Fiduciary Breach Lawsuit Issues Explored
Topic #5: No Regular Recordkeeper RFPs

Earle W. Allen, CEBS, Partner
Cammack Retirement Group

With more than 100 lawsuits filed against the fiduciaries of defined contribution retirement plans for breach of their responsibilities, litigation has plagued the retirement plan industry over the past decade. While the original lawsuits focused on large corporate 401(k) plans, litigation has expanded to include large healthcare organizations and higher education institutions, with more than twenty suits filed against these sponsors since 2016. Other lawsuits have even trickled down to medium- and small-sized retirement plans, rendering all plan sponsors as potential targets.

The claims in these lawsuits cover a broad range of topics and issues related to actions taken or not taken that may have limited the potential growth of plan participant account balances. Most of the claims focus on fees charged in the plan, or investments used that have not performed adequately to yield the return participants should have received.

Last month, we provided an in-depth exploration of the issues with offering multiple active recordkeepers as a potential fiduciary breach. This month, we discuss the concern over not conducting a regular competitive bidding process for the plan's recordkeeping services.

TOPIC #5: NO REGULAR RECORDKEEPER RFPS

One of the claims incorporated into several of the retirement plan lawsuits is that the plan sponsor did not conduct a regular competitive bidding process through a Request for Proposal (RFP) to obtain the most competitive recordkeeping and administrative services for the plan. Of the twenty-six lawsuits filed against healthcare and higher education institution retirement plans, twenty-four of them included some language about the lack of regular RFP processes.

An example of the specific language in the claim, which is repeated verbatim in many of the lawsuits, reads, "Defendants also failed to conduct a competitive bidding process for the Plan's recordkeeping services. A competitive bidding process for the Plan's recordkeeping services would have produced a reasonable recordkeeping fee for the Plan."[1] The lawsuits typically include additional language related to the frequency of such competitive bidding processes. "To ensure that plan administrative and recordkeeping expenses are and remain reasonable for the services provided, prudent fiduciaries of large defined contribution plans put the plan's recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years."[2]

[1]*Clark v. Duke University, et al*; [2]*Clark v. Duke University, et al*

WHY CONDUCTING AN RFP IS BEST PRACTICE

Recordkeeper RFPs are excellent tools to compare the types of plan administrative services that may be offered by various providers. They enable plan sponsors to benchmark their current recordkeeper's fees and services with others in the marketplace, thereby confirming what alternate providers would offer to the plan. RFPs also tend to encourage the current provider to pay more attention to the plan. After working with a client for many years, recordkeepers can become complacent; an RFP forces the provider to re-focus its attention on the plan. Given the possibility of losing the business, the current recordkeeper often reduces its prices for providing ongoing services. As a result, the outcome of an RFP is typically a lower price, either through the current provider or a selected alternative, along with enhanced services. For these reasons, conducting a periodic RFP is a sound fiduciary practice.

The question before the judges reviewing these lawsuits is whether or not the plan sponsors breached their fiduciary responsibilities by not conducting RFPs. Nothing in ERISA requires that plan sponsors conduct an RFP every three years, or at all. It is the fiduciaries' responsibilities to ensure that the plan is competitive and only pays reasonable fees. While an RFP is a good exercise to help plan sponsors confirm the competitiveness of their retirement plan arrangements, there is no proscribed requirement for how the fiduciaries get to this result.

LITIGATION OUTCOMES

As with many of the issues confronted in the lawsuits, the results have been mixed. However, most of the decisions have fallen in favor of the plaintiff. In the eighteen cases where there have been motion-to-dismiss hearings that included the question of conducting competitive bidding processes, the judge determined that the plaintiff argued a plausible claim to proceed on this issue in thirteen; only five judges dismissed this claim.

As examples, in *Larson v. Allina Health System*, the plaintiff focused on the fact that the plan sponsor maintained "the same recordkeeper for the past 22 years, without any indication that the Plans ever engaged in an RFP process."[3] The judge in this case found that the plaintiff had sufficiently stated its claim and thus allowed the matter to proceed, denying a dismissal. The judge in *Morin v. Essentia Health System* found a similar rationale for denying the same motion to dismiss for excessive recordkeeping fees, specifically stating that the argument claiming ERISA does not require a competitive bid was "unpersuasive."[4]

In *Disselkamp v. Norton Healthcare*, the claim also survived the motion to dismiss. The interesting element in this case was that Norton had conducted an RFP six years prior to the date of the lawsuit. However, because they had not conducted one within three years of the lawsuit, and because they had not refuted the claim about the need to conduct competitive bidding every three years, the judge denied their motion to dismiss this claim.[5]

Despite the examples above, some judges have ruled in favor of the defense and granted the motion to dismiss on this claim. In *Johnson v. Providence Health*

[3]*Larson v. Allina Health System*; [4]*Morin v. Essentia Health System*; [5]*Disselkamp v. Norton Healthcare*

& Services et al, the defense was able to demonstrate that it had renegotiated its fees with the plan's current provider, securing expense reductions on multiple occasions.[6] In *Davis v. Washington University in Saint Louis*, the ruling focused on the fact that plan sponsors must consider options beyond simply fees when it comes to recordkeeper decisions.[7] Some of the other dismissals focused less on the lack of competitive bidding processes, and more on the use of multiple recordkeepers, which the plaintiffs had tied together in the argument that administrative fees were too high.

In the *Sacerdote v. New York University* case, the judge ruled in the motion-to-dismiss hearing that the lack of RFP processes could proceed onto discovery. During the trial, evidence was presented about NYU having conducted RFP processes, which enabled them to secure lower fees, without changing their multiple recordkeeper structure, which was also an issue for the plaintiff. Ultimately, the judge ruled in favor of NYU since they were able to prove having conducted competitive bids.[8]

WHAT DOES THIS MEAN FOR PLAN SPONSORS?

Among the issues we have examined in this series of articles, the claim about fiduciaries failing in their duty of prudence by not conducting RFPs has had the most success for plaintiffs, proceeding past the motion to dismiss more than 70% of the time. While ERISA does not specify the need to conduct an RFP every certain number of years, or ever, the courts have generally acknowledged that competitive bidding processes are good mechanisms for plan sponsors to benchmark the plan and confirm whether or not the fees are appropriate for the services provided. In light of this, plan sponsors should consider conducting an RFP for their plan if one has not been done in the last several years, both to protect themselves from a fiduciary perspective, but also to ensure they are receiving value for their plan fees and delivering enhanced benefits to their participants.

Editor's Note: Additional articles from our Fiduciary Breach Lawsuit Series can be found via the links below:

- **Topic #1: Active vs. Passive Investments**
- **Topic #2: Asset-Based vs. Per Participant Fees**
- **Topic #3: Too Many Investments**
- **Topic #4: Multiple Active Recordkeepers**

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[6]*Johnson v. Providence Health Services et al*; [7]*Davis v. Washington University in Saint Louis*; [8]*Sacerdote v. New York University*