

Erin Weber Discusses Fund Benchmarking in 401(k) Litigation with *Bloomberg Law*

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Winston & Strawn partner Erin Weber was quoted in a *Bloomberg Law* article discussing the importance of benchmarking funds in 401(k) fee litigation. Differences have emerged in how carefully judges scrutinize the comparisons made between a specific plan's fees and investments and the alternatives held up as better options. Some courts have rejected challenges that lacked detailed comparisons to funds with similar strategies, objectives, and risk profiles, while others have allowed cases to advance without looking closely at benchmarks.

Plaintiffs' attorneys have argued that courts should not require detailed benchmarking at the motion to dismiss stage because some information about a plan's funds may not be readily available. However, if they're willing to put some work into it, attorneys bringing 401(k) challenges can learn a lot about a plan's funds and how they stack up against similar alternatives, Erin said.

"These are things that with a little bit of work can be determined pretty easily," she said.

The courts that apply more scrutiny to 401(k) benchmarks may be trying to tamp down on the flood of "cookie-cutter" complaints that challenge investments using "practically word-for-word" language, Erin said.

"I think it's become apparent at least to some courts and appellate courts that there needs to be some kind of real analysis and work that has to go into these complaints in order for them to survive," she said.

[Read the full article.](#)

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