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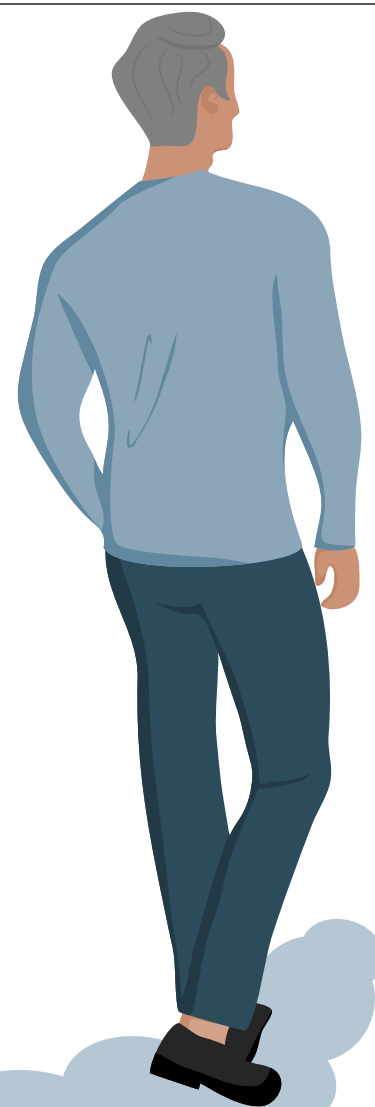
SPRING
2024

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POORLY PREPARED

RETIREMENT PLANNING BEYOND FINANCES

IT'S TIME TO
CONSIDER ALL
THAT'S NECESSARY
FOR A FULFILLING
RETIREMENT
AND HOW PLAN
PROFESSIONALS
CAN HELP.



plus

**Standout Stars—
2023 NAPA Top Young
Retirement Advisors (Aces)**

**The CAA Presents
a Major Opportunity**

**A Cybersecurity
Audit Survival Kit**



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SPRING 2024

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Poorly Prepared: Retirement Planning Beyond Finances

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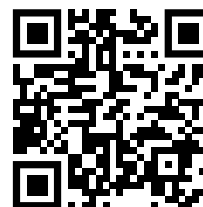
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Former Chief Content Officer of the American Retirement Association, Nevin now claims to be “retired.” One of the industry’s most prolific writers, during his more than four decades in the retirement industry, he’s served as the Employee Benefits Research Institute’s (EBRI) Director of Education and External Relations, spent a dozen years as Global Editor-in-Chief of PLANSPONSOR/PLANADVISER, and after two decades working with retirement plans, entered journalism as the originator, creator, writer and publisher of PLANSPONSOR.com’s NewsDash.



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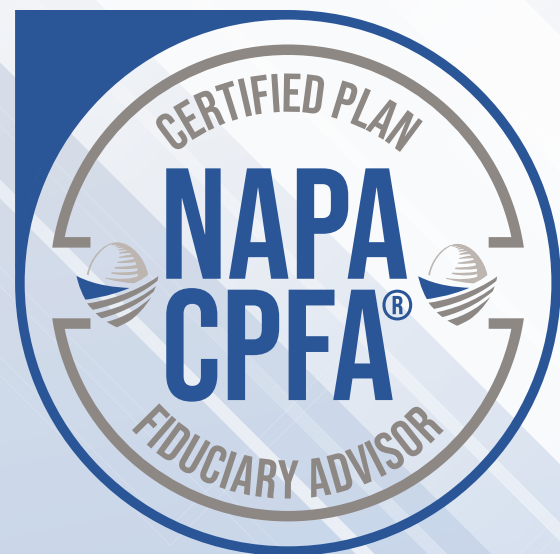
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Automatic For the People

There was big news out of Washington recently, which you might have overlooked, given all that's happening.

House Ways and Means Committee Ranking Member Richard Neal (D-Mass.) introduced a bill to establish a federal auto-IRA for employers with over 10 employees who do not currently sponsor a retirement plan.

The Automatic IRA Act of 2024 would require employees to be automatically enrolled in either an IRA or some other "automatic contribution plan or arrangement," like a 401(k) plan. It would apply to plan years beginning after 2026.

The bill's summary said it would "build upon, expand, and improve the private pension system in a manner that explicitly protects and complements



that will significantly increase access to workplace retirement savings programs," ARA CEO Brian Graff said. "Importantly, it achieves this by leveraging the existing public-private partnership that drives the successful 401(k) system providing benefits to over 100 million Americans."

Neal said the mandate would "essentially be costless" to smaller employers since it would create a new tax credit of \$500 per year for three years for employers of up to 100 employees that offer either a state or national automatic IRA, in addition to other existing tax credits.

The legislation exempts companies with 10 or fewer workers, those already offering a

preservation fund and a balanced fund must be offered, as well as any others that the Treasury Department might add.

The bill also includes a lifetime income requirement for defined contribution plans with over 100 participants, which must permit participants to elect to receive at least 50% of their vested account balance in the form of lifetime income. It does not apply to participants with balances less than \$200,000.

The bill comes at a time when state-supported and mandated retirement plans are gaining in popularity.

As of January 1, 2024, 19 states have enacted new programs for

"The Automatic IRA Act of 2024 would require employees to be automatically enrolled in either an IRA or some other 'automatic contribution plan or arrangement,' like a 401(k) plan."

employer-sponsored plans and arrangements."

In other words, it would reinforce—rather than replace—private sector plans, the reason for NAPA's support.

It also acknowledged the success of the 15 state auto-IRA plans currently in place (with more in the works), which "give proof of concept" to a federal auto-IRA program. It specifically mentioned their role in reducing the racial coverage and savings gap while encouraging greater adoption of private-sector retirement plans overall.

"The American Retirement Association (ARA) strongly supports the Automatic IRA Act

qualified plan, those in business for less than two years, or those with governmental or church plans.

The minimum default contribution for the first year is 6%. It can be higher but limited to 10% the first year and 15% after that. The rate then automatically escalates 1% per year over five years, capped at 10%. More specifically:

- Year 1 - **6%**
- Year 2 - **7%**
- Year 3 - **8%**
- Year 4 - **9%**
- All subsequent years - **10%**

The default investment must be target-date funds, and a principal

private sector workers, and 15 are auto-IRA programs, according to Georgetown University's Center for Retirement Initiatives. Since 2012, at least 47 states and the District of Columbia have acted to implement a new program, study program options, or consider legislation to establish retirement savings programs.

As always, we'll update you as the bill advances.

John Sullivan
Editor-in-Chief

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The Critical Lessons I've Learned as NAPA's President

There is something powerful that happens when you align with other enthusiastic people.

By Renee Scherzer

In my final article, I express my deep appreciation for the privilege of serving as your NAPA President. This past year has been marked by many moments of profound connection with new friends and fellow leaders.

Together, we navigated legislative storms, celebrated victories, and worked tirelessly for our clients, peers, and industry to create a better future for all working Americans. We collaboratively grew in our knowledge and networks through the memorable NAPA and ARA Conferences, committee engagements, and best practice small groups.

As I pass the baton, I will carry with me further intensity to pursue the work with the joy of progress filling the days ahead. To my fellow NAPA family, thank you for your trust, friendship, and unwavering commitment to our shared ideals and limitless passion. I look forward to the continued advancement we will all make with NAPA and the ARA, providing guidance and helping us navigate the complexities our industry brings.

I stepped into this role on the shoulders of those who came before me and with whom I hold the utmost respect. The path cleared before me allowed me to jump right in this past year



Renee Scherzer is a Senior Vice President of OneDigital's Retirement + Wealth division specializing in retirement plan consulting. This is her inaugural column as NAPA's 2023/2024 president.

and work alongside so many of you who are committed to progress. However, what I am most proud of and grateful to be a part of is our community that showed up for one another when unexpected life challenges and loss came into one another's lives and families.

There is something powerful that happens when you align with other enthusiastic people whose "whys" align with one another's; the fulfillment it brings beyond the work that we do is what makes life so meaningful and provides lasting friendships, industry advancement, and an opportunity to live a life of impact.

“We must recognize and challenge the dynamics our industry continues to embody to create an environment where women feel empowered to express their views and opportunities for advancement are more readily available.”

In my final article, I will share a couple of areas that impacted me the most.

First, we must protect our industry through annual contributions to the ARA PAC, yet we have an exceedingly small percentage of people committing yearly. Contributing to the American Retirement Association (ARA) Political Action Committee (PAC) plays a vital role in shaping our nation's retirement policies. The ARA PAC strengthens our voice by reinforcing credible relationships with lawmakers championing the employer-based retirement savings system.

By contributing to the ARA PAC, we ensure that our ideas and philosophies are widely heard and understood, safeguarding the future of retirement planning for all Americans and the future of our vital roles. For those who have attended the NAPA Fly-In, you get a front-row seat in seeing how collectively we can move the needle with the guidance and support of the ARA PAC.

Second, one area that became more evident to me was the work we still must do to advance women in our industry.

The value of bringing female leaders together or giving them a seat at the table yields numerous benefits. Yet, I heard from countless women this past year who felt their voices stifled, and advancement opportunities were limited. It was from women of all ages and positions, and what they shared has given me a continued passion for using the voice that I was forced to have early in life.

We must recognize and

challenge the dynamics our industry continues to embody to create an environment where women feel empowered to express their views and opportunities for advancement are more readily available. My fellow female leaders, most of whom I know because of our annual NAPA's Women in Retirement Conference (WiRC), exemplify a remarkable spirit of camaraderie and mutual support championing each other's success; you just need to read a few of my group texts strings to see this in action.

We provide one another with support in all aspects of each other's lives, bringing compassion and connection. Both individually and collectively, these leaders are working hard to be effective through grassroots efforts each day to bring other females into and up within our industry. However, as far as we've come, we still have a long way to go. I adore my male colleagues who understand the importance of this initiative and never miss including female leadership at the table.

In closing, I'd like to share my appreciation for the growth I've experienced and my enjoyment of working with Brian Graff. Brian Graff's guidance has been instrumental in shaping my leadership journey over the past couple of years, along with the brilliant minds of the American Retirement Association, the NAPA Leadership Council, and the leaders before me.

The wisdom, dedication, and unwavering commitment to fostering collaboration while

leading with integrity inspired me to engage in impactful discussions, looking for creative ways to engage others in the fundamental mission of the ARA. It also allowed me to look at things through a different lens, eliminating distractions that get in the way of advancement. I will take what I have learned to continue the needed work, just in a different role with Brian and the entire team.

In looking ahead, I have goals that I want to achieve that align with my main priority of living a life of purpose and impact. And, maybe not like the list of 100 that I wrote in my early 20s as a broke college graduate finding my way to which I completed 99, but one where I show up for those around me in a stronger way.

We tend to get "busy" in our lives striving for more; I never want to lose sight of my personal mission of living a life of legacy and ensuring my actions are reflective of that both personally and professionally while not losing sight of the importance of laughter, showing up for others and having a calendar filled with new experiences.

May this year be a canvas of growth and possibility for all of you and thank you to so many of you who were instrumental in the growth and new possibilities this past year brought to me. And one more thing: if anyone knows how I can get interviewed by Oprah, please let me know so I can mark that final goal off my 100 list! **NNTM**

A 401(k) Call to Action

We'll continue to execute on our mission to expand, strengthen, and defend the employer-based retirement plan system.

By Brian H. Graff

I'll be blunt—the frequency and intensity of the policy “fixes” from both sides of the aisle are increasing and usually contain massive proposals to completely upend the retirement savings system.

We thought the Retirement Savings for Americans Act (RSAA)—pushed by familiar names at the Economic Innovation Group and backed by high-profile politicians—was peak radical. Only a year later, it's almost quaint, at least when compared with more recent proposals.

The message to NAPA members is the same now as it was then, only with far greater urgency; there's an ideological—and increasingly political—battle for the country's retirement plan system and the extent to which the private and public sectors play a role. 401(k)s and similar-style defined contribution plans are at its center and under threat, so we need you engaged.

As an industry, we must be better about communicating the 401(k) plan's value proposition and how it's the only effective way to get working Americans to meaningfully save.

In just the past few months, we've seen three concerning proposals, only because national outlets are all-in on the media hype.

The first added a topical twist to Social Security solvency concerns. Writing for the Center for Retirement Research at Boston College, Andrew Biggs, Alicia Munnell, and Michael Wicklein [argued](#) the federal government should limit

contributions or accumulations in tax-advantaged retirement plans—or tax the earnings each year—to address Social Security's shortfall.

The trio reasoned that tax expenditures for employer-sponsored plans are expensive, costing about \$185 billion in 2020, and primarily benefit high earners. They also claimed the tax advantages failed as a compelling incentive to save.

Talk about robbing Peter to pay Paul. It's absurd to take away the incentives from a system that's actually working to give money to a system with fundamental challenges.

Not to be outdone, two Massachusetts Institute of Technology professors [also argued against the tax preferences](#), claiming they exacerbate the racial savings gap. Yet, they referred to the preferences as “very powerful” and admitted that defined contribution retirement plans are one of the biggest ways to build wealth in today's economy.

Finally, Allison Schrager, a senior fellow at the Manhattan Institute, appeared in *Bloomberg Opinion* with a provocative piece titled “[Your 401\(k\) Will Be Gone Within a Decade](#).” This line, in particular, caught our attention: “The intellectual case for getting rid of tax-advantaged retirement plans is strong, and the political case is catching up.”

We disagree (vehemently) with the premise, but we note its purpose. Schrager popped up on CNBC the next day to expound on her claim, echoing arguments that auto-enrollment,



Brian H. Graff, Esq., APM, is the Executive Director of NAPA and the CEO of the American Retirement Association.

rather than tax preferences, drive participation and the latter should be abandoned.

Thankfully, we're fighting fire with fire, or rather research with research. Peter Brady, Senior Economic Adviser with the Investment Company Institute, said the idea that tax incentives don't work and primarily benefit high earners is “easily dispelled.” He dug into the data he and colleague Sarah Holden shared in a NAPA point/counterpoint and on my DC Pension Geeks podcast, which are available on [NAPA-Net.org](https://www.napa-net.org).

Most irritating is the notion of a zero-sum, mutually exclusive retirement system in which the public and private sectors compete with—rather than complement—one another.

State-based auto-IRA plans have shown the exact opposite to be true, what we've called the perfect public-private partnership. State plans encourage more private sector businesses to offer a plan and more employees to engage, resulting in higher coverage, participation, and greater retirement security overall.

The bad ideas will continue, and we will continue to execute on our mission to expand and strengthen (and defend!) the employer-based retirement plan system, which, while imperfect, is incredibly effective for hardworking Americans.

The point/counterpoint is at <https://bit.ly/49BXeJ7>.

The DC Pension Geeks Podcast is at <https://bit.ly/4bNsmH4>. [NTM](#)



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ABA Foundation and NAPA Join Forces on Student Financial Literacy Initiative

NAPA members will help in preparing and educating students in their communities.

By Joey Santos-Jones



Recent national surveys reveal that basic financial literacy is low in the United States overall—especially amongst racially underrepresented populations.

According to the U.S. Financial Literacy and Education Commission's 2021 report,

tailoring financial literacy education to specific economic situations is critical. Additionally, having education that helps underserved communities avoid financial exclusion and predatory credit card offers is always needed.

In response to the nation's financial literacy deficit, the

American Bankers Association Foundation (ABA Foundation) teamed with the National Association of Plan Advisors (NAPA) to enlist some NAPA members, when needed, to help spread financial education in schools across the country.

The ABA Foundation will tap NAPA to aid in educating

“No one has taught them how to be financially secure in school, so the opportunity to share my story with these girls was really [an] empowering and beautiful experience.”

— Jennifer Ingham Shellely, Ingham Retirement Group

students across the country on budgeting, financial literacy and retirement options, leaning on NAPA members to share their knowledge.

“At the ABA Foundation, we believe financial literacy is key to empowering students and young adults to achieve their financial goals,” said Lindsay Torrico, executive director of the ABA Foundation. “We’re appreciative that ARA and its members will join us in this decades-long effort to educate students nationwide.”

NAPA members have already jumped at the chance. Jennifer Ingham Shellely from Ingham Retirement Group is volunteering her time for the program.

“Financial education shouldn’t start when you get a job,” Ingham Shellely says. “No one has taught them how to be financially secure in school, so the opportunity to share my story with these girls was really [an] empowering and beautiful experience.”

Ingham Shellely’s presentation helped educate students on speaking freely about money and understanding the importance of long-term markets.

“People don’t like to talk about money or think it’s wrong to want money,” she continued. “You can still be loving and nurturing but have your best financial interests at heart and form a basic instinct for survival.”

Ingham Shellely touched on the history of retirement savings and what students can do today.

“I had enrollment 101, the history of retirement, the history of social security, pensions—you name it,” she added.

Student feedback from Ingham Shellely’s presentation displayed its positive effects, with one student noting that even though she isn’t investing yet, “Jennifer [Ingham Shellely] did a great job of highlighting the important principles of saving 10%.”

Another student said the presentation was the first “real” exposure to financial literacy and that “advice about paying off credit card debt each month” was especially helpful.

The communities seeing the widest gap in financial literacy are Black, Hispanic and Native Americans. Especially in retirement planning, Black and Latino workers report lower participation rates in retirement plans, with 53% of Black employees and 45% of Latino employees participating, according to a recent Voya Financial study.

It’s compared to a 66% participation rate among White workers and 62% among Asian Americans. Average account balances reflect similar disparities, with White and Asian American savers having higher balances than their Black and Latino counterparts: Whites at \$99,000, Asian Americans at \$86,000, Blacks at \$45,000, and Latinos at \$43,000.

For NAPA members Andy and Bill Bush of Horizon Financial Group, the opportunity to teach financial literacy in their own Louisiana backyard just made sense. Louisiana has one of the worst personal income growths among all states.

“[For the kids to] just to have someone come in and talk about those topics at an early age, you could see the value and importance to that,” Bill Bush said when describing his, as well as his brother’s, goals for their presentation. “Everything starts with budgeting—then use those skills for paying for college, then leverage that into careers in finance.”

Brother Andy agreed and added the importance of teaching financial behavior and the math behind saving.

