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Wave of ERISA Suits Puts Colleges in Crosshairs

By Mark Hamblett, Published: Aug 30, 2016

The plaintiffs law firm that's been Enemy No. 1 to Corporate America when it comes to litigation over retirement plans has a new target—the country's largest universities.

Roughly a dozen universities have been hit with suits this month charging the schools with wasting retiree money on needless record-keeping, offering underperforming plans and failing to use their leverage to negotiate lower fees. Many of the suits are backed by Schlichter Bogard & Denton—a St. Louis firm that has led the way in class litigation over retirement plans and reaped significant legal fees over the past few years.

Baker & Hostetler Cleveland partner John McGowan, who specializes in litigation involving benefit plans, said universities may have landed in Schlichter's crosshairs because their retirement plans historically have not been subject to the same scrutiny as corporate plans. "It's not an area where a lot of attention has been paid to dotting the i's and crossing the t's," he said.

Technically, the university suits mainly challenge 403(b) retirement plans, which are available to employees of colleges and universities, religious organizations and other nonprofit entities. Until several years ago, the Internal Revenue Service had regulated such plans more loosely, but that ended with rules implemented in 2009.

Some universities have been slow to adapt to those rules, which treat their retirement plans much like 401(k) plans or layered new plans on top of old, defense lawyers said, leaving them exposed to litigation under the Employee Retirement Income Security Act.

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"If you're a big enough fund and your fiduciary duty is to get the best pricing going forward, then why aren't you using your leverage?" McGowan said. "That's what appeals to the plaintiffs' bar—when they can catch someone with a fiduciary duty being asleep at the switch."

For the plaintiffs' bar, "it's really as simple as realizing there's a whole additional universe of plans that may have gotten less attention than in the past," Dechert partner Andrew Oringer said. He added: "It would seem like a good time for universities generally to review their legal compliance and their tax compliance and put themselves in the best position to deal with possible allegations."

'LESS OVERSIGHT'

The university lawsuits challenge practices at New York University, Duke University, the Vanderbilt, Columbia, Cornell, Northwestern, Emory, Johns Hopkins, University of Southern California, the University of Pennsylvania, Massachusetts Institute of Technology and Yale—employers responsible for billions in assets and representing tens of thousands of retirees and people saving for retirement. (Click [here](#) for more details.)

Defense attorneys are just now starting to make their initial appearances in those cases. In *Tracey v. Massachusetts Institute of Technology*, for one, Alison Douglass of Goodwin Procter and Brian Boyle and Meaghan VerGow of O'Melveny & Myers, have been tapped to represent MIT.

They'll be facing off against Jerome Schlichter and his colleagues at Schlichter Bogard. Schlichter said the suits are the result of a "sea change" in American pension plans, in which employees doing the funding now have more incentive to question fees and management practices.

"It's our position that university employees are entitled under ERISA to the same protections for their retirement assets as employees of private companies," Schlichter said. "In some cases, we allege that the fiduciary obligation has not been complied with—and historically, there has been less oversight of funds in the university space than in private companies."

Employees of universities, he said, "have been paying significantly more for investments and record-keeping than they should—and this is an erosion they have to answer for."

Schlichter's firm has a track record on fee cases that has earned it the praise of federal judges for saving American workers billions of dollars. The firm has also taken home sizable legal fees in connection with its retirement-plan litigation—earlier this year, a \$57 million settlement with Boeing Co. resulted \$19 million in attorney fees.

Another plaintiffs firm, Sanford Heisler, filed a suit on Aug. 16 against Columbia University in the Southern District of New York. Charles Field, a partner at the firm, said, "For so long, everyone focused on corporations and big enterprises and didn't pay much attention to colleges." But, he added, the problem of multiple record-keeping merits scrutiny because "it's inefficient and it drives up costs."

“When you look at all these cases, they have a very common thread, one is they use multiple record-keepers—it’s almost as if they shopped at the same tailor,” he said. “The second thing you see about the college plans is they offer a bewildering number of options. How do you choose? It’s hard enough shopping at the grocery store, how do you choose between 150 options?”

DEFENSE STRATEGIES

Patrick Spangler of Vedder Price’s ERISA litigation practice said the wave of complaints filed in the past few weeks may also be the result of a transitional period where universities are catching up to private businesses.

Some universities may have allowed faculty to keep traditional investment options they are comfortable with, while also adding new options, he said. That’s contributed to allegations that too many offerings have muddied the waters for the consumer.

“The trend has been toward offering more streamlined investment options and that’s what most of the investment advisers and consultants in the industry are advising for 401(k)s and 403(b)s,” Spangler said. There’s no magic number, he added, but “when you’re up to 15 or so investment options ... you increase the risk of that type of argument—that you’re running too many.”

Dechert’s Oringer said universities may be able to defend the use of multiple record-keepers.

“It’s never going to be one size fits all,” he said. “There’s nothing inherently wrong with having two record-keepers if in fact the people who are making the choice as to how to structure their plans are reasonably looking at the right and relevant considerations.”

Defense lawyers agree that it is critical for universities to take a close look at how investments are made and document that process so that, if sued, they can point to rational and conflict-free decision-making as a defense.

“An awful lot of the college and university culture is to do what the guy down the street is doing—and some might have been in the public sector and so they’ll just run it the same way,” McGowan said. “So all of a sudden, maybe, just maybe, colleges and universities get influenced by alumni who happen to be donors—an enterprising plaintiffs’ lawyer is going to focus on that.”

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