The CFO's Playbook For 401(k) Liability

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Introduction

Call it *fiduciary liablity*, but it is really about …

You … getting sued

ERISA law says: Banks, mutual fund and insurance companies are exempt.

Clear enough?

Like Pavlov's dog fiduciaries become conditioned to a sound. Not a bell signifying food, but hearing the words, "fiduciary liability" which means you are about to be subjected to a bait and switch proposal to take over the plan's investments.

Irritating.

Especially when you find out that your protection has little to do with the investments.

You want protection —without the investment baloney—?

Good. Because that's what we deliver!

You'll see…

About You

Your position

Usually a CFO, CEO, or Director of Human Resources

When the lawsuits get started, you will be named as a defendant.

Type of plan

401(k)

401(k)s allow individual plan participants to sue (other plans don't).

Plan size

Small to mid-sized organizations need my services.

Big companies don't. They have endless resources.

Your concern

You don't want to get sued.

You'd like somebody to tell you what REALLY happens

And what to REALLY do about it

About Me

Lies to Fiduciaries Bug Me

Example: a Fiduciary Warranty – courtesy of several well-known insurance companies

> "we will pay for any damages from violating the *investment guidelines rule …* under the condition you not violate *section 2550.404c-1(b)(3)* "

That is -- "We pay if you violate X, on the condition you not violate X." Cute.

And big love to the lawyers who write *intentionally deceptive* documents

Sensitized to Your Issues

I faced legal challenges. It left a bad taste.

I learned about oversight, fiduciary liability and lawyer ethics.

I got determined to know this area. And I did. The internet gave me the ability to get straight answers without filtering by the ever trustworthy ***(not!)*** home office.

My "Issues" Became Your Solutions

Over several years, I studied ERISA code, Department of Labor bulletins, obtained an Accredited Investment Fiduciary designation, and read hundreds of legal articles and court rulings about fiduciary litigation.

Your protection has little to do with investments. It's the other stuff that will hurt you.

I created software and founded Fiduciary SafeHarbor to deliver the tools you need.

I pretended I was a sleazebag attorney suing you.

And I'll show you how to win.

About Bill

“Bill” is from Georgia, a former co-worker of a relative of mine.

Government lawyers accused Bill – personally -- for a corporate misdeed —falsely, as it turned out.

Bill expected his employer to protect him.

But the company’s lawyers thought it safer for the company to fire him.

So they fired him.

Then Bill blew through his children’s college funds to pay his legal defense fees.

The kids found out when they were escorted out of their college classrooms by security guards.

The charges were later dropped.

Bill’s financial disaster was just collateral damage.

Ho-hum, sorry, Bill.

Want to be Bill?

No?

Well Bill thinks you should listen to me, so you won’t go through what he and his family went through.

Let’s look at the Fiduciary Position

And then at who protects you,
not "promises", *but* "protects"

Personal Liability

Retirement plan fiduciaries are *personally* responsible for

-- executing duties

-- paying damages for failure to do so

ERISA personal

Getting embroiled in a fiduciary suit is

a career killer

a family disaster

Gotcha!

Who is a Fiduciary?

Fiduciaries are created 2 ways:

Having authority

-- appointed

appointed

Exercising authority

-- whether appointed or not

exercise not appointed

Think you aren't a fiduciary?

Whew! That's a relief!

Except…the attorney will sue you anyway under the "exercised authority" rule.

And you have a naaac day, ya heah?

Gotcha!

Cost Ratio

Plaintiff's cost to sue: $10

Fiduciary cost to defend:	$1,000s
Fiduciary upside:	Nothing
Fiduciary downside:	Everything

For the plaintiff lawyer it's business.

For the fiduciary it's *personal*.

He plans on you settling.

But if you settle you will be hit with a copycat suit from another participant the next day.

You must win this.

If you do what this CFO playbook shows you, you will win and it won't cost you a penny.

How Long?

