

How to Reduce **Your Potential Liability** *as a Plan Sponsor*

Five Steps to Help Avoid Becoming a Target



Capital Research + Consulting

Reduce Your Potential Liability as a Plan Sponsor

The trend toward more retirement plan litigation unfortunately continues to progress. This is especially troubling given that it has happened at a time when most retirement plan participants have enjoyed rising account balances. While we can't predict the future, there very well may be increased activity when the next downturn arrives.



Regardless of what happens going forward, one thing is clear: if you're a plan sponsor, now is the time to make sure you are doing everything you can to prevent a problem. You don't want to become a target.

At Capital Research + Consulting, we've been helping retirement plan clients for almost three decades. As specialists, we know the best practices that can help minimize concerns.

Unfortunately during our years, we've also seen plan sponsors unknowingly put themselves at risk. It's not hard to understand why....running a retirement plan is something few have training in. Especially if you try to go it alone, there's definitely a steep learning curve involved. Between confusing regulations, paperwork and responsibilities that are outside your normal business duties, it's not an easy job for anyone to manage a plan.

That's why we wrote this book....we want to help you avoid the nightmare of a lawsuit. We've identified five steps that will help you make sure you're covering your bases. While there's no guarantee, we've been keeping our retirement plan clients out of harms' way for over 30 years.

Feel free to contact us with any questions.

Thanks for reading.

THE CAPITAL RESEARCH + CONSULTING TEAM



Introduction

You're smart to be reading this book. With continuing litigation activity for US retirement plans now involving small and medium sized plans as well as large ones, it's clear that attorneys are watching. There's also more consumer resources, such as [Brightscope's 401k rankings](#), out there that help your participants evaluate the quality and costs of your retirement plan.

While some of these early cases haven't progressed very far, keep in mind that a lawsuit doesn't even have to have merit to be extremely costly to defend.

Our Unique Perspective



Our team has over 30 years experience managing retirement plans, so we've seen a lot. Also one of our team members has been called in as an expert witness on some of these initial legal cases. Through both these channels, we keep up to date on what to look out for.

Regardless, the message couldn't be more clear: Now is the time to make sure your plan is in compliance and you're meeting all of your responsibilities. Waiting could be an extremely costly mistake.

We've identified five critical steps you can follow to help avoid encountering a problem. We'll review those next.





Step 1: Understand Your Responsibilities as a Fiduciary

If you play a key role at an organization with a retirement plan, you're likely to be considered a plan fiduciary. Being a fiduciary means you're responsible to make sure everything in the plan is managed for the benefit of participants.

That should not be surprising. If your employees are putting their own money away each month to save for retirement, they should be able to expect those responsible for the plan to manage the plan very carefully. Their future depends on it.

What is surprising? A recent survey showed that about half of plan sponsors don't believe they are fiduciaries.



You Are Personally Liable, Too

But it actually goes further. It's not just corporate or organizational responsibility: you personally are likely on the hook as well. That means if the participants sue the plan, your own assets could be on the line, too.

Sounds far-fetched, but unfortunately this threat is very real. In a recent court case (*Tibble v Edison International*), the Vice President of Human Resources was found personally liable for a fiduciary breach, along with the corporation.

What Should I Do?

When you're a fiduciary, the pressure is on you to do the right thing consistently, or be held accountable. So everything you do with your retirement plan must be in the best interests of the participants. That includes such diverse tasks as creating an investment policy, selecting mutual funds, managing fund costs and educating participants. Even if you have professionals helping you with all of those functions, as a plan sponsor, you're still held responsible. You're in a position of authority in watching over participant money, so you had better make sure it is done correctly.

Of course, that usually means hiring the right professionals to make sure it is done right. It's not the time to be a pioneer. Hire only those with proven experience, who help plans similar to yours.

But remember, the onus is on you. Don't just assume things are going right. Watch your professionals closely. Get second opinions. The law requires you to get a [plan review](#) every two years. Firms like ours [offer those for free](#), so there's no cost. Make sure you do this regularly to keep a look out for problems and show that you are fulfilling your role and watching out for the participants and the plan.

You can learn more specifics about being a retirement plan fiduciary in this [article on the IRS.gov site](#).





