CLASS ACTION PLAINTIFFS TARGET UNIVERSITY 403(B) PLANS

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In June, an ERISA action – a proposed class action - was filed against Washington University in St. Louis alleging, among other things, that the University's 403(b) plan recordkeeping and investment fees were excessive. Also named as defendants in the suit are the University's Board of Trustees, the current and former Vice Chancellor for Human Resources, and the Director of Benefits and Compensation. Washington University is now the 15th major university to face this kind of lawsuit. Other prominent universities that must now defend their fees and investment process include the University of Chicago, Princeton, Yale, Vanderbilt, Columbia, Northwestern, and USC.

Specifically, the complaint filed in the suit against Washington University alleges, among other things, that:

- the fees paid to the plan's recordkeepers - TIAA and Vanguard – were unreasonable because they were based on a percentage of plan assets instead of the number of plan participants;
- many of the investment funds offered to participants were "retail" investment class funds even though lower-cost versions of the same funds (i.e., institutional share classes) were available to the plan because of the size of the plan's assets;
- the plan's multiple-vendor investment offering included "an excessive number of duplicative funds, including poorly-performing funds, 'bundled' into the Plan by TIAA and Vanguard mandates . . . ", a structure that resulted in higher costs;
- investment fund revenue sharing served as an incentive for the vendors to recommend higher cost funds, including proprietary funds; and
- the plan's investment fiduciaries should have favored funds that employ less costly passive investment strategies (i.e., index funds) over actively managed funds (which are typically more costly) in light of studies that show that index funds have outperformed actively managed funds over time.

The complaint contains case studies involving plans maintained by other prominent universities all of which have reportedly moved from multiple-bundled recordkeeping structures to single recordkeeping structures that exist alongside separately managed, open architecture investment platforms. The complaint alleges that by consolidating into a single vendor and separating the recordkeeping and investment management functions, a plan can secure more favorable fee terms, streamline administration, increase transparency, simplify participant investment decisions, and reduce costs.

It is important to understand that the allegations in the complaint against Washington University and the other universities should not be taken as true. As of this writing, none of the cases have been decided on the merits, and so it remains to be seen whether the acts and omissions alleged in the complaint constitute ERISA fiduciary breaches. In the meantime, employers should review plan recordkeeping and investment programs to determine whether they could face similar claims. One thing is sure: Plan fiduciaries are more likely to mount a successful defense if they can establish that they have engaged in an oversight process that includes periodic review of the plan's investment funds and recordkeeping costs, and that they have made adjustments, when necessary, to improve performance and reduce costs. The complaint in the case against Washington University alleges that the University's alleged failure to make any changes to the program over the course of several years "evidences a lack of independent due deliberation by the Plan fiduciaries." This allegation, if true, is a cause for concern.