401(k) Plan Fiduciary Responsibility and Litigation Risks

Employers sponsoring retirement plans must navigate multiple regulatory agencies that oversee qualified plans. Investigations and penalties may arise from failing to follow proper standards of conduct.

Plan Fiduciaries Face Scrutiny

ERISA stands for the Employee Retirement Income Security Act of 1974 and it regulates employer-sponsored retirement plans. ERISA sets standards of conduct that plan fiduciaries must fulfill.

Every plan must name at least one fiduciary. The named fiduciary(s) oversees the plan's operation.

Recent regulations have imposed expanded obligations for fiduciaries to disclose plan fees. Investment selection, monitoring, and costs have been the subject of recent Supreme Court rulings.

Fiduciaries have the responsibility to act prudently and solely in the interest of plan participants. Prudence focuses on decision making processes which should be documented.

Are you a Fiduciary?

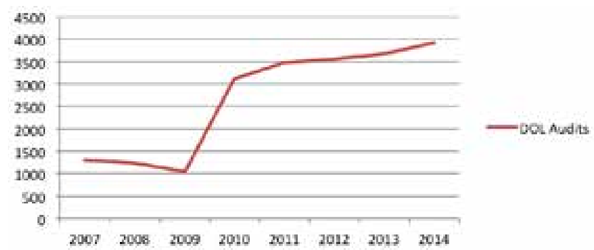
We have seen uncertainty about fiduciary roles among plan sponsors. ERISA deems anyone a fiduciary who has decision-making authority over the management of the plan or its assets. You are a fiduciary if you:

- Have any discretionary authority or responsibility in the plan's administration
- Assume one of ERISA's named fiduciary roles, such as trustee, investment advisor, or plan administrator
- Exercise any authority or control over the plan or its assets whether direct or indirect, even if you were never delegated the authority to do so

The DOL Is Auditing More Than 3,000 Retirement Plans Annually

The Department of Labor has increased attention on plan audits and penalties. The DOL recently increased its audit staff to over 1,000 and plans to increase the number of investigations conducted each year. This should be of particular concern to retirement plan sponsors because the DOL conducted 3928 audits in FY 2014 and 64.7% concluded in monetary results. *(http://www.dol.gov/ebsa/newsroom/fsFYagencyresults.html)*

DOL Audits



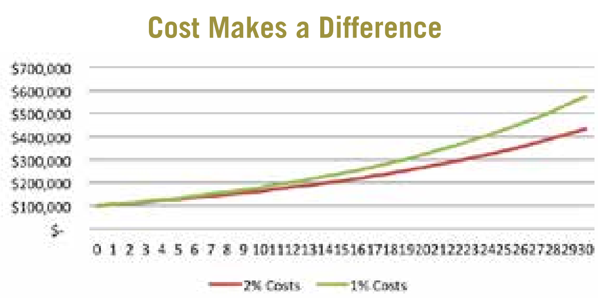
Litigation Risk

Plan fiduciaries should have the expertise to determine, both at the initial selection and during ongoing reviews, whether services, fees, and investments are reasonable and supporting the participants best interests.

Too often, however, there is no evaluation of competing service providers. It's more likely that service providers are selected because of a relationship with a golfing buddy who happens to be a broker. Alternate service providers are not evaluated.

Even with DOL mandated fee disclosures provided to employers, it is what employers do with the information that is critical. Are they evaluating performance relative to appropriate benchmarks? Can they determine if the designated investment alternatives allow participants to diversify their retirement accounts? Are they evaluating the reasonableness of fees given the level of service being provided? The DOL stated its intention to focus on how employers handle this in its Strategic Plan for 2014-2018. *(http://www.dol.gov/_sec/stratplan/FY2014-2018StrategicPlan.pdf)*

The failure of employers to fulfill their fiduciary duties can result in exposure to liability. Just one percent more in costs than is reasonable will cost employees hundreds of thousands of dollars in their retirement accounts.



An employee exposed to 2% in fees will end up with $142,155 less in her account after 30 years. (Assumes $100,000 starting balance, 7% annual return, and no further contributions)

Liabilities, Breaches and Remedies

Plan fiduciaries are held personally liable for losses in the plan if they fail to perform their duties under ERISA. Potential consequences include:

- Liability to restore plan losses due to the fiduciary breach
- 20 percent civil penalty
- Criminal sanctions
- Disqualification from serving as an ERISA plan fiduciary in the future

You could be liable for another fiduciary's breach if:

- You share duties (such as on a committee)
- You are aware of another fiduciary's breach and do nothing about it
- You fail to monitor another fiduciary when required

How To Protect Yourself

Partner with a specialist retirement plan advisor. Phillips & Company will guide you through the muddle of evolving requirements to help protect the interests of your participants and fiduciaries.

1. Develop or improve your Investment Policy Statement (IPS)

The IPS establishes the policies and objectives for the plan.

2. Identify and appoint fiduciaries to a committee

Hold regular meetings. Phillips & Company guides committees and is a resource for education and assistance with fulfilling fiduciary obligations.

3. Partner with providers that offer fiduciary support and impartial advice

Phillips & Company streamlines the request for proposal (RFP) process. With our knowledge of industry providers, we review their proposals and help you choose vendors who meet your participant's needs and may result in lower costs.

4. Select and monitor investments

Phillips & Company monitors, reports performance, and recommends changes when necessary.

5. Disclose and evaluate fees

New regulations require plan sponsors to disclose plan fees to participants. They must also document their evaluation of plan fees and determine if fees are reasonable.

6. Give your participants access to timely educational materials and resources

Phillips & Company will sit down with your employees one-on-one to provide education and investment advice.

7. Document everything

The plan may be investigated at some point, in which case it will be necessary to provide accurate and detailed records to avoid fines and penalties.

Make Sure You're Protected and Prepared

There is help for plan sponsors understanding ERISA's complex requirements. Even small plans can get valuable support from an unbiased, experienced retirement plan advisor. An initial review of your current plan will point out strengths and potential liabilities. Phillips & Company can help you understand and implement the steps to protect yourself and your employees. You can have a stronger plan designed to help participants reach their savings goals.

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