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403(b)s Are Not 401(k)s: Higher Education Organizations Come to the Defense of 403(b) Plans

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A recent amicus brief involving one of the cases in the ongoing litigation against university 403(b) plans is interesting because it came to the defense of 403(b) plans and their distinctiveness. (For the uninitiated, amicus briefs are statements that offer information, expertise, or insight that has a bearing on the issues in a case, provided by someone who is not a party to a legal proceeding.) The brief involves the appeal of a lawsuit against the University of Pennsylvania (Penn) over the management of its 403(b) plan that was dismissed by a district court. The issuers of the brief — a "who's who" of higher education associations (from the American Council on Education to the College and University Professional Association for Human Resources, or CUPA-HR) — have quite a statement to make in this 29-page document, which can essentially be summarized in a single assertion: 403(b) plans are most certainly not like 401(k) plans, and the law requires an apples-to-apples comparison, and therefore, a 403(b) apple should not be compared to a 401(k) orange.

The brief rallies to the defense of 403(b) plans, stating that they are a system that "has, for generations, sustained academics after their teaching days have ended" and have "achieved a similar guarantee of lifelong income without hampering the movement of personnel that is essential to academic life." The brief also provides a history lesson on 403(b) plans, as well as a primer on why any 403(b) litigation that attempts to assert that these plans should be more like 401(k)s is "based on a flawed predicate" for the following reasons:

- 403(b) plans are invested in a fundamentally different fashion than 401(k)s, due to the limitation of 403(b) plans to annuities and mutual funds. Annuities remain a dominant investment type in 403(b) plans, offered as an option in 68% of these plans, as compared to only 6% of 401(k) plans.
- 403(b) plans utilize investments—primarily annuities, but some custodial accounts as well—that are not liquid at the plan sponsor level. Therefore, plan sponsors are unable to direct current assets out of the investments.
- 401(k)s rarely utilize more than one recordkeeper, where it is not unusual for 403(b) plans to have multiple recordkeepers.

Since ERISA requires fiduciaries "to act as would a reasonable individual in similar circumstances who is familiar with such matters," the brief argues that "in the university context, that standard requires 403(b) fiduciaries to measure themselves by the conduct of fiduciaries to similar plans, not to measure themselves by the conduct of the cohort of 401(k) fiduciaries overseeing different types of plans." As indicted above, 403(b) plans are most certainly not like 401(k) plans, and thus should simply not be compared to 401(k) plans for ERISA purposes.

However, the brief continues to make additional arguments against the plaintiffs' approach in this case, such as:

- **The fact that several lawsuits similar to the one against Penn have been filed proves that Penn's conduct was not unusual.** According to the brief, Penn's conduct was "in accordance with industry norms" and not an "outlier," and thus, considered reasonable.
- **If the plaintiffs prevail, it would be difficult to enlist people to serve as fiduciaries for 403(b) plans.** This is due to the potential litigation liability and general disruption to the lives of individuals who voluntary agree to be fiduciaries. As stated in the brief, "a system of freewheeling litigation—in which even standard industry practices can be challenged through years of onerous litigation—is anathema to the recruitment of a sound fiduciary committee."

In summary, this particular amicus brief is a must-read for those 403(b) plan sponsors concerned with fee litigation.

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