ARE LAWSUITS AGAINST TOP PRIVATE UNIVERSITIES' 403(b) PLANS THE "CANARY IN THE COAL MINE"?

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For the past several years 401(k) retirement plans both large and, more recently small, that are sponsored by for-profit corporations have been sued by participants for charging them excessive fees resulting in significant losses to their retirement savings. Now participants in ERISA covered 403(b) plans are asserting that not-for-profit plan sponsors may also be breaching their fiduciary duties by charging excessive fees. It appears that the first such lawsuits are being filed against major private universities: Duke, Johns Hopkins, Vanderbilt, Emory, University of Pennsylvania, Massachusetts Institute of Technology (MIT), New York, Yale and Columbia Universities.

The legal theory behind these lawsuits finds support in the Tibble v. Edison Int'l., 2015 U.S. LEXIS 3171 (U.S. May 18, 2015) decision where the Supreme Court reaffirmed that fiduciaries of ERISA governed retirement plans have a continuing obligation to monitor participants' investment options and remove those deemed imprudent. As such, in the new round of fee litigation, the 403(b) participants claim that plan fiduciaries have breached their fiduciary duty by providing participants with too many investment choices leading to an unnecessary increase in fees. The participants claim the alleged excessive fees resulted from:

1) an excessive number of investment options available to participants that ultimately resulted in their inability to make informed investment decisions as well as the inclusion of investment vehicles with a history of underperformance; and

2) the fiduciaries' failure to leverage their superior negotiating position to obtain lower record keeping fees as well as their failure to opt for "institutional" investments instead of the costlier "retail" investment options which, due to the amount of plan assets involved, were available to the university plan sponsors.

Interestingly enough, as to the first item shown above, one of the universities sued in this initial round, MIT, did change its investment strategy in 2015 by dramatically reducing the number of investment options available to participants. However, the allegations are that this change came too late in that if it were effectuated in 2014 the participants would have saved in excess of $8 million in fees.

These lawsuits may simply be the "canary in the coal mine" in foretelling other ERISA governed 403(b) plan lawsuits against additional institutions of higher learning, health care institutions, foundations, and similar institutions. As such, now

may be the best time for sponsors of ERISA covered 403(b) plans to review their current investment offerings and practices with a view of making any changes as appropriate. It is imperative that plan procedures be designed to assist plan fiduciaries in demonstrating that they have acted with "care, skill, prudence and diligence" when selecting and evaluating plan investments.

Action Steps for ERISA Covered 403(b) Plan Fiduciaries

Colleges and universities as well as other not-for-profits with ERISA covered 403(b) plans should take the following steps to put themselves in a better defensible position in the event they are sued for breach of fiduciary duty on their management of participant investments:

- Conduct a thorough review of the process by which investment decisions are currently made, including (a) ascertaining how investments are monitored; (b) how alternative investments are investigated and selected with an eye towards the importance of leveraging the plan's economic power; and (c) how fees are documented;
- Once such review is completed, implement and document new procedures if found to be necessary;
- Such procedures must include consistent investment monitoring as well as periodic swaps of underperforming investments for more attractive alternatives;
- The review as well as the new procedures put into place must be carried out by plan sponsors and fiduciaries with the assistance and guidance of appropriate and competent professionals, including investment advisors and legal counsel;
- Plan sponsors and fiduciaries need to retain investment advisors to assist in supporting and documenting the integrity of the investment selection process;
- Retention of legal counsel is necessary to educate fiduciaries and document their thorough understanding of their fiduciary duties to plan participants.

In summary, although ERISA covered 403(b) plan sponsors cannot be completely insulated from lawsuits, they can maximize their chances of success when they find themselves in court by structuring a successful legal defense.