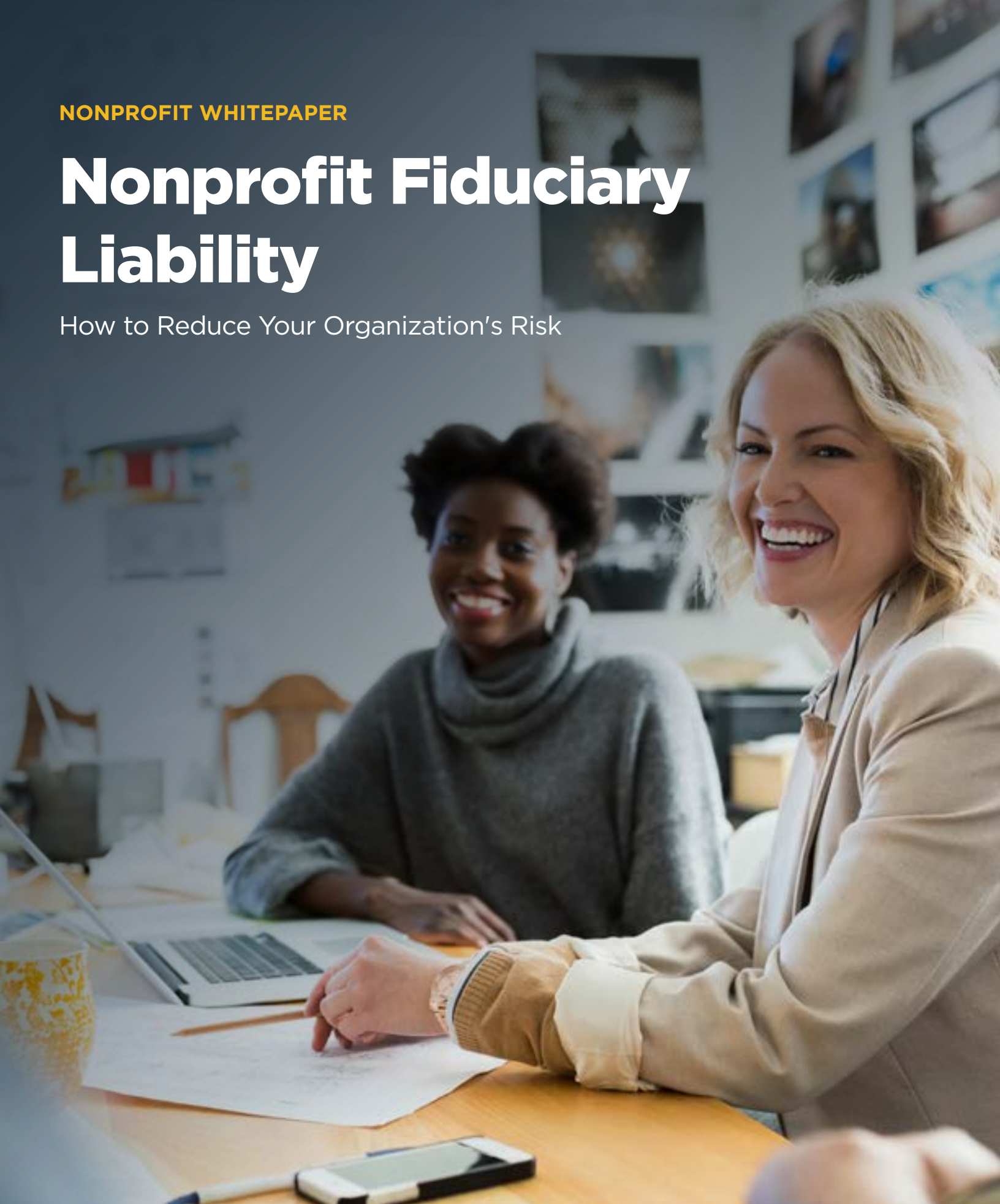


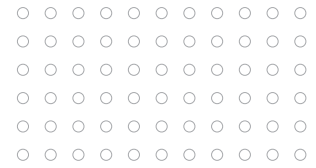
NONPROFIT WHITEPAPER

Nonprofit Fiduciary Liability

How to Reduce Your Organization's Risk



Nonprofit organizations and their leaders should be aware of risks posed by fiduciary liability, a growing concern not covered by directors and officers (D&O) liability insurance policies. While this exposure has existed for years, a series of regulatory changes governing group health and welfare plans have raised the stakes for plan fiduciaries. Fortunately, fiduciary liability exposures can be addressed simply and affordably through thoughtful risk management strategies and widely available insurance solutions.



What is Fiduciary Liability?

Fiduciary liability arises from “wrongful acts” committed as a fiduciary of group health and welfare benefit plans. These may include errors, omissions, misstatements, misleading statements, neglect or breach of duty. Activities that can create liability include benefit plan design and funding, plan asset management, provider selection, plan disclosures and communications and plan termination, to name a few.

Why Have Fiduciary Liability Exposures Increased?