“It comes down to mainly how you behave and then understanding the Xs and Os, right?” he said. “The math of financial planning is easy. It’s the behavior that gets people in trouble, and so that’s what I would really want to impart is, ‘Hey, here are the simple things that help you understand the ABCs [of finance].’”

Andy and Bill Bush will take their advice directly to the classroom by conducting a financial literacy presentation for parents and students ages eight to 18 in a Baton Rouge, La. school.

The ABA Foundation will call upon ARA members when opportunities arise in different cities each year. NAPA members will then help in preparing and educating students in their communities.

NAPA members interested in participating in the program can contact Madison Oakley at moakley@usaretirement.org for more information. [NNTM](#)

Trends ‘Setting’

Americans bomb a retirement income quiz, less than half of advisors see their clients as ready for retirement, and Vestwell reveals four emerging wellness trends advisors should seize on now.



Schools Out

Americans bomb retirement income quiz.

If the results of a recent retirement income quiz are any indication, there's work to be done.

Older Americans scored just 31% on the 2023 Retirement Income Literacy Study from the

American College of Financial Services, which found a "direct relationship" between financial literacy and asset levels—test takers with more than \$1.5 million scored twice as high as those with less than \$100,000.

The study also found that advisors play an "essential role" in educating clients, as those with an advisor scored higher.

The study comes as an interest in in-plan retirement income products is rising, at least within the industry. Increasing longevity, the demise of defined benefit pension plans, and sequence of returns risk have combined to force the need for a guaranteed income stream within retirement portfolios.

“Among those who didn’t rate themselves very highly in terms of retirement knowledge, a whopping 73% had less than \$100,000 saved up for retirement.” — Eric Ludwig, Center for Retirement Income

“In the U.S., with the exception of Social Security and the comparatively small number of workers with guaranteed pensions, saving for retirement is voluntary,” Steve Parrish, Co-Director of the Center for Retirement Income at The American College of Financial Services, said in a statement. “This requires the consumer to know how much to save, where to save it, and how much to drawdown at retirement.”

This necessitates an understanding of basic concepts about investing, taxes, insurance, and finances.

“To measure how prepared Americans are for retirement, an important consideration is how knowledgeable consumers are about retirement,” he added. “Call it ‘literacy,’ ‘aptitude,’ or ‘competence,’ do Americans know enough to take on the burdens that come with the freedom of voluntarily saving for retirement?”

The study focused on those aged 50 to 75, a period where issues such as how best to withdraw income from assets come into play and how to manage finances in retirement is critical.

One of the more eye-popping results was how well respondents rated their retirement income knowledge compared with actual scores.

“Among those who didn’t rate themselves very highly in terms of retirement knowledge, a whopping 73% had less than \$100,000 saved up for retirement,” Eric Ludwig, the center’s director, said. “Compare

that to the group at the other end of the spectrum—those who felt confident about their retirement smarts. 81% of this group had savings above \$100,000,”

Although overall and underlying scores were low across the board, respondents showed significantly greater knowledge of certain areas concerning inflation, housing, and Medicare.

The study also explored longevity, and respondents consistently underestimated life expectancy and were unaware of how long individuals tend to live, with just over one in five (22%) expecting to live past 89 and just over one in four (27%) able to correctly identify the average life expectancy of a man at age 65.

“This is particularly concerning because so many Americans plan to supplement their Social Security with their 401(k) and IRA accounts,” the college said. “If they underestimate their own life expectancy, they risk exhausting their savings in retirement—potentially outliving their assets.”

Retirement planning knowledge was “highly variable” across different parts of society. Generally, more assets, higher education, male gender, white or “other” race, and greater life experience (including age and retirement status) correlated to higher scores.

Notably, participants with ongoing advisory relationships scored 11 points higher on retirement income literacy than those without (38% vs 27%).

— John Sullivan

Deep Disconnect

Less than half of advisors see their clients as ready for retirement.

There apparently is a “disconnect” between financial advisors and their retiree- and near-retiree clients on their retirement readiness, according to the results of a new survey.

The survey, conducted by Escalent on behalf of Allspring Global Investments—which for the first time included advisors—found that advisors’ perceptions of their clients’ retirement preparedness reflected far less confidence than did those of retired or near-retired respondents.

While nearly two-thirds (64%) of retirees and near-retirees see themselves as ready for retirement, advisor respondents believe that only 40% of their clients are ready. The disparity is significantly sharper regarding specific retirement topics, Allspring further observes.

For example, when asked if they know enough about Social Security to be prepared for retirement, 44% of near-retirees and over 50% of retirees say they do. Only 11% of advisors agree. Similarly, a third of near-retirees and nearly half of retirees say they know enough about Medicare planning. Yet only 8% of advisors think investors do. So, what gives?

“Advisors believe investors know less than they think they do about Social Security, Medicare planning, and general financial planning,” said Nate Miles,

Allspring's Head of Retirement. "Advisors have the experience and tools to help those in or nearing retirement get a clearer picture of what it will take to achieve financial security."

To that point, particularly when it comes to engaging younger investors, the survey also found that 6 in 10 near-retirees know that their 401(k) or 403(b) plan offers advisory services through the plan. In addition, 47% of near-retirees are equally likely to work with the advisor associated with their plan as with any other advisor, the results show.

Deciding When to Retire

Of course, deciding when to retire is a highly personalized choice that depends on many factors, including financial resources, health and job satisfaction, the report emphasizes. While the average age of retirement among survey respondents was 62, the survey found that retirees had mixed opinions and expectations of the right time to stop work.

In this case:

- **37%** of retired respondents said they retired sooner than expected, while 6% said they retired later than expected; and
- **39%** said they retired too late and wish they had more time to enjoy retirement.

Meanwhile, a sizable number of respondents decided to "unretire" and return to work. Compared with other retirees, this group is older and less educated, and had lower household income and total savings, as well as lower expected retirement income, the survey found.

At the same time, however, many returned by choice.

- One in eight near-retirees are un-retirees.
- **83%** of un-retirees returned by choice, not necessity.
- Two in five un-retirees went back within the past year.

Additional findings show that near-retirees believe they will need \$1.6 million in expected retirement savings, while

retirees believe they will need \$1.1 million. Investment choice was also found to be important among this cohort, as 52% of near-retirees indicated that they prefer a menu of fund options, as opposed to a professionally managed account or target date fund.

The survey was conducted from Sept. 5-28, 2023, among 1,515 adults who reside in the U.S. and are primary or joint household financial decision-makers. The sample consisted of 752 near-retirees (average age of 61) and 763 retirees (average age of 70) (both with at least \$200,000 in investable assets), and 320 advisors (with at least \$5 million in assets under management).

— Ted Godbout

Perk to Prerequisite

Four emerging wellness trends advisors should seize now.

While workplace retirement plans are becoming an expectation for employees, the results of a new survey show there are multiple areas where savers are seeking additional support.

In fact, according to Vestwell's annual Savings Industry Report, four emerging trends for 2024 all point to a growing need for more comprehensive financial wellness solutions, including that:

- savers are increasingly seeking more personalized financial wellness solutions;
- workplace retirement plans have moved from perk to prerequisite;
- saver demand continues to grow for more comprehensive and inclusive workplace financial wellness benefits; and
- employer-sponsored education savings benefits are gaining momentum in response to student debt challenges.

The results, which are based on a nationwide survey of 1,200 employees conducted during the summer and fall of 2023, illustrate the future of financial

wellness and workplace savings—and how employers and financial advisors can align their offerings with evolving employee priorities, the firm suggests.

For employers, this shift represents an opportunity to become champions of holistic financial wellness, the report notes. Employers can play a pivotal role in reducing their employees' financial stress by integrating education savings benefits, establishing employer-sponsored emergency savings accounts (ESAs), and offering access to health savings accounts (HSAs).

"Employees are increasingly viewing financial wellness offerings as a 'must-have' in today's workplace environment. With inflation fears and uncertain economic outlooks affecting retirement goals, employers and advisors have a huge opportunity to enhance their offerings beyond the traditional 401(k)," said Aaron Schumm, founder and CEO of Vestwell.

By adopting these solutions, businesses can offer a variety of programs, empowering employees to make informed choices and positioning themselves as leaders in a competitive job market, the report further suggests. Financial advisors also have a vital role in guiding employers through the nuances of these expanded offerings, along with the legislative changes brought on by the SECURE 2.0 Act.

Workplace Retirement Benefits

According to the survey, employees are increasingly expecting retirement benefits from their employers:

- **85%** of respondents expect their employer to offer retirement benefits.
- **89%** of those surveyed would be more likely to continue working for an employer that offered a retirement benefit.

Education Savings Benefits

Employees are also increasingly looking for employers to offer expanded financial wellness



benefits. In this case, the survey found that:

- **93%** of survey respondents with student loans reported that their student debt has affected their ability to save;
- **74%** of those with student loans agree that they would be more likely to continue working for an employer that offered student loan-related benefits; and
- **73%** placed some level of importance on having a 529 Education Savings Account in their workplace benefits package.

“The student debt crisis continues to create barriers for Americans looking to save for retirement. By offering the latest savings solutions to their employees, employers can enhance retention and employee wellbeing,” added Schumm. “If we want to help people save for retirement, we must also provide

holistic financial wellness benefits that reduce these barriers to savings.”

Personalized Financial Wellness Solutions

Meanwhile, a growing number of savers are seeking personalized financial wellness solutions through financial advisors, managed accounts, and digital tools, the report further notes. Here, the survey found that:

- **41%** of respondents plan to work with a financial advisor in the future; and
- **94%** of respondents think a tool that offers digital personalized investment suggestions would be valuable.

Inclusive Financial Wellness Benefits

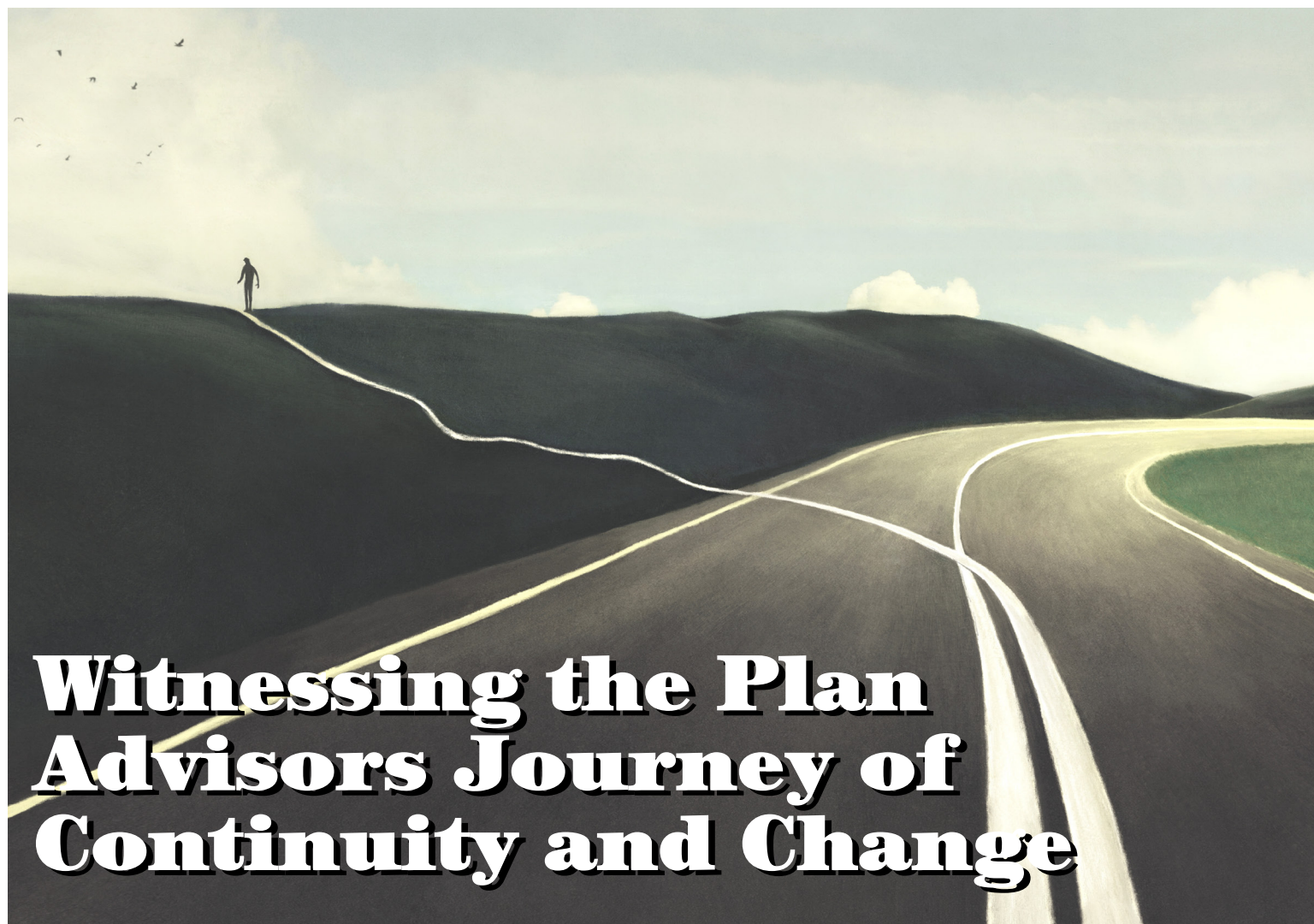
Vestwell’s report also highlights the increased demand by employees to address an emergency savings shortfall.

According to the findings:

- **38%** of respondents reported less than \$1,000 in emergency savings;
- nearly **70%** of respondents expressed willingness to participate in an ESA; and
- **87%** of employees placed some level of importance on having access to an HSA in the workplace.

“Advisors should actively consult with their employer clients on the benefits and implementation of these valuable savings vehicles. As we transition into 2024, the concept of the ‘next best dollar’ takes on a broader meaning, with savers looking beyond traditional retirement accounts to more diverse financial wellness solutions,” the report further emphasized in a concluding observation. **NNTM**

— Ted Godbout



Witnessing the Plan Advisors Journey of Continuity and Change

Recent milestones offer a unique opportunity to reflect on my journey and share key changes and constants I've witnessed in retirement plan marketing.

By Rebecca Hourihan AIF, PPC

There's something sad, sweet, and savory about reaching significant milestones. They serve as a reflective mirror, allowing us to pause on the path behind us and look forward to the journey ahead.

As I recently turned 40, a milestone that stung a bit, it also brought profound gratitude. After all, many friends shared that their 40s were their favorite decade, so I'm excited to see what this new chapter holds.

Another milestone we're celebrating this year is the 10th anniversary of 401(k) Marketing. It all began with a simple question, "What do you do for your marketing?"

This sparked the idea of creating a full-service marketing

agency dedicated to retirement plan professionals. It's astonishing how fast time flies. It feels like yesterday when we started, yet sometimes it feels like an eternity ago.

These dual milestones offer a unique opportunity to reflect on the journey and share key changes and constants we've witnessed in retirement plan marketing.

The Power of Communication

One thing that hasn't changed throughout the years is the importance of communication. Effective communication remains at the heart of the top retirement plan advisor's service model, whether it's a simple quarterly client newsletter or a robust automated weekly sequence.

Over the years, the topics have ranged from 408(b)2 fee benchmarking and plan design education to financial wellness resources. However, the message's mission—clarity, relevance, and value—remains steadfast.

Embracing Change with Courage

Change can be intimidating. It requires us to scrutinize current practices—pipeline campaigns, onboarding processes, client services, plus more—and be willing to adapt. It takes courage to identify areas for improvement and even more to follow through. But the reward? A stronger, more efficient, and more impactful retirement plan business.

The Difference Between Internet Time vs. Real Time

While the internet has made everything seem achievable at the click of a button, it's crucial to remember that quality work still takes time. Projects require concentration, selection, feedback, and abundant communication. The convenience of AI and digital tools shouldn't lead us to underestimate the effort behind successful initiatives.

Visibility in the Digital Age

In today's digital age, you can't be in sales and remain a secret. 401(k) advisors must establish a visible online presence. With most prospects turning to the internet for information, your visibility online directly impacts your success in attracting and retaining clients.

Your website, social media profiles, and other digital platforms must be easily discoverable and clearly articulate how you can support retirement plan clients. By being present and active online, you not only enhance your credibility and reach but also demonstrate your commitment to meeting the evolving needs of your clients in an increasingly digital world.

Navigating the Social Media Merry-Go-Round

Social media is no longer an optional form of communication. It has revolutionized how we communicate in business and build professional relationships. However, standing out amidst the noise and mastering the ever-changing algorithms can feel like trying to jump onto a spinning merry-go-round.

Despite the challenges, it's a playground we cannot ignore. After all, only 1% of people produce and share content on LinkedIn weekly, leaving a staggering 99% of users watching from the sidelines. Jumping on and staying on might be challenging, but it's worth the ride.

Feeding the Visual Appetite

A decade ago, we were bombarded with 5,000 advertisements a day. That number has doubled today, underscoring the need for visually appealing

materials to satiate today's digital appetite. Your content isn't just competing with other businesses—it's vying for attention amongst 10,000 daily distractions.

Simplicity Instead of Information Overload

Despite the internet's unlimited resources, people are still people. We thrive on digestible, bite-sized information. This holds for plan sponsors who need to understand their plan options and for employees grappling with retirement planning. From a content perspective, employees still prefer simple yet powerful concepts like the power of compounding, Roth vs. Pre-tax, and budgeting basics.

As retirement plan advisors, you should strive to educate, simplify, and develop deeper conversations. Seek to deliver content that demystifies the complex world of 401(k) plans and offers clear, actionable insights.

The Convergence of Wealth and Retirement

There's a fascinating evolution unfolding in our industry. When the Pension Protection Act (PPA) of 2006 was passed, it triggered a wave of wealth management advisors setting up retirement plans for their business owner clients. As fiduciary services—specifically 3(21) and 3(38)—gained traction, the landscape shifted towards specialist advisors designated to service retirement plans.

Now, we're witnessing another shift. With state-mandated IRAs, SECURE 2.0 requirements, institutional fiduciaries, PEPs, fee compression, and enhanced employee data, the tide is again turning.

