

## Lessons from Recent Litigation for TPAs and Plan Sponsors

### Questions and Answers

1. Is there one case out of last year's fiduciary litigation that best summarizes what plan sponsors need to do to put themselves in a good defensive position?

That would be the NYU [*Sacerdote v. NYU*] case that we spent some time discussing. They did so many things right in terms of being able to fight off the allegations made in the lawsuit.

- They established a committee that became a central focus of responsibility for important plan matters.
- The committee was comprised of experienced and knowledgeable members.
- It hired an investment adviser to provide the expertise on fees and vendors it did not have.
- It met regularly to discuss plan matters and it read service provider reports
- The court made a big deal I think out of the fact there was evidence of regular and persistent fiduciary engagement and that the committee made "*serious and successful efforts*" to lower fees.
- Lastly, the committee documented what it did so that it could show its work and demonstrate to the court that it had acted prudently.

2. You mentioned earlier the value of plan audits and preparedness for agency examinations and investigations. Could you elaborate on what preparedness entails?

Sure. This is very important. I've seen too many plan sponsors run around in panic mode when they get notice of a DOL investigation or IRS examination, when they could have avoided that by being prepared. You pretty much know what's coming because generally work of standard letters. So, you know what documents they're looking for and you pretty know what issues they're focusing on although changes somewhat from year-to-year as priorities change. I start my clients off with a checklist that covers documents that will be requested and agencies priorities. Often this turns into a self-audit and problems are discovered that can be remedied before the government walks in the door. I generally think having have these records on hand and organized for the three preceding years seems reasonable, since that's generally how far back the agencies look back when they audit. But, if your starting fresh in assembling this type of file, that's a lot of work. So, you may want to start with the most current recent past year and work forward from that point. If as a result of your efforts you've organized

things together in one place electronically in an “agency audit file,” you for the most part have a plug-and play package you can give to the agency when they ask for it.

Some clients choose don't want to do all this work but instead to self-audit on a specific issue or issues that are priorities that they think might be coming up in their plans.

3. You said that ERISA doesn't require RFPs to be done every three years, but what is an RFP?

That's a good question because ERISA doesn't define what a request for proposal or RFP is and the regulations define it either. The term sounds very formal with the rules for the who process laid out very rigidly in terms of what should be in the proposal and the questions the vendor candidate should address and timelines laid out for the ultimate selection. But I don't think that has to be the case. It can be a much more informal process. I've seen knowledgeable advisors work informally with great success they use their knowledge of vendors to whittle down the candidates for the plan sponsor to select and make sure each of the vendor candidates has the same information about the plan, so they are on a level playing field. They cull the herd without an extreme level of formality and still have a prudent process.

4. I heard there has been a proposed change in AICPA rules governing plan audits. What does the proposal mean for plan sponsors?

Yes, there is a proposal that is not yet finalized that would go into place for the 2020 plan year. You would be looking at audits and annual returns that would be filed in 2021 for that plan year. My short answer is I think the changes will have some impact on the way auditors audit and on plan sponsor behavior.

Here's what I know. The changes are in response to a 2015 Labor Department (DOL) published study that found 39 percent of employee benefit plan audits had one or more major deficiencies. Because of these results, the DOL asked the American Institute of Certified Public Accountants (AICPA) to initiate a project to help strengthen the quality of employee benefit plan audits and enhance auditor reporting. In response to the DOL's request, the AICPA recently issued a statement on auditing standards for ERISA benefit plans called, Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA. It includes new requirements for auditors, including engagement acceptance, audit risk assessment and response, communications with governance, procedures.

I think generally the changes will put more pressure on plan sponsors to recognize and fulfill their fiduciary responsibilities and improve plan governance. I think this is probably good because many sponsors don't understand the limits of an audit and that

it doesn't cover all areas of their ERISA fiduciary responsibilities. This is just a proposal and it's not an item of pressing concern, but I think plan sponsors ought to be aware of it and discuss the proposal with their auditors.

5. You mentioned cybersecurity issues. Where can I get more information about them?

I cover the issue in my book. If you are a subscriber, you can look there. A nice place to look, too, is the ERISA Advisory Committee report issued in 2016 called "Cybersecurity Considerations for Benefit Plans." It's about 40 pages and does a nice job of covering the issues. If you google, the name of the report and EBSA, you will find it on the DOL website.

6. Is it realistic for a plan to be able to locate a participant that may have terminated 20 years ago and still have assets in the plan?

It may not be, but plan sponsors are required to make the effort. The Labor Department of Labor describes four steps for plan sponsors to try in locating missing participants.

