

# Universities Sued for Fiduciary Breaches of Retirement Plans

02.16.17 | Linda J. Rosenthal, JD



Prestigious universities around the nation are facing a new legal challenge related to how they administer employee retirement plans.

In August 2016, a single law firm filed separate complaints against eight prominent educational institutions: Duke, Emory, Johns Hopkins, Vanderbilt, NYU, Yale, Penn, and MIT. The common allegations: These educational institutions have allegedly breached their fiduciary duties to employees in connection with the management of their [401(b), non-ERISA] defined contribution pension plans. There are plans to ask for permission to consolidate these cases as a class action lawsuit.

## Background

Schlichter, Bogard & Denton, a law firm based in St. Louis, was successful recently with similar claims against for-profit companies offering 401(k) retirement plans. The firm achieved a 2015 Supreme Court victory; the justices ruled that various defendants “managing these employer retirement plans – plan fiduciaries – have an ongoing duty to monitor investments and remove bad options,” and they breached that duty by offering far too many choices and overcharging on fees. “Those 401(k) lawsuits are regarded as a major development in retirement planning...,”

After that victory, this law firm set its sight on the higher education sector. The type of retirement plan in these university cases is the 401(b), non-ERISA plan. “A 403(b) plan, also known as a tax-sheltered annuity (TSA) plan, is a retirement plan eligible to be sponsored by employers such as Code Section 501(c)(3) organizations (otherwise known as non-profit organizations), public education institutions and certain ministers.” Under current law, there are certain fiduciary responsibilities for plan sponsors and administrators.

## *Allegations of Fiduciary Duty Breaches*

The lawsuits against these 8 higher education institutions include allegations that “the universities did not uphold their fiduciary duty as retirement plan sponsors, effectively leaving tens of thousands of employees and retirees to pay millions in unnecessary fees.”

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*Nearly all of the complaints center around 403(b) plans, defined-contribution retirement savings plans that are similar to the better-known 401(k) but are available for nonprofit institutions, including colleges and universities. Generally, the suits allege that universities offered employees too many investment options in their retirement plans, which can confuse employees and also result in higher fees. Arguments also include that universities did not swap out expensive and poor-performing investments for better options and that higher-fee retail-class funds were available instead of a menu made up of only less expensive institutional funds.*

*Some suits also allege that universities cost employees by using multiple companies as retirement plan providers, or record keepers. An institution can negotiate lower fees by consolidating to one record keeper, increasing its bargaining power, the suits argue.”*

This litigation is the first of its kind in the higher education sector. According to the law firm’s senior partner: “The objective of these cases is not only to compensate university employees for what’s happened to their retirement assets, but to reform the plans and change the plans they are operating.”

An “interesting” twist to these claims is that these plaintiffs’ lawyers are arguing that there are not too few retirement planning choices – but too many.

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*The idea is that many options are essentially expensive false choices, that offering investments with different names from various companies is not of any benefit if those choices follow identical investing strategies and post similar returns. Under the line of reasoning, the unnecessary expenses associated with all of those choices can total many thousands of dollars for an employee over a lifetime of retirement saving.*

There are, indeed, huge amounts of money at stake. For example, for the year 2014, the faculty plan for NYU, with over 16,000 participants had \$2.4 billion in net assets. Yale’s plan, with a similar number of participants, had some \$3.6 billion in assets.

According to the complaint filed against NYU, the institution “has about 20 large-cap domestic equity options for faculty.” –

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*That’s not counting other types of options – universities can have hundreds total of choices. A prospectus for each investment can run dozens of pages, meaning an employee who wants to review all investment options would be faced with an astronomical challenge.*

## Conclusion

While it’s unclear whether this law firm will sue additional universities, that would fit the earlier pattern it followed in connection with the lawsuits against the for-profit 401(k) employer plans. Some observers believe these are test cases, and – if successful – will lay the groundwork for litigation against other educational institutions, large and small. Other counsel can also bring lawsuits. Columbia University, for instance, was just sued by a different law firm.