

What's Important in 2025: Fiduciary Lawsuits and Government Investigations

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The management and oversight of qualified retirement plans, such as 401(k) plans, continue to evolve with changing laws and regulations, new investments and services, and participant expectations. Plan committees play a pivotal role in ensuring their firm's plans are administered in compliance with legal standards while meeting participant needs.

Plan sponsors and the officers and managers who oversee the operations of those plans typically have two primary concerns:

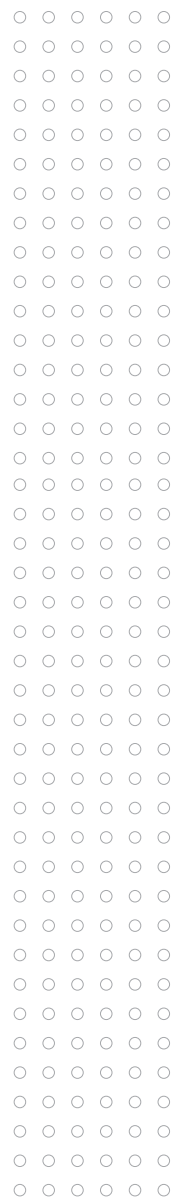
- How to manage the plan so that it is an attractive and successful benefit for the employees; and
- How to comply with the governing laws and regulations to minimize risk of lawsuits and government investigations.

This article focuses on the latter...**risk mitigation**.

Plan Committees and Fiduciaries

As background, the officers and managers who oversee the operations of qualified retirement plans are fiduciaries under the Employee Retirement Income Security Act (ERISA). To satisfy their legal responsibilities of prudence and loyalty to plan participants, they often operate as a plan committee.

ERISA requires that committee members make decisions about plan investments, services and administration, including plan and investment costs, in a careful, skillful, diligent and prudent manner. The failure to gather and evaluate the information needed to make prudent decisions, and any resulting injury to a plan and its participants, is a fiduciary breach that can result in a fiduciary lawsuit or in penalties and damages in a government investigation.



Emerging Areas of Litigation

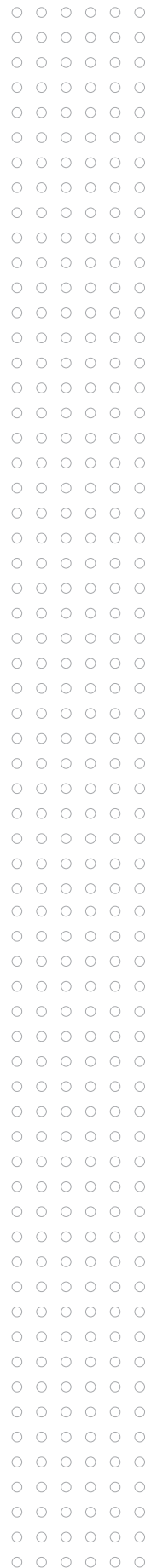
Over the last two decades, most lawsuits against plan committee members have focused on claims that a plan’s investments were too expensive and that the plan’s service providers were paid too much—at the expense of the participants (often as a result of revenue sharing from the plan’s expensive investments). However, more recent lawsuits have also highlighted new claims, including:

- **Improper Use of Forfeitures:** Allegations that forfeited amounts should have been used offset plan expenses or to allocated to the participants, rather than to reduce employer contributions. This is a complex issue. Plan sponsors should review their plan’s forfeiture provisions and seek legal guidance. If the plan provision requires that forfeitures be used in a particular manner, e.g., to pay plan expenses, the fiduciaries should check their practices to make sure that they are complying with the plan. On the other hand, if the plan document provides that the committee can make a decision about how to use the forfeitures, the committee should seek legal advice to determine if which of the alternatives can be selected in light of the fiduciary duties that apply.
- **Imprudent Selection of Target Date Funds (TDFs):** Allegations that a plan’s target date funds were improperly selected and are underperforming. TDFs now hold more money than any other plan investments. As a result, they have become a target of lawsuits and plan committees should more closely review their TDF decisions. Key issues to consider are:
 - **Is the TDF suite “to” or “though” retirement and why did the committee select one over the other?** If the committee has made a thoughtful decision, it is likely prudent and appropriate. However, the key is that a committee consider the issues and make an informed decision. For risk mitigation, a committee should document the decision in the minutes of its meeting and retain the information that was reviewed in that process.
 - **Is the TDF suite’s glide path conservative, moderate, or aggressive, and how does that match the demographics of the participants.** There is not a right or wrong decision; instead, they key is that the committee engage in a thoughtful and knowledgeable process to make the decision that the committee members believe is in the best interest of the participants.

Focus Areas of DOL Investigations

The DOL has intensified its focus on two critical areas:

- **Missing Participants:** Ensuring plans follow best practices for locating and communicating with participants who are no longer employees of the plan sponsor, but who have left their accounts in the plan. A “missing participant” is defined as a participant who cannot be located or who is nonresponsive. Plan committees should make diligent efforts to find any missing participants and ensure that they continue to receive the required plan disclosures and account statements. If not, the DOL will take the position that the fiduciaries breached their duties under the law. Here is DOL guidance on this matter: [best-practices-for-pension-plans.pdf](#)
- **Cybersecurity:** DOL investigations now regularly include questions about a plan’s cyber security policies and practices, including whether the plan fiduciaries have considered whether the cybersecurity practices of the plan’s service providers are prudent and reasonable. Here is guidance from the DOL on what plan fiduciaries should do: [compliance-assistance-release-2024-01.pdf](#)



To address these issues, plan committees should consider:

- Reviewing and implementing the DOL’s best practices for cybersecurity; and
- Reviewing and implementing the DOL’s best practices for missing participants.

Risk Management for Fiduciaries and Plan Sponsors

The primary risk “threats” are fiduciary breach lawsuits and government investigations. Realistically, plan sponsors and committee members can’t be expected to be aware of those threats, and particularly of the emerging threats. However, the law—ERISA—says that where a fiduciary does not have the knowledge needed to do its job, the fiduciary must seek advice from advisors or attorneys who can provide “missing” information. A good approach is for a plan committee to ask their advisors or attorneys to provide annual fiduciary training that covers fiduciary responsibility and the claims being asserted by plaintiffs’ attorneys, the Department of Labor, and the Internal Revenue Service. In this case, the best defense is knowledge of where the problems are and what needs to be done to avoid those problems.

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RPW-413-0225 (Exp. 02/27)

