RETIREMENT PLAN LITIGATORS TARGET HIGHER EDUCATION

Over the last few weeks, the law firm of Schlichter, Bogard & Denton has filed numerous lawsuits against multibillion-dollar, university-sponsored retirement plans. The lawsuits claim the universities allowed participants to be charged unreasonable expenses for plan administration and retained expensive, underperforming investments in the lineup. While the first rounds of class action lawsuits already represent hundreds of thousands of employees in both 401(k) and 403(b) plans, there will likely be many more to come.

Plaintiffs’ Claims

The allegations are similar to those levied against private sector employers over the last decade: these universities, as retirement plan sponsors, breached their ERISA duties by causing plan participants to pay millions of dollars in unreasonable and excessive fees. The cases all allege one or more of the following fiduciary breaches:

- Selecting and retaining numerous high-cost and poor-performing investment options.
- Using multiple, rather than single, recordkeepers created duplicative, excessive, and unreasonable fees.
- Providing active management solutions, rather than passives, drove up investment expense.
- Failing to follow the plan’s investment policy statement.
- Offering duplicative investments.
- Forcing the use of the provider’s proprietary products.
- Using mutual funds—and retail mutual funds at that—rather than collective investment funds or separately managed accounts increased cost.
- Failing to seek competitive bids for plan services.

Targeted University Plans

- Massachusetts Institute of Technology (MIT)
- New York University
- Yale University
- Cornell University
- Northwestern University
- Columbia University
- University of Southern California
- Duke University
- Vanderbilt
- Johns Hopkins
- University of Pennsylvania
- Emory University
Of particular interest were some of the allegations pertaining to MIT, Emory, and Duke. In the case of MIT, its lawsuit alleges that its close relationship with Fidelity Investments led to Fidelity’s selection as plan recordkeeper. The suit claims this was done without any competitive bidding process, violating the university’s duty to act in the exclusive interest of its employees and retirees. The complaint takes further issue with Fidelity CEO Abigail Johnson’s longtime position on the MIT Board of Trustees and the inclusion of more than 150 Fidelity funds on the $3.5 billion plan menu—funds that the complaint describes as high priced retail funds, though the plan was allegedly large enough to demand lower options.

In the case of Emory, the lawsuit alleges the plan’s investment policy statement requires consideration of passive index funds in efficient markets where active managers could potentially have difficulty outperforming their underlying benchmarks. This would require consideration of potentially lower fees and expense ratios for the plan’s investment options.

In the case of Duke, the lawsuit alleges that the university provided so many funds (more than 400) that it deprived the plan of its bargaining power and led to “decision paralysis” for participants. It also claims its provider, TIAA-CREF, required the CREF Stock Account annuities be included in the plan, costing plan participants in excess of $100 million of their retirement savings.

**Next Steps**

This is only the beginning. These cases will continue to be brought against more and more university plans. It is also very likely, in the near future, that the next round of lawsuits will target non-profit organizations like hospitals. Any university that sponsors a retirement plan should immediately evaluate their processes, specifically reviewing:

- Procedures for service provider selection including consultants, investment advisors, third party administrators and recordkeepers
- Service provider fees and compensation, with regular benchmarking and formal requests for proposals each 3-5 years
- The plan’s investment menu for diversity, efficiency, pricing, and performance, paying particular attention to share class availability and proprietary products
- Formal plan governance procedures, including establishment of a fiduciary committee and charter, an investment policy statement, regularly occurring meetings, formalized agendas and minutes, and fiduciary training
- Existing E&O or D&O policies for ERISA fiduciary liability coverage or considering a standalone fiduciary liability policy

**If you have any questions or would like further assistance, please contact your Lockton Retirement Services Team.**