UNIVERSITY 403(B) PLAN FEES AND INVESTMENTS UNDER SCRUTINY

Hodgson Russ Employee Benefits Newsletter
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Over the past year, 16 private universities became the target of lawsuits alleging breaches of fiduciary duty with respect to 403(b) plan fees and investment options. The lawsuits, brought against Brown University, Columbia University, Cornell University, Duke University, Emory University, New York University, Johns Hopkins University, Massachusetts Institute of Technology, Northwestern University, Princeton University, University of Chicago, University of Pennsylvania, University of Southern California, Vanderbilt University, Washington University, and Yale University, span multiple federal court jurisdictions.

To date, district court rulings have been issued on motions to dismiss filed by 10 of the plans. Out of the rulings in those 10 cases, only 1 lawsuit was fully dismissed (against University of Pennsylvania), and that ruling is already being appealed. The remaining 9 universities received mixed rulings, with some allegations dismissed and some allowed to proceed to further stages of litigation. Below are some of the key topics covered by the allegations in the cases grouped by trends in the district courts' rulings to date:

- Rulings tend to favor plaintiffs on allegations relating to the following:
  - Recordkeeping fees (inefficient and costly use of multiple recordkeepers; lack of competitive bidding process; failure to monitor fees)
  - Offering high-fee actively-managed funds
  - Maintaining poor performing investments
- Rulings tend to favor plans/plan fiduciaries on allegations covering the following:
  - Offering a large number of investment options (alleged to be "too many" or a "dizzying array")
  - Selecting and maintaining investment options with unnecessary/excessive fee layers
  - Entering into "lock-in" arrangements (contractual agreements requiring inclusion of certain investment options with recordkeeping arrangements for those options)
  - Breach of the duty of loyalty
- Rulings are notably split with regard to allegations that plan fiduciaries imprudently offered higher cost retail class mutual fund shares when an allegedly identical and cheaper institutional class mutual fund shares are available.
- Rulings with respect to prohibited transaction, fiduciary monitoring, and co-fiduciary liability allegations tend to be dismissed or limited in scope in the courts' rulings.

It is important to keep in mind that, in those cases where the courts ruled in favor of the plaintiffs, the courts were simply finding that the allegations are plausible enough to proceed further in litigation. Whether the plaintiffs will ultimately succeed in obtaining rulings that the plan fiduciaries breached their fiduciary obligations with respect to the plans remains

to be seen.

While the ultimate outcomes of these cases may be uncertain, they all serve as a reminder to plan sponsors to take great care in making choices regarding, and continuing to monitor, fee arrangements and investment options for defined contribution plans such as 403(b) plans or 401(k) plans. A good starting point is ensuring that an adequate plan governance structure is in place to assist with meeting fiduciary obligations with respect to service provider arrangements and plan investments (*i.e.*, plan committee(s), committee charter, investment policy statement, fiduciary training).