The retirement plan industry is adopting a hybrid approach where wealth managers and retirement plan advisors are working together. This convergence aims to offer comprehensive solutions to employers and employees, enhancing retirement confidence.

The Power of Personalization

In an age where people can customize everything from coffee orders to streaming playlists,

the demand for personalized experiences has emerged within retirement plans.

Tomorrow's retirement plan clients will expect advice that is tailored to their unique circumstances and goals. Advisors delivering this level of service will stand out in RFPs as a true differentiator.

Process Leads to Profitability

Establishing a repeatable and scalable process can boost profitability. That could mean subscribing to investment monitoring software, buttoning up CRM input data, using a finalist presentation template, and organizing internal file naming conventions, which increases internal organization, reduces scatter time, and improves profitability.

Operating under constant fire drills drains resources and wastes talent and money. It's a stressful approach that can lead to burnout and decreased productivity.

This is where the power of a business plan can provide clear direction and a sense of purpose. Having a clear roadmap for your business operations can help you allocate budgets more effectively, minimize stress levels, and help you make informed decisions that align with your long-term business goals.

Forecasting into the Future

As we navigate this new world, the constants remain communication, courage, and simplicity. Some upcoming changes include the convergence of wealth and retirement, the rise of visual marketing, or the increasing importance of digital visibility. However, we must remember the core mission: to make retirement plans accessible, understandable, and achievable for all.

As we celebrate these milestones and look ahead, I am grateful for the journey thus far and excited about the opportunities and challenges ahead. Here's to embracing change, celebrating constants, and making a difference in 401(k) marketing.

Thanks for reading & Happy Marketing! **NNTM**

Major League Engineering: How To Easily Supercharge Your AI Prompts

Better tailor your AI use directly to your retirement plan practice by using simple acronyms.

By Spencer X Smith

“**T** Technology is something that doesn't work yet. Once it does, we call it engineering.” It isn't just a clever quip from the early computer scientists. Engineering is a set of best practices to replicate tried and true outcomes.

Need to build a bridge across a river? There are specs and examples to follow. Technology, on the other hand, is always a little hit or miss. Most get as far as the “Have you tried turning it off and back on again?” line of thinking and then start hunting for help on Google or with our 13-year-old offspring.

If you've played with various AI tools like ChatGPT, Google's Bard (now Gemini), or Microsoft's Copilot, you've probably gotten quickly frustrated because of the inconsistent results.

We can use our natural language to communicate with these tools, and we expect them to respond how we'd like. But that's not the case.

Why is that? Deep inside its computer brain, it's still converting what we said to formulas—zeros and ones, a set of probabilistic outcomes meant to give us what we want.

To get consistent, useful results, we can use models to ensure the AI yields as close to what we want as possible.

I've done the heavy lifting for you since you've been busy servicing your plans and clients. Here are the models to follow using easy-to-remember sports acronyms.

An Introduction to Prompt Engineering

We'll begin by decoding the acronyms PGA, MLB, and NFL.

PGA stands for Prospecting with AI, a framework designed for those looking to prospect for new business opportunities using AI, with ChatGPT as the tool of choice. But what does PGA really mean?

At a high level, the P stands for perspective or the angle or viewpoint I'm interested in (e.g., technical or historical). The G is for Guidance, or the specific advice or guidance I seek.

Lastly, A is for Application, or how I plan to use the information or advice.

Diving more in-depth, P is where you define your angle or viewpoint. Are you looking at this from a technical lens, seeking to understand the nuts and d bolts? Or is your perspective more historical, aiming to see how this fits into the broader narrative of digital evolution? Clarifying your perspective sets the stage for a more targeted inquiry.

With guidance, you're seeking specific advice or direction. It's about asking, “Given my perspective, what should my next steps be?” This is where the AI can shine, offering insights and suggestions tailored to your unique viewpoint.

Finally, Application is about putting it all into practice. How will you use the insights and guidance provided by the AI? This is where the theoretical meets the practical, turning ideas into action.

Imagine using ChatGPT to explore new markets, understand emerging trends, or generate leads. By framing your queries within the PGA framework, you're not just asking questions but engaging in a strategic dialogue that can open up new business avenues.

Next, we have MLB, a strategy for maintaining and enhancing business relationships by gauging the competitive landscape, with Google Bard (Gemini) as the recommended tool. What's MLB?

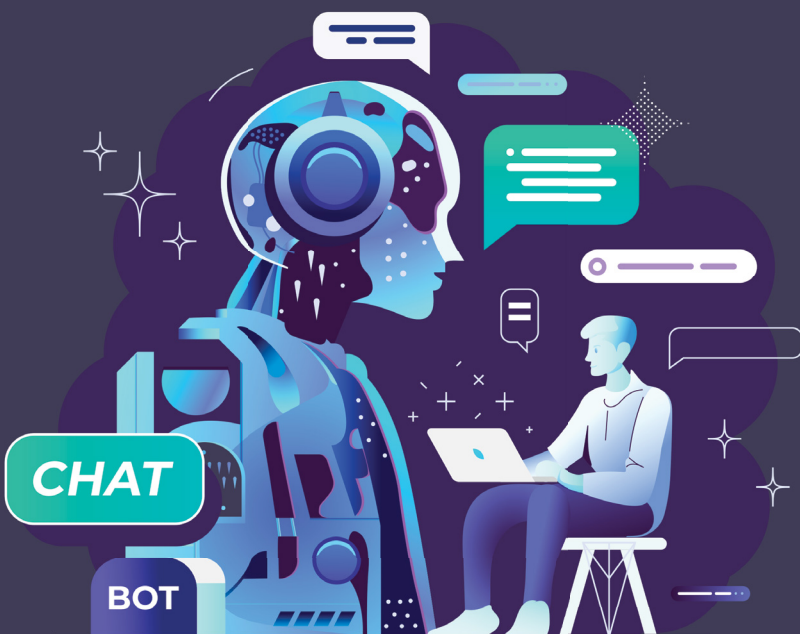
At a high level, the M means Motivation. What is my [competitor] or [set of competitors] doing? L is the Likelihood of discovery; what are the most popular pages or posts on [competitor URL]?

The B is for Buzz, or what's the most popular content on [topic] or [industry]?

Going more in-depth with the M, start by identifying the ‘why’ behind your inquiry. What drives your interest in analyzing your competitors? Understanding your motivation clarifies your objectives and ensures your efforts align with your business goals.

L involves assessing the potential for uncovering valuable insights. What are the odds that delving into your competitor's content will reveal actionable intelligence? By evaluating this, you can prioritize your research efforts effectively.

Finally, use B to tune into the chatter. What's the word on the street about your chosen topic or industry? This could involve social media trends, news articles, or



You
You're an expert in new client acquisition. Please help me with prospecting for new retirement plan business. I'm going to prompt you using this rubric:

P - Perspective: The angle or viewpoint I'm interested in (e.g., technical, historical).
G - Guidance: Specific advice or guidance I'm seeking.
A - Application: How I plan to use the information or advice.

Ready to get started?

ChatGPT
Absolutely, I'm ready to dive in! Let's start with your P - Perspective. What's the angle or viewpoint you're interested in for prospecting new retirement plan business?

You
I'd like to attract plans from businesses that are growing. My thought - a growing, healthy business will lead to more and better plan participants. How can I best find these businesses in my area? Please be concise with your answer for both this response and the others in our discussion.

ChatGPT
To attract growing businesses for new retirement plan clients, focus on identifying companies experiencing rapid expansion, increased hiring, or entering new markets. Utilize local business news, chamber of commerce updates, and industry networking events to pinpoint these prospects. Additionally, leveraging LinkedIn to track companies announcing achievements or expansions can be fruitful. Engaging with local business incubators or accelerators can also provide leads on up-and-coming businesses poised for growth.

You
Let's proceed with G - what's your guidance?

ChatGPT
For engaging these identified growing businesses:

1. **Tailor Your Pitch:** Highlight how your retirement plans can scale with their growth, emphasizing flexibility and customization options.
2. **Educate:** Offer value first by providing insights on how a robust retirement plan can aid in attracting and retaining top talent, a crucial aspect for any growing business.

3. **Network Strategically:** Attend or even sponsor events that these businesses are likely to participate in. Position yourself as a thought leader in retirement planning.
4. **Leverage Testimonials:** Use success stories from current clients similar to your prospects to build credibility.
5. **Personalized Outreach:** Craft personalized messages that resonate with the specific growth stage and challenges of each business.
6. **Follow-Up:** Persistence is key. Maintain a respectful yet persistent follow-up strategy to stay top of mind.

Remember, it's about building relationships and offering solutions that align with their growth trajectory.

You
Let's move onto application, now

ChatGPT
To apply this strategy effectively:

1. **Research and List:** Start by compiling a list of growing businesses in your area. Use the criteria mentioned earlier to identify potential prospects.
2. **Develop Your Pitch:** Create a tailored pitch for each prospect, focusing on how your retirement plan services can support their growth and talent retention efforts.
3. **Initiate Contact:** Use your personalized outreach strategy to make initial contact. This could be through LinkedIn, email, or even a phone call, depending on the context and your relationship with the prospect.
4. **Offer Value:** Consider hosting a free webinar or workshop on the benefits of robust retirement plans for growing businesses. Invite your prospects to attend.
5. **Schedule Meetings:** Aim to schedule face-to-face or virtual meetings with interested prospects to discuss their specific needs and how you can help.
6. **Follow-Up:** After the initial meeting, ensure timely follow-ups to address any questions and move the conversation towards closing the deal.

By applying these steps, you'll be well on your way to securing new retirement plan business from growing companies in your area. How does this action plan sound for your goals?

☐ ☑ ☒ ☓

even industry reports. Keeping a pulse on the buzz helps you stay ahead of the curve and adapt your strategies accordingly.

Using Google Bard (Gemini) to analyze the content and strategies of your competitors can offer a wealth of insight. Whether it's identifying trending topics, understanding content gaps, or gauging audience engagement, the MLB framework ensures you're collecting data and deriving meaningful insights from it.

Our final acronym, NFL, means using data analytics and business intelligence to unearth previously unknown insights. Microsoft Copilot is the tool in focus here. Where can NFL help?

At a high level, N stands for Nuance. What are the fine points or intricate aspects you're curious about regarding your own data? The F is Focus: Identify your inquiry's central theme or main subject. What is the core topic or key idea you want to explore?

L means Layout: Describe your preferred format for the response.

Do you want a bullet-point list, a detailed narrative, a concise summary, or something else?

Moving more in-depth, N is about digging deeper into the intricacies of your data. What subtle patterns or trends might you be overlooking? By focusing on nuances, you can uncover insights beyond the surface level.

With F, you pinpoint the core theme or subject of your inquiry. What's the main question you're trying to answer or the key idea you want to explore? Having a clear focus helps you stay aware of the vast sea of data.

Finally, use L to consider how you want the information presented. Do you prefer a detailed narrative that tells a story with your data, or are you more inclined towards a concise summary or bullet-point list? The format can greatly influence how you interpret and use the information.

Copilot can be a powerful ally in sifting through complex datasets, offering insights to

inform strategic decisions. Whether it's customer behavior patterns, market trends, or operational efficiencies, the NFL framework ensures that your approach to data analytics is structured and goal-oriented.

So, what's next? Pick one framework that resonates with you. Just one and start small but think big picture.

Are you actively looking to grow your practice? Get your prospecting reps in on the practice green and start with PGA.

Want to build a competitive moat and ensure you know which pitch is coming before it crosses home plate? Start with MLB.

Need to better understand your practice's big picture through data analysis? Break down those insights like a Monday morning quarterback and go with NFL.

Apply it to a project, a curiosity, or even a challenge you've wrestled with to transform these models from mere concepts into tangible, digital tools. **NTM**



POORLY PREPARED RETIREMENT PLANNING BEYOND FINANCES

ARE ADVISORS RESPONSIBLE FOR PARTICIPANT OUTCOMES BEYOND SUCCESSFULLY SAVING FOR RETIREMENT? IF SO, HOW? THE GAP BETWEEN EXPECTATION AND REALITY IS GROWING. DOING SOMETHING ABOUT IT IS A DIFFERENTIATING FACTOR. IT'S TIME TO CONSIDER ALL THAT'S NECESSARY FOR A FULFILLING THIRD ACT AND HOW PLAN PROFESSIONALS CAN HELP. **BY JOHN SULLIVAN**

Is it possible to fail at retiring? The once preposterous question is increasingly commonplace, as longer life spans bring a corresponding need for sustained purpose and fulfillment. The opening montage of the movie *The Intern* perfectly encapsulates the problem. Widower Ben Whittaker (Robert De Niro) called retirement an “ongoing, relentless effort in creativity.”

“At first, I admit I enjoyed the novelty of it; it sort of felt like I was playing hooky,” Whittaker said. “I used all the miles I’d saved and traveled the globe. The problem was that no matter where I went, as soon as I got home, the ‘nowhere to be’ thing hit me like a ton of bricks.”

The former executive could only play so many rounds of golf, read so many books, and take so many cooking and yoga classes. He admitted he relied too much on his children and grandchildren to fill his time, and he eventually returned to work.

The need for an active and engaging retirement with a defined sense of purpose isn’t new, but for whatever reason, it appears to be nearing critical mass.

Does it make sense for retirement plan advisors to get involved, or is it best left to their wealth management and financial planning counterparts, especially when the former still struggle to effectively scale one-on-one participant meetings, let alone more ancillary problems outside their direct scope of services?

“I love the subject and it is our responsibility,” Jason Chepenik, OneDigital’s Senior Vice President of Retirement & Wealth, said. “The first access someone has to a financial advisor today is usually through the workplace. Their 401(k) advisor or record keeper is their first interaction with someone who may be their coach for the rest of their lives. They remember the first person to help them, and that person needs to be far more versed in helping them navigate other things in life.”

FOURPILLARS

So where does a retirement plan advisor (RPA) begin with these “other things?”

Christine Benz, Morningstar’s Director of Personal Finance and Retirement Planning, said it’s about helping to

solve four interrelated needs typical of a successful retirement.

“You want the finance piece to line up; you need to make that work,” she explained. “People tend to focus on the finance piece because it’s so quantifiable.”

Not surprisingly, good health is next, and “whatever you can do to burnish your health, to take care of your health in the years leading up to and during retirement, is important.”

Relationships are the third crucial element of happiness, something needed throughout retirement.

“Many people, men especially, tend to get much of their social network from their workplace,” Benz said. “When they step away, they haven’t lined up who their relationship resources will be post-work. I spoke with Dr. Laura Carstensen, director of the Stanford Center on Longevity, and she talked about how women, when you look at the data, tend to do a better job diversifying their social networks throughout their lives.”

The fourth piece is the all-important purpose, or something that animates the individual.

“I was struck by a conversation I had with Jordan Grumet, a hospice physician and financial independence blogger,” Benz noted. “He frequently talks about purpose, and he said people are paralyzed by what he calls the ‘Big P’ purpose, this idea that they need to start a foundation or fully devote themselves to a volunteer activity.”

But people can have many ‘small p’ purposes in life, maybe by nurturing a relationship with a partner or a hobby that’s fun but won’t necessarily change the world. And ‘small p’ purposes matter just as much as a ‘Big P’ purpose, so retirees shouldn’t be paralyzed when deciding what to do next.

“It can be a lot of these smaller things that really give you a reason to wake up in the morning,” she added.

So, how well is the industry performing when helping with all four?

Benz was diplomatic.

“Good financial planners are attuned to the holistic nature of retirement planning, not just the financial piece, and the financial advice industry is becoming more holistic overall throughout the entire life cycle. I think there’s more attention to overall wellness and the linkage between our financial health and other aspects of our wellness, so I think we’re improving.”

Yet, RPAs’ proximity to participants gives them an added opportunity, which

A Word About Wealth

Jason Chepenik goes hard at those who believe services beyond saving belong somewhere else—especially with wealth managers.

“How do you feel when you hear the word wealth?” Chepenik said. “I think that’s a question we need to ask ourselves. We say this term wealth out loud, but most people don’t think they’re wealthy, right? If the median income in America is \$75,000, and only 3.8% of Americans make over \$300,000, is that person wealthy. If you ask them, they don’t think they are.”

He believes retirement plan advisors are using the wrong words, or at least not the right words, and conversations are still too sales based.

“That isn’t really the end game,” he argued. “It’s helping people make good decisions. As they get older, how they score the board changes. It’s more time with family and peer groups and promoting friends that matter most. How can I help them do that? It’s a really interesting and beautiful change.”





is why so many are looking to add wealth management services, for instance.

"Based on the data I see, more employers are trying to keep participants in the plan longer," Benz said. "That's a potential touch point for retirement advisors and gives them the chance to play a more holistic role."

FOURSTAGES

Retirement author Fritz Gilbert has interesting data on why the holistic role is so important. Gilbert, who blogs at [The Retirement Manifesto](#), joined fellow author [Eric Weigel](#), a Certified Professional Retirement Coach, in researching expectations versus reality in pre-retirees and retirees.

"Your chance of depression goes up by 40% when you retire," Gilbert said. "That's where financial professionals can step in and provide a roadmap. They can provide value beyond the financial side."

Several survey findings stood out, including:

- **52%** of pre-retirees "mostly agree" that the retirement transition will be smooth, whereas only **32%** of actual retirees feel the same way.
- **62%** of retirees miss social interaction at work, whereas only **29%** of pre-retirees expect it to be an issue.
- **38%** of retirees miss the mental stimulation from work, yet only **21%** of pre-retirees think they'll miss it.
- **31%** of retirees struggle with losing their sense of identity versus **22%** of pre-retirees thought they would.

"Retirement is like getting married and having children," Gilbert added. "You never truly understand what it's like until you do it. People go into retirement with one set of expectations, and the reality is often different."

He mentioned Dr. Riley Moyné's *The Four Phases of Retirement: What to Expect When You're Retiring* and its companion [Tedx Talk](#), which has received 2.6 million views.

The four phases are:

1. **Vacation (Honeymoon) Phase:** There is no set schedule and lots of leisure. It begins to wear out in one year.
2. **Lost and Loss—A loss of the Big 5** that people get from work: routine, identity, relationships, purpose, and, for some, power.
3. **Trial and Error Phase—An attempt** to regain purpose and enjoyment.
4. **Reinvent and Rewire Phase—**Getting the most from retirement by finding meaningful activities

that provide a sense of accomplishment.