- Send a certified letter to the participant's last known address. If he or she signs for it, you have confirmation of receipt.
- A recordkeeper may not have a current address, but the plan sponsor's payroll provider or health insurer has something more up-to-date. So, seeking that information from them and reviewing other company and plan-related records is suggested.
- If the participant has designated a beneficiary, try to find and ask them if they know where the participant is.
- Use free electronic search tools: Search engines, social media, or public record databases such as those for licenses or real estate holdings may be helpful.

If none of these approaches work, the Labor Department says plan fiduciaries should consider any relevant facts and circumstances to determine if other actions should be taken -- such as using a commercial locator service or various paid internet search tools. If this last effort doesn't work, transferring the participant's account balance to a state unclaimed property fund and escheatment. This action should be taken only after considering the terms of the plan, the applicable state law, and Labor Department guidance.

7. If we are providing an auto rollover to an IRA service who provides multiple locator services, does that protect the plan sponsor of their fiduciary duties?

I assume you are talking about a rollover to a safe harbor IRA of account balances of less than \$5,000. If the rollover is to that type of IRA, plan fiduciaries are deemed to satisfy all of their fiduciary obligations and those responsibilities end when the funds are transferred to the IRA.

8. If participants have invalid social security numbers due to being in the country illegally and the custodian cannot process a distribution because of the invalid social security number, how should the plan sponsor address this situation?

Likely, you have no alternative but to hold the money until the person can present proper tax identification to take the distribution, including proper identification and social security number. This is also more than a plan matter. The use of an invalid would impact other tax reporting and necessitate the filing of forms to correct that problem using Forms W-2c and W-3c. If your question relates to a live matter, I would suggest contacting legal counsel.

9. What do you mean "if participant data is asset, fiduciaries have to attach monetary value data?"

I want to be careful here because the issues relating to the use of participant data, whether it is a plan asset, and whether that data has value (meaning commercial value) are not settled. So, no one should think, even the data is a plan asset (and one Illinois district doesn't think it was) that it has value that, for example, a plan sponsor would have to monetize. I think there are arguments on the issue, pro and con. And this is the uncertainty I talked about during the presentation that needs addressing by plan sponsors and their attorneys.

10. For a company that provides 401k services along with other insurance services, is it okay to share participant data with other areas of our own company?

There appears to be nothing in the law at this point that directly and outright prohibits it. But providers should review their client agreements to see what they say about the use of participant data and the sharing of that data within the same company. Also, it may be in everyone's interest (providers and plan sponsors) to have candid conversations about data use and reflect any understandings reached in their agreements.

11. You mentioned the importance of educating of educating plan sponsor fiduciaries such as plan committee members. Can you elaborate on what that entails?

Yes, this is one of my favorite topics. When a plan sponsor employee or officer becomes a fiduciary should be trained in three critical areas. These are, first, the particular details of the plan, second, plan service providers and their roles and functions, and, third, ERISA law and Internal Revenue Code requirements.

I have developed for this purpose a web-based program that I use with my clients and that some advisers use with theirs. Newly appointed fiduciaries spend about an hour with it and at the end they take a short quiz that tests them on what they have learned about ERISA. Some clients want more and have asked me to draft for them a fact book tailored to their plan that covers their responsibilities, basic plan provisions, key plan tax qualification issues, key ERISA fiduciary responsibility provisions, and various appendices. The fact book is their plan in a nutshell, relatively short, and easily digestible.

Finally, plan fiduciaries should be re-trained from time-to-time and they should keep up to date on current developments in the 401(k) industry and on changes in the law and agency guidance. This updating can be made part of committee meetings, be the subject of special training sessions or be a combination of these approaches. Service providers can be valuable in helping plan fiduciaries keep up.

12. You mentioned some of the key areas of interest in DOL investigations and mentioned there were others. Can you summarize these areas?

The following is a list of those areas including the areas I mentioned and those that I didn't.

- Terminated vested participants
- The timeliness of participant contributions continues to be of interest and opportunity for the Department.
- In the area of disclosures, plan sponsors and providers are smart to do self-audits of their compliance with service provider and participant disclosure rules. DOL is also looking at 404(c) disclosures and blackout notices. So, plan sponsors might want to look at these too.
- Whether the plan has a bond in place and whether it satisfies the statutory minimums (10% of plan assets up to a maximum bond of \$500,000 or one million in the case of a plan with employer securities)
- The quality of processes and procedures for benefit claims. DOL will ask you for paperwork relating to these claims.
- Interested party and prohibited transactions. For example, are plan assets being used to pay non-plan expenses?
- Plan investment conflicts are a national enforcement priority. This effort focuses on service provider compensation and conflicts of interest. In particular, DOL is focusing on the issue of revenue sharing and whether it has been properly disclosed and considered by plan sponsors.
- DOL is also looking at hard to value assets, but this effort seems to be focused on those assets in defined benefit plan, and not those in 401(k) plans.

