

# MANAGEMENT

## Liability Focus

Provided by Connor & Gallagher OneSource

### Fiduciary Liability Insurance and Evolving ERISA Risks

A fiduciary is an individual or entity acting on behalf of others. Depending on their roles, an organization's board members, benefits administrators or investment advisors may serve as fiduciaries responsible for overseeing employee retirement plans. Fiduciaries are bound by the Employee Retirement Income Security Act of 1974 (ERISA) to uphold certain duties, namely to act prudently and in the best interests of plan participants and beneficiaries.

ERISA also establishes the legal framework under which fiduciaries may be held personally liable for breaching their duties, often through excessive fee lawsuits. This litigation, which generally alleges that fiduciaries failed to properly manage employee retirement plans and associated costs, has become increasingly frequent and complex, largely due to evolving claim theories, changing plan requirements and investment-related scrutiny.

Altogether, these developments could pose additional ERISA risks among business leadership and influence fiduciary liability insurance offerings. This article provides more information on excessive fee litigation, highlights other key fiduciary exposures to watch and outlines related coverage considerations.

#### Excessive Fee Litigation Explained

Excessive fee litigation typically stems from claims in which retirement plan participants allege fiduciaries failed to adequately monitor plan

investment options, recordkeeping costs, service provider fees or similar expenses, thus breaching their duties under ERISA. Over the years, plaintiffs have continued to develop new theories to support these claims, especially regarding stable value funds and the use of plan forfeitures, prompting additional litigation. Retirement plans of varying sizes can be subject to such claims, expanding this exposure beyond just the largest plans.

Compounding concerns, recent legal developments could create additional ERISA-related exposures for fiduciaries. In 2025, the Supreme Court reached a unanimous decision in *Cunningham v. Cornell University*, lowering the pleading standard for plaintiffs in certain ERISA lawsuits.

This decision has since made it easier for plaintiffs to bring prohibited transaction claims, as they need only allege the basic elements of the transaction at the pleading stage, rather than provide specific facts showing that statutory exemptions do not apply. Going forward, these developments will likely continue to drive up excessive fee litigation and related scrutiny of plan transactions, costs and oversight practices.

#### Other Fiduciary Exposures to Watch

Alongside evolving ERISA risks, here are some additional developments currently affecting the fiduciary liability landscape and influencing excessive fee litigation trends:

- **Changing plan requirements**—The SECURE 2.0 Act, which builds on the Setting Every Community Up for Retirement Enhancement (SECURE) Act, was part of an omnibus bill signed in late 2022. It's intended to increase employees' retirement

savings by making several changes to plan requirements that have taken effect on a phased schedule, with additional requirements and plan amendment deadlines continuing through 2026 and beyond. While beneficial to employees, the administrative complexities of this legislation have further escalated fiduciaries' existing compliance and oversight responsibilities. As such, any errors in implementing these new plan requirements could leave fiduciaries exposed to additional compliance concerns and associated litigation.

- **Investment scrutiny**—Fiduciaries are ethically and legally responsible for properly selecting and managing employee retirement plan investments and service providers. As it pertains to ERISA standards and excessive fee litigation, fiduciaries' plan investment choices don't necessarily need to produce the best possible financial results, so long as they follow a prudent decision-making process. Nevertheless, as plan requirements and related investment practices continue to shift, these developments are creating new avenues of scrutiny among plan participants. While traditional fiduciary responsibilities have remained the same, plaintiffs are now placing greater pressure on investment choices and pursuing litigation over perceived failures or wrongdoing.
- **Alternative investment options**—As regulators and retirement plan sponsors consider expanding plan access to investment options that incorporate alternative assets, such as private equity or real estate investments, the U.S. Department of Labor has proposed guidance clarifying fiduciaries' duty of prudence in selecting these options. If finalized, such guidance may provide fiduciaries with a safe harbor for following a documented process when evaluating newer investment types, helping to ease uncertainty as plan menus continue to evolve. This may, in turn, help reduce fiduciary exposures and combat excessive fee litigation.

## Coverage Considerations

Fiduciary liability insurance is a specialized type of coverage designed to protect organizations and their fiduciaries against allegations of breached

duties that lead to shortcomings in employee benefits plans. This coverage may help pay for legal defense costs arising from such allegations and reimburse losses incurred by participants due to associated plan issues.

With ERISA-related claims and excessive fee litigation on the rise, many fiduciary liability insurers have begun reassessing their risk appetites and conducting more rigorous evaluations of policyholders' specific exposures. At the same time, a growing number of directors and officers liability insurers have entered the fiduciary liability market, generally expanding the total coverage available to organizations and their fiduciaries even as risk appetites shift.

Looking ahead, insurers are likely to consider factors such as retirement plan size and structure, recordkeeping expenses, fee benchmarking, investment selection and performance, service provider oversight, and fiduciary governance practices and documentation during the underwriting process. While specific coverage offerings will vary across insurers and total risk levels, some ERISA-related claims may also be subject to stricter terms, retentions and other unique policy conditions.

In light of these challenges, it has become all the more important for organizations and their fiduciaries to maintain detailed and accurate documentation regarding retirement plan selections and investment choices. In doing so, they can demonstrate prudent, consistent decision-making processes, thereby limiting the likelihood of ERISA-related claims and potentially securing more favorable coverage options.

Furthermore, organizations and their fiduciaries should consult a trusted insurance professional, such as a broker, to help them routinely review their policy terms, limits and retentions, making updates as needed to ensure their coverage adequately reflects their fiduciary exposures.

## Key Takeaways

In today's complex liability landscape, fiduciaries are facing mounting pressure to uphold their ERISA

obligations and properly manage employee retirement plans. Evolving legal standards, regulatory changes and heightened investment scrutiny mean that even well-intentioned fiduciaries can find themselves exposed to costly litigation.

Maintaining thorough documentation, following consistent oversight processes and staying informed on emerging claim trends are essential steps toward minimizing this risk. As the fiduciary liability insurance market continues to respond to these developments by expanding available coverage and sharpening its focus on documented governance practices, organizations and their fiduciaries should coordinate with insurance experts to ensure their coverage keeps pace with their current exposures.

Contact us today for more management liability guidance and coverage