"Fully **85%** of retirees enter phase two wondering what they'll do with the rest of their lives," Gilbert said. "To answer your question, can people fail at retirement? I think the people that fail get stuck in that phase. There's so much more you get from your job than just the paycheck, and there's a lack of awareness of that. Those non-financial elements you receive from work bring value to your life, but you don't think about it. I frequently hear from readers that they are stuck in that phase. The difference in retirement is that it's on you to figure it out."

While acknowledging that returning to work is an option, he encourages retirees to first experiment in other ways.

"Think about those five attributes you once got from work besides the paycheck (routine, identity, relationships, purpose, power) and decide if there are ways to develop them through new interests that don't come with the obligation of an everyday job. If you can't, go back to work so you're fulfilled, which is fine, but people who return to work usually haven't tried to find ways to get fulfillment outside of work. Maybe it's not a failure, but I wouldn't say it's a success."

Like Benz, he believes financial professionals are getting better at addressing non-financial issues but still have much to do.

"We're in the early days," he claimed. The good news is that the industry recognizes the need, but I suspect the percentage of financial professionals who have truly incorporated a more holistic non-financial element into their retirement planning for their clients is probably still a small percentage of the population at large."

Part of the reason for the low percentage lies with the client because they don't recognize the need.

"But if you're a financial professional and you plant those seeds pre-retirement, then as that retiree starts running into phase two, that lost phase, they're going to remember those conversations," Gilbert concluded. "And guess what? You're creating value for your client. Why should they start reaching out to others or calling coaches? You should get that business. You can cover that within your firm, which should be part of your service to justify your differentiation." **NTM**

A Retirement 4 X 4

Retirees typically have four ingredients for a successful retirement, and four stages through which they pass (courtesy of Christine Benz and Dr. Riley Moyné):

Four Needs

1. **Finances—Easier to focus on** because it's quantifiable.
2. **Health—Whatever can be done to** burnish health in the years leading up to and during retirement is important.
3. **Relationships—A crucial element** of happiness, something needed throughout retirement. Women are typically better than men at fostering social networks in retirement.
4. **Purpose—Don't be paralyzed by the** 'Big P' purpose, people can have many 'small p' purposes in life, maybe by nurturing a relationship with a partner or a hobby that's fun but won't necessarily change the world.

Four Phases

1. **Vacation (Honeymoon) Phase—**No set schedule, lots of leisure. It begins to wear out in one year.
2. **Lost and Loss—A loss of the Big 5** that people get from work: routine, identity, relationships, purpose, and, for some, power.
3. **Trial and Error Phase—An attempt** to regain purpose and enjoyment.
4. **Reinvent and Rewire Phase—**Getting the most from retirement by finding meaningful activities that provide a sense of accomplishment.

A Cybersecurity Audit Survival Kit

Six experts discuss what plan sponsors must do to pass a DOL cybersecurity audit—and how advisors can help.

By Judy Ward





Since issuing its first cybersecurity guidance in 2021, the Department of Labor (DOL) has laid out what it **expects plan sponsors to do**. Plan sponsors should now do it.

It appears that cybersecurity will be part of all DOL retirement plan audits, and clear to the agency which plans fall short.

The work requirement to follow all the DOL's cybersecurity guidance is substantial. Many organizations don't have the resources to comply fully, or they don't feel an urgency to put their resources toward it, said Jon Meyer, chief technology officer at CAPTRUST in Raleigh, North Carolina.

"The DOL's investigators are auditors first, and they are going to say, 'Show me what your policy is, and then show me that you live up to your policy,'" Meyer said. "The hard part for the employer is to show that it does live up to its policy. People get into trouble when they copy a cybersecurity policy from another organization or get it off the internet, but they don't actually execute on that policy."

Six experts spoke with *NAPA Net* about what they think the DOL will expect from plan sponsors with their cybersecurity policies and procedures.

Protecting the Assets

ERISA, enacted in 1974, does not explicitly address a fiduciary responsibility for cybersecurity. It's not surprising, since people didn't think much about cybersecurity in the 1970s, said Allison Itami, a Washington, D.C.-based principal at Groom Law Group.

"But obviously, there is a fiduciary duty to make sure that the plan assets are used for the payment of benefits and plan expenses," Itami added. "Part of that is protecting those assets from hackers and fraud."

ERISA doesn't say anything directly about a fiduciary responsibility for cybersecurity, agreed Stephen Wilkes, San Francisco-based chief legal officer and partner at The Wagner Law Group. But look at ERISA's fiduciary principles of loyalty and prudence, he said, and it is not hard to stretch those to say that a fiduciary must protect plan participants' accounts in the cyber realm.

With hacking and fraud attempts increasing, it's not surprising that the DOL started asking plan sponsors facing an audit to supply documentation relating to any cybersecurity or information security programs that apply to the data of that plan.

Now, DOL investigators are deciding what to do with all the cybersecurity information submitted by plan sponsors, Itami said. She expects cybersecurity to start becoming a part of all retirement plan audits, rather than the DOL doing cybersecurity-specific audits, and she added that the DOL's cybersecurity guidance also applies to health and welfare plans.

"I think the DOL is now trying to figure out how to develop audit

guidelines for these cybersecurity issues," said Joseph Lazzarotti, a principal at law firm Jackson Lewis P.C. in Berkeley Heights, New Jersey. "If I had to guess, I also think that those guidelines will end up being part of every DOL retirement plan audit."

Plan sponsors are gradually getting the message about their cybersecurity responsibilities, Wilkes said. Many are with organizations that already have an enterprise-wide cybersecurity strategy, and sponsors can build on that base in developing their retirement plan cybersecurity protections.

"The added layer here is, on top of what their organization is doing already, what are the additional cybersecurity responsibilities they have with regard to the retirement plan itself?" Wilkes added.

Mitigating Risk Externally

For years, major financial institutions that work on retirement plans have invested a lot of time and money to build and maintain safeguards that prevent bad actors from stealing participant assets or data. But the assumption some sponsors make that their plan uses Well-Known Vendor X, and so they can simply trust that this large vendor must maintain strong cybersecurity protections, is faulty, Lazzarotti said.

"That's not what the DOL has in mind," Lazzarotti added. "A plan

“It is very important to dig into who has got what data, and how sensitive is that data?”

— Jon Meyer, CAPTRUST

fiduciary still has to act prudently: do their due diligence, document that they’ve done their due diligence, and make prudent decisions.”

Before implementing a program to monitor plan providers’ cybersecurity, Meyer suggested that a sponsor first consider all the plan providers it utilizes and what type of data each provider has access to for that plan. This helps the sponsor to gauge the level of cybersecurity risk at each provider and then make plans accordingly for the intensity of ongoing monitoring needed for that provider’s cybersecurity.

“It is very important to dig into who has got what data, and how sensitive is that data?” Meyer said.

Does a provider only have access to firm-level data for the employer? Does it have access to plan-level data, such as on the investment lineup? Or does it have access to specific, sensitive data about individual participants?

“The plan sponsor needs to come up with a risk-based approach to document what steps it took with each of the plan’s providers to assess the provider’s cybersecurity,” Lazzarotti said.

For a lower risk level, that could mean someone from the employer’s IT staff talking to someone from the provider’s IT staff about its cybersecurity provisions and then writing a memo assessing their reasonableness.

For providers with a moderate risk assessment, it could mean developing a comprehensive cybersecurity questionnaire and requiring providers to complete it, as well as carefully reviewing a provider’s independent cybersecurity audit.

He said that more intensive monitoring could include additional steps such as requiring that the provider regularly have “penetration” testing

done to determine if the provider’s cybersecurity protections are actually working to thwart unauthorized access.

“From an employer perspective, the main thing that they can do is to monitor, monitor, monitor, to show that they’re doing their job,” said Frank Palmieri, a partner at law firm Palmieri & Eisenberg in Princeton, New Jersey.

A sponsor’s cybersecurity program for its retirement plan should spell out what processes it will follow for monitoring its plan providers’ cybersecurity on an ongoing basis.

The good news is that most recordkeepers produce solid documentation of their cybersecurity via their annual SOC (System and Organization Controls) audits and/or ISO (International Organization for Standardization) audits, Meyer said. Those documents, from an auditing and regulatory perspective, can serve as the foundation of how a sponsor assesses a recordkeeper’s cybersecurity.

“It is very hard for a small employer to independently assess the cybersecurity of a big recordkeeper,” Meyer added.

Meyer said that the DOL will be looking for sponsors to have obtained the recordkeeper’s independent SOC or ISO audit, reviewed it, and produced a written summary of its thoughts on the report. He suggested that this review of the recordkeeper’s independent cybersecurity audit and the sponsor’s written summary of the results of that audit should be done annually. He added that third-party experts can analyze the audit if the employer doesn’t have the in-house expertise.

“It doesn’t do the employer any good to say to the DOL, ‘Well, we collected the SOC audit, but we didn’t go through it,’” Meyer continued. On the flip side, he added, “I don’t think the DOL is

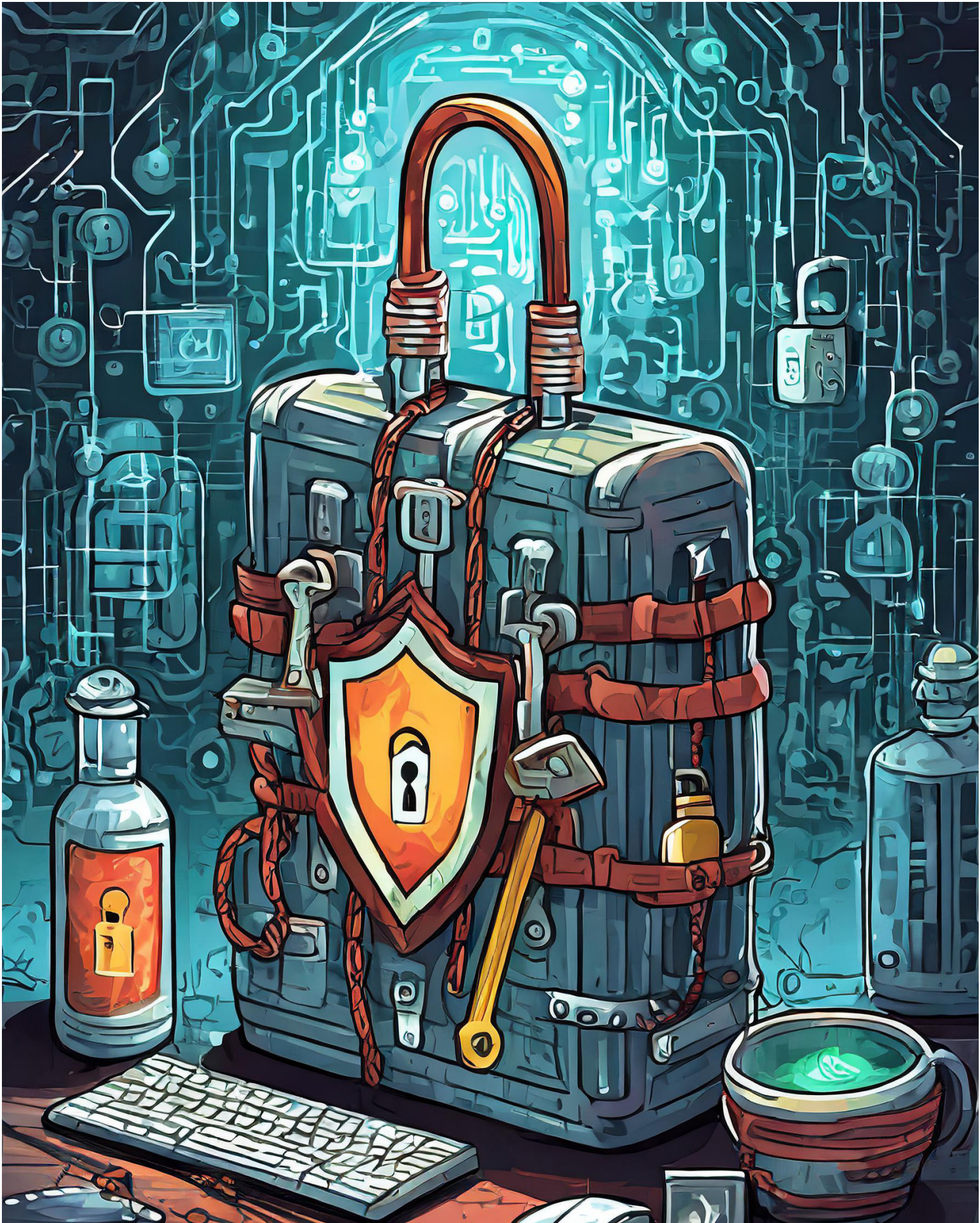
expecting an employer to bring a party of seven people to the recordkeeper’s headquarters to make sure that the recordkeeper is actually doing what it is saying it is doing.”

Employers should periodically get their own independent assessment of the plan recordkeeper’s administrative, technological, and physical controls, Lazzarotti recommended. He gave an example of those three control types related to access management to participant data. On the administrative side, a provider’s leadership must decide which staff members at the provider get access to participant data and which specific data points.

On the technological side, the provider’s IT staff must then do the coding correctly so that the system works operationally based on those parameters. The physical dimension includes areas such as the policies for employees who get access to data on their work computer: Are they allowed to access participant data on their work computer while at home, for example?

Plan sponsors can use the DOL’s tips to learn what they need to assess at plan providers, suggested Denise Finney, a partner in charge of the Pension Services Group at auditing and accounting firm EisnerAmper LLP in Iselin, New Jersey. If a plan sponsor’s organization doesn’t have the internal resources to assess a provider’s cybersecurity provisions independently, firms like EisnerAmper can do it (separately, EisnerAmper also can assess internal cybersecurity risks at a sponsor’s organization).

In a nutshell, Finney described EisnerAmper’s assessments as looking at how a provider’s current cybersecurity practices compare to the DOL’s guidance on cybersecurity best practices, as well as reviewing





the cybersecurity provisions in a plan's current service agreement with the provider. She said it would be ideal for a sponsor to get that assessment done annually.

As for the need to assess the cybersecurity of the plan advisor's firm, Meyer said the advisory firm may have little or no access to that plan's data at the individual participant level, so it poses a lower cybersecurity threat. But it's still appropriate to annually ask for an advisory firm's independent audit of its cybersecurity practices, review it, and produce written comments summarizing the audit and the sponsor's reaction to it, he recommended.

"It is worth doing the exact same (audit review) process for the advisor as the recordkeeper, and the DOL will expect the sponsor to do the same process," Meyer added.

Mitigating Risk Internally

The DOL's cybersecurity document requests and written questions for sponsors also include information that touches on several internal areas at the employer itself: They include data governance, classification, and disposal; the assessment of security risks; and cybersecurity awareness training.

When developing an internal cybersecurity policy and procedures for a retirement plan, Lazzarotti said, the first thing is to look at what controls that organization has now and how they can be leveraged for the retirement plan.

Next, Lazzarotti suggested pinpointing the organization's participant data in its systems. Many sponsors may initially think they don't get access to much participant data. But often, the human resources or finance staff at an employer may not have a complete sense of what participant data the organization as a whole has and where it is stored, he said. So that's where a mapping process helps to identify the participant data the employer has and where it is kept. Then, the employer can decide what data it truly needs to retain.

"A lot of risk can be mitigated for free by stopping getting data that the employer doesn't actually need or deleting older data that the employer doesn't need anymore," Lazzarotti said.

Once an employer understands what participant data it has and needs to keep, Itami suggested developing a written cybersecurity program for the retirement plan. She advised making sure that the program aligns

with the employer's organization-wide cybersecurity policies as well as the three pieces of cybersecurity guidance the DOL released in 2021: "Tips for Hiring a Service Provider," "Cybersecurity Program Best Practices," and "Online Security Tips."

"Whatever protections the employer has for the retirement plan absolutely cannot be less than what the organization as a whole has for other business data," Itami said.

The organization-wide policy may say that sensitive data can only be transmitted in encrypted form, for instance, so that would need to apply to transmitting all files with individual-participant data.

After developing sound policies and procedures for the retirement plan and implementing them properly, an employer should periodically assess its own systems and get a "stress test" done to ensure that the controls work and unauthorized people can't access its systems, Wilkes recommended.

How often that needs to happen will depend on the company's size, he added: A large, prominent corporation needs to test its systems more frequently than a small employer because it's far more likely to be the target of hacking or fraud attempts.

And to help protect the sponsor from both a regulatory and potential participant-lawsuit perspective, the plan's committee should also cover cybersecurity at every meeting, Palmieri recommended. It's crucial to document this discussion, he added.

At a minimum, the committee's meeting minutes should reflect that someone has asked the plan's recordkeeper for a cybersecurity update since the last meeting. That includes finding out whether the recordkeeper has made any recent changes to its cybersecurity or fraud policies, if it has experienced any breaches impacting participant data or assets, if it has engaged an auditor to assess its cybersecurity policies, and if it has received adverse comments from a cybersecurity auditor.

Making Participants Whole

Sources predicted that a big part of the DOL's bottom line would be whether a plan has provisions to make participants whole if something happens. If a participant loses money from their account due to a cybersecurity incident or a participant's data is stolen, and that harms the participant, Wilkes said

the DOL's position is that whatever happened, the participant needs to be made whole.

"Their focus on cybersecurity is that plan benefits that are earned and vested have to be paid to participants," Wilkes added. "I think the DOL is not going to be satisfied until it is clear that someone is going to be responsible for paying that benefit."

With the courts not yet having settled the issue of who is ultimately responsible when a breach does occur, Palmieri said, it's essential to address the issue in the recordkeeper's contract. The service agreement should clarify that if the recordkeeper is negligent in making a fraudulent distribution, he said the recordkeeper is fully liable for making the participant whole.

The DOL's guidance also encouraged employers to educate their plan participants about good cyber hygiene to help prevent theft from their accounts, Itami explained. She suggested that sponsors learn what steps they can encourage participants to take to help the plan's recordkeeper protect participants' data and assets, such as requiring multi-factor authentication.