Step 2: Keep a Plan Administration Calendar

As a responsible party for the plan, you want to make sure you're doing the things that are required in a timely manner. That's an easy thing for attorneys to check for, so it's vital that you stay current with all your compliance tasks.

A recommended way to track and plan for all responsibilities is to keep a formal calendar for the plan.

In addition to compliance requirements, we also recommend that you formally plan all other tasks, such as fee benchmarking, monitoring plan performance, and responding to participant feedback. If ever called into question, having a written document showing these tasks are scheduled and completed in a consistent, organized fashion can help show you are meeting your fiduciary responsibilities.

Remember that your responsibilities may vary depending upon the type of plan you have (i.e. 401(k) or 457). It's important to double check that you're clear on your organization's specific responsibilities in relation to the plan.



As a consultant to the plan, we create and maintain a calendar for our clients, so if you have a plan advisor, they likely will be taking care of this for you. However, you need to check the calendar regularly and monitor it closely to make sure your organization is staying on track with its responsibilities.

Here's suggested items to make sure are on your calendar (which may vary with your plan type).

- ✓ Ensure participant notices, disclosures and government reporting are delivered
- ✓ Confirm the annual Form 5500 filing was completed
- ✓ Review nondiscrimination testing results and contribution limits
- ✓ Confirm timely deposits of all employee contributions and loan repayments
- ✓ Benchmarking of plan against other plans of similar size
- ✓ Periodic evaluations of plan service provider performance
- ✓ Review Investment Policy Statement (IPS) regularly
- ✓ Review the plan's investment options
- ✓ Benchmark investment fees to make certain they are reasonable
- ✓ Benchmark service provider fees
- ✓ Make sure any fees paid from plan assets are reasonable and necessary





Step 3: Document, Document, Document (Keep Good Records)

If you've ever had the unfortunate experience of being involved in any type of legal claim, you probably quickly realized the importance of getting things in writing.

As a retirement plan sponsor, you've got significant fiduciary responsibilities. So you want to make sure everything is properly documented.

Further, you must be very careful to document things in a way that is thorough and formal. In a legal proceeding everything put in writing might be put under a microscope. Worse, if you didn't document certain things (like meeting minutes, or handling participant concerns), that could create risk for you and your organization.

With retirement plans, everything you do should be documented. Since we're dealing with your employees' money, there's no room for casual. Everything should be documented with sufficient detail about what is being done for the plan, and provide reasoning behind why certain decisions were made. This process is your potential protection if you end up getting any type of legal claim.

One caveat though: the documentation needs to remain consistent. If you detail actions that need to be followed up on, then those should also be documented in a similar fashion. If not, your detailed records can potentially backfire on you.

If you've got a retirement advisor that's knowledgeable about litigation trigger points, they can help you with this process. Also your consultants should be providing you with regular reports which should be added to your documentation.

With the responsibilities placed on you as retirement plan sponsor, this message is vitally important. **You must document everything you do for the plan.**

Don't forget to take detailed minutes in your retirement plan meetings. Or your retirement plan advisor may provide that service, but you should always review those and retain copies in the plan records.



Other areas that should be thoroughly documented:

- List of attendees at participant education and enrollment meetings
- Copies of all communications
- Copies of all investment education materials

**If in doubt,
add it to the file!**





Step 4: Adopt an Investment Policy Statement (IPS)

Investments are a focus of recent litigation, so you will need to pay attention to any and all decisions related to them. The best way to add discipline to the process is the creation of an Investment Policy Statement (“IPS”). While not technically required, this can go a long way in clarifying and documenting the goals and policies of the plan.

What is an Investment Policy Statement?

An investment policy statement, or “IPS”, is a document that outlines the policies that the retirement plan will adhere to. The IPS is not required by law. However, this is one of the documents the IRS and Department of Labor will ask for when conducting plan audits. It also is a key document to help you and your plan prevent liability, when properly constructed and adhered to.

