Law Firm Sues Many Private Universities for ERISA Violations, Alleging Breach of Duties Causing Excessive 403(b) Retirement Plan Fees

During August, at least a dozen lawsuits were filed against private universities alleging that they have breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") in the way they administer their 403(b) retirement plans,[1] causing faculty, staff and retirees to be charged excessive fees.[2] The vast majority of these lawsuits were filed by the same St. Louis-based law firm, which has a long history of suing corporate employers with claims that they allowed their employees to be overcharged for fees associated with their 401(k) retirement plans.[3]

Last year, the United States Supreme Court ruled that employers, as plan fiduciaries, have a continuing duty to monitor the investment options offered to their retirement plan participants and to remove imprudent ones. The plaintiffs there were represented by the law firm that filed the bulk of the cases against universities last month.[4]

All the cases have been filed as class actions, meaning that the law firm seeks to include as plaintiffs all of an institution's faculty, staff and retirees who are plan participants. The complaints generally attack rather common 403(b) plan investment practices and plan design features, asserting that the plans pay too much for recordkeeping services; that the plans offer investment options with unnecessarily high expenses, sometimes coupled with historically poor performance; that the plans offer too many investment options, thereby confusing participants and contributing to the high expenses; and that the universities have not adequately supervised the individuals or committees charged with making decisions regarding the plans.

ERISA is the federal law that establishes the fiduciary duties and other rules applicable to the administration of employee benefit plans, other than church and governmental plans (many of which are subject to state fiduciary laws or other rules applicable to plan investments).

According to the U.S. Department of Labor ("DOL"), which enforces ERISA, fiduciaries must act prudently and in the best interest of participants in deciding what investment options to offer to participants, and in hiring record keepers and other service-providers for the plan. Many of the 401(k) plan lawsuits the plaintiffs' law firm filed in the past against corporate plan sponsors have settled (some for tens of millions of dollars, reportedly[5]), but some have resulted in published decisions. Those decisions generally focus more on the process for selecting investment options than on the selections themselves. For example, one federal court of appeals criticized a fiduciary's complete failure to investigate or have its consultant investigate whether lower-cost share classes

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were available, noting that its conclusion might have been different if there had been a "prudent process" for considering those classes.[6] Another federal court of appeals warned against judging fiduciaries' choices of investment options on the basis of hindsight.[7] This focus on process is consistent with other case law regarding ERISA fiduciary duties and is likely to guide the courts as they deal with this new round of lawsuits.

Approximately five years ago, the DOL increased the amount of information plans must provide to participants about fees charged to their accounts and fees associated with different investment options. While such disclosures have made it easier for participants to choose among options, the disclosures also potentially make lawsuits that challenge such fees easier to bring.

It seems likely that more similar lawsuits will be filed. Colleges and universities may wish to assure that their counsel and plan fiduciaries (often an administrative or investment committee) discuss their own situations with qualified ERISA advisors as they consider what impact, if any, the recent lawsuits could have on them and the retirement plans they administer.

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[1] A *403(b)* plan is a retirement plan that may be available to employees of private educational institutions and other non-profit institutions, as well as some public educational institutions. See https://www.irs.gov/publications/p571/ch01.html

[2] Suits have been reported against Columbia, Cornell**,** Duke, Emory, Johns Hopkins, New York University, Northwestern, Massachusetts Institute of Technology, University of Pennsylvania, University of Southern California, Vanderbilt and Yale.

[3] A 401(k) plan is an employer-sponsored qualified profit-sharing plan that allows employees to contribute a portion of their wages to individual retirement accounts. See https://www.irs.gov/retirement-plans/401k-plans

[4] *Tibble v. Edison International*, 135 S. Ct. 1823 (2015). See https://www.supremecourt.gov/opinions/14pdf/13-550_97be.pdf

[5] As reported in *The New York Times*: "Some of the more prominent cases against 401(k) plans settled by Mr. Schlichter include a $62 million settlement against Lockheed Martin, $57 million from Boeing and $27.5 million from Ameriprise, all in 2015. He also settled cases with Cigna, International Paper, Caterpillar, General Dynamics, Bechtel and Kraft."

[6] *Tibble is: Tibble v. Edison International*, 711 F.3d 1061 (9th Cir. 2013), as amended, 729 F.3d 1110 (9th Cir. 2013), http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/01/10-56406.pdf

[7] *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), http://media.ca8.uscourts.gov/opndir/14/03/122056P.pdf