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SETTLEMENT IN VANDERBILT UNIVERSITY 403(B) CASE INCLUDES PARTICIPANT DATA SAFEGUARDS

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After almost three years of litigation, the excessive fee case involving Vanderbilt University's two 403(b) retirement plans is awaiting court approval of a [settlement](#) reached earlier this year (*Cassell v. Vanderbilt Univ.*, 3:16-cv-02086 (M.D. Tenn. April 22, 2019)). The agreement requires the school to pay \$14.5 million into a settlement fund, review existing investment options and recordkeeping arrangements, and provide employees information about the plan's investments and instructions on how to reinvest their accounts. But another aspect of the settlement is making some employers take note: Vanderbilt must to take additional steps to protect confidential participant information.

FEES AND FUND PERFORMANCE

The plaintiffs claimed the fiduciary committee for the plans violated its duties of prudence and loyalty by causing the plans to pay unreasonable administrative and investment-management fees and retaining underperforming investment options. The litigation echoed specific challenges raised in other 403(b) cases, including concerns about these practices:

- Using multiple recordkeepers (TIAA, Fidelity, Vanguard and VALIC)
- Including recordkeepers' proprietary funds on the plans' investment menu
- Failing to negotiate rebates on excessive revenue-sharing arrangements
- Locking in underperforming investment options through bundled investment/recordkeeping arrangements
- Selecting retail-share class funds when institutional-share classes were available

- Offering too many and duplicative investment options (more than 330)
- Lacking a prudent process for monitoring and removing investment options

CONFIDENTIAL PARTICIPANT INFORMATION

The plaintiffs also claimed the committee breached its duties of prudence and loyalty and participated in prohibited transactions by allowing TIAA to misuse confidential participant information for its own benefit. The complaint [alleged](#) TIAA used its position as recordkeeper to gain “valuable, private, and sensitive information including participants’ contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement, among other things.”

The plaintiffs argued this information was a plan asset, and the committee did nothing to stop TIAA from using the information to sell its investment products and wealth-management services to participants outside of the plan. The complaint also faulted the committee for not trying to determine the value of TIAA’s access to participants’ information as a marketing benefit. It’s unclear if the plaintiffs believed the committee should have reduced TIAA’s fees by this value or taken some other action.

SETTLEMENT TERMS

Besides establishing the \$14.5 million fund, the settlement requires Vanderbilt to inventory the plans’ investment funds and fees and notify employees about where to find fund information and how to reinvest their accounts.

Vanderbilt also must request proposals for recordkeeping and administrative services from at least three qualified recordkeepers. Any proposal for basic recordkeeping services must express fees on a per-participant basis. Vanderbilt can choose a new recordkeeper or keep its current one, Fidelity (the school switched to a single recordkeeper in 2015).

To address concerns about misuse of participant information, the settlement requires Vanderbilt’s future contracts to prohibit recordkeepers from “u/sing information about Plan participants acquired in the course of providing recordkeeping services ... to market or sell products or services unrelated to the Plan,” unless responding to a participant’s request. The agreement also requires Vanderbilt to inform Fidelity that it is prohibited from using participant information in this way.

MORE TO COME ON PARTICIPANT INFORMATION?

The assertion that participant information is a plan asset was key to the claim that TIAA misused that information. If TIAA used plan assets for its own benefit, that would be a prohibited transaction. But the law is currently unclear on whether confidential participant information is a plan asset.

The Vanderbilt case provides no help in answering that question since the parties settled before the court could weigh in. The settlement applies only to the parties in this case. The agreement creates no obligation for employers — other than Vanderbilt — to restrict how recordkeepers use participant information.

The issue of safeguarding participant information is unlikely to go away anytime soon, given the current debate over privacy in the digital world. Claims about mishandling of participant data could arise in future litigation. The 7th US Circuit Court of Appeals is currently considering this issue in a case involving Northwestern University's 403(b) plans. The lower court in that case held participant data is not a plan asset ([*Divane v. Northwestern Univ.*](#), No. 16-8157 (N.D. Ill. May 25, 2018)).

RELATED RESOURCES

- [Plaintiffs' Memorandum for Preliminary Approval of Class Settlement](#) in *Cassell v. Vanderbilt Univ.* (M.D. Tenn. April 22, 2019))
- [*Divane v. Northwestern Univ.*](#) (N.D. Ill. May 25, 2018)

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