College and University 403(b) Plans

- A retirement savings plan available to employees of colleges and universities, as well as employees of other non-profit employers and hospitals.

- Allowable Investments:
  - Annuities
  - Mutual Funds
ERISA Regulations

- Duty of Prudence:
  - Fiduciary shall act with the "care, skill, prudence and diligence under the circumstances, then prevailing, that a prudent man acting in a like capacity would act." 29 U.S.C. § 1104(a)(1)(B)

- Duty of Loyalty:
  - Fiduciary shall act "solely in the interest of the participants and beneficiaries" and for the exclusive purpose of "providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i)

- Liability for Co-Fiduciary Breach:
  - Participation
  - Enabling
  - Knowledge without acting to remedy 29 U.S.C. § 1105(a)

403(b) Plan Litigation

- 12 colleges and universities sued between August 9-17, 2016, including:
  - Duke (4th Cir.)
  - Johns Hopkins (4th Cir.)
  - Vanderbilt
  - Emory
  - NYU
  - MIT
  - Penn
  - UNC
  - Yale
  - Northwestern
  - Columbia
  - Cornell

- Why?
  - A fiduciary who breaches ERISA responsibilities, duties or obligations is personally liable to return losses to the plan and to restore profits. 20 U.S.C. § 1109(a)

Alleged Breaches by Plan Fiduciaries

- Who are the defendants?
  - College/University
  - Investment & Oversight Committees, and the individual members of those committees
  - Individual Employees, including:
    - VP of Human Resources
    - VP of Investments and Chief Investment Officer

- Breaches Alleged:
  - Duty of Prudence
  - Duty of Loyalty
  - Duty to Monitor Co-Fiduciaries
Alleged Breaches of the Duty of Prudence

- Excessive administrative and recordkeeping fees
  - Too many recordkeepers
  - Use of revenue-sharing
  - Non-competitive bidding processes
- Failure to consider lower-cost investments
- Retention of underperforming investments
- Duplicative investment options with too many choices

Defenses

- Other 403(b) plans look like ours do
- Administrative and Recordkeeping Fees are reasonable
  - Competitive bidding is not required; benchmarking studies are okay
  - Multiple recordkeepers are common (50% of higher education plans use more than 4 recordkeepers)
  - Revenue fee-sharing does not violate any statute or regulation.
- The cost of investments is reasonable
  - Expense ratios between 0.03% and 2.0% are reasonable
- ERISA requires diversification
- Hindsight is not permissible to evaluate fiduciary performance in investment selection and retention.
- Lack of Standing
- Statutes of Limitations

And Now... We Arbitrate?

- Only 1 of the 12 colleges and universities sued has asked the court to dismiss the case and submit the claims to non-binding arbitration instead.
- How?
  - USC’s plan participants signed an arbitration agreement with the University requiring arbitration for the types of claims pursued in the filed litigation.
- Why?
  - Claims proceed on an individual basis, in a more private proceeding.
What Questions Should I Be Asking?

- **Recordkeepers**
  - How are the plan’s recordkeepers selected?
  - How often are they re-evaluated? Is a benchmarking study performed?
  - How many are there?
  - How are they compensated? Fixed fee? Revenue sharing? Expense ratios?

- **Fund Selection and Retention**
  - How are the investment options offered selected? Are they duplicative?
  - How many options are there? Is there a tiered structure in place?
  - What processes are in place to monitor investment performance?
  - Are there any procedures for removing poorly performing investment options?
  - Are any conflicts apparent?

- **Monitoring Fiduciaries**
  - Who is responsible for monitoring co-fiduciaries?
  - What processes are in place to monitor and remove co-fiduciaries, if necessary?

Tweaks To Your Selection Process

- Possible improvements:
  - competitive bidding
  - administrative cost comparisons
  - vetting to avoid conflict of interest or appearance of conflict; e.g., does recordkeeper/fund manager have college connections
  - independent expert grading of alternative service providers

Poll Question

- Does your institution currently have a competitive bidding process in the selection of fund investment alternatives?
  a) Yes
  b) No
Poll Question

- Does your institution have an independent expert grade and/or monitor alternative fund investment alternatives?
  a) Yes
  b) No

Poll Question

- Does your institution have a conflict of interest procedure in place for the selection of fund investment alternatives?
  a) Yes
  b) No

Importance of Regular Plan Review and Updates

* Consider periodic outside and independent, benefits expert plan review by entity that is not a service provider and will not benefit from recommendations;

* Consider regularly scheduled plan legal review by independent counsel
Poll Question

• Does your institution have a regularly scheduled periodic review of your retirement plan by an independent benefits expert and/or outside legal counsel?
  a) Yes
  b) No

What Should I Do Now?

– Too soon to tell, but in the meantime consider asking questions.
– Remember, if you want to make a change...

"Allegations regarding subsequent, prudent conduct do not create an inference or serve as evidence that prior conduct was imprudent" and a fiduciary’s decision to “change funds [does] not sustain allegations that [any fund] was an imprudent choice previously.” (Employer’s ERISA Violation, Dkt. No. 16-9, at *6 (D.N.J. Aug. 7, 2012), 48 F. Supp. 3d 78 (D.N.J. 2016).)
Don’t forget to submit your questions to our presenters.

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Thank You!

“College and University Retirement Plan Fees and Controversial Class-Action Litigation”

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