

The Lone Ranger of 401(k)s takes on University Plans

12 Universities named in Class-Action Lawsuits

Universities may have a lesson to learn with twelve prestigious universities being named as defendants in lawsuits concerning their sponsored retirement plans. Among these universities are:

- Massachusetts Institute of Technology (MIT)
- New York University (NYU)
- Yale University
- Duke University
- Emory University
- The University of Pennsylvania
- John Hopkins University
- Columbia University¹
- Vanderbilt University
- Cornell University
- Northwestern University
- The University of Southern California (USC)

The lawsuits are being filed by none other than Jerry Schlichter of St. Louis based Schlichter, Bogard and Denton. Nicknamed a “Lone Ranger of the 401(k)s” by the New York Times, Jerry Schlichter has been a pioneer for excessive fee litigation in 401(k) plans. Now, however, he has set his sights on the 403(b) realm, the plan type sponsored by all of these universities except MIT which sponsors a 401(k). These suits are very significant being the first of their nature for 403(b) plans. The sheer amount of universities being targeted is also important, serving as a red flag for plan sponsors, especially those sponsoring 403(b) plans, to review their plans and adjust where needed.

403(b) v. 401(k) - What's the Difference?

Both 403(b) plans and 401(k) plans are tax-advantaged, employer-sponsored retirement saving vehicles which allow participating employees to set aside pre-tax dollars up to the legal limit. The most significant difference between the two is that 403(b) plans can only be offered by 501(c)(3) tax-exempt organizations or governmental entities, including public school systems. 401(k) plans, however, can generally be offered by any employer. In the past decade, 403(b) and 401(k) plans have become increasingly similar. Prior to 2007, 403(b) plans had very little plan sponsor oversight. These plans were not even required to have a written plan document until 2009.

Besides the difference in organization types which may sponsor each plan, another distinction is the investment types in 403(b) plans. Required by law, 403(b) assets must be held in either a custodial account, typically in mutual funds, or in an insurance company annuity. Also, 403(b) plans historically have been provided through multiple vendor arrangements; however more alternatives do not necessarily equate to better choices for participants.

¹ Columbia University is facing two class-action lawsuits; the first filed by the Sanford Heisler Law Firm, the second filed by Schlichter, Bogard, and Denton

Common Complaints

While each university named is facing its own class-action litigation, there are clear similarities among these lawsuits. Comparable to other ERISA lawsuits, the plaintiffs assert that the Plans' fiduciaries have allowed excessive fees to plague their plans. Namely in these cases, the plaintiffs claim the fiduciaries have not utilized the size of the plan as bargaining power to achieve lower expenses through economies of scale. Additionally, the plaintiffs cite excessive revenue sharing fees due to numerous recordkeepers being utilized as well as high cost, historically poor performing investment alternatives. In the case of MIT, Fidelity is the sole recordkeeper but the claim asserts that this designation was made without a competitive bidding process due to a long standing relationship between Fidelity and MIT.²

Many of these lawsuits claim that an exorbitant number of fund alternatives are being utilized, some in the hundreds, which has resulted in "decision paralysis" among participants and diluted the bargaining power of the plan. In the Duke (University) Faculty and Staff Retirement Plan for example, more than 400 investment alternatives are available.³

The Takeaway for Plan Sponsors

The trend of excessive fee lawsuits has entered the 403(b) sector. This is a wakeup call to all plan sponsors. It's time to review your Plan to ensure the same claims cannot be made as valid arguments against your Plan.

- For larger plans, are you using the size of your Plan as bargaining power to achieve lower expenses?
- Have you recently benchmarked your Plan's overall expenses and reviewed investment performance?
- Are you allowing only reasonable expenses in the Plan?
- How many investment alternatives are you offering? Are you able to efficiently monitor all investment offerings? Could the number of funds be considered overwhelming, causing "decision paralysis" for participants? Are poor performing funds in the mix?
- How many Recordkeepers/Vendors are you utilizing? Have you utilized a proper competitive bidding process in selecting these providers? Are you able to efficiently monitor all of the service providers for your Plan?

Only time will tell the outcomes of these bouts of litigation, but two things are likely. The outcomes of these cases will set precedence for future 403(b) plan litigation and ERISA litigation in general. These lawsuits are illuminating common 403(b) practices including utilizing multiple vendors and offering an excessive amount of investment alternatives. The plaintiffs are asserting that a ruling is needed to determine what a proper 403(b) plan should look like. After all, nearly a decade ago, many 403(b) plans were exempt

² Manganaro, John. Big-Name Universities Targeted in Bout of ERISA Suits. PlanAdviser. 09 August 2016.

³ Iacurci, Greg. Duke, John Hopkins, UPenn and Vanderbilt latest schools under fire for excessive 403(b) fees. Investment News. 11 August 2016.

from ERISA rules.⁴ After precedence is set, more ERISA lawsuits in the 403(b) sector are likely. It is up to plan sponsors to review their fees, benchmark their investment alternatives, and overall, ensure their plan is being operated for the greatest benefit to participants.

⁴ Moore, Rebecca. 403b Plans Have Distinct Arguments in Excessive Fee Suits. PlanAdviser. 18 August 2016.