Mission Possible: How 401(k) Plan Sponsors Can Handle Fiduciary Liability Like A Pro

By Ary Rosenbaum, Esq.

Tom Cruise doesn't age, and apparently neither do the problems that plague 401(k) plan sponsors. The plotlines may change—market volatility, regulation updates, SECURE 2.0—but one thing remains constant: fiduciary liability looms like the villain in every retirement plan story. And for many plan sponsors, it feels like they've been cast in Mission: Impossible without a stunt double or script. But here's the thing: it's not mission impossible—it's mission possible. I've spent over two decades in the retirement plan space, long enough to know that most plan sponsors don't mess things up because they're evil or incompetent. They mess things up because they don't know what they don't know. Fiduciary liability isn't some boogeyman invented by ERISA attorneys to scare clients into signing retainers. It's real, it's manageable, and most importantly—it's something you can get under control if you're willing to take it seriously. So if you're a plan sponsor reading this, breathe easy. No need to rappel off a skyscraper. You don't need IMF clearance to do this job well. You just need information, some discipline, and the ability to surround yourself with people who know what they're doing. Because, like Ethan Hunt, you're not in this alone.

Our Lives Are the Sum of Our Choices

There's a line from Dead Reckoning: Part I that I love (yes, I'm mixing movie metaphors, sue me): "Our lives are the sum of our choices." That line could be carved into the walls of every fiduciary committee meeting room in the country. Every decision you make—or fail to make—about your company's 401(k) plan adds up. Those decisions form the foundation of your fiduciary status. Choosing not to review your investment lineup? That's a choice. Not benchmarking fees? That's a choice. Hiring your buddy's TPA firm because "he's a good guy"? Also a choice. And in this industry, every choice has consequences—legal, financial, and reputational. The good news is that you don't have to be perfect. The law doesn't demand perfection. It demands prudence and loyalty. You don't have to win the game. You just have to play by the rules.

Fiduciary 101: What You Signed Up For (Whether You Knew It or Not)

Let's start with the basics. Under ERISA (that's the Employee Retirement Income Security Act of 1974, for those who haven't been to one of my conferences), anyone who exercises discretionary control over a plan's management or assets is a fiduciary. That means you, the plan sponsor, probably wear a fiduciary badge whether you realize it or not. And with great power comes—you guessed it—great liability. You're expected to act solely in the interest of plan participants and their beneficiaries. That's the famous "exclusive benefit rule." You're required to be prudent with investments, pay only reasonable expenses, and diversify plan assets. And you need to follow the plan document like it's your GPS through a post-apocalyptic landscape. Stray off-course, and you may find yourself on the DOL's radar. But again—none of this is impossible. You don't need to be a superhero. You just need to be deliberate, informed, and committed to doing the right thing, even when it's not convenient.

Form a Fiduciary Committee. No, Seriously.

One of the simplest, smartest, most underutilized tools in the 401(k) plan sponsor toolbox? The fiduciary committee. You don't need a boardroom full of PhDs or a consultant who speaks in buzzwords. You just need a small group of folks willing to meet quarterly (at minimum), keep minutes, review investments, monitor fees, and make decisions in the best interest of plan participants. Too many plan sponsors put one person—usually someone in HR—on the hook for everything. That's like asking a tech support guy to land the plane. It's not fair, it's not effective, and it's not going to end well. A fiduciary committee shares responsibility and creates a process, which is exactly what the law requires. It's not about being right all the time—it's about being methodical and documenting your decisions. If your committee isn't keeping records, isn't meeting regularly, or is just rubber-stamping decisions, you're not really managing fiduciary risk—you're managing optics.

Benchmark Your Fees. Then Do It Again.

In The Wolf of Wall Street, Jordan Belfort says, "Nobody knows if a stock's going up, down, sideways or in circles." That may be true of Wall Street, but it better not be true of your plan's fees. If you haven't benchmarked your recordkeeping and advisory fees in the last three years, you're flying blind. The DOL and plaintiff's attorneys love nothing more than a plan sponsor who didn't bother to ask what they were paying—or what they could be paying elsewhere. And with fee compression in full swing, there's no excuse for overpaying. Remember, it's not about finding the cheapest option. It's about making sure the fees you're paying are reasonable for the services provided. A $150,000 annual recordkeeping fee might be reasonable for a $50 million plan with custom technology and white-glove service. But that same fee for a $10 million plan using off-the-shelf solutions? That's a lawsuit waiting to happen.

Hire the Right Advisors—Then Hold Them Accountable

Not all advisors are created equal. And not all TPAs are saints, either. I've seen more than my share of plan sponsors blindly rely on providers who talk a good game but can't execute under pressure. I've also seen sponsors choose providers based on friendships, golf games, or worse—kickbacks. (Yes, that still happens. And yes, it's still illegal.) You want advisors who know ERISA inside and out. Who proactively suggest improvements. Who disclose conflicts and explain fees clearly. And you need to remember: hiring an advisor doesn't remove your fiduciary duty. Delegating doesn't mean abdicating. Review your service provider agreements. Check their insurance. Ask about cybersecurity. Monitor their performance. If they're not delivering, replace them. This isn't high school—you don't have to stick with the same group of friends forever.

Avoid the "Set It and Forget It" Trap

401(k) plans are not crockpots. You don't set them up in 2017 and expect them to self-correct through 2025. The industry evolves, laws change, and participant needs shift. You need to stay on top of things. When was the last time you reviewed your investment lineup? Are your default investments aligned with your workforce demographics? Are you offering a target-date fund series that's been vetted for glidepath appropriateness and asset allocation? How about plan design? Are your eligibility and vesting rules still competitive? Are you taking advantage of the latest SECURE Act provisions? The best plan sponsors treat their 401(k) plan like a living, breathing organism. They nurture it. Reassess it. Adjust it. Because inaction is, legally speaking, actionable.

Communicate With Participants Like It Actually Matters

Here's a tip from the world of behavioral finance: plan participants don't read dense prospectuses or fee charts written in legalese. They want plain language. They want to know: Am I on track for retirement? Am I paying too much? What should I be doing? Too many sponsors dump piles of paper on employees during open enrollment and call it "education." That's not education—it's cover. Work with advisors who know how to communicate. Offer group sessions. Use technology. Tailor messaging by age group or job role. The more informed your participants are, the less likely they are to sue you. And believe me, participant lawsuits are on the rise.

File Your Form 5500—and Everything Else—Accurately and On Time

You'd be amazed how many plan sponsors get tripped up on administrative stuff. Missing a Form 5500 deadline. Failing to deposit employee contributions within the DOL's "reasonable timeframe." Using the wrong definition of compensation. These aren't sexy errors, but they're common—and expensive. The good news is that many of these issues are fixable through the Voluntary Fiduciary Correction Program or Self-Correction Program. The bad news? If you don't catch them first, the DOL or IRS might. And once they do, your options shrink fast. Be proactive. Conduct annual compliance reviews. Engage an ERISA attorney (like me!) to audit your processes. Don't wait for the knock on the door.

You Don't Have to Be James Bond—You Just Need to Care

Let's bring it back to the movies. You don't need to be a tuxedo-wearing superspy to fulfill your fiduciary duties. You just need to: take your role seriously; ask the right questions; work with people who know more than you do document everything; And, most importantly, care. ERISA doesn't require perfection. It requires prudence, loyalty, and process. If you can commit to those three principles, you've already won half the battle. This mission is not impossible. It's entirely possible. And if you're willing to accept it, your participants—and your legal counsel—will thank you. Now go be the hero of your own 401(k) story.

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