Life and Annuity Series: Focus on 403(b) Annuity Sales Practices

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T*he New York Times* has been running articles sharply critical of annuities, especially 403(b) annuities sold to teachers.

This is part of what we think will be a concerted effort by consumer advocates to expand the US Department of Labor (DOL) fiduciary rule standards to all retirement and investment products, including those sold under sections 457 and 403. While that process is ongoing, we expect that plaintiffs' lawyers will argue that the principles in the DOL fiduciary rule should apply to 403(b) and 457 plans even if those plans don't fall under the Employment and Retirement Income Security Act of 1974 (ERISA), either based on an “excessive fee” or a suitability theory. This latest focus on annuity sales, including commentary from so-called experts that certain kinds of annuities are never in a purchaser's best interest, can also be expected to spark activity from the state regulators.

We have decades of experience in litigation and regulatory matters challenging annuity sales, and have been particularly focused lately on the new DOL rule. We have successfully defended class actions alleging that an insurance company's sale of 403(b) annuities through a teachers' association amounted to an unlawful ERISA “plan” (that complaint was dismissed, and the dismissal was affirmed by the Ninth Circuit). We have also defeated efforts by plaintiffs in 457 plan class actions to import ERISA rules for the sale of retirement annuities to state and local governmental plans, and recently won a jury trial verdict in an equity index annuity case.

We can provide clients with further information on these potential claims, and also have ideas on how to enhance clients' current procedures with respect to 403(b) and 457 plan sales that we can share.

Authors

Andrea J. Robinson

RETIRED PARTNER

+1 617 526 6000