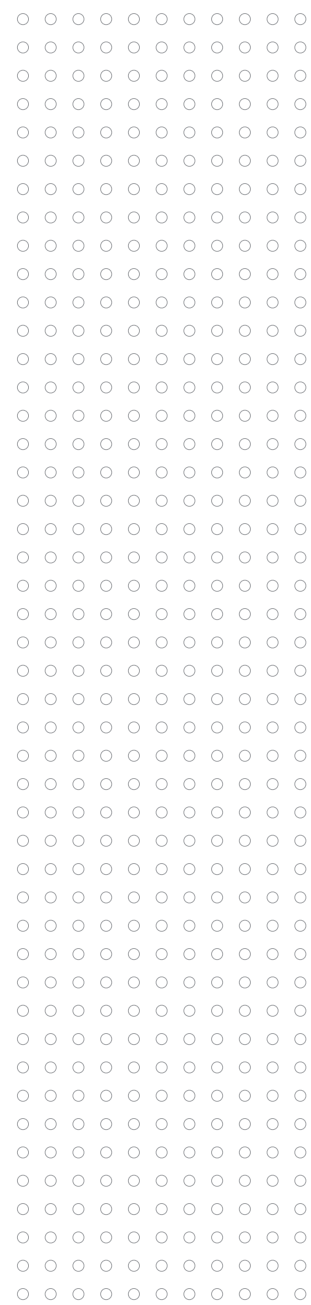
In 2009, the Internal Revenue Service (IRS) regulatory changes demanded new levels of fiduciary diligence and disclosure in the treatment of tax-sheltered annuities or 403(b) plans — the retirement vehicles of choice for many nonprofits. Effectively, the change forced 403(b) plans to operate within the same framework as 401(k)s, with comparably stringent requirements of transparency, documentation, communication, disclosure and privacy. The IRS Publication 4546 provides a handy [self-audit compliance checklist](#).

Since then, the minefield of other compliance pitfalls has continued to expand, encompassing a virtual “alphabet soup” of federal statutes that could create liability for fiduciaries of retirement and health plans.



Several of these regulatory changes have had a particularly significant impact:

- Enacted over a decade ago, the Affordable Care Act (ACA) continues to beleaguer employers by mandating a variety of intricate health coverage duties, reporting obligations, communication and other organizational requirements.¹
- More recently, the Consolidated Appropriations Act of 2020 (CAA) adds a series of new employer obligations concerning transparency and disclosure concepts. Although the CAA does not directly add new fiduciary responsibilities on Employee Retirement Income Security Act (ERISA) plans, it intensifies the scrutiny and visibility of possible health and welfare fiduciary compliance shortcomings. For example, delays in moving employee-paid “salary reduction” dollars out of payroll to an insurer may result in a compliance violation. Failure to comply strictly with federal health and welfare statutes, as well as their state and local counterparts, can trigger liability, as can other wrongful acts by benefit plan sponsors and their fiduciaries.²



PREPARE FOR SCRUTINY

The IRS plans to use \$80 billion of Congressional funding to improve operations, invest in new technology, expand its ability to audit high-wealth taxpayers, hire more customer service representatives and agents, as well as fill vacant positions due to retirements. With this additional workforce, nonprofits can expect increased scrutiny of filings and a greater number of enforcement actions.

Source: [IRS Inflation Reduction Act Strategies Operating Plan, FY 2023-2031](#)

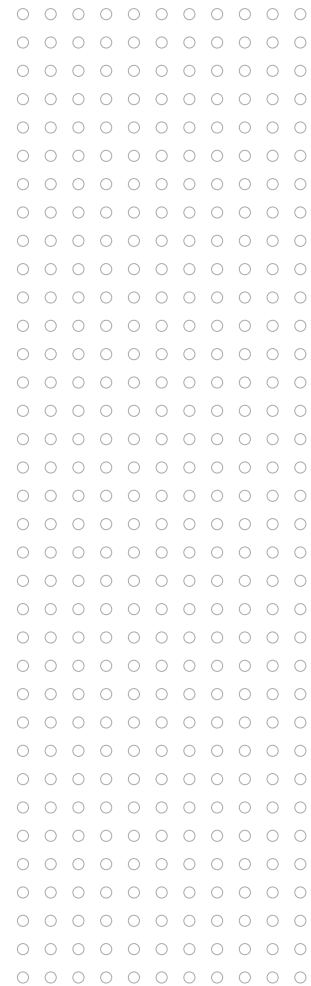
¹ADP, “How Well Do You Understand the ACA Employer Mandate?” February 2023.

²Society of Human Resource Management (SHRM), “2021 Appropriations Act Increases Employee Health Plan Transparency,” January 5, 2021.

The Limits of D&O Insurance Protections

Virtually all D&O liability policies exclude coverage for the entity and its individual decision-makers for actual or alleged violations of fiduciary responsibilities imposed by ERISA and its amendments. In addition, policies generally exclude violations of similar federal, state, local and common laws.

