NEWS Lawsuits

New strategy in 401(k) litigation: Ask for settlement before suit is filed

Law firm Lieff Cabraser is reportedly busy sending letters to plan sponsors.

September 20, 2023 By Emile Hallez

A new entrant to the world of 401(k) lawsuits is trying what appears to be a novel tactic: Contacting plan sponsors out of the blue and implying that they should settle.

That's before the hint of any lawsuit or request for information about the plan that would lead to a lawsuit, said Daniel Aronowitz, managing principal of 401(k) insurer *Euclid Fiduciary*, who has had at least seven clients contacted by law firm Lieff Cabraser Heimann & Bernstein.

Like other plaintiffs' firms, Lieff Cabraser alleges in the notices that plans have unreasonably high record-keeping fees, Aronowitz said. What's different is that the initial notice amounts to a request to settle potential *claims* — something that none of the copycat firms that have piled into the lucrative business of ERISA litigation have apparently tried.

"We think defense counsel need to fight back, because this is unfair," Aronowitz said. "The plaintiff law firms are taking advantage of that fact that there is no business judgment rule under ERISA."

That means that in *excessive fee cases*, defendants often have to disprove a negative — they have to show in court that their plans aren't as bad as plaintiffs might claim, he said.

A commonality among the letters that big companies have received is that the law firm claims that a plan's fees are out of line with plans of a similar size, citing figures from the *"401k Averages Book."* In each letter that clients have received, the example is that a $200 million plan charges participants $13 annually for record keeping.

"This really offends me, because it's not what the book says," Aronowitz said.

Most 401(k) plans with less than $400 million in assets pay for a portion of record keeping through the use of revenue-sharing fees that are included in the mutual funds within the plan, he noted.

Euclid's data from 2,500 public records in 2022 show a common range of $28 to $60 per participant among plans with $1 billion to $5 billion in assets, which covers the size of the plans that have been contacted for settlements, he said.

"Plans are not paying $13 per participant," he said. "[Only] a few do."

The nearly identical letters also allege that the plans in question include investment lineups that underperform, Aronowitz said. “He’s basically saying, ‘I can sue you. I don’t need any proof. There is a very low bar.’”

However, the law firm did file its first case related to a 401(k) plan last year. *That suit*, which names TTEC Services Corp., includes claims over allegedly excessive record-keeping and investment management fees, underperforming investment options, and a delay in adding target-date funds to the investment menu.

Additionally, the firm reportedly has sent Employee Retirement Income Security Act information requests to some retirement plan sponsors, indicating “early preparations” for rapid-fire lawsuits “against many large corporate plans,” Aronowitz wrote in a blog post about the issue.

Lawyers at Lieff Cabraser who filed the case against TTEC did not immediately respond to a request for comment.

It has become common for plan sponsors to settle ERISA claims, often doing so if such cases survive a motion to dismiss and could otherwise drag on for years and be expensive to defend. That has drawn more plaintiffs’ firms to branch out into 401(k) litigation.

“There’s been a long tradition of advertising for potential class representatives based on a sense that there could be a settleable or even winnable claim,” Andrew Oringer, partner at The Wagner Law Group, said in an email. “Going straight to the plan sponsor without there being a lawsuit, or substantial work toward the filing of a lawsuit, would seem to be going aggressively to the next level. It remains to be seen whether any sponsor would really be willing to settle an excessive fee case that doesn’t yet exist.”

Sean Cooper, founding partner at Endeavor Law, said it’s hard to see a plan sponsor paying claims ahead of a lawsuit.

“While settling pre-suit can be beneficial in the individual plaintiff context, class or representative claims are different. Any release the plan sponsor could receive out-of-court would (almost certainly) be confined to the individual participant who retained the plaintiffs’ firm,” Cooper said in an email. “Due process requires notice and an opportunity to object to a settlement for non-parties, as well as court approval … So, there’s nothing prohibiting the same plaintiffs’ firm from ‘going back to the well,’ i.e., finding a different participant to assert the same claim and demand compensation.”

The letter strategy shows that more plaintiffs’ lawyers will likely continue to pursue ERISA cases, he said. “For plan sponsors, it highlights the importance of following best practices — while you can’t prevent a lawsuit, you can always have a good defense prepared, and of course, your first call should be to counsel if you receive such a demand letter.”
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