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Practice Update

Universities: Growing Concern With Explosion of Retirement Plan Fee-Related Lawsuits

August 23, 2016

By Beth Alcalde

In a concerning development for universities and other institutions of higher learning nationwide, a growing number of schools, including Massachusetts Institute of Technology, New York University, Yale University, Johns Hopkins University, Emory University, and Duke University, among others, now find themselves defendants in costly employee benefit plan litigation.

Within the last month, these institutions have faced possible class action lawsuits alleging that the fiduciaries within each university who were personally charged with acting on behalf of and otherwise protecting each universities' retirement plan participants had breached those duties. Specifically, the breaches are alleged under the Employee Retirement Income Security Act (ERISA), and are rooted in allegations that the plan sponsors did not act consistent with ERISA's requirements to monitor and reduce excessive fees that were allegedly charged to plan participants. In some cases, the fiduciaries are said to have selected and then failed to remove from the investment menu a number of poor-performing and/or high-cost investment options. Other allegations involve retirement plan service providers offering duplicative or unnecessary services. The suits claim

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that university plan sponsors too-eagerly and without appropriate ongoing oversight accepted and paid for the services of multiple plan record-keepers, administrators, or outside advisors from plan assets, thus financially harming their plan participants.

The type of retirement plans within all these cases are Code Section 403(b) plans. Section 403(b) plans are very similar to the better-known Section 401(k) plans. Both are defined contribution plans, meaning that neither is a traditional "pension" that offers a guaranteed formulaic benefit. 403(b) retirement plans are commonly offered by public schools, hospitals, and not-for-profit corporations as a way for eligible employees to make pre-tax salary deferrals for retirement savings. The reason that private universities are often swept into the 403(b) plan mix is by operating under nonprofit status.

While it is true that 403(b) plan rules and regulations are not identical to those governing 401(k) plans, the same ERISA fiduciary duties apply in these cases. Given that 403(b) plans have – taken as a whole and as a practical matter – not been subjected to the same level of historic Department of Labor scrutiny as have 401(k) plans, and often include annuity investment options that may include onerous surrender charges, plaintiff's counsel in these recent cases have seized an opportunity to protect plan participants by attacking what they perceive to be abusively high fees.

Plan fiduciaries in this space are well advised to act promptly to minimize their risk of facing similar litigation, and if a lawsuit does in fact arise, to position themselves in the strongest possible posture. For example, 403(b) plan fiduciaries should conduct a prompt, thorough, and documented review of the reasonableness and prudence of all the plan's fee and service arrangements with any outside plan service providers. Transparent, complete, and accurate plan participant communications can be an effective tool for concerned plan sponsors to allay the type of fear and

mistrust that often serves as the environment that gives rise to class actions of this type.

Akerman's Employee Benefits and Executive Compensation Practice Group is available to answer any questions on this line of cases or to advise university 403(b) plan fiduciaries in their ongoing retirement plan compliance needs.