Fiduciary liability lasts ***6*** years:

-- Not six years *if you stay at the employer/ plan sponsor*

-- *But* ***… 6 … years.***

You take a job with a new employer.

Four years go by.

Your prior employer is sued over the 401(k).

You are named as a fiduciary defendant.

Your new employer won't help you.

Your former employer won't help you.

Your former employer has all the files, all the data, all the signed and dated documents.

Gotcha!

Under our contract, Fiduciary SafeHarbor is given the authority to share documentation we create for you with **anyone named as a defendant***.*

This protects you if you retire, move, go to work somewhere else, are bought out.

You may not have the relationships you used to.

The ever vigilant corporate lawyers can't wait to make you a scapegoat.

They will sacrifice you to the ever greedy nuisance lawyer.

This issue matters. You will know what I mean if it ever happens to you.

This is why I built this for YOU. I worried about it so you don't have to.

So YOU can get your documents from us, and there is nothing anybody can do to stop it.

Nobody EVER Told You about 410(a):

ERISA, Section 410(a)

Any promise to take fiduciary duty or liability is null as a matter of public policy.

ERISA 410(a)

When I first read 410(a) I stopped and re-read it over 100 times in disbelief.

I have been in and around this business for over thirty years, and let me tell you:

Not a peep from anybody about this rule …

Not by home office

Not by marketing materials

Not by training

Not by continuing education

It does not suit their purposes to tell you.

But you need to know that no promise to protect you can exist under the law.

Gotcha!

But we've got you covered. You'll see.

Employer Protection

The legal doctrine respondeat superior (Latin, the boss answers) protects employees from liability for actions they perform on behalf of the employer.

respondeat superior does not apply to fiduciaries because

ERISA requires fiduciaries to act exclusively on behalf of participants.

So, a fiduciary must not act for the employer.

The employer owes a fiduciary nothing.

Gotcha!

You need to protect YOU.

We've got you covered.

Insurance Protection

All standard insurance policies exclude fiduciary claims.

Bonding

Employment Practices

Employee Benefits

Errors and Omissions

Directors and Officers, etc.

If you go to the trouble to get fiduciary liablity insurance

If *the employer* pays the premium it can determine whom the policy covers.

The employer's lawyers can cut you off.

If *the plan* pays the premium, the policy MUST give recourse against the fiduciary. It gives the insurance company to right to sue a fiduciary personally to recover damages paid.

YES! Really!

(ERISA 410 b)

In any event, the insurance company is not obligated to *defend you.*

Costs less to settle than litigate, so they settle. And then cancel the policy.

The word spreads, *"Free money; the insurance company will pay!"*

But you don't have insurance anymore.

You are on your own to handle the inevitable ensuing copycat suits.

Gotcha! *gotcha, gotcha, gotcha, gotcha, gotcha, gotcha, gotcha, gotcha, gotcha …*

Investment Company Protection

Financial institutions crow incessantly about how much you can trust them—

unless you need help. In which case they inform you it's YOUR problem.

By law

Banks, insurance and investment companies are exempt from fiduciary liability.

Wait, wait … unless the institution *volunteers* to take the liability.

ERISA (3(38)

Been around awhile?

Guess whether they ever volunteer to get sued for li'l ol' you.

By contract

A financial institution's contract says

-- "not a fiduciary"

-- "neither have nor exercise authority" (the two attributes of a fiduciary)

-- "services are ministerial only" (they take orders and never give them)

They are not a fiduciary to anyone else's plan, just their own.

By experience

Whenever an investment companies gets named as a fiduciary defendant,

The next day they submit a Motion to Dismiss.

They attach their contract as evidence.

Works every time.

Motion granted. They are dismissed from the suit.

Gotcha!

TPA Protection

Third party administrators (TPA) work under contracts.

Their contracts deny being a fiduciary.

Gotcha!

"But I know those guys…"

Reality: Contracts have a clause that goes like this:

"No other understandings between the parties exist other than the understandings set forth in this Agreement."