What you’ll find in an Investment Policy Statement

Most investment policy statements will include the following:

- A list of eligible investments that may be included in the plan
- A list of prohibited investments (such as individual stocks)
- A description of the roles and responsibilities of the plan participants (which may include an investment committee, custodian, investment advisor, etc).
- A description of the investment selection process
- A description of the investment monitoring process
- A description of the process used to replace a poorly performing investment option

Following the Investment Policy Statement

Once you’ve established an IPS, it’s extremely important to follow it very closely. In fact, there’s been recent litigation over a plan that strayed from its IPS.

So it should be reviewed on an ongoing basis. It also should be modified if there’s a change to the policy that would improve the plan’s ability to provide service to its participants.

So, be sure to create an IPS, follow it and keep it up to date.



Step 5: Review and Benchmark Fees

Fees have been a focal point of recent retirement plan litigation, for good reason. Small percentage differences, over time, can eat away at participant nest eggs.

Because of the frequency of excessive fee lawsuits, you should employ best practices here. That means taking the time to develop a documented procedure on how you will help ensure that plan fees are kept reasonable.

Here's a few tips.

Tip 1. First, Know What You Are Paying

One challenge to fee review and benchmarking is the complexity of some fee arrangements. The financial services industry historically is notorious for hidden and confusing fees, so as the plan sponsor you need to be crystal clear on how all plan provider fee arrangements work. If you don't understand this to the letter, you could be putting you and your organization at risk. That's why it is always recommended to hire service providers who have transparent, easy-to-understand fee schedules. There's just too much at stake to not require that.

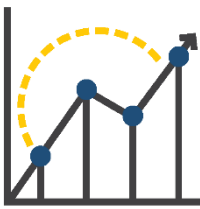


That also means speaking up. If plan service providers give you fee schedules that are not clean and clear, ask for a different structure. Or just look for other firms who will.

Tip 2. **Make Sure All Fees Are Reasonable and Necessary**

Along with knowing the fees the plan and participants are paying, you also are required to ensure that the services you are purchasing for the plan are necessary and reasonable. If they are not providing a very specific and needed benefit, you should probably revisit if they are appropriate.

Tip 3. **Benchmark Everything Regularly**



Once you are clear on the above, now you need to make sure you're getting good value for the plan and participants. The way you can do that most effectively is through **benchmarking**. With benchmarking, you periodically compare your fees against the fees of similar plans. That way, you can see if the fees that your plan and your participants are paying are more than what others pay. You can then use that information to negotiate better prices with service providers.

This is good news for participants, of course.

Tip 4. **Use the RFI (Request for Information) Process**

One of the best ways to benchmark is to periodically engage in the request for information process. For most plans, every three to five years is a good interval for this. More often and you may end up losing effectiveness.

This process keeps the retirement plan market competitive. In most cases plan sponsors simply opt to remain with their existing provider, but the RFI process allows them to negotiate a better deal.

If you have a full-service retirement plan advisor, they can help you with this process. At Capital Research + Consulting, we normally do this every three years for our clients.

THINGS TO KEEP IN MIND

While fees are critical, don't lose sight of the need for experience and the right knowledge. Newer entrants to the retirement plan industry might price lower to gain new clients, but that may expose your plan to someone's learning curve.

As a fiduciary, you want to make the best decisions possible for your participants, so the fees should always be balanced with the need to hire an experienced provider with the right expertise.

Your Next Steps

In this book, we've provided five ways to help reduce your potential liability as a plan sponsor.

Really, these all revolve around a few concepts:

- Always keep in mind that you are a fiduciary of the plan, so you are responsible to put the needs of the plan participants first.
- Remember everything you do might be put under a microscope if there is any legal claim. So document everything, and keep in mind that those documents may be reviewed in the future.
- Employ best practices.
- Utilize only experienced firms that can help you implement and adhere to those best practices.

Of course, it is all easier said than done when you have a business or organization to run. That's why for most plan sponsors, outsourcing is by far the best choice. Then it's not a matter of learning how to manage a retirement plan from the ground up, it's about picking the right professionals. And managing the process.

We hope this eBook has provided you with some good ideas. Please feel free to contact us with any questions or comments you may have.

About Capital Research + Consulting



Capital Research + Consulting is a Retirement Plan Advisor to governmental, non-profit and corporate retirement plans. Our full-service, fiduciary support includes investment consulting, plan cost analysis, vendor selection services, model portfolio design and financial education for your participants.

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