

ERISA Litigation Playbook

Fiduciary checklist

Employee Retirement Income Security Act (ERISA) lawsuits have shed light on issues surrounding governance, investments, plan fees, documentation and administration, and participant communications. The following actionable checklist can be used as a guide to help defined contribution (DC) plan committees minimize litigation risk.

Governance

- 1** Create a governance charter document that outlines the fiduciary delegation, formal acceptance, and monitoring process
- 2** Carefully use “Plan Sponsor” and “Plan Administrator” in documents
- 3** Carefully select committee members for expertise and conflicts (CEO/CFO/Legal)
- 4** Conduct annual fiduciary training and document the attendees and materials covered
- 5** Carefully craft fiduciary committee minutes to capture enough detail on process but not too much detail where it could be questioned in court
- 6** Review insurance for cyber/plan coverage (fidelity bond, fiduciary policy, cyber, errors & omissions)
- 7** Hire expertise where needed [3(21) or 3(38) investment consultant, independent fiduciary, consultant]
- 8** Conduct vendor search of all service providers every 5-6 years (recordkeeper, trustee, managed accounts, brokerage, auto-IRA, investment consultant)
- 9** Benchmark service providers’ fees and service every 1-2 years; document any “Indirect Compensation” from rollover IRAs, managed accounts, brokerage accounts, float income, revenue sharing
- 10** Consider use of attorney-client privilege if timing on vendor search and/or fee benchmarking are stale
- 11** Add fiduciary detail to annual audit report (last date of fee benchmarking, share class review, use of revenue sharing, etc.)

Investments

- 12** Document fund structure rationale as a clear, deliberate fiduciary decision (active vs. passive, TDF vs. target risk, ESG, etc.) and watch for overlapping funds that could be consolidated
- 13** Ensure each fund has meaningful benchmarks
- 14** Continually monitor each fund for lowest share class, including CITs and separate accounts
- 15** Carefully evaluate any proprietary fund use: revenue sharing, performance, share class, indirect compensation
- 16** Credit revenue sharing back to participants (vs. paying plan fees); evaluate funds with lowest “net expense” after revenue credits are applied
- 17** Continually monitor fund performance to meaningful benchmarks and peer groups, including any funds frozen to new contributions
- 18** Annually review QDIA selection using DOL guidelines and monitor participant utilization
- 19** Monitor self-directed brokerage provider fees/service and participant utilization
- 20** Monitor custom TDF fiduciary for reasonable glide path; use plan data to help determine a “to or through” glide path
- 21** Consider hiring an independent fiduciary for company stock; document decision to unitize with cash position or not (share accounting); document cash “drag” on fund performance

Plan fees

- 22** Evaluate fee structure (asset based, flat dollar, or hybrid) and document rationale; ensure asset-based fees are capped
- 23** Consider paying participant fees (reduces potential harm to participants)
- 24** Review both plan sponsor and participant fee disclosure for accuracy (hidden revenue in float, self-directed brokerage account (SDBA), managed accounts)

Plan documentation

- 25** Consider adding mandatory arbitration clause to plan document to deter class-actions
 - 26** Consider adopting fiduciary policies to document process: Investment Policy, Fee Policy, Cyber/Fraud Policy, Education Policy – if adopted, it must be followed
 - 27** Review service contracts for cyber/fraud language, including make-whole protection
 - 28** Review service contract for cross-sell language and who owns the data (require no cross-selling without participant consent)
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Plan administration

- 29** Create fiduciary file on cyber/fraud evaluation (issue RFI, review insurance, communicate with participants, review DOL audit letter questions)
 - 30** Review service provider SOC 1 and 2 reports annually and address any deficiencies
 - 31** Conduct periodic compliance reviews of plan operation, especially missing participants, plan loans and definition/use of Plan Compensation
 - 32** Review loan program for use of collateralized “plan loans” (vs. normal participant loans) in 403(b) plans
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Plan communications

- 33** Carefully draft employee communication to not overly promote “improved,” “lower cost”
 - 34** Communicate cyber/fraud risk to participants with annual reminders to check account activity
 - 35** Monitor participant fund selection (heavy allocation to multiple TDFs, stable value, company stock, etc.) and consider communicating investment advice/guidance services
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All investing involves risk, including risk of loss.

CIT = Collective Investment Trust

DOL = Department of Labor

ESG = Environmental, Social, and Governance

QDIA = Qualified Default Investment Alternative

RFI = Request For Information

TDF = Target Date Fund

3(21) Investment Advisor: A co-fiduciary role whereby an advisor provides investment advice with respect to funds in a retirement plan investment menu. Employers retain the discretion to accept or reject the advice. Also referred to as a 3(21) fiduciary.

3(38) Investment Manager: A plan fiduciary with full discretionary authority and control over selecting, monitoring and replacing retirement plan investments. The plan sponsor offloads fiduciary risk for investments to the advisor; however, employers still carry a fiduciary duty to monitor the advisor. Also referred to as a 3(38) fiduciary.

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