to compare the plan at issue with similar plans to determine whether the plan was mismanaged. For a comparable fund to be considered a "meaningful benchmark," it must have similar "aims, risks and potential rewards." [17] This requirement ensures proper comparison of plans and avoids "apples and oranges" comparisons. [18]

Although Intel developed its own benchmarks and disclosed them to the plan participants and beneficiaries, the plaintiff in *Anderson* used different benchmarks to compare to the fund's performance. Intel's benchmarks consisted of benchmarks for each asset class included in the plan funds. [19] Intel explained that the benchmarks were chosen because they had the same asset allocation as Intel's target asset allocation.[20] However, the plaintiff sought to compare the plan's funds to retail funds that were equity-heavy and focused on different goals like revenue generation.[21] Because the plaintiff had access to the benchmarks Intel provided and the plaintiff proposed benchmarks that were not truly comparable, the court rejected the plaintiff's benchmarks and the argument that Intel breached its duty of prudence based on performance levels compared to other funds.[22]

*Higher Fees*

The plaintiffs also alleged that the plan's investment in PE and hedge funds led to higher-than-average fees.[23] However, the court found that the plaintiff's attempt to compare Intel's fees to lower fees for a different kind of fund that did not have the same risk-mitigating objective was insufficient to prove that the plans' PE investments were imprudent. [24]

*Participant Disclosures Regarding Plan Investments*

The *Anderson* decision shows that providing appropriate disclosures about plan investments can protect fiduciaries from liability. Since many plaintiffs in ERISA cases may not be knowledgeable about appropriate comparators, the Ninth Circuit suggested that plaintiffs should look to the summary plan descriptions and annual reports, which contain disclosures required by ERISA regarding how the fiduciary invested the plan's assets. The court pointed out that these disclosures give prospective plaintiffs the opportunity to see how the plan invested its assets and form an argument for how a prudent fiduciary would have acted differently.[25] The plaintiff was not able to make such a showing. Intel provided detailed information to the plan participants and beneficiaries, including which hedge funds and PE funds the plan invested in.[26] Instead of using the information Intel provided, the plaintiff made more general arguments about the riskiness and costliness of hedge funds and PE funds.[27]

Because Intel provided extensive disclosures and the plaintiff did not effectively use the information available to him, the Ninth Circuit found that the plaintiff failed to state a claim for a breach of the fiduciary duty of prudence.[28]

**Duty of Loyalty**

The *Anderson* plaintiff also alleged that the plan managers breached their duty of loyalty by creating a possible conflict of interest through Intel's investments in certain hedge funds and PE funds. [29] The plaintiff argued that these investments could potentially benefit Intel Capital, a venture capital arm of Intel.[30] The district court and the Ninth Circuit rejected this claim.[31] Both courts dismissed the claim, because ERISA plaintiffs must allege a real conflict of interest, not the possibility of one.[32]

Additionally, the plaintiff alleged that the Investment Committee breached its duty of loyalty by failing to sufficiently monitor the performance and fees of the funds.[33] The district court found that this fell under the plaintiff's breach of prudence allegation and could not be "repackaged" as a duty of loyalty claim.[34] The Ninth Circuit did not consider this allegation separately and only considered the potential conflict-of-interest issue.

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[1] Letter from Larry Fink, Chairman and Chief Exec. Officer, BlackRock, Inc., Larry Fink's 2025 Annual Chairman's Letter to Investors (March 31, 2025), https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter#unlocking-private-markets; Press Release, Empower Annuity Insurance Co. Am., Empower to Offer Private Markets Investments to Retirement Plans (May 14, 2025), https://www.empower.com/press-center/empower-offer-private-markets-investments-retirement-plans.

[2] Department of Labor, Information Letter 06-03-2020, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.

[3] *Id.*

[4] *Id*.

[5] U.S. Department of Labor Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives (Dec. 21, 2021), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.

[6] *Id.*

[7] Anderson v. Intel Corp. Inv. Pol'y Comm., No. 19-CV-04618, 2021 WL 229235 at *2 (N.D. Cal. Jan. 21, 2021).

[8] *Id.* at *2–3.

[9] *Anderson*, 2025 WL 1463295, at *2.

[10] *Id.*

[11] *Id.* at *7.

[12] *Id.* at *6.

[13] *Id.*

[14] *Id.* at *7.

[15] *Id.*

[16] *Id.*

[17] Anderson v. Intel Corp. Inv. Pol'y Comm., 579 F. Supp. 3d 1133, 1148 (N.D. Cal. 2022).

[18] *Id.*

[19] *Anderson*, 2025 WL 1463295, at *5.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Anderson*, 2021 WL 229235 at *3.

[24] *Anderson*, 2025 WL 1463295, at *6.

[25] *Id.*

[26] *Id.* at *7.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at *8.

[31] *Id.*

[32] *Id.*

[33] *Anderson*, 2021 WL 229235 at *13.

[34] *Id.*