She also recommended giving participants a few simple, easy-to-follow steps they can take to protect their assets and data, such as setting up their online account with the recordkeeper if they haven't already.

And Meyer suggested that when looking into whether a plan's recordkeeper has sufficient participant protections, it's also important for a sponsor to understand the recordkeeper's fraud prevention policies and procedures, in addition to its cybersecurity protections.

When the rubber meets the road and something actually happens, he said that frequently, the incident as elements of both cybersecurity and fraud. For instance, a criminal could manipulate a participant into agreeing to offer access to the participant's smartphone and then use it to get into that person's online account and initiate a withdrawal.

"It is really important for the sponsor to know: What is the recordkeeper's policy and coverage for participants who are impacted by fraud?" Meyer said. "Because I can guarantee you that some sort of (attempted) fraud event is going on every day at recordkeepers." **NTM**

Judy Ward is a freelance writer specializing in retirement plan-related subjects.



CONSOLIDATED APPROPRIATIONS ACT SPECIAL SECTION: THREATS AND OPPORTUNITIES

WE WEREN'T SURPRISED THAT A FIDUCIARY LITIGATION-RELATED STORY WAS THE SECOND MOST READ NAPA-NET.ORG ARTICLE OF 2023, BUT WE

were shocked at the twist. The story focused on tort-terror Jerry Schlichter and his new target—healthcare plan fiduciaries as defined by the Consolidated Appropriations Act (CAA) of 2021.

The law requires, among other things, a determination of the “reasonableness” of vendor fees and services for healthcare and prescription drug reporting for plan years 2020, 2021, and 2022 (due Jan. 21, 2023). Fail to do it, and he’ll come a-knockin’.

He even posted social media advertisements last May and June looking (trolling) for employees and potential plaintiffs at Target, State Farm, Nordstrom, and Pet

Smart. They sought “current employees who have participated in the company’s healthcare plan.”

“The fiduciary duty for a healthcare plan sponsor is essentially the same duty as a retirement plan sponsor of a 401(k) or 403(b),” Schlichter told us at the time. “That duty is to work for the sole benefit of the employees and to make sure fees are reasonable. And that applies to healthcare as well.”

Schlichter noted that this legal exposure for employer-sponsored healthcare plans has always existed, though the CAA now makes it concrete.

“It didn’t create a new duty; it simply defined that duty in a specific way,” he added.

So—what does it possibly mean for retirement plan advisors?

Having gone through the fiduciary wringer in the last decade makes them perfectly primed to help their plan sponsor clients navigate the CAA and their new responsibilities, leading to potential new service differentiators and revenue streams.

The following CAA/healthcare fiduciary special section features the threats—and equally important opportunities—to watch for.

PART 1

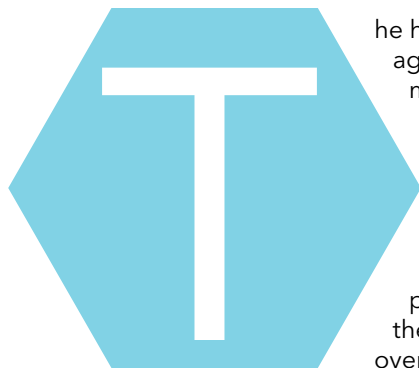
CONSOLIDATED CHAOS:

WHY THE CAA
PRESENTS
A MAJOR
OPPORTUNITY
FOR
RETIREMENT
PLAN
ADVISORS





HEALTHCARE PLAN SPONSORS MUST STRENGTHEN THEIR FIDUCIARY GOVERNANCE OR FACE POTENTIAL LAWSUITS. RETIREMENT PLAN ADVISORS CAN HELP, AND IT'S A MASSIVE OPPORTUNITY TO INCREASE THEIR BUSINESS, DIFFERENTIATE THEIR SERVICES, AND, MOST IMPORTANTLY, BETTER SERVE THEIR CLIENTS. BY JUDY WARD



The history of class-action lawsuits filed against retirement plan fiduciaries may repeat itself with healthcare plans.

For the first time, a new(ish) federal law has led to the disclosure of a lot of fee data to health plan fiduciaries. This creates opportunities for health plan fiduciaries to strengthen their governance programs and fee oversight—and if they don't, potential opportunities for plaintiffs' attorneys to file lawsuits on behalf of participants.

Many warily noticed when St. Louis-based law firm Schlichter Bogard—whose managing partner Jerry Schlichter has been a significant force in class-action lawsuits against retirement plans—posted ads recently, seeking to connect with employees who'd participated in the health care plans of several prominent companies.

"We've got a model on the retirement plan side of how to be good plan fiduciaries," John Schembari, an Omaha, Neb.-based partner and leader of the national employee benefits and executive compensation group at law firm Kutak Rock LLP, said. "Now, we'll see in the next five years how to tweak it to be good health plan fiduciaries. We need to be proactive about doing that because if we aren't, the Jerry Schlichters of the world are going to force our hand."

The newfound need for more robust health plan fiduciary governance allows fiduciary retirement advisors to help employer clients with their healthcare plans.

"Many employers haven't actively managed their health plans because they haven't felt the same level of potential fiduciary liability as they did on the retirement side," Jamie Greenleaf, Red Bank, New Jersey-based senior vice president at OneDigital Retirement + Wealth, added. "We're moving from passive health plan management to active health plan management, and employers will need help with that."

THE FIDUCIARY OBLIGATION ON STEROIDS

ERISA makes clear that its fiduciary responsibilities apply to health and welfare plans. But until recently, the federal government hadn't mandated transparency in fee disclosures by health care providers, as it did years ago for retirement plan providers.

In reality, Greenleaf said, employers frequently had "gag clauses" mandated by health care providers in their service agreements, severely limiting an employer's access to data on costs and the quality of care.

That, in turn, severely limited health plan sponsors' ability to run a solid fiduciary governance program.

"So it has been very hard for the DOL (U.S. Department of Labor) or plaintiffs' litigators to hold employers to that same fiduciary standard for health plans as they do for retirement plans," Greenleaf explained. "Because the employer could just say, 'We're in a black box: We don't have the information we need.' Literally, employers often had limited to no access to information about health care costs or quality of care."

That changed with the passage of the federal Consolidated Appropriations Act of 2021 (CAA). It's a lot like what happened in the wake of the Pension Protection Act of 2006 (PPA), which, among other things, required more transparency around plan expenses, said Jason Andrade, employee benefits practice leader at Mesa, Arizona-based

insurance and employee benefits broker The Mahoney Group. Following the enactment of the PPA, the Department of Labor issued final regulations under ERISA Section 408(b) (2) in 2012. The agency said then that the final rule, for the first time, established specific disclosure obligations for retirement plan service providers to ensure that plan fiduciaries had the information they needed to make better decisions when selecting and monitoring service providers. The CAA did something similar for health plans, Andrade said, and also required employers by the end of 2023 to certify that they'd eliminated any gag clauses from their health plan service agreements.

In short, Andrade said, the CAA put the fiduciary obligation for health plans on steroids. Now, employers that sponsor a health plan will need to have a methodical process for determining fair fees for the value of the services received, and they'll need to document that process clearly.

"The CAA has essentially put some backbone into the fiduciary obligations for all employers' health and welfare plans," Andrade said. "Ultimately, that is going to require employers to demonstrate that they are actively managing their health plan and showing good governance on a go-forward basis."

Having all that data now could be an opportunity or a risk for health plan sponsors, agreed Cory Jorbin, an attorney and the chief compliance officer for the West Region Employee Benefits team at HUB International in Phoenix. On the opportunity side, all the increased disclosure will allow employers to assess better what they and their health plan participants are getting in terms of outcomes for what they're paying and potentially lead to health plan participants getting better care and/or lower fees.

"The risk is, is the employer really acting on this information? Or is the employer just sitting on it?" Jorbin continued. If an employer is sitting on it, plaintiffs' attorneys are going to be able to get access to the data on what that employer and its health plan participants pay for services. "In terms of the risk, the issue is, with all this information being available, we are starting to see talk of litigation in the health and welfare space, similar to what we have already seen in the retirement plan space," he added.

When the CAA passed, attorney Benjamin Conley and his colleagues felt excited that a health plan sponsor could use the data disclosed to do what the law intended: get better fees and services for the people utilizing the employer's health plan.

"But we were also a bit leery about how this same data could be used by the plaintiffs'



bar to point fingers at fiduciaries and say, 'You are not doing all that you can to negotiate lower fees,'" added Conley, a partner at law firm Seyfarth Shaw LLP in Chicago. "It certainly opened the door, and now we're seeing the plaintiffs' bar look at how they can leverage that data to bring lawsuits against health plan fiduciaries."

Ultimately, the CAA's enactment is a good thing, Schembari said, since it gives employers more opportunity to provide good health plan benefits for their employees, for fair fees paid by the employer and employee.

"But it also means that employers can no longer stick their head in the sand and say, 'Well, we didn't know what we were paying,'" he said. "And that has created a potential class-action lawsuit boom in the health space. Previously, plaintiffs' attorneys have not had a firm argument to say, 'OK, I see that you're paying X dollars for prescription services: That's much higher than comparable

employers. Employees participating in your health plan pay part of these costs, and had you done your job better as a fiduciary, you would have negotiated a better deal on behalf of health plan participants.'"

But David Levine, a Washington-based principal and co-chair of the Employers and Sponsors group at Groom Law Group, pointed to factors that could make health plan fiduciary lawsuits more challenging for plaintiffs than retirement plan fiduciary lawsuits.

For one thing, recordkeepers commonly don't act as fiduciaries for retirement plan clients. But on the health plan side, health insurance carriers and TPAs (third-party administrators) often take on some fiduciary duties, such as claims adjudication. And designing a plan—such as deciding whether employees will have a 30% co-pay or a 20% co-pay—is a settlor function for an employer, not a fiduciary function.

Conley noted another distinction: 401(k) participants generally pay the entire investment fee for their account, and paying higher fees over many years can substantially affect a participant's results. He said that a health plan is more like a defined benefit plan in that employers bear most of the upside cost risk. The employer usually pays a substantially

higher percentage of health care costs overall than employees, and employees' health care premiums and co-pay amounts or percentages are generally fixed in a given year.

"So the predominant risk of having to pay more is born by the employer, rather than the participant," Conley continued. "We think that it's going to be a lot harder to establish harm to a health plan's participants, based on whether the plan sponsor negotiated the best deal, because it is harder to demonstrate a back-end impact to the participant."

FOUR STEPS TO TAKE

Sources said that many employers are just beginning to set up a solid fiduciary governance program for their health plan. They point to several key steps to take:

- **Establishing a fiduciary committee:** Neither ERISA nor the CAA requires a health plan sponsor to have a fiduciary committee. However, most of the experts interviewed think it's a good idea because it establishes a governance structure and processes more firmly, including regularly scheduled meetings.

Schembari was asked if he thinks more employers will maintain separate committees for their health and retirement plans or have one committee that handles both.

"I don't know if there's a 'normal' yet, but there are arguments to support having the same committee handle both," Schembari responded. "Often, the retirement plan committee has been doing this for a while, and it already has a good governance structure in place. On the flip side, some people who have been serving on the retirement plan committee may not want to take on fiduciary responsibility for the health plan too. Most of my clients are going with the same committee and making tweaks in committee members if there's an individual who no longer wishes to serve on a committee that now has dual fiduciary roles."

- **Benchmarking fees:** In the past, employers often relied on their broker to tell them whether a healthcare provider's or TPA's fees made sense for the services received. Fiduciaries now need to understand more about their health plan fees and how they compare to fees currently available in the marketplace.



"It's going to be important for employers to regularly explore the opportunities they have to improve the cost structure of their health plan without compromising the quality of care for their employees," Andrade added. "They are going to have to be able to defend every decision they made as fiduciaries."

The fees agreed to several years ago may have been reasonable then, but that doesn't mean they're still reasonable today, as Schembari said. It makes sense for health plan sponsors to do a fee review annually, and at a minimum, an employer's broker should be able to provide aggregate benchmarking data culled from the broker's broader client base, he said.

• **Understanding indirect compensation:**

Indirect compensation remains very common in the employer health plan world, Greenleaf said, and employers frequently have no idea.

Often, a benefits broker or TPA determines where an employer's healthcare business is being placed and then receives indirect compensation in return for placing that business, she explained. The provider disclosures that the CAA now requires will highlight this.

Health plan sponsors often don't realize that the costs of indirect compensation are embedded in the fees they and their employees pay for the health plan.

They may think they're getting a broker's services for free, for example, when that broker is being compensated indirectly.

"There are a lot of perverse incentives in the health care industry because the insurance carriers are compensating the brokers, in many cases," Andrade said. He likened the situation to what happened after 408(b)(2) fee disclosures made retirement plan sponsors more aware of indirect compensation paid, and its use diminished. "The same progress needs to be made on the health and welfare side," he added. "It's wash, rinse, and repeat."

- **Going to market:** Conley anticipates that the pace of employers making healthcare network changes will pick up, but also that some employers will keep their healthcare network after they use information gained in going to market to negotiate a better deal. He said that employers may have more leverage, based on the market data now available to them, to win additional concessions from their current providers.

Most contracts in the employer health plan space run for three years, Jorbin has observed. The CAA doesn't mandate that health plan sponsors go to market at specific

intervals, but he recommended that an employer at least do an RFI (request for information) every three years.

"If you have a client that signed its service agreement 10 years ago and has just been on auto-renewal since then, how can they know if they are paying fees that are in line with the market?" Jorbin asked.

Complicating the decision-making when employers go to market for health coverage will be the complexity of the fees for the many different services a healthcare network provides, he explained.

No one network is going to universally have all the best rates with different providers. An employer could move to another network, but some discounts with certain providers will be better, and others won't.

And health plan sponsors need to remember that going to market isn't just about fees, Jorbin continued. It's also about considering the total user experience and learning what enhanced services are currently available. In determining the value that a health plan gets for fees, factors such as the participant interfaces, the usability of the technology, and the smoothness of the integration with the PBM (pharmacy benefits manager) are important, too.

THE LIGHTBULB WILL GO ON

The steps health plan fiduciaries need to take sound familiar because many are the same steps retirement plan fiduciaries need to take. And there is room for retirement plan advisors to apply many of the principles and processes they utilize to health plan governance, Levine said. But they need to remember that other consultants already have been working with employers on their health plan, he added.

Some plan advisory practices that remain independent may develop a new health plan advisory practice, mirroring much of the work they've done for years on the retirement side, Levine said.

For the many advisors who've joined aggregators, those firms already may have a large health and welfare consulting business, so the opportunity may be to pair up with a healthcare consultant already serving an employer client.

"There could be an opportunity to collaborate with people who are already there working with employers but who maybe don't do the fiduciary consulting work that you do," Levine added.

Greenleaf started working on health plan fiduciary governance seven years ago when a retirement plan sponsor client asked her to help with its health care plan, which had seen steadily rising costs without a corresponding increase in value received.

She's stepped up her involvement since the CAA was enacted, and health plan sponsors' need to establish and maintain sound fiduciary processes intensified.

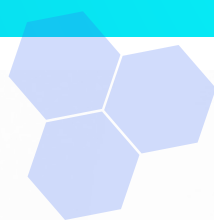
"I think it's an awesome opportunity for retirement plan consultants who understand how to run a fiduciary process, to apply it on the health care side," Greenleaf said.

She said that most employers are beginning to develop good fiduciary governance processes for their health plans.

"Unfortunately, if you talk to the average employer, very few know that the CAA has passed or that it is going to impact them in any way," she added. "But at some point, the lightbulb is going to go on, and they are going to realize, 'Oh my God, there's risk here.'" **NNTM**

Judy Ward is a freelance writer specializing in retirement plan-related subjects.

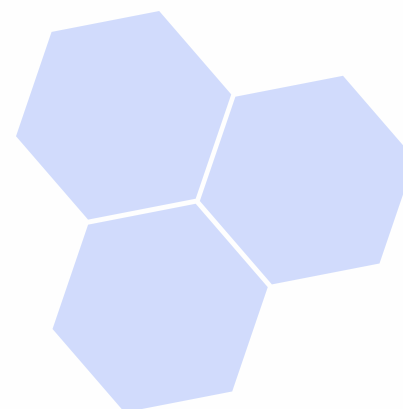




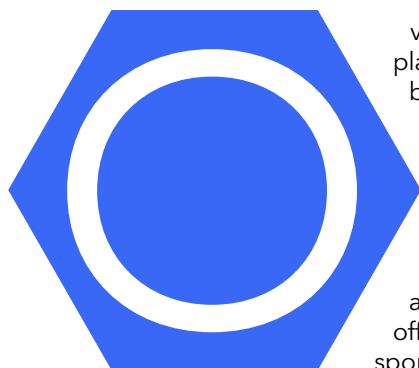
PART 2

CONSOLIDATED CHAOS:

HOW TO
LIMIT CAA
INSPIRED
FIDUCIARY
LITIGATION



HEALTH PLAN FIDUCIARIES ARE SUBJECT TO THE SAME FIDUCIARY DUTIES AS RETIREMENT PLAN FIDUCIARIES TO MONITOR PLAN COSTS AND SERVICE PROVIDERS. IT MAY BE DIFFICULT TO AVOID, BUT FIDUCIARIES AND SERVICE PROVIDERS CAN AT LEAST LIMIT THEIR LIABILITY IN ANY LITIGATION THAT MAY BE BROUGHT. BY EMILY KILE-MAXWELL, GLENN MERTEN & KENDRA ROBERSON



ver the last decade, retirement plan sponsors and advisors have been targeted in fiduciary breach litigation, alleging failure to monitor and control costs to participants in retirement plans and offering poorly performing investment options in those plans.

Like retirement plan sponsors and advisors, fiduciaries (typically officers or employees of the plan sponsor) of employer-sponsored health and welfare plans have a duty to prudently select service providers to

their plans and monitor the fees and costs of the plan. Service providers to health plans typically include insurers, third-party administrators, pharmacy benefit managers, brokers, and consultants. Newly required disclosures regarding healthcare costs, such as medical provider rates and prescription drug prices, fees and compensation received by brokers and consultants to health and welfare plans, and data analyzing prescription drug and healthcare spending, have greatly expanded the scope of information available to health plan fiduciaries and the plaintiffs' bar. It now looks like health and welfare plans will have their turn in the barrel. Lawsuits alleging failure to comply with fiduciary duties have already been filed, and sophisticated plaintiffs' firms are exploring potential claims.

