AI in 401(k) Plans: Cool, But Who's Getting Sued When It Goes Wrong?

By Ary Rosenbaum, Esq.

Artificial Intelligence. It sounds futuristic, impressive, and maybe even a little terrifying—like something you'd expect in a sci-fi movie where robots take over the world. I'm still convinced that AI is just Skynet in sheep's clothing and the next step is Judgement Day like in the Terminator movies. But in the 401(k) space, it's already showing up in places like participant engagement, plan analytics, and investment management. The problem? Most 401(k) plan sponsors barely understand their plan document, let alone a machine-learning algorithm. Let's be clear: AI can do some pretty cool stuff. Chatbots that answer participant questions at 2 a.m.? Great. Tools that flag eligibility errors before the auditor does? Even better. But here's where the honeymoon ends—because while AI might make life easier, it also comes with enough legal and compliance baggage to give any sponsor a fiduciary ulcer. I'm still amazed that half of this article was written in AI in my language and that it knew who I was.

Fiduciary Responsibility Still Applies

Here's the kicker—AI doesn't take over your fiduciary duty. Just because an algorithm suggests a certain investment or participant communication strategy doesn't mean a 401(k) sponsor is off the hook. The Department of Labor (DOL) isn't going to accept "the robot told me to" as a valid defense, even though it sounds cool, like something you saw in The Jetsons. You, dear 401(k) plan sponsor, are still going to be on the hook for monitoring your plan providers, evaluating outcomes, and documenting decisions. AI might reduce human error, but it doesn't erase human responsibility. You still have to provide the highest duty of care in law and equity, AI won't save you as some sort of defense. As I always say, you will always be on the hook for liability as a 401(k) plan sponsor and AI will do nothing to truly minimize that risk.

Garbage In, Garbage Out

AI only works if the data it's fed is accurate. If your payroll data looks like it was entered by a raccoon with a calculator, AI won't save you. It'll just make bad assumptions faster. And when those bad assumptions lead to compliance violations—like incorrect eligibility calculations or missed deferral opportunities—you can bet your plan will be in the hot seat. Automated or not, oversight is still non-negotiable. 401(k) plans must complete compliance tests outlined in the Internal Revenue Code. Those tests must be accurate and if they're not, that is a huge problem because those mistakes aren't usually detected until a year or couple of years down the road and the costs to fix that problem will cost you a lot more.

Bias in Disguise

One of the more uncomfortable truths about AI is that it reflects the biases of the data it's trained on. If historical plan data shows lower contribution rates among certain employee groups, guess what? The AI might "learn" that those groups are less likely to engage—and stop targeting them with educational content. That's not just a bad look. It's a potential ERISA and discrimination landmine. It's common sense that highly compensated employees will have higher participation and deferral contribution rates than employees who make less. The problem is that AI doesn't have any common sense.

Cybersecurity & Privacy Risks

AI thrives on data. And in a 401(k) plan, that data includes names, Social Security numbers, salaries, ages—you know, the kind of stuff that hackers and online predators have dreams about. AI vendors need to have top-tier security, but too many 401(k) plan sponsors don't ask the right questions. If your recordkeeper is feeding data into a third-party AI tool, you'd better know who has access to it, how it's being stored, and what happens if (not when, if) there's a breach. Whether it's my email with weird mortgage paperwork even though I don't handle real estate transactions, text messages trying to phish my crypto account info, or someone trying to hack my Google account, scammers won't stop trying to steal data they can use. That is why you have to be vigilant and ask cybersecurity of your plan providers and the cybersecurity of the tools they use.

Vendor Transparency

Most 401(k) plan sponsors don't understand half of what their providers are doing already. Let's be honest—many couldn't tell you the difference between a QDIA and a QNEC without checking their notes. Now throw Artificial Intelligence into the mix, and suddenly the service agreement starts to read like a cross between a Silicon Valley pitch deck and a Terminator script. AI-driven tools might be powerful, but they're also complicated, and that complexity can lead to opacity—especially when vendors start tossing around terms like "proprietary algorithm" and "black box decisioning" as if that ends the conversation. But here's the problem: under ERISA, "trust us, it's proprietary" doesn't cut it. Plan sponsors must monitor plan service providers, and that includes understanding what the AI tools are doing, how they're doing it, and what risks come with the territory. Sponsors must ask pointed, uncomfortable questions: How exactly does the AI make decisions? What data is it pulling from? Can those decisions be reviewed and audited later? What kind of human oversight is involved? Who's on the hook if something goes sideways—especially if a bad AI recommendation leads to a fiduciary breach or a participant complaint? Transparency isn't optional, it's a fiduciary mandate. If a vendor can't—or won't—explain how their AI system works in a way a reasonably informed sponsor can understand, that's a red flag, not a feature. The bottom line: you don't need to be a tech expert, but you do need to know enough to exercise proper oversight. Because when the DOL comes knocking, "our provider uses fancy AI" isn't a defense—it's an invitation for a closer look.

You Still Need A Human Element

I've seen a growing number of plan providers rushing to slap "AI-powered" on their marketing materials like it's some kind of fiduciary fairy dust. Everyone wants to look cutting-edge, even if they barely know how the technology works. I've even come across a few ERISA attorneys—yes, actual lawyers—who've developed AI tools that can take your current 401(k) plan document and map it out to a new one when you change plan providers. It's pretty slick stuff, and yes, it's impressive. It can shave off hours of manual review and help identify inconsistencies faster than a junior associate fueled by cold brew and fear. But let's not confuse "impressive" with "infallible." These tools are still just that—tools. And tools, no matter how smart they sound, don't replace the need for good old-fashioned human judgment. AI might be able to scan provisions and spit out a polished comparison, but it won't know if the choices align with your plan sponsor's specific goals, your company's demographic needs, or that obscure provision your last advisor stuck in there because someone asked about it in 2014. AI doesn't understand nuance, context, or consequences. It doesn't know when a change could trigger an issue with nondiscrimination testing or when a seemingly minor tweak could confuse participants and open the door to complaints. That's where humans—specifically humans who understand plan design and ERISA—need to step in. Someone has to check the logic, confirm the details, and ensure that everything aligns legally and practically. And let's not forget: AI has its quirks. One time it drew me as a New York Ranger—full uniform, helmet, the whole deal—and while I appreciated the sentiment (and the jawline), it didn't look like me. Not even close. #LGR So yes, AI can make things faster, more efficient, and even more accurate—with the right supervision. But it's not a substitute for expertise, experience, or common sense. You still need someone at the wheel who knows when the GPS is wrong and the "shortcut" is a dead end.

Final Thought: Use AI, But Don't Lose Your Mind

AI isn't the enemy (I'm still not convinced because of the first two Terminator movies)—but blind trust is. AI is a tool, not a replacement for your due diligence. 401(k) plan sponsors should embrace technology that makes their job easier, but they need to stay engaged, ask hard questions, and remember one simple truth: when things go wrong, it's not the AI standing in front of a judge. It's going to be you.

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