There is nothing your friend can do.

Gotcha!

Hiring a Fiduciary

It's so obvious, isn't it? Since a fiduciary takes the hit, just hire a fiduciary.

By Jove, he's got it! ***Brilliant!***

Nope. By ERISA Section 405 he ain't got it!

section 405

You hire a fiduciary.

That is an exercise of authority over the plan. Makes you a fiduciary.

Under 405 the hiring fiduciary can be sued for a hired fiduciary's negligence three ways:

Knew about the breach did nothing

Found out and did nothing

You should have known but didn't bother to look

Gotcha!

Co-fiduciary liablity is a two way street; you WILL get sued for their screw ups!

And big love to the attorneys who write the deceptive documentation that hiring a fiduciary - does anything good for you*.*

To the Rescue

Your Rescue Review	
The employer	Separate defendant
Insurance company	Excludes coverage or sues you anyhow
Mutual Fund Company	Not a fiduciary
Broker	
Broker Dealer	
Investment Platform Provider	
Record Keeper	
Third Party Administrator	
A hired fiduciary, and or Registered Investment Adviser	You get sued as a co-fiduciary anyhow
SEAL Team 6	Presidential authorization
US Cavalry	Wrong century
Brad Pitt or Halle Berry	In your dreams

No one is coming to your rescue.

You need your very own "slapdown" documents that refute the plaintiff's allegations.

You throw them on your desk (slap!) Done. Over.

There's the door. Now get out, please.

Who Sues and For What

'Round about 2006, I was in a meeting.

Somebody said to Wayne, "You need to consider your fiduciary liablity."

Wayne replied, "What's that?"

"You can get sued over the retirement plan."

"Who can sue me… and for what?"

"Oh, you don't have to worry. We'll take care of it!" *(Smile!)*

In 2016 a large payroll company's salesperson was in my friend Bob's office.

Bob asked, "What about 401(k) liability?"

The salesperson replied, "Not a problem; we take care of all of that!" *(Smile!)*

Ten years had elapsed.

Same serious question

Same effusive responses

Still false

Nice people, but they don't get sued, you do.

Your reliance on blow off assurances could haunt you for the rest of your life.

You deserve a real answer, don't you?

Okay, well here it is: ***There are 20 possible suits; only three matter.***

Who Sues and For What

Four parties can sue

Department of Labor (ERISA 409)

The plan (ERISA 502)

Class actions (since 1998)

Individual 401(k) participants (2008 Supreme Court ruling, LaRue)

The only grounds are for violating (breaching) any one of five fiduciary duties.

Duties

1 -- Comply with ERISA and the plan document

2 -- Diversify the investments

3 -- Act solely on behalf of plan participants (no conflicts of interest)

4 -- Pay only reasonable fees

5 -- Be prudent

It looks like this: 4 who can sue x 5 grounds = 20 possible lawsuits

Who sues / Duties /Grounds	Department of Labor	The Plan	Class Actions	Individual 401(k) participant
Comply				
Diversify				
No conflicts				
Reasonable fees				
Be Prudent				

Four Can Sue

The plan

A plan sues to recover plan contributions not made

So, make the contribution, and cross off the plan suing.

Class actions

Big plans only. Under $50 million are usually too small for class actions.

So, cross off class action suits.

Department of Labor

The DoL sues to recover money owed to the plan. In 2015, the Department of Labor collected on average over $5 million dollars per lawsuit.

Figuring you aren't withholding $5 million dollar errors, cross off the Department of Labor suing you.

Participant Suits

Participants don't sue for Comply. TPAs handle it.

Don't sue for Diversify. Investment people handle it

Participants sue about #3, conflicts of interest, #4, reasonable fees and #5, prudence.

Those are the 3 suits out of 20.

Slapdown documents address the issues upon which those three suits are based.

Participant Suits

2008, the Supreme Court ruled an individual 401(k) participant may sue.