This article explores the new disclosures that provide the impetus for the anticipated wave of litigation, the claims that may be brought, and the efforts plan sponsors and advisors can take to limit their liability.

COVERED SERVICE PROVIDER DISCLOSURES

The Consolidated Appropriations Act of 2021 ("CAA") amended ERISA to require that before entering into or renewing a contract with a health plan, covered service providers (defined as those that provide brokerage or consulting services to a plan) deliver information to responsible plan fiduciaries sufficient to assess the reasonableness of their compensation. In addition to a description of the services provided and any compensation received directly from the health plan, covered service providers must provide a description of any indirect compensation they expect to receive from any source – for example, a description of potential commissions for facilitating selection of an insurance product, third-party administrator or other service provider to a health plan. Any contract between a covered service provider and a health plan sponsor (or fiduciary) where the required disclosures are not provided is considered to be a prohibited transaction under ERISA, which, as discussed below, is subject to greater enforcement rights and penalties. The disclosures also may serve to help plan fiduciaries identify potential conflicts of interest that a consultant or broker may have with another service provider for the health plan.

PUBLIC COST DISCLOSURES BY HEALTH PLANS

"Transparency in Coverage" rules published by the Departments of Labor, Health and Human Services ("HHS"), and the Treasury require plans to disclose, on publicly available websites, pricing information in "machine-readable" files, meaning files that can be imported or read by computer systems. Plans must publish three separate machine-readable files:

- One showing negotiated rates for all covered services between the plan and in-network providers;
- One showing historical payments to, and billed charges from, out-of-network providers; and
- One showing in-network negotiated rates and historical net prices for all covered prescription drugs, broken down by pharmacy location.

This published data aims to make information available to the public to promote innovation and pricing transparency. Requiring the data in machine-readable format further promotes transparency by facilitating data analysis by sophisticated actors.

Already, the plaintiff's bar is creating algorithms to dissect and parse this data and pinpoint fees and expenses to challenge in litigation.

In addition, health plans must make available to plan participants an internet-based self-service tool that estimates the participant's cost-sharing liability for covered items of services. Participants can use this tool to determine their out-of-pocket cost for any particular service or procedure.

DRUG REPORTING

The CAA also introduced new reporting requirements for health plans related to prescription drugs and healthcare spending. Health plans must report certain information to the Departments of Labor, HHS, and the Treasury (called an "RxDC" report), which those departments will use to prepare a bi-annual report on prescription drug prices.

Insurers are responsible for submitting the RxDC report for insured health plans, and plan fiduciaries are responsible for submitting the report for self-insured plans. However, insurers and health plan fiduciaries can delegate the reporting responsibility to other vendors, including their third-party administrators (TPAs) or pharmacy benefit managers (PBMs). Plans must report data on prescription drug and health care spending, prescription drug rebates from drug manufacturers, participant-paid premiums and other cost-sharing elements, as well as the identity of prescription drugs that account for the most spending or are prescribed most frequently. TPAs and PBMs may report most of the required information on an aggregate basis, separated by market segment.

RxDC reports are intended to identify potential causes of increases in prescription drug and healthcare spending and to promote transparency in prescription drug pricing, including the effect of prescription drug rebates.



GAG CLAUSES

To further promote transparency and empower participants to make informed choices about their health care, the CAA requires service providers to supply provider-specific cost or quality of care information to plan sponsors and participants, among others. In addition, service providers who offer provider networks for a health plan may not include “gag clauses” in their contracts with providers or health plans that would directly or indirectly prohibit plans from:

1. Providing provider-specific cost or quality of care information or data to the plan sponsor, participants, or referring providers.
2. Accessing de-identified claims data.
3. Sharing the foregoing information with a HIPAA business associate.

Plans must also attest to various federal agencies that they comply with the gag clause rule.

IMPACT OF DISCLOSURES ON FIDUCIARY LITIGATION

ERISA imposes duties on fiduciaries who administer health plans to protect plan assets and participants, including duties of loyalty and prudence. The duty of loyalty requires plan fiduciaries to administer the plan solely in the interest of participants and beneficiaries and to provide benefits under the plan, and pay plan expenses. The duty of prudence requires

plan fiduciaries to act with the care, skill, prudence, and diligence that a prudent person would use in similar circumstances. In the context of health plans, the duty of prudence generally requires plan fiduciaries to follow a prudent process in selecting service providers, monitoring service provider compensation and performance, and overseeing health plan costs. Plan costs have been a driver of fiduciary retirement plan litigation for years, and they may be for health plans now, too.

Taken together, all of these provisions of the CAA dramatically increase the amount of data that covered service providers have to provide and that plan fiduciaries have available to consider when they are making fiduciary decisions about health plan administration and, in particular, selecting and monitoring service providers to their health plans. ERISA’s duty of prudence focuses on the process fiduciaries used to make decisions about the plan. As part of a prudent process, plan fiduciaries must demonstrate that they are aware of the information in their possession and otherwise available to them regarding service provider compensation and performance, as well as health plan costs and



that they have considered how best to use that information to make decisions about plan administration. Plan service providers should expect plan fiduciaries to carefully review their required disclosures with this context in mind.

Plaintiffs' attorneys may also use the increased publicly available information about health plan costs to bring breach of fiduciary duty claims against health plan fiduciaries. The duty of prudence is process-based, not results-based, so theoretically, plaintiffs should not be able to bring a claim based solely on information about health plan costs (the ultimate result of the fiduciary process). But courts often recognize that ERISA plan participants rarely have information about the processes behind fiduciary decision-making before filing suit, so many courts will allow participants to infer an imprudent decision-making process based solely on cost information, and proceed to discovery in litigation—which may require significant involvement from plan service providers—on that basis.

In addition to breach of fiduciary duty claims, the CAA potentially creates new prohibited transactions for health plan fiduciaries. The covered service provider disclosure requirements described above create a liability standard very close to strict liability for plan fiduciaries. Under the CAA, payments to a health plan's covered service provider are a prohibited transaction under ERISA unless the plan receives the required disclosures from the covered service provider, even if the services are necessary for the administration of the plan and even if the covered service provider's compensation is, in fact, reasonable. The only exception is plans that (1) request the required disclosures from their covered service providers *in writing* and (2) certify to the Department of Labor that the written request was made and that the covered service provider failed to provide the disclosures. In that case, the transaction isn't prohibited solely for failure to receive the disclosures. However, it still has to satisfy other requirements (namely, that the service provider received reasonable compensation for services necessary for the plan's administration).

RISK MITIGATION

Plan sponsors hoping to avoid litigation—or, at a minimum, prevail in litigation if it is brought—may find it helpful to start by identifying the fiduciaries responsible for administering their health plans and ensuring they have received training on their responsibilities. The primary responsibilities of health plan fiduciaries—who can include the plan sponsor's Board of Directors, employees, or officers—are typically to select and monitor service providers and to adjudicate claims

and appeals (or monitor claims and appeals adjudicated by third-party administrators to whom the fiduciary has delegated this responsibility). Health plan fiduciaries may engage experts to assist them in meeting their responsibilities but should ask about any conflicts of interest that the experts may have and ensure that the experts' compensation (including indirect compensation) is reasonable.

In selecting and monitoring service providers for health plans, some strategies for health plan fiduciaries to consider, and of which covered service providers should be aware, include:

- Regularly conduct requests for proposals for service provider services.
- Regularly review and benchmark service providers fees and the cost and quality of the services provided under the plan.
 - Consider whether the information in the new CAA disclosures (e.g., machine-readable files, prescription drug reports) can be used by consultants to help inform benchmarking and other cost analysis.
 - Obtain and understand required fee disclosures from brokers and consultants, especially concerning indirect compensation.
 - If covered service providers fail to provide required disclosures, use the mitigation procedures to limit potential liability by (i) requesting the disclosures in writing and (ii) certifying to the Department of Labor that the disclosures were requested and not provided.
- Ensure that contracts with service providers provide audit rights and access to information needed to monitor performance and fees.
- Conduct regular audits to assess fees and performance.
- Consider theories advanced in pending fiduciary litigation to inform strategies for selecting and monitoring service providers.
- Document the processes for selecting and monitoring service providers.

When monitoring service provider compensation, plan fiduciaries should consider all compensation service providers receive in connection with their services to the plan. "Indirect" compensation, meaning amounts that the service providers receive from third parties in connection with services to the plan and not from the plan sponsor or plan participants, has been hotly litigated in the retirement plan space. Some courts have held that plan fiduciaries may breach their fiduciary duties or engage in prohibited transactions if they fail to take indirect compensation into account (even if a service provider's *direct* compensation received from the plan and its participants is reasonable).

CONCLUSION

Health plan fiduciaries are subject to the same fiduciary duties as retirement plan fiduciaries to monitor plan costs and service providers. Recent legislative changes and litigation have spotlighted health plan costs and service provider compensation, opening the door to lawsuits against health plan fiduciaries. It may be difficult to avoid litigation, but plan fiduciaries and their service providers can make efforts to limit their liability in any litigation that may be brought. **NNTM**

Emily Kile-Maxwell is a litigation associate with Faegre Drinker Biddle & Reath, LLP. Glenn Merten and Kendra Roberson are partners with the firm.



STANDOUT

STARS



NAPA'S TOP PLAN ADVISORS UNDER 40

ONCE AGAIN, WE'RE
PLEASED TO SHARE THE TOP
RETIREMENT PLAN ADVISORS
UNDER 40—NAPA'S 'ACES.'

BY
JOHN SULLIVAN

FOR AN INDUSTRY HAVING TROUBLE ATTRACTING AND RETAINING NEW ENTRANTS, THE LIST OF TOP RETIREMENT PLAN ADVISORS UNDER 40 (ACES) IS A WHO'S-WHO OF YOUNG AMBASSADORS REPRESENTING THE BEST IT OFFERS.

It's one of the oldest and most popular of NAPA's standard-setting accolades, and many professionals who previously appeared have gone on to become the industry leaders it was designed to identify—the up-and-comers making a difference—including with the National Association of Plan Advisors.

The list, established in 2014, is drawn from nominations (more than 500 again this year) provided by NAPA Broker-Dealer/RIA Firm Partners, subsequently vetted by a blue-ribbon panel of senior advisor industry experts based on a combination of quantitative and qualitative data submitted by the nominees, as well as a broker-check review.

It's a combination of returning names and fresh faces, and 58 of this year's 100 were also on last year's list. Half of this year's list have worked with retirement plans for 10 to 15 years, and 13 have worked with them for over 15 years. A clear plurality (46%)

focuses on plans with \$10 million to \$50 million in assets, while a third is focused on plans with less than \$10 million in assets.

We thank all who participated in the nomination and voting process, the hundreds of nominees, and our panel of judges, who always selflessly give their time and energy to make the process another resounding success.

Most importantly, a BIG congratulations to this year's Top Retirement Plan Advisors—and for all you have done, and will continue to do, for the many plans, plan sponsors, and plan participants you support.

You can also find all the Top Retirement Plan Advisors Under 40 lists at www.napa-net.org/2024-aces-top-100-retirement-plan-advisors-under-40.



**NAPA'S TOP
PLAN ADVISORS
UNDER 40**

**GARRETT
ANDERSON**

Anderson Financial

**JARED
ANDERSON**
CAPTRUST

**TROY
ANDERSON**
CAPTRUST

**T.J.
ARCURI**
SageView Advisory Group

**MATTHEW
AREY**
Lebel & Harriman LLP

**LUKA
ARNERICH**
SageView Advisory Group

**JUSTIN
BAKER**
Merrill Lynch

**KEN
BARNES**
SageView Advisory Group

**ROSS
BERGE**
Northwestern Mutual

**ERICA
BLOMGREN**
CAPTRUST

**JON
BRATINCEVIC**
Morgan Stanley

**JASON
BURRISS**
Morgan Stanley

**RACHEL
CARTER**
Merrill Lynch

**DANIEL
CARTHEW**
Crux Wealth Advisors

**MATT
CELLINI**
Greenspring Advisors, LLC

**KEVIN
CHANG**
CAPTRUST

**JOSEPH
CONZELMAN**
HUB Retirement

**REILEY
CROSBY**
Greenspring Advisors

**MARGARITA
CROSS**
SageView Advisory Group

**BRADY
DALL**
OneDigital

**JAKE
DALY**
Newfront Retirement Services

**TAYLOR
DANCE**
GBS Retire

**MORGAN
DAVIS**
NFP

**JOE
DEBELLO**
OneDigital

**TYLER
DECK**
Oswald Financial

**MARI
ERB**
RPS Retirement Plan Advisors

**BLAKE
FAUST**
Abbey Street

**ANDREW
FIEGEL**
CAPTRUST

**DEREK
FIORENZA**
*Summit Group
Retirement Planners, Inc.*

**PATRICK
FLINT**
CAPTRUST

**JONATHAN
FREDMAN**
Marsh McLennan Agency

**JOE
GALBRAITH**
UBS Financial Services Inc.

**CHRIS
GIOVINAZZO**
Accelerate Retirement

**MATT
GIST**
*HUB International - Retirement
& Wealth Management*

**TREVOR
GLASGOW**
Merrill Lynch

**KEVIN
GOOD**
BBM Financial Services

**KOREY
GROW**
Summit Business Solutions

**EUGENE
GUREVICH**
BayBridge Capital Group, LLC

**QUINT
HALL**
Creative Planning, LLC

**RYAN
HAMILTON**
NFP

**MATTHEW
HEDLEY**
OneDigital

**BLAKE
HIETT**
HUB International - Fort Worth

**EMILY
HOPKINS**
Sequoia Consulting Group

**KEITH
HUBER**
OneDigital

**TREY
JAMISON**
Chase Dominion Advisors

**DOUG
JOHNSON***HUB International***WHITNEY
JONES***Premier Wealth Management,
a Relation Company***RODNEY
KAUFFMAN***SageView Advisory***ANDRAOS
KHALIL***Merrill Lynch***MARK
LAUGHTON***HUB***ERIC
LESAGE***Retirement Fiduciary Group, LLC***JUSTIN
LEVONYAK***Wintrust Investments, LLC***BENJAMIN
LIENER***Merrill Lynch***DEAN
LYSENKO***Marshall & Sterling
Wealth Advisors, Inc.***KEVIN
MAJOR***OneDigital***ALICIA
MALCOLM***UBS Financial Services***KRIS
MALESKI***HUB International,
Mid-Atlantic Inc.***PHIL
MAZUREK***Marsh and McLennan Agency***ANTHONY
MCCRACKEN***Newcleus***PATRICK
MCKAY***Stokes Family Office***CASEY
MCKILLIP***Aldrich Wealth LP***JONATHAN
METZ***Deschutes Investment Consulting***SIMON
MICAHAJ***Rehmann***ANDREW
MICHAEL***Retirement Plan Analytics (RPA)***JACKSON
MILLER***Fiduciary Benefits Group***SARAH
MONTOKA***Morgan Stanley -
Graystone Consulting***NATE
MOODY***Lebel & Harriman
Retirement Advisors***BRENNAN
MOORE***NFP***DAVID
MOREHEAD***OneDigital Retirement***JOSHUA
MOTT***Morgan Stanley***CHRISTOPHER
NORDLUND***NFP***SCOTT
ONDEK***SageView Advisory Group***RYAN
O'TOOLE***Sequoia Consulting Group -
Pensionmark Financial
Group, LLC***BRYAN
PEEBLES***Strategic Retirement Partners***KATHLEEN
PERSAK***SEIA***ERIK
PFLAUM***Marsh McLennan Retirement
Services***ENRICO
PIATELLI***Baystate Financial***JOHN
POLIVKA***Merrill Lynch***CULLEN
REIF***SageView Advisory Group***JOHN
RICHARDS***NFP Retirement***ALLIE
RIVERA***OneDigital***ADAM
RIVETT***OneDigital***TRAVIS
RUANE***Associated Investor Services***MITCH
RYAN***Morgan Stanley***MICHAEL
SAULNIER***Aprio Wealth Management***JEFF
SCHOBBER***Gallagher Fiduciary Advisors***SARAH
SCHWARTZ***Newfront***MICHAELA
SCOTT***The Strategic Retirement
Benefits Group***BRENT
SHEPPARD***Cadence Financial Management***TOM
SMALL***The Mahoney Group
of Raymond James***CHRISTIAN
STANLEY***Greenspring Advisors***JEREMY
STOKER***Newfront Retirement Services***ALEXANDER
STUCHEN***Merrill Lynch***GREGORY
TEDONE***Strategic Financial Services, Inc.***MICHAEL
TISDELL***OneGroup Retirement Advisors***JENNA
WITHERBEE***401(k) Plan Professionals***EMILY
WRIGHTSON***CAPTRUST***KEN
ZARSKE***Creative Planning***RYAN
ZELASKI***NFP Retirement***BLADE
ZYCH***OneDigital*



Welcome to 2024: Have More Litigation

Retirement plan litigation is now a fact of life. Accepting it as an ongoing reality can help advisors and clients position themselves when the next lawsuit is filed.

By David N. Levine

Looking back at the end of 2023, I saw that, amazingly, the number of new 401(k) fee lawsuits declined from the peaks of prior years, although many were still filed. So far, 2024 has

started with a significant number of new lawsuits, so the lull may be over. What type of lawsuits are we seeing now, and what does it mean to an advisor's practice? Let's walk through the current themes a bit:

Investment and Recordkeeping Fees.

- The "classic" "you paid too much for X" –whether X investments, recordkeeping, and/or TPA services continue to be filed regularly. As firms



like ours who defend these claims have had some wins in a number of these cases – including those we took to trial in 2023—plaintiffs’ attorneys have continued to adapt and restructure their claims. This tactical back and forth is likely to continue. As an advisor, continuing with a robust fiduciary process—including strong documentation—can significantly support plan sponsor clients as many recordkeepers, TPAs, and investment funds continue to be challenged.

