

## Litigators View Your 401(k) Plan as a Tempting Target. What Can You Do as the Plan Sponsor?

---

September 6, 2022

---

As noted in our prior blog post [here](#), plaintiffs' firms - large and small - have been aggressively targeting 401(k) plan fiduciaries. Fiduciary breach claims are on the rise, and it is increasingly the fiduciaries of midsize and small plans who find themselves in the crosshairs.

The majority of these lawsuits fall into the "excessive fee" category. The claims may include allegations that fiduciaries breached their duties to the plan by selecting higher fee actively-managed funds instead of index funds, selecting more expensive retail class funds instead of institutional class funds, selecting bundled funds with additional layers of fees (such as certain target date funds), failing to monitor revenue sharing from the selected funds, paying excessive recordkeeping fees, retaining poorly performing investment options for too long, failing to benchmark service provider fees or solicit bids from competing service providers, failing to leverage the plan's asset size to negotiate lower fees, and the list goes on.

It used to be fairly easy for plan sponsors to get these types of claims dismissed. However, plaintiffs' firms have adapted. They typically conduct Internet searches to locate a few ex-employees to enlist as plaintiffs in a class action lawsuit. Instead of drafting complaints with a broad brush, they employ a more sophisticated approach by asserting specific claims with detailed benchmark data to substantiate those claims. As a result, it has become increasingly difficult for a plan sponsor to have such claims dismissed via a summary judgment motion. The end result over the past several years has been increasingly costly litigation. Even a meritless claim can result in a large settlement just to avoid the cost of continued litigation.

There are proactive actions that a plan sponsor can take that may mitigate the risk, such as: (i) updating your plan documents with regards to potential litigation, such as adding mandatory arbitration provisions to the plan documents and a shorter limitations period for bringing fiduciary breach claims; (ii) ensuring that plan fiduciaries document their "procedural prudence" when making fiduciary decisions affecting the plan; and (iii) providing fiduciary training to committee members and other plan fiduciaries. By implementing these steps, responsible fiduciaries should better understand their fiduciary obligations and can take and document actions involving plan assets that are consistent with ERISA's fiduciary standards to mitigate the litigation risk.

In summary, there are prudent, proactive actions that can be taken that may minimize fiduciary risk exposure and potential liability. A plan fiduciary that is forewarned is forearmed.

The prior blog post is available [here](#).