ROPES & GRAY

UNDER ATTACK

# ERISA CLASS-ACTION LAWYERS TARGET COLLEGES AND UNIVERSITIES

## THE POTENTIAL THREAT

Class-action lawyers have now set their sights on retirement savings plans offered by colleges and universities, focusing on "jumbo" plans, often with assets of more than $1 billion (though that amount may decline as the pickings become slimmer). These lawsuits are founded in claims of ERISA breaches of fiduciary duty.

Colleges and universities need to understand these claims, and know what they need to do to prepare.

## THE ISSUES AT HAND

The theories for each case vary slightly, but the common core is an allegation of "excessive fees" paid on investment options offered under the plan—focusing on the lower cost of index funds compared to traditionally managed sector- or strategy-based funds. According to plaintiffs' counsel in the recent suits, the plan fiduciaries' purported failure to choose these "better and cheaper" options means that they have violated ERISA. Even in instances where a university changed its investment options in 2015, touting the lower fees to participants, plaintiffs' counsel has used that change as an admission in its complaint that the university's prior actions had somehow allegedly violated ERISA.

## THE FIRM BEHIND THE CASES

A class-action law firm out of St. Louis, Missouri, Schlichter Bogard & Denton, is engineering these cases, touting its history of representing 15 other classes in actions against for-profit corporations as the basis for its appointment as class-action counsel. As of now, lawsuits have been filed against eight major universities. This firm has been relatively successful, extracting settlements of between $117 and $1,145 per participant. This firm seeks its named plaintiffs through Facebook ads.

## ADDRESSING THE THREAT

Given these developments, plan fiduciaries need to keep several basic considerations in mind:

- **PROCESS AND PRUDENCE** Contrary to the allegations, ERISA does not require the best and the cheapest, determined after the fact. Not every plan in the ERISA universe needs to offer index funds. What is important is that the evidence show that, among other things, the fiduciaries acted with "care, skill, prudence and diligence" in selecting investment options and engaging in monitoring activities. This determination is made at the time that the fiduciaries acted (not looking at comparative returns after the fact). Plaintiffs' counsel has lost in instances where the courts have concluded that it failed to prove that fiduciary decisions resulted from a "lack of prudence or poor process."

- **ATTORNEY-CLIENT PRIVILEGE** Plan fiduciaries should know that their communications with attorneys on matters of plan administration are generally discoverable by plan beneficiaries. Under the ERISA "fiduciary exception" to the attorney-client privilege, a plan fiduciary is viewed as acting on behalf of plan participants and beneficiaries, so the participants and beneficiaries are the attorneys' true clients. This includes any communications, whether in writing, by e-mail or even by text message.

- **THE IMPACT OF PENDING LITIGATION ON ATTORNEY-CLIENT PRIVILEGE** The fiduciary exception noted above does not apply in connection with pending or threatened litigation. In these instances, attorney communications with fiduciaries remain privileged. This means that any college or university that is the target of a class-action law firm can and should seek help even before litigation actually commences.

## WHY ROPES & GRAY

Ropes & Gray is among the leading law firms representing colleges and universities in the United States, including with respect to employee benefits matters. We have a long history of representing companies, institutions and ERISA fiduciaries in class-action litigation and ERISA breach of fiduciary duty claims.

If you wish to discuss this summary further, please contact a member of our team:


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