

Essential, But Often Ignored, Principles Of 401(k) Fiduciary Risk Management

Minimizing the likelihood of being dragged into 401(k) litigation and, if you are, maximizing the likelihood of getting the case dismissed quickly

Copyright © 2010 Richard D. Glass

1. The goal—the ultimate value proposition—of any 401(k) plan, from an ERISA perspective, is to help workers achieve a financially secure retirement.
2. The appropriate benchmark for measuring whether participants are using their 401(k) plan wisely is to annually determine whether or not the number of years, on average, participants will have enough income to enjoy a specified targeted replacement ratio has increased.
3. The goal of fiduciary risk management is to make sure that, from the perspective of a knowledgeable class action attorney, the plan does not appear as “low hanging fruit” (i.e., it is not an easy target).
4. Fiduciaries must recognize that the duties of loyalty, prudence, and disclosure are a matter of facts and circumstances, and thus are in a state of flux more often than not. By striving to substantively help the employees—by fulfilling the spirit of the law as well as merely “dotting i’s and crossing t’s”—the chances are significantly increased that the fiduciaries will be meeting their ever evolving duties and managing employee expectations to boot.
5. Fiduciaries must incorporate into their actions the fact that their typical employees are unrealistic about and ill-prepared to undertake retirement planning.
6. Fiduciaries must make telling the “whole” truth the top priority of their 401(k) participant communications.
7. Overhyping the 401(k) plan, especially in a manner that may be construed as misleading, is analogous to BP cutting costs on its deep water wells and leaving a paper trail to prove it (especially in today’s environment of high unemployment and distrust of financial institutions).
8. Fiduciaries cannot afford to get caught being clueless with respect to how their participants are using, misusing or simply not using the 401(k) plan.
9. The most likely employees to initiate 401(k) litigation over excessive fees and target-date funds are the ones in middle management. Remember, it is these people who make the Wall Street Journal the most widely read newspaper in the nation. They also make wonderful prospective clients for class action law firms that use social media for soliciting clients and gathering evidence.