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Great-West/Empower Targeted in Revenue Sharing Lawsuit

By Rebecca Moore
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Great-West, now doing business as Empower Retirement, is facing similar accusations to those leveled against Prudential at the end of last year.

Empower Retirement is the latest retirement plan provider accused of charging excessive fees to retirement plans and participants.

A recently filed lawsuit says Empower Retirement has entered into revenue-sharing agreements and similar arrangements with various mutual funds, and other investment advisers, instruments or vehicles by which it receives revenue-sharing payments for its own benefit in violation of the Employee Retirement Income Security Act (ERISA).

According to the compliant, the revenue-sharing payments range from twenty-five (25) basis points of the total assets of the plans to substantially greater revenue-sharing payments. The lawsuit filed by TPS Parking Management, LLC 401(k) Plan seeks to recover damages not only for the TPS plan but for “all other similarly situated retirement plans and entities” that are employee benefit plans under ERISA, subject to Internal Revenue Code Sections 401(a) and 401(k), and subject to the revenue sharing payments and other compensation that Empower Retirement receives.

The lawsuit contends that the revenue-sharing payments received by Empower Retirement constitute excessive fees and otherwise violate ERISA because their receipt results in prohibited transactions under ERISA.

Great-West, the named defendant in the suit, issued a statement to PLANSPONSOR saying, “We won’t comment on pending litigation; however, we will say we believe this suit and the claims it makes are without merit, and we will defend the matter vigorously.”

The lawsuit calls the revenue-sharing “kickback payments” and says they are part of a “pay-to-play scheme” in which Empower receives payments from mutual funds in the form of 12b-1 fees, administration fees, service fees, sub-transfer agent fees and/or similar fees in return for providing the mutual funds with access to its retirement plan customers.

Empower Retirement uses its ownership and control over separate accounts in which its retirement plan customers’ investments are placed to negotiate for the receipt of the revenue-sharing payments from mutual funds, and the revenue-sharing payments have the effect of increasing the expense ratios of the mutual funds, which expenses are deducted directly from the assets of the separate accounts, the complaint says.

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DC	3.8.16	10k

The revenue-sharing payments are often internally described by service providers as “services fees” and reimbursement for expenses incurred in providing services for, to, or on behalf of the mutual funds, and the lawsuit contends this is a deceptive characterization provided to retirement plans and their participants. The complaint says the amounts of the revenue-sharing payments bear absolutely no relationship to the cost or value of any such services, and that Empower performs the same services regardless of the amount of revenue-sharing payments, if any, made to it.

“As a result of its acceptance of these unlawful payments, Empower Retirement occupies a conflicted position whereby it effectively operates a system in which it is motivated to increase the amount of such payments, while improperly requiring certain plans and/or participants who invest in mutual funds and similar investments that provide higher amounts of revenue-sharing payments to incur and pay unreasonably high fees for the services provided,” the complaint says.

It charges that the receipt of such payments places Empower in a conflicted position in which the interests of its retirement plan customers can be and are sacrificed in the interest of Empower earning greater profits through the receipt of revenue-sharing payments.

The lawsuit also accuses the recordkeeper of engaging in acts of self-dealing with respect to the retirement assets of the plans class held in the separate accounts and with respect to certain proprietary and/or sub-advised mutual funds in violation of the prohibited transaction rules of ERISA.

In its compliant, TPS lists several ways it contends Empower controls its own compensation. It says that under the group contracts, Empower does so by calculating the current value of the separate accounts by applying a “daily asset charge,” which Empower calculates itself based on so-called “expense risks” and which can, in Empower Retirement’s discretion, include a profit payable to Empower, and by applying so-called “experience credits” to reduce or increase the fees charged to the separate accounts, based upon Empower Retirement’s unilateral determination.

The lawsuit says Empower also utilizes the assets contained in the separate accounts to earn additional compensation independent of the revenue-sharing payments by utilizing uncommitted assets in these separate accounts to engage in certain hedging transactions, securities lending transactions and to negotiate for the payment of additional compensation from third parties on the basis of its ownership and control of these retirement assets. Thus, Empower invests the retirement assets of its customers through “schemes” and by utilizing devices independent and apart from the investment of these assets in mutual funds and other contemplated investments.

Empower Retirement also influences its own compensation by effectively electing to receive all dividends payable to the plans from mutual funds in the form of additional mutual fund shares, thereby increasing the amount of the assets of the plans in the separate accounts, increasing the amount of revenue-sharing kickbacks payable to Empower, the complaint contends.

The lawsuit also mentions “mortality and expense risk charges” and “wrap fees,” and says the group contracts also obligate the TPS plan and other similarly situated plans to pay Empower brokerage commissions, transfer taxes and any expenses incurred by Empower, and which Empower determines are reasonably necessary to preserve or enhance the value of the assets in the sub-accounts representing the plans’ investments.

Finally, TPS accuses Empower of not meaningfully disclosing its fees.
Retirement plan fee lawsuits have increased over the years, but 2016 has started with a force. Accusations similar to those against Empower have been leveled against Prudential.