2009, a widow, beneficiary of a deceased 401(k) participant, sued the company owners as fiduciaries. Out of the blue, no warning. She never even met the owners.

Free money! 267 participants piled on.

Settled privately in 2012. Damages are rumored to be over $10,000 apiece.

The defendants are wealthy, own a professional baseball team. Live in New York City.

A large construction firm was sued by its 401(k) participants.

The company filed a motion to dismiss arguing that the plan was totally compliant with Department of Labor requirements.

The judge denied the motion explaining that

duty to the Department of Labor is one thing

duty to participants is another

since this was a participant suit, Department of Labor filings were *irrelevant.*

Both suits above were about fiduciary oversight.

Your slapdown documents address those issues.

The Lawsuit Business

5% of complaints go through a trial and get a judge’s ruling

95% end by

-- dismissal

-- plaintiff goes away

-- defendant settles

Your real adversary is not the plaintiff; it’s the plaintiff attorney

-- pays for the suit

-- decides to pursue it or quit

If a judge were to rule, he must rule on the preponderance of evidence.

There are two types of evidence

Testimony

Your testimony is not worth much.

They figure it is coached and after the fact.

Documents

Signed and dated in advance,

Establish your diligence, refute allegations of negligence, and prove you did your job.

Your slapdown documents provide the evidence you need.

Proof / Evidence

I was questioned one day by a few lawyers.

They repeatedly asked two questions.

"Where are your documents?"

"I'd like to circle back. Tell me again how…"

So, here's the deal.

Lawyers suing you *fear documents.*

Proves your innocence. No payday!

They love, love, love *testimony.*

An opportunity to trip you up.

Time consuming, and you pay your defense lawyer by the hour—pressure!

They ask you to explain something *again* because nothing in your first honest answer revealed any wrong doing.

They feign confusion and need for clarification. *They are not confused.*

They keep asking until you leave out one word or participle so they can cry, "Victory!" (And conveniently ignore all the other statements you made.)

Nuisance lawyers hate your evidence; you'll love it.

But you have to complete the slapdown documents ahead of time.

Let's see how to do that.

Let's see what we learned.

Rescue -- nobody.

Escape routes -- cut off.

Rules the plaintiff lawyer can use against you—lots.

Your Protection – documentation of your proper execution of fiduciary duty

Let's build 'em.

Duty #1 Obey ERISA and Plan Documents

The plan hires a third party administrator (TPA) to take care of Department of Labor compliance issues.

What if the TPA is not properly fulfilling its tasks?

How would you know?

You are not the expert.

The issue is whether you have a ***reasonable expectation*** the TPA is doing its job.

Do you have any indications the TPA is not doing its job?

Such as the Department of Labor asking for explanations, participant complaints

With such indications, you would follow up. Ask the TPA for an explanation. Decide if it's the TPA's problem or someone else's.

If it's the TPA's have the TPA fix it or fire the TPA.

Without such indications, it is reasonable to conclude the TPA is doing its job.

Duty #2 Diversify the Investments

The plan hires an investment platform provider and / or managers to diversify.

What if the investment people are not fulfilling the diversification rules?

You are not the expert, so how would you know?

The issue is your ***reasonable expectation*** they are doing the job

Do you have any indication that there is a lack of diversification?

Indications would be participant complaints regarding access, ability to exchange, offering the minimum number of funds

With such indications, you would follow up. Ask the investment provider for an explanation. Decide if it's the investment company's problem. If so, have them fix it or fire them.

Without such indications, it is reasonable to conclude that the investment provider is doing its job.

Duty #3 No Conflicts of Interest

Duty 3 is the "loyalty clause" or "no conflicts of interest clause".

Conflicts of interest are a fiduciary's ***judgment call.***

Fiduciaries do *not* hire this out.

Example of conflicts

The employer sets up an investment management company, and then authorizes the plan to use that company for the plan's investment management services.

