Retirement Plan Lawsuits Now Targeting Not-For-Profit Organizations

May 3, 2018
Mr. Margiotta is responsible for retirement plan consulting, and new business development. Pete has more than 25 years of experience in the retirement benefit planning industry, specializing in retirement plans for healthcare and not-for-profit organizations. He has been a featured speaker, most recently presenting on the Impact of Mergers and Acquisitions on Retirement Plans.
Today’s Agenda

• Strategic Benefit Services Overview
• Retirement Landscape Retrospective
• Class Action Law Suits
• Duties of A Fiduciary
• Fiduciary Best Practices
Strategic Benefit Services Overview

Retirement Advisory Firm

- 40+ years; $4.6 billion

Client Focus

- Healthcare
- Not-for-profit
- Corporations
Retirement Plan Services Overview

- Vendor Management & Benchmarking
- Employee Communication & Education
- Financial Wellness
- Merger & Acquisition Support
- Plan Optimization & Governance
- Investment Selection & Monitoring
Fiduciary Governance

FIDUCIARY SERVICES

- Board Resolution, IPS, By-Laws
- Meeting Minutes
- Committee Training
- Legislative Updates
- Investment Monitoring & Reporting
Retirement Plan Landscape Retrospective
A Retrospective - How did we get here

- ERISA enacted into law on September 2, 1974 to protect the interests of employee benefit plan participants and their beneficiaries by:
  - Requiring the disclosure of financial and other information concerning the plan to beneficiaries;
  - Establishing standards of conduct for plan fiduciaries;
  - Providing for appropriate remedies and access to the federal courts
A Retrospective - How did we get here

Not-For-Profit Retirement Benefit Structure

• Money Purchase & traditional Pension Plans subject to ERISA

• 403(b) programs typically offered by several insurance companies
  – Not subject to ERISA
  – Numerous Variable Annuity and Fixed interest General Account investments
  – Considered a supplemental benefit
A Retrospective - How did we get here

Here We Are:

- 403(b) plans dominate
  - Employer contributions
  - Subject to ERISA
  - Typically one vendor
  - Mutual funds and Fixed interest/Stable Value investments- limited menu

- 401(k) plans approved for NFP
Who’s Paying Attention?

- Internal Revenue Service
- Department of Labor
- The Legal Community
Class Action Suits
Schlichter Bogard & Denton
Lead the Way

• First suits launched 2006
• Filings against 18 large well known corporations
• Focus on fees and investments
• Supreme Court notoriety
• 2015 banner year with over $300m in settlements
It Starts With Some Fishing

DOL 5500 filings
- Financial information
- Investments
- Fund revenue share
- Compensation
- Multiple vendors
Success Fuels Frenzy

• Not just Schlichter Bogard & Denton
• More than 20 new cases – dropping down market
• Allegations:
  – Retail v. institutional share classes
  – Annuities v. mutual funds
  – Money market vs. stable fund
  – Record keeping fees
    • Percentage or hard dollar
Major Universities Targeted

- Harvard University
- Duke University
- New York University (NYU)
- Cornell University
- Yale University
- Massachusetts Institute of Technology (MIT)
State of Not-For-Profit Retirement Plans

- Legacy products
- Existence of variable annuity investments
- General account investments
- Vendor proprietary fund requirements
- Numerous investment options
  - Duplicative funds
- Multiple record keepers
ERISA 404(c) Compliance Is Another Area of Focus

Four Main Requirements

1. Employee Notification
2. Investment Choices
3. Transfer Flexibility
4. Investment Information

404(c) is optional but only full compliance provides protection from employee losses on investments.

Check your plan to make sure you are in compliance.
Duties of a Fiduciary
Duties of a Fiduciary

I. Act solely in the interest of plan participants and beneficiaries

II. Offer diversified investments

III. Use plan assets exclusively for the plan

IV. Abide by the law and plan documents

V. Act prudently
Duties of a Fiduciary

I. Act solely in the interest of plan participants and beneficiaries
   a) Cannot let their position in the organization influence their decision-making as a fiduciary
   b) Must put personal interests aside and act only for the benefit of plan participants
Duties of a Fiduciary

II. Offer a diversified set of investments
   a) Must be diversified to minimize the risk of large losses

III. Use plan assets exclusively for the plan
   a) Plan benefits
   b) Reasonable and necessary expenses of administering the plan
Duties of a Fiduciary

IV. Abide by the law and plan documents
   a) Must abide by the plan document and all related documents
      i. Trust agreement
      ii. Investment Policy Statement
      iii. Other documents as applicable
   b) First step – read the documents
Duties of a Fiduciary

V. Act prudently

Prudent Man Rule:

“with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” *

*ERISA §404(a)(1)(B)
Process vs. Outcomes

• Not judged on whether the right decision was made, rather whether the decision was prudently made
  – Thorough: must seek the advice of an expert if the requisite knowledge is lacking
  – Consistent: written procedures for common plan decisions
  – Well-documented: if it’s not documented, it didn’t happen
Fiduciary Best Practices
Multiple Challenges

- Plan
- Sponsor
- Participants
- Fiscal Constraints
- IRS
- Legislation
- Litigation
- Media
- Competition
- Service Providers
- DOL
Best Practices

- Review & Maintain Fiduciary Documents
  - Board Resolutions & By-Laws
  - Plan documents and contracts
  - Ensure plan document, SPD and day-to-day administration are 100% consistent
  - Records naming plan fiduciaries
  - Records documenting fiduciary training and committee meetings
  - Fidelity bond and fiduciary insurance
Best Practices

• Preventative Measures
  – Conduct operational reviews
  – Understand and regularly benchmark fees & services
  – Monitor funds
    • Maintain an Investment Policy
    • Avoid duplicative funds
    • Replace funds as necessary
    • Evaluate fees and share class alternatives
    • Understand stable value investments and alternatives
Best Practices

- Legislative updates and fiduciary training
  - New committee members
  - New board members
  - Other interested parties
  - On-going committee & board training
- Take meeting minutes
- Provide participants with required information and disclosures
- Address the existence of legacy vendors

*Always act in the best interest of plan participants*
What May The Future Hold?

- More litigation
- More law firms joining in
- All industries affected
- Shift to small/mid size organizations
Important Disclosure

This presentation is intended for general informational purposes only, and it does not constitute legal, tax, or investment advice from Strategic Benefit Services or its affiliates. Retirement plan sponsors should consult with their own legal counsel to understand the nature and scope of their responsibilities under ERISA and other applicable law.

Thank you.