- **Proprietary Fund Cases.** Proprietary fund cases of all kinds—from those challenging

investment management companies maintaining their own plans to investments managed or supported by advisors or their affiliates—continue to be filed as well. While we on the defense bar have had some success in these claims, continued diligence, which will be closely scrutinized in the document-sharing process part of litigation called “discovery” on proprietary fund selection and usage, remains a critical factor in defending these cases.

Forfeitures. A new theme (which has had six lawsuits filed as of mid-February 2024) is lawsuits centered on how plan forfeitures are used – whether to offset employer contributions, pay plan expenses, or other uses permitted by the Internal Revenue Code and ERISA. These lawsuits generally claim that fiduciaries have breached their ERISA fiduciary duties by allowing forfeitures to offset employer contributions to a plan.

- The defense of these lawsuits has just begun. Still, advisors can play a crucial role in communicating with their plan sponsor clients about these claims and, if necessary, evaluating their processes and plans.
- **Privacy, Cross Selling, and Additional Services.** Although not commonly framed as a standalone lawsuit, lawsuits and settlements regularly include claims about using plan and participant information to allegedly “sell” additional services, such as rollovers, wealth management, and other in-plan proprietary services from a service provider. Like with the other claims, documenting the process and why a particular service is selected or made available remains essential, especially for products affiliated with a plan service provider.
- **Claims Against Specific Types of Plans.** Lawsuits against single-employer plans of all sizes dominate the total number of claims. However,

there are other categories of lawsuits—defined benefit plans (and their actuarial assumptions), private company employee stock ownership plans (and the transactions involving these plans), and pooled solutions—such as multiple employer plans, pooled employer plans, and multiemployer plans—continue to face lawsuits. In defending these lawsuits, having proactive efforts to address the unique features of these plans in day-to-day operations can be very helpful in mounting a solid defense as a “standard” single employer 401(k) plan is not automatically identical in structure, operations, and cost to these other types of plans.

- **Health Plan Litigation.** Last year, I wrote about the discussions about concerns about a future wave of healthcare litigation. In recent months, we have seen more health litigation emerging – although not a giant wave at this point. If an advisor is supporting a plan sponsor on health care matters, there are many proactive steps that might be taken in support of a client’s fiduciary process (remembering health plans are not just 401(k) plans with the term “health” substituted in).

So, where does this landscape leave an advisor? Part of the message is, “Keep doing the good work you’ve been doing.” The other part is to watch for the trends and evaluate potential protective items—statutes of limitations, arbitration clauses, and how service provider products (including your company’s) are reviewed and documented. As always, insurance coverage—for your clients and you—and ensuring you have the “right” coverage (which can be worked through with your brokers) is a key consideration. Retirement plan litigation is a fact of life and accepting it as an ongoing reality can help an advisor and their clients be positioned when the next lawsuit is filed. [NTM](#)

How to Craft a 401(k) Crisis

When you consider the coverage gaps left by the defined benefit 'system,' I don't know where we'd be without the 401(k)—or, more precisely, I do—and it wouldn't be a good place.

By Nevin E. Adams, JD



A recent article in an industry publication led with the title “401(k) experiment has failed, fueled U.S. retirement crisis, labor economist says.”

In what I am sure generated a fair number of “clicks” that turned out to be the pronouncement of none other than Professor Teresa Ghilarducci, teeing up a new book¹—one that she says aims to review the last 10 years of research by multiple entities on something she’s labeled the “liminal” period of life—that apparently intended to refer to an “intermediate” stage of life.

According to the article, she is taking aim at certain assumptions that are made with regard to retirement investing/saving between the ages of 55 and 70. Bad assumptions, apparently.

Now, considering that Professor Ghilarducci has written an entire book on this particular subject, extrapolation from a short interview about it (particularly when someone else did the interview) is a hazardous undertaking. But in that article—based on the upcoming book—she asserts that “experts and professionals and policymakers” have got it wrong; in this case “wrong” appears to be thinking that when people get to be about 62 and realize they don’t have enough resources to do so—they’re simply counseled to work longer.

She also takes issue with the advice promulgated by a number of experts (and advisors) that folks should postpone taking their Social Security benefits—something she says (in the article) that “does not speak to the lives of most Americans.”

On the latter point (and I hope you’re sitting down), I completely agree.² The logic in that advice is based on a solid strategy designed to maximize Social Security benefits—but increasingly

is “buddied” by financial professionals/experts with the approach of using what may be inadequate retirement savings to bridge living expenses between leaving the workforce for good and age 70.

That said, and as the article acknowledges, the decision to leave the workforce for good often isn’t a choice, which not only shortens the accumulation opportunity, but extends, and thus undermines the ability to stretch those savings. Particularly when that happens late in one’s career, there’s no question it creates problems, and surely for some, financially insurmountable ones.

While that apparently isn’t the focus of the book, those type misapplications do seem to be at least a contributing factor to the crisis Ghilarducci perceives. More than that, she apparently sees an overarching theme at work here.

In the interview she says that some unnamed “experts and professionals and policymakers” have embraced this notion if you find yourself later in your career short of funds, you simply have to work longer—a presumption she claims is further undermined by the debt carried by those heading into retirement.

THIS she says is undermining retirement security, though in the article she lays the fault for this (“much of the loss of their security”) on the loss of defined benefit plans, before proceeding to label the 401(k) an “experiment,” and a “failure”—labels she has applied to these programs...repeatedly.

On this, as you might imagine, we disagree. Now, I’ve got no beef with the comfort of a federally insured and well-funded defined benefit plan, particularly those in the private sector that traditionally required no involvement with³ or investment by individual participants.

Of course, even at the height

of their popularity, fewer than a third of private sector workers were ever covered by those plans, and only about 1 in 8 of those ever met the service length criteria to fully vest in those benefits. As retirement coverage “experiments” go, those are surely shortcomings.

Indeed, when you consider the coverage gaps left by the defined benefit “system,” I don’t know where we’d be without the 401(k)—or, more precisely, I do—and it wouldn’t be a good place.

Those of us who actually work with real people know that this so-called “broken” system works amazingly well—for those who have access to it—including, most especially, those at the lower end of the income scale.⁴

Academics routinely target the well-off in their criticisms but ignore the needs of middle-income households for whom Social Security will almost certainly not be... enough. And they routinely completely discount and/or ignore the role that the current tax preferences play in fostering the formation and maintenance of these retirement plans.

With all its admitted imperfections, thanks to this “failed experiment,” tens of millions of Americans now have trillions of dollars of retirement savings set aside...and they—and their employers—have done so voluntarily, deferring, not avoiding, tax obligations.

No, as “experiments” go, it seems to me that the real failure is that not enough Americans have the opportunity to do so. And we’re working on that. [NNTM](#)

FOOTNOTES

¹ Titled “Work, Retire, Repeat: The Uncertainty of Retirement in the New Economy.”

² In the interests of full disclosure, the author considered, but did NOT defer taking his Social Security benefit until age 70.

³ So little involvement, in fact, that surveys routinely still find ridiculously high number of individuals think they have one.

⁴ I have never understood the notion that the “rich” are gaming the system with the maximum (in 2024) \$23,000 annual 401(k) contribution (not including the \$7,500 in catch-up contributions for those over age 50), often less due to the limits of non-discrimination testing.

Targeting TDFs, ‘Meaningful’ Markers and Pre-Litigation Letter Campaigns

Here’s what you need to know about emerging trends in ERISA litigation in the most recent quarter.

By Nevin E. Adams, JD & Bonnie Triechel

Retirement plan litigation continues at a rapid pace and with massive, surprisingly quick, settlement numbers. The last quarter of 2023 saw a continued variety of litigation under the Employee Retirement Income Security Act (ERISA), including:

- dismissal of performance-focused target date funds (TDF);
- an appeal of a 403(b) excessive fee suit against Yale University (yet a “win” for Cornell on similar facts); and
- an expanding application of the need for a “meaningful” benchmark in pursuing excessive fee litigation, which is spreading to smaller plans.

New litigation involving the use of forfeitures has emerged as well as a “campaign” by a law firm seeking to reach settlements with plan sponsors without even filing a lawsuit. Here’s what you really need to know for emerging trends happening in ERISA litigation during the 4th quarter of 2023 and how it impacts your retirement plan(s).

Here’s what you really need to know:

1. While ERISA fiduciaries/plan sponsors cannot stop a lawsuit from being filed, they can (and generally do) file a motion to dismiss the

suit early on in the process. Courts in some jurisdictions are increasingly inclined to require that allegations of a fiduciary breach have as a comparison point a “meaningful” benchmark to make the case for fees that are said to be “excessive”—emphasizing again, the importance of plan fiduciaries documenting not only their review of fees but associated services.

2. There are now five suits filed (by a single law firm) challenging the use of forfeitures to offset employer contributions even though the plan document (ERISA and the IRS) clearly allows for that use of forfeitures. While plaintiffs’ attorneys continue to seek novel issues, a good defense to these claims—or an audit by the Department of Labor (DOL)—certainly starts with following the plan’s documents.
3. Speaking of novel issues, a growing number of plaintiffs’ attorneys are making claims related to ERISA, most recently sending threatening letters ahead of actual litigation. Plan fiduciaries are encouraged to follow a strong process, including documentation of the process, and if in receipt of a threatening letter, contact



ERISA counsel quickly. Let’s dive in.

Target Date Challenges Tumble

In 2023, approximately a dozen suits were filed alleging that plan fiduciaries “chased low fees” and ignored investment performance in choosing the BlackRock LifePath Target Date Funds. To



date, only one of the 12 cases has made it past the motion-to-dismiss phase.

One of the 12 cases had a unique twist and in October 2023 it was dismissed. Similar to the others, this case “targets” the Marsh & McLennan Companies’ 401(k) Savings and Investment Plan’s holding of the BlackRock LifePath Index Funds—and

especially their selection as the plan’s qualified default investment alternative (QDIA), which had approximately 17% of the plan’s assets. However, this case additionally challenged the selection and retention of the Mercer Emerging Markets Fund, which was managed by Mercer Investment Management, LLC, a subsidiary of Marsh & McLennan.

In dismissing the suit, the judge cited prior case law in concluding that “[T]he duty of prudence does not compel ERISA fiduciaries to reflexively jettison investment options in favor of the prior year’s top performers.” Beyond that, the judge did not see a sufficient gap in performance vis-à-vis the alleged benchmarks to support the claims made by the participant plaintiffs.

In a separate instance of these suits, in November, the participant plaintiff Jermaine Anderson, a former worker at Advance Publications Inc., and a participant in the firm's \$1.5 billion 401(k) plan, proactively dropped the case rather than pursue it.

CommonSpirit Consequences

In a different target-date fund related suit, the fiduciary defendants of a \$4.3 billion 401(k) plan won their revised motion to dismiss a fiduciary breach suit involving the selection and retention of a suite of TDFs.

The plan fiduciaries were accused by a handful of participant plaintiffs (represented by the law firm of Schlichter Bogard LLP) of retaining a suite of allegedly unproven, underperforming TDFs from Northern Trust, which the plaintiffs said had "significant and ongoing quantitative deficiencies and turmoil" resulting in losses

ranging from \$45 million and \$73 million when identical, lower-cost alternatives were available.

Despite those claims, the judge concluded that the allegations fell short of the necessary "context-sensitive" inquiry for ERISA fiduciary duty breach claims. "Without any additional context, Plaintiffs' theory is nothing more than a 'naked assertion devoid of . . . factual enhancement. . . Plaintiffs essentially ask this Court to find that any time a plaintiff alleges a large plan did not obtain the lowest-fee shares, plan beneficiaries and participants have stated viable ERISA fiduciary duty claim. To Plaintiffs, no other factual allegations are required—only the size of the plan and the existence of shares with lower fees must be pleaded." And the case was dismissed.

Add this decision to the line of cases decided since the CommonSpirit case, which marked something of a shift in the standards for "plausibility" that

would be required to move past a motion to dismiss. While a court might be required under the law to accept the facts presented by the plaintiffs, courts do not have to embrace them without a critical mind.

Another 403(b) Fiduciary Win

On the heels of Yale University's win in an excessive fee suit involving its 403(b) plan, Cornell University also prevailed in an action brought on behalf of participants by Schlichter.

Cornell had previously fended off most of the claims in 2019 when the judge ruled that the plaintiffs had plausibly argued that it was imprudent to pay annual recordkeeping fees of more than \$115 per participant, but presented no evidence that this caused the plan to suffer losses.

This court noted that "whether fees are excessive or not is relative to the services rendered," and that it is not unreasonable to pay more



for superior services. “Yet, here, Plaintiffs have failed to allege any facts going to the relative quality of the recordkeeping services provided, let alone facts that would suggest the fees were ‘so disproportionately large’ that they ‘could not have been the product of arm’s-length bargaining.’” The appellate court affirmed the district court’s dismissal of that claim as well.

However, the court actually went with a standard of review that was somewhat of a middle ground between other circuit courts—leaving plan fiduciaries with yet another standard to consider. Because of the split in circuits for the proper standard

in a “friend of the court” amicus brief that the federal judge in that case mis-instructed the jury on the burden of proof in an excessive fee suit and that an appeal of that decision is warranted. Stay tuned on this one.

The Meaning of ‘Meaningful Benchmarks’

When it came to excessive fee suits, those suing plan fiduciaries have long been able to get past a motion to dismiss by merely asserting that the recordkeeping fees paid by a plan (often based on data from the plan’s Form 5500, which has certain shortcomings) were either out of line with fees paid by plans that

which the defendant’s plan can be compared.

Moreover, the judge noted that, “for a comparison to be ‘meaningful’ in the administrative-cost context, the plaintiff must allege facts showing ‘that the recordkeeping services rendered by the chosen comparators are similar to the services offered by the plaintiff’s plan.’”

The judge rejected the notion that comparison of the defendant’s plan to “industry-wide averages,” such as the generalized figures published in “the 401(k) Averages Book,” was appropriate, as those “measure the cost of the typical ‘suite of administrative services,’ not anything more.”

“The “meaningful” benchmark standard now being applied in some districts is clearly a higher threshold for plaintiffs to clear—though it’s not a consistent requirement across all federal court jurisdictions.”

of review, there may be an opportunity for this type of case to be heard by the United States Supreme Court to resolve the circuit split.

Despite Yale University’s win in their excessive fee case, Schlichter has now appealed the decision of the district court. The suit against Yale University was one of the first to be filed in 2016, as well as the first (and, to date, only) jury trial in this genre of cases.

Yale University fiduciaries prevailed; though the jury did conclude that they breached their duty of prudence “by allowing unreasonable recordkeeping and administrative fees to be charged” to retirement plan participants—the jury found that no damages resulted.

Given the appeal, the DOL has weighed in on the case, arguing

were allegedly comparable based on either asset size or participant count or based on industry surveys or data (e.g., 401(k) Averages Book).

However, in recent years, a new standard has been applied in certain federal district courts; in December, federal courts in two different districts upheld motions to dismiss excessive fee suits, noting a lack of “meaningful benchmarks” presented by the plaintiffs.

The first was a case filed in August 2022 where a \$285 million 401(k) plan allegedly failed to leverage their size to negotiate better terms with their recordkeeper. In that case, the judge held that, in order to raise an inference of imprudence due to pricing differences alone, a plaintiff had to allege a “meaningful benchmark” to

Finally, the judge also found shortcomings in the plans that the plaintiffs had positioned as comparators due mostly to a lack of specificity with regard to services provided, but also in some cases, differences in assets and/or participant sizes.

We are often reminded that “it’s not just about fees.” And most would agree that what makes a fee for services reasonable (or not) is the type/level of services that you get for those fees.

That said, for years folks have been describing recordkeeping services as a commodity (including individuals who are leading those enterprises), and plaintiffs’ attorneys have, thus far, managed to coast along using that argument, frequently describing those services at best as being comparable/identical

“ California law firm has now filed five cases charging plan fiduciaries with a breach of fiduciary duty by using plan forfeitures to offset employer contributions.”

for plans of a certain size—and at worst as “fungible.”

The “meaningful” benchmark standard now being applied in some districts is clearly a higher threshold for plaintiffs to clear—though it’s not a consistent requirement across all federal court jurisdictions. That means that plan fiduciaries will need to continue to be sensitive to those concerns.

Arbitration ‘Cause?

This quarter (October 2023) also saw the nation’s highest court, once again, decide not to weigh in on the applicability of an arbitration clause in fending off an ERISA suit. The case was decided in favor of the participant plaintiffs by the U.S. Court of Appeals for the 10th Circuit, which in January affirmed the decision of the district court that the arbitration clause in the plan document impermissibly blocked rights afforded under ERISA.

For now, anyway, the Supreme Court’s (non)decision leaves that judgement in place in the 10th Circuit.

A Look at Forfeitures

A California law firm has now filed five cases charging plan fiduciaries with a breach of fiduciary duty by using plan forfeitures to offset employer contributions. The plans in question all appeared to give fiduciaries the discretion to do so, but the challenge seems to be that choosing to do so, as opposed to reallocating them to participant accounts (which was also within their discretion), was not in the best interests of participants.

In one of those cases (involving Clorox), defendants filed a motion to dismiss, arguing that “it effectively seeks (i) to bar the long-standing practice, expressly required by a sixty-year-old IRS regulation, of reallocating forfeitures to cover other benefits promised by the Plan and (ii) to require instead that forfeitures be diverted to individual participant accounts to provide additional benefits not promised by the Plan. The Court should reject Plaintiff’s novel, and strained, construction of ERISA.”

Defendants argued that the participants bringing suit suffered no injury and received all benefits they were entitled to under the plan because they were not entitled to forfeitures. The court has not yet responded to this motion to dismiss (or others filed since the beginning of the year by Intuit or Qualcomm).

The DOL has also taken an interest in the use of forfeitures. In September, a judge issued a consent order and judgment ordering Sypris Solutions Inc. to restore \$575,000 to the plan participants who were harmed by defendants’ use of the forfeiture funds. According to the DOL, on Dec. 27, 2017, the DOL filed a complaint, alleging that Sypris Solutions Inc. failed to follow its own governing documents regarding the use of forfeiture funds for several of its 401(k) plans.

Specifically, the DOL alleged that from 2012 through 2015, the 401(k) plans’ governing documents required defendants to use forfeiture funds to pay plan expenses, but defendants used

the forfeiture funds to reduce employer contributions to the plans.