Duty #4 Reasonable Fees

The fourth duty, reasonableness of fees, is a major ground for lawsuits.

Reasonable is a value judgment, services received for amount paid.

not cheapest

Courts have ruled that lowest cost is not a fiduciary duty.

not track records

Problem in executing this duty.

Financial institutions charge fees differently.

Some charge one all-inclusive fee.

Some charge fees separately.

Some mix them up.

To improve transparency and allow fiduciaries better fulfill their responsibilities, regulation 408(b)2 was created.

Two pages from now.

It's what you need, part of your slapdown documents.

Duty #5 Be prudent

The fifth duty, prudence, is being careful, a judgment call.

A fiduciary's ultimate defense, the issues that count, are:

follow a prudent process, (due diligence) reasonable conclusion

action as needed

Oh, and you have to prove it.

Real World Lawsuits

You Won't See Lawsuits about Duties 1 and 2

Duty #1: Comply with ERISA

TPAs know their jobs.

They document the ever living hell out of it.

#2 Diversify Investments

Investment firms know their jobs.

They document the ever living hell out of it.

You Will See Lawsuits about Duties 3, 4 and 5

All about fiduciary *oversight*

Fiduciaries do not document the hell out of it.

Easy pickin's for an opportunistic nuisance attorney. *Life is good.*

Oversight Guidance

Regulation 408(b)2 is your answer to documenting your Duties 3, 4, and 5.

Not opinion; the regulation says so!

A regulation begins with a preamble, a statement of why it was created.

> 408(b)2 says this: "To assist plan fiduciaries in
>
> assessing the *reasonableness of compensation* paid for services,
>
> *conflicts of interest* that may affect a service provider's performance of services
>
> in order to satisfy their fiduciary obligations to *act prudently* and *solely* in the interests of plan participants"

Bingo! *Now that's what we're talkin' about!*

Fiduciary Duty	Who Handles It	Lawsuits	**Regulation 408(b)2**
Comply with ERISA and the Plan Document	TPA	No	--
Diversify Investments	Investment People	No	--
Conflicts of Interest	Fiduciary	Yes	Addresses this
Reasonableness of Fees	Fiduciary	Yes	Addresses this
Prudence	Fiduciary	Yes	Addresses this

First, proposed in 2009, it became law after a three year period of public commentary.

408(b)2 is mandatory.

Mandatory means … ***mandatory***.

How Does 408(b)2 Work?

Step 1

Service providers send disclosure statements to the fiduciary describing their compensation arrangements

(who is paid, for what, and how much).

Step 2

The fiduciary determines if the disclosure statement is complete.

If not complete, the fiduciary is responsible for requesting any missing data.

If that request is ignored, the fiduciary must fire the service provider and report it to the Department of Labor.

Step 3

If disclosure is complete the fiduciary then evaluates

Reasonableness of fees and

Conflicts of interest

Please Note

Those who disclose have no liability *for failure to disclose.*

But YOU have liability for not catching it.

If you don't complain -- in writing (the rule), you have given your tacit approval.

Your tacit approval of a bad arrangement is proof a plaintiff will use against you.

You were informed that it was a lousy deal and did nothing about it.

So, 408(b)2 is NOT " initial it and chuck it in the file."

Following the process –or failing to do so -- has big implications.

408(b)2 Compliance

408(b)2 says "at a minimum" a fiduciary must

Form a reasonable belief the required disclosures are made

by comparing what is disclosed to what is required to be disclosed

The Department of Labor's explanation of 408(b)2 is 29,617 words.

408(b)2 explanation

To read 29,600 words @ 2oo words per minute = 2 ½ hours

It takes 10 or more readings ~ 20 hours.

Then create your document templates ~ more hours and hours.

Then review the disclosure statements ~ more.

Realistic time investment—*days stretching into weeks*

Or 15 minutes a year

Send us the disclosures.

We do all the work, extract the correct data from the disclosures, enter the data into our database, and produce your documents

—worksheets & minutes, signature ready.