Although many nonprofits assume employee benefit liability (EBL) or employment practices liability insurance (EPLI) will fill the gap in D&O protection, that is a common misconception. EBL coverage added to a commercial general liability policy only addresses mistakes in the administration of benefit plans, such as the inadvertent failure to enroll a participant. EPLI only protects against employment-related management offenses such as wrongful termination, discrimination and harassment. Neither policy protects against fiduciary acts, errors, omissions, misleading statements, neglect or breach of duty associated with benefits plans.



BREACH OF FIDUCIARY DUTY SETTLEMENTS

At least 11 major colleges and universities have faced class action suits for breach of fiduciary duties in the management of their 403(b) plans under the ERISA. Settlements included:

- Brown University: **\$3.5 million** in 2019
- Columbia University: **\$13 million** in 2021
- Washington University: **\$7.5 million** in 2022

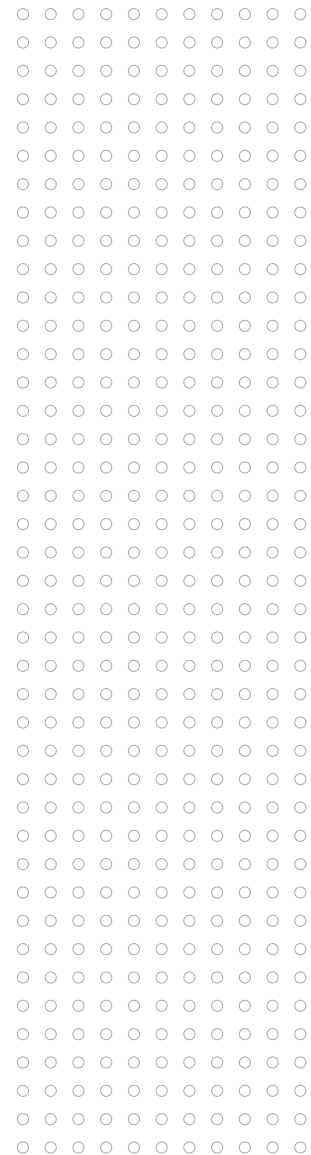
Source: [National Association of Plan Advisors](#)

Outsourced Solutions Do Not Eliminate Fiduciary Liability

Many nonprofits outsource retirement fund asset management to third-party managers. While the strategy of engaging independent expertise is often prudent, it doesn't absolve the sponsoring organization and its leaders of potential liability. If the plan manager underperforms in its professional assignment, participants will likely target the sponsoring employer first with allegations of negligent selection/retention, inadequate oversight or other accusations of fiduciary mismanagement.

Even with the most competent and ethical asset managers there's room for error. The disclosures for investment options and administrative fees for the retirement plan are seldom crystal clear, opening the door to grievances from participants. In addition, employers are often targeted by class action attorneys for failure to fully and clearly benchmark the fees charged to participants in the plans.

Many employers also overlook their group medical, dental, disability and ancillary benefit plans as sources of potential fiduciary liability. While retirement plans arguably present the greatest — or most conspicuous — risk, employee benefit offerings that fail to meet workforce needs, cost too much, aren't clearly communicated or are poorly managed can create fiduciary liability.



A Simple Remedy to Fiduciary Liability Exposure

The good news for exposed nonprofits is that fiduciary liability risk can be managed with relative ease. Insurance is both plentiful and affordable, especially when purchased as an adjunct to existing D&O protection. Some major insurers also provide no-cost risk management support.

Virtually every nonprofit D&O/EPLI market offers a fiduciary liability product. Rating is based primarily on asset size (funds under management), the scope of the applicant's employee benefits offerings and the integrity of internal plan management controls. Pricing varies in direct relationship to limits and self-insured retentions/deductibles.

The Bottom Line

As group health and welfare sponsors and fiduciaries, nonprofit organizations and their leaders operate within a dynamic regulatory landscape. They must comply with the same federal, state and local laws as their for-profit counterparts — but sometimes do so with less rigorous governance by good-natured volunteer boards, leaner human resource infrastructures and a focus on mission that supersedes attention to nuts-and-bolts business detail.

At the same time, their employees are becoming better informed, more discerning benefits consumers with heightened performance expectations.

The best defense is a multi-pronged strategy that includes performing regular compliance self-audits; adoption of clear written benefit plan documents; obedient, loyal and diligent fiduciary governance; clear, frequent and fully transparent employee communication; and fiduciary liability insurance that achieves the most efficient, cost-effective commercial risk transfer.

Contact HUB International's **nonprofit insurance specialists** to learn more about protecting your organization from fiduciary liability risk.

AN ALPHABET SOUP OF COMPLIANCE

Compliance requirements of many laws could leave a nonprofit exposed to fiduciary liability, including:

- **ACA** (Affordable Care Act)
- **ADA** (Americans with Disabilities Act)
- **ADEA** (Age Discrimination in Employment Act)
- **CAA** (Consolidated Appropriations Act)
- **COBRA** (Consolidation Omnibus Budget Reconciliation Act)
- **ERISA** (Employee Retirement Income Security Act)
- **HIPAA** (Health Insurance Portability and Accountability Act)
- **PDA** (Patient Decision Aids)

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