The DOL argued that in doing so, the employer benefited by reducing its contributions to the plans at the expense of plan participants who saw their plan account balances reduced by payments of plan expenses from plan assets and not from forfeitures.

Unlike the plans that have been targeted for their decisions regarding the use of forfeitures (all of which seem to have allowed for discretion in the application of forfeitures), this one appears to have made the decision to offset employer contributions in violation of clear language in the plan document that stipulated how those forfeitures were to be applied.

It is certainly a timely reminder that, while the law may allow certain latitude, the flexibility can be limited by the plan document. This action serves as a reminder that following the plan document is critically important.

A Closing Note

In late September, a California law firm by the name of Loeff Cabraser Heimann & Bernstein started what appears to be a pre-trial “shakedown.”

More specifically, Leiff Cabraser has engaged in a letter-writing campaign to plan sponsors, alerting them to a series of assertions about ERISA litigation, allegations about the fees paid by participants in their plans (relative to a standard that has been repeatedly criticized in



that context at trial), all alongside the fact that they've allegedly found an as-yet-unnamed plaintiff-participant in the plan in question that is said to be willing to represent a class action alleging the plan's fiduciary breach.

According to the letter, Lieff Cabraser is "open to discussing our client's ERISA claims in hopes of reaching an early resolution... before a great deal of time and expense is incurred by any party in litigating this matter."

And if the threat of litigation was not sufficient to garner their attention, the letter closes, "This may be the last time that the parties have total control over the outcome of this matter without leaving it up to the Court. A settlement now, before the parties have incurred significant litigation expenses, will benefit both parties."

For plan sponsors that may find themselves in receipt of these letters, contact counsel before responding.

Action Items for Plan Sponsors
Even if you are the fiduciary

of a plan that might not be the perceived subject of a mega class-action lawsuit, these back-to-the-basics best practices apply to plans of all sizes. For plan sponsors, consider the following:

Establish an investment committee that is qualified and engaged, supported by experts and an investment policy statement (the lack of one has been a noted factor in several of the lawsuits—and the presence of one was noted in a number of litigation decisions in favor of plan fiduciaries).

Consider regular fiduciary updates/training for plan committee members—this has been a factor in favor of fiduciary defendants—and a requirement that some plaintiffs' firms have imposed in settlement agreements. Make sure new committee members have an opportunity to participate when they join the committee.

As a growing number of courts are looking for a "meaningful" benchmark, make sure that you understand (and document) not

only the fees, but the service(s) provided for those fees in recurring benchmarking exercises (think: annually or semi-annually).

If forfeitures are used to offset employer contributions, make sure that language specifically permitting use of forfeitures is in the plan document. And consider changing language that provides discretion in applying forfeitures to language that simply directs how they will be used.

Be thoughtful about the information that the committee makes publicly available including agendas, minutes, and reports. Decisions can (and should) be summarized—the discussion itself need not be (and arguably should not be).

Make sure you have an ERISA fiduciary liability policy in place. Generally speaking, your standard E&O policies do not cover this type of litigation, and ERISA fiduciary liability is personal. To be clear, this is different from the fidelity bond the plan is required to have. **NNTM**



Regulatory Radar

The introduction of a federal auto-IRA bill for uncovered workers, the DOL gets tough on a TPA, EBSA enforcers go to work, and we're feeling inSECURE about 401(k) start-up credits.

Coverage Gap Close

A federal auto-IRA bill for uncovered workers was introduced in the House.

Okay, so it's legislation not regulation, but still important enough to mention. House Ways and Means Committee Ranking Member Richard Neal (D-Mass.) introduced a bill recently to establish a federal auto-IRA for employers with more than 10 employees who do not currently sponsor a retirement plan.

The Automatic IRA Act of 2024 (H.R.7293) would require employees to be automatically enrolled in either an IRA or some other "automatic contribution plan

or arrangement," like a 401(k). It would apply to plan years beginning after 2026.

The bill's summary said it would "build upon, expand, and improve the private pension system in a manner that explicitly protects and complements employer-sponsored plans and arrangements."

It also acknowledged the success of the 15 state auto-IRA plans currently in place, which "give proof of concept" to a federal auto-IRA program. It specifically mentioned their role in reducing the racial coverage and savings gap while encouraging greater adoption of private-sector retirement plans overall.

"The American Retirement Association (ARA) strongly supports the Automatic IRA Act that will significantly increase access to workplace retirement savings programs," ARA CEO Brian Graff said. "Importantly, it achieves this by leveraging the existing public-private partnership that drives the successful 401(k) system providing benefits to over 100 million Americans."

Neal said the mandate would "essentially be costless" to smaller employers since it would create a new tax credit of \$500 per year for three years for employers of up to 100 employees that offer either a state or national automatic IRA,

in addition to other existing tax credits.

The legislation exempts companies with 10 or fewer workers, those already offering a qualified plan, those in business for less than two years, or those with governmental plans or church plans. Importantly, it does not affect workers currently enrolled in a state-sponsored plan.

The minimum default contribution for the first year is 6%. It can be higher but is limited to 10% the first year and 15% after that. The rate then automatically escalates 1% per year over a five-year period, capped at 10%. More specifically:

- Year 1 - **6%**
- Year 2 - **7%**
- Year 3 - **8%**
- Year 4 - **9%**
- All subsequent years - **10%**

The default investment must be target-date funds, and a principal preservation fund and a balanced fund must be offered, as well as any others that the Treasury Department might add.

The bill also includes a lifetime income requirement for defined contribution plans with over 100 participants, which must permit participants to elect to receive at least 50% of their vested account balance in the form of lifetime income. It does not apply to participants with balances less than \$200,000.

The bill comes at a time when state-supported and mandated retirement plans are gaining in popularity.

As of Jan. 1, 2024, 19 states have enacted new programs for private sector workers, and 15 are auto-IRA programs, according to Georgetown University's Center for Retirement Initiatives. Since 2012, at least 47 states and the District of Columbia have acted to implement a new program, study program options, or consider legislation to establish retirement savings programs.

— John Sullivan

But was it a TKO?

The DOL gets a TRO against a TPA

The Department of Labor (DOL) has gone to court to protect retirement plan assets in a case of alleged embezzlement by a TPA.

The DOL says that an emergency temporary restraining order (TRO) has been issued by the U.S. District Court for the Western District of Pennsylvania against RiversEdge Advanced Retirement Solutions LLC, and owner Paul Palguta.

According to the DOL, RiversEdge is a third-party administrator of at least 240 retirement plans that hold millions of dollars in plan assets and acts as an agent to manage and administer plan assets—at least 229 of these retirement plans are covered by the Employee Retirement Income Security Act of 1974 (ERISA).

An investigation by the department's Employee Benefits Security Administration (EBSA) determined that RiversEdge Advanced Retirement Solutions

LLC and its owner Paul Palguta violated ERISA. More specifically, that from October 2022 through January 2024, the defendants embezzled at least \$5.5 million in retirement plan assets from 17 retirement plans—by transferring them from retirement plan trusts into their own corporate accounts.¹

According to a DOL press release, EBSA also found that the defendants allegedly attempted to conceal the embezzlement when they issued fraudulent account statements to the retirement plans causing them to file false reports with the department that overstated the amount of assets in the trust accounts. When retirement funds lacked sufficient assets to process transactions, the defendants transferred plan assets from other trusts to cover the shortfall.

In acquiring the TRO, the DOL cited that “immediate and irreparable injury, loss, or damage will result to the Plans and their participants.” It went on to note that the “irreparable injury to be prevented is the harm to the Plans caused by the RiversEdge



FOOTNOTES

¹According to the TRO, the RiversEdge defendants allegedly misappropriated and misallocated in retirement plan assets from 17 retirement plans, 14 of which were covered by ERISA (“the Mismanaged Plans”). The RiversEdge defendants also are alleged to have transferred assets among the trust accounts for these plans and generated false records to conceal these transfers. Because of RiversEdge’s misappropriation and misallocation of plan assets among the plans, some of these trust accounts now hold plan assets of unaffiliated ERISA-covered plans.

Defendants' breach of their fiduciary duties, responsibilities, and/or obligations to the Plans, which includes misuse and misallocation of the Mismanaged Plans' assets."

The temporary restraining order obtained by the DOL:

- Forbids the defendants from any further involvement with trust assets.
- Enjoins them from serving as fiduciaries or service providers to any ERISA plans.
- Forbids the defendants from withdrawing any funds from their two corporate accounts into which they had illegally transferred the plan assets, except court-ordered payment of independent fiduciary fees.
- Requires the defendants to preserve all relevant records for the purpose of transferring to an independent fiduciary appointed by the court.
- Requires the independent fiduciary to oversee an accounting of the 17 mismanaged plans.

In addition to the temporary restraining order, the DOL says it is pursuing litigation seeking a permanent injunction and order that requires the defendants to restore the missing plan assets to the retirement plans and forbids them from serving as fiduciaries to any plan in the future.

The DOL also explained that the affected plans "may have standing to participate in this proceeding presently pending, including the injunctive relief being requested. Affected plans should immediately consult with legal counsel to obtain advice and make decisions relative to your interests."

In granting the TRO, U.S. District Judge Marilyn Horan noted "the Acting Secretary has shown a reasonable likelihood of success on the merits of the ERISA claims, irreparable harm absent this injunction, and that the balance of the harm to the parties and the public interest weigh in favor of an injunction."

—Nevin Adams

Speaking of DOL

EBSA enforcement recovers more than \$1.4 billion in 2023, but ...

While the Department of Labor's Employee Benefits Security Administration (EBSA) recovered \$1.435 billion in direct payment to plans, participants and beneficiaries in fiscal year 2023, that number has been trending downward for the past few years.

According to a fact sheet released by EBSA, more than half of those recoveries were the result of enforcement actions and more than 30% came from informal complaint resolutions.

Yet, despite the sizeable number, the overall amount is less than half of the \$3.12 billion EBSA recovered in FY 2020, and a billion less than \$2.4 billion recovered in FY 2021. For FY 2022, the recovered amount was constant at \$1.4 billion.

In sum, the \$1.435 billion in total monetary recoveries for FY 2023 included:

- Enforcement actions: \$844.7 billion
- Informal complaint resolution: \$444.1 billion
- Voluntary Fiduciary Correction Program: \$84.5 billion
- Abandoned Plan Program: \$61.2 billion

"At least \$1 billion of that drop off from FY 2020 is due to reductions in recoveries from missing participant enforcement," noted Kelsey Mayo, Director of Regulatory Policy at the American Retirement Association. "I think that reflects a general shift in industry toward adopting more robust procedures to stay in touch with terminated participants or find them if they don't provide the plan with updated information."



“The VFCP allows plan officials who have identified certain ERISA violations to remedy the breaches and voluntarily report the violations to EBSA without becoming the subject of an enforcement action.”

Enforcement Actions

As to the current \$844.7 million recovered through enforcement actions, EBSA notes that it closed 731 civil investigations in FY 2023.¹ Of those, 505 cases (69%) produced monetary results for plans or other corrective action.

Recoveries for terminated vested participants played a key role in these results. In total, EBSA's enforcement program helped 5,690 terminated vested participants in defined benefit pension plans collect benefits of \$429.2 million owed to them. According to the fact sheet, these results represent a combination of the present values of lifetime annuity payments or cash-out lump-sum balance payments, plus interest on distributions paid as either retroactive lump sums or included in actuarially adjusted future annuity amounts.

In FY 2023, EBSA also obtained 352 non-monetary civil corrections, including removing 20 fiduciaries, barring 41 individuals from serving as fiduciaries, appointing 20 fiduciaries, improving missing participant procedures for 44 plans, and 34 global corrections involving service providers for numerous ERISA-covered health plans.

EBSA also referred 50 cases for litigation. However, even after referral to the Solicitor of Labor, the DOL can often resolve the claims for monetary relief without filing suit. EBSA often pursues voluntary compliance to correct violations and restore losses, but in cases where those efforts have failed, EBSA forwards a recommendation to the Solicitor

of Labor to initiate litigation, the fact sheet explains.

Drilling down further, EBSA notes that its investigations led to the indictment of 60 individuals, including plan officials, corporate officers and service providers, for offenses related to employee benefit plans. Overall, EBSA closed 196 criminal investigations in FY 2023.

Informal Complaint Resolution

When workers experience a problem with an employee benefit plan, they can directly contact an EBSA Benefits Advisor for assistance. In FY 2023, EBSA's Benefits Advisors closed more than 197,000 inquiries and recovered \$444.1 million in benefits on behalf of workers and their families through informal resolution of individual complaints.

Abandoned Plan Program

During FY 2023, EBSA received 1,770 applications from qualified termination administrators and closed 1,347 applications with terminations approved. In total, \$61.2 million was distributed directly to participants as a result of these terminations.

According to EBSA, these results include plan assets restored, benefits paid to participants, disgorgement of profits, reversal of prohibited transactions that benefit the plan or participants and voluntary fiduciary corrections, as well as amounts recovered through the abandoned plan program and informal complaint resolution.

Compliance Assistance

EBSA's Voluntary Fiduciary Correction Program (VFCP) and Delinquent Filer Voluntary Compliance Program (DFVCP) encourage the correction of ERISA violations by providing significant incentives for fiduciaries and others to self-correct.

The VFCP allows plan officials who have identified certain ERISA violations to remedy the breaches and voluntarily report the violations to EBSA without becoming the subject of an enforcement action. In FY 2023, EBSA received 1,192 applications.

The DFVCP, meanwhile, encourages plan administrators to bring their plans into compliance with ERISA's filing requirements. In this case, EBSA received 18,955 annual reports through this program in FY 2023. Additionally, the EFAST2 Help Desk handled over 16,000 filer inquiries to help filers meet their reporting obligations.

"I am incredibly proud to lead this agency that, despite its small size and colossal responsibilities, consistently delivers for America's workers, retirees and their families, year after year," Assistant Secretary for Employee Benefits Security Lisa Gomez said in a statement announcing the results. "These victories are clear evidence of the Department of Labor's continued leadership in keeping President Biden's promise to be the most pro-worker administration in history."

A copy of EBSA's FY 2023 Enforcement Fact Sheet can be found here.

— Ted Godbout

FOOTNOTES

¹ For comparison, EBSA closed 1,122 civil investigations in FY 2020, with 754 of those cases (67%) resulting in monetary results of \$2.6 billion for plans or other corrective action.



Feeling InSECURE

Small Biz owners are unaware of 401(k) start-up credits.

Despite the SECURE and SECURE 2.0 acts essentially making it free for small business owners to offer a retirement plan, new research finds that many are still harboring old excuses for not providing one.

The research published by the Employee Benefit Research Institute (EBRI), Center for Retirement Research at Boston College and Greenwald Research

found that other than “more profits,” no single reason will lead more small businesses to offer retirement plans.

Also, many small businesses were found to not have experience working with an outside organization for payroll or administering other benefits, which can lower the ability or comfort in looking into what needs to be done to offer a retirement plan. Perhaps not surprisingly, the small business owners were also found to lack an understanding about policies, tax

credits and regulations regarding plans.

The report, “Small Business Retirement Survey: Policy Knowledge and Reasons for Offering or Not Offering a Retirement Plan” is the result of a survey of small businesses conducted in order to give a more current understanding of attitudes, concerns and knowledge about retirement plans.

Additional findings in the report include the following.

State efforts. One positive finding is that the efforts by the

“According to the findings, among the small business owners not offering a plan, nearly three-quarters (72%) said they were not aware of tax credits up to \$5,000 being available to cover the costs of starting a retirement plan.”

states to launch retirement savings program for those private-sector employers that don't offer one is not expected to have a major impact on those employers that do offer one.

In this case, the research found that 47% of the small business owners who were offering a plan and 22% of those not offering a plan said they were aware of states launching programs requiring employers without a retirement plan to automatically enroll their employees in an IRA.

Among the small business owners offering a plan, only 21% said they would stop offering their plan if this policy were adopted in their state, while 68% said they would continue to offer their plan.

Tax credit awareness.

Amazingly, even after all the national press coverage of SECURE and SECURE 2.0, most surveyed small business owners indicated they were not aware of the credits.

According to the findings, among the small business owners not offering a plan, nearly three-quarters (72%) said they were not aware of tax credits up to \$5,000 being available to cover the costs of starting a retirement plan. One positive, however, is that 78% said the tax credits would make it at least somewhat more attractive to offer a plan.

Recruitment and retention.

Another helpful finding is that more than 9 in 10 of the small

businesses offering a plan say the reason they offer one is the positive effect on employee attitude and performance. What's more, 90% say that a competitive advantage for the business in employee recruitment and retention is a reason for offering a plan. In fact, 30% say the positive effect of offering a plan is the most important reason, while another 25% say the competitive advantage is the most important reason.

Excuses for not offering. For the small businesses not offering a plan, the costs of administering a plan and the profitability of the business were among the reasons that were most likely to be considered for not offering a plan.

The business is “too new or too small,” coming in at 26%, was the reason most cited as the most important for not offering a plan. Yet, numerous other rationales across many factors were just below “too new or too small” as being the top reason—suggesting that no single reason will clearly be the most effective in increasing retirement plan offer rates, the report notes.

“The most important factor leading small businesses to consider offering a plan was an increase in the business's profits,” explained Craig Copeland, director of Wealth Benefits Research at EBRI. “There were other reasons that were cited less, such as government

mandates, lower administrative requirements, tax credits, and demand from employees. So, there isn't a specific reason or type of reason that stands out as leading more small businesses to consider offering a plan.”

The survey was conducted between February and April 2023 among 703 small businesses (100 or fewer workers) with 323 offering a plan and 380 not offering a plan.

“Without some direct interaction with small business owners, it will be hard to greatly increase the percentage of small businesses offering retirement plans, particularly among those that are the smallest,” added Copeland.

The EBRI research director further observed that the rules and options for offering retirement plans are not well understood, and many of the business owners are experts in something other than benefits and do not have a benefits specialist on staff.

“Thus, increasing offer rates among small businesses is going to require creative methods to reach them with the necessary information and infrastructure for the administration of retirement plans,” he concluded. **NTM**

— Ted Godbout

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