We download our findings

We review them with you on the phone.

You sign and file them. (Or we redo them if you disagree with our findings.)

And you have your slapdowns.

408(b)2 Your Friend or Your Enemy

408(b)2 addresses the issues upon which fiduciaries are sued –and lose.

408(b)2 is mandatory

The DoL said it will ask for 408(b)2 compliance documents in an audit.

You need your full disclosure checklist- proof of your review

Without it, it automatically triggers a *prohibited transaction* fine

(Section 4975)

Prohibited transaction fines are

Proof you neglected your oversight

Proof a plaintiff lawyer will use against you

You lose.

Do-it Yourself versus Hiring Assistance

A CFO could easily do what a TPA does, but they don't.

A CFO could easily pick a few mutual funds, too. Heck a third grader could.

"Little Johnny, see where it says Growth funds?

"Yeah."

"See all those numbers in that column?"

"Yeah"

"Ok. Do you think you could pick the biggest two numbers in each column and circle them for me?"

"Sure!"

"Great! I'll pay you $7,000 to do that for me!"

"Really?"

"Sure thing, Little Johnny, that's a whole lot less than I'm paying now."

The real reason you let others do what you could do is this:

It looks prudent and you have a fallback position.

If you do it yourself you don't have anyone but yourself to blame when the suit happens.

Just letting you know

One of the salient issues mentioned in court rulings is whether the fiduciary ***sought assistance.***

If so, it is sign of prudence.

If not, it is sign of irresponsibility.

So, I am recommending you not do 408(b)2 yourself but pay someone to assist you.

(But not Little Johnny, which would look irresponsible.)

Dumb Ass Moves

Fred hands the football to the opposing team and Fred's team lets them run the ball down the field and score.

That's a dumb ass move.

Here's another one.

Fred Fiduciary lets the people being overseen prepare his fiduciary oversight documents.

Lawyers call that a *conflict of interest*.

So does a Department of Labor auditor.

So does a judge.

So would you.

A plaintiff attorney will pick up those documents, evidence of fiduciary lack of prudence, run to the courthouse and …

Touchdown! You lose!

Life is good for the nuisance attorney.

Gee, thanks Fred!

*I am gently suggesting you **not** let your oversight documents be built by those being evaluated.*

Cross off your TPA

Cross off the investment people.

408(b)2 Assistance from Fiduciary SafeHarbor

Using us is Faster

15 to 20 minutes per year

Using us is Easier

Just send us your disclosures

Using us is Cheaper

No comparison! And the plan can pay for it.

Using us is Better

Our database provides a "red flag alert" if your data is significantly different from other 408(b)2 disclosure statement data filed in our database. Something you can't possibly do on your own.

Nobody else has access to our database, and that includes the plaintiff lawyers.

Worksheets –full due diligence analysis, transparent, anybody could do it

Minutes – conclusions

Letters –as needed under the regulations

Emails—more proof of your oversight

And if you are ever named as a fiduciary defendant, you get copies of the documents no matter where you are.

Using us means No Conflicts of Interest

We provide no other plan services – no conflicts of interest.

Using us is Prudent

Court rulings are crystal clear: seeking professional assistance is prudent.

We are experts; this playbook is proof.

And if you think this was a lot, wait until you get your thirty page fiduciary review!

Next Step

If you want to learn more

Please visit our website for other materials.

I highly recommend the video, "Steve's Date".

If you want to talk to me

Please click ***here*** and schedule a time when I can call you.

Or while on the website, click on the button

Our pricing is simple.

We have a fixed cost investment in software, documents and database.

Our variable cost is Time, going through your documents and data entry.

The more disclosures to review, the more time it takes.

So we charge a flat fee and hourly fees. Simple.

What to expect on a phone conversation.

Answer any questions.

Review our procedures and give you a price.

First come, first served scheduling.

Talk to you then or see you on the videos!