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Not-for-profit Hospitals and Health Care Providers Facing Retirement Plan Class Actions

There has been much media coverage of the recent class action lawsuits filed against some of the most prestigious universities in the United States by university employees. These class action lawsuits allege that the universities breached their fiduciary obligations in running their defined contribution 403(b) retirement plans by allowing the plans to pay excessive investment, record-keeping and administrative fees, thereby resulting in reduced retirement savings for their employees. The roster of current defendants includes Yale, MIT, Vanderbilt, Duke, Cornell, Johns Hopkins, and the University of Pennsylvania, among others, and more class actions of this type against other universities are expected. These suits are similar to the fiduciary-duty breach hidden fee litigation that has bedeviled corporate 401(k) plan sponsors for years. The suits also claim that some university retirement plans offer too many investment options (Duke University allegedly offered more than 400; John Hopkins, 440; and Vanderbilt, 340), have multiple recordkeepers (John Hopkins allegedly has five recordkeepers; Duke and Vanderbilt, four) and the universities failed to put record-keeping and other services for their retirement plans out for competitive bidding on a periodic basis.

Among the plaintiffs' allegations are that the universities' failure to properly supervise their plans resulted in too many and confusing investment options; that some investments charged significant withdrawal penalties thereby making withdrawal very difficult; that retirement assets were invested in actively managed underperforming funds with high retail costs as opposed to less expensive institutional index funds; and that, in some cases, conflicts of interest existed between the universities' plans and the universities' board members and administration.

While these suits have only recently been filed, other suits against 401(k) plan sponsors for alleged mismanagement and high fees have already resulted in settlements running into tens of millions of dollars.

Not-for-profits sponsoring 403(b) plans must realize that under the Employee Retirement Income Security Act of 1974 (ERISA), they likely will be met with allegations that they are fiduciaries, responsible for demonstrating prudence in selecting and monitoring the plan's service providers, making sure that the plan is operated in accordance with its terms,

and assuring that the plan's expenses are reasonable. ERISA requires a plan fiduciary to act solely in the interest of the plan's participants and their beneficiaries.

What should be of concern particularly to large not-for-profit hospital and health care systems is that their roles as fiduciaries of their employees' retirement plans is no different than that of the universities involved in these class actions. In fact, the law firm that is at the forefront of bringing these class action lawsuits brought a similar class-action lawsuit in 2014 against Novant Health, a not-for-profit hospital system that operates numerous hospitals in the Carolinas, Virginia, and Georgia. In that case, a retired physician and several other employees claimed, among other things, that the fees associated with Novant's retirement plan increased tenfold over three years; that its retirement plan options were too costly; and that the founder of a brokerage firm that earned fees from Novant's retirement plans had previously donated $5 million to one of Novant's hospital facilities. The Novant suit was settled in May 2016 for $32 million.

Not-for-profit hospital and health care systems should consult with counsel in order to consider taking steps to reduce the likelihood of becoming a victim of these class action lawsuits. There are some steps such plan sponsors may want to consider:

- Adopting a robust governance structure that regularly reviews the types of investment funds offered and their performance as compared to other funds, examines expenses and annuities in particular, and regularly benchmarks and documents fees to determine if they are reasonable.
- Adopting an investment policy statement pointing towards supervision of the plans to assure that they are operated exclusively in the best interests of the plans' participants.
- Setting up performance standards for the plan's service providers and regularly monitoring their performance.
- Conducting a confidential, comprehensive, and objective review (perhaps by independent counsel who specializes in plan governance and forensic fee analysis) of all current investment options available in the plans, the investment option selection process, and all administrative, investment, and record-keeping fees. Any decisions to change or decisions to keep fund options should be documented.
- Implementing a periodic competitive bidding process for record-keeping, administrative, investment consulting, plan participant education, and other commoditized plan services.
- Providing all plan participants with accurate information about all retirement plan options, all fees they may incur, and the identity of plan fiduciaries.

As noted above, this list is not exhaustive, and while taking any of these measures has the potential to reduce exposure to risk, it is not a guarantee. Risk mitigation techniques should be developed with counsel and tailored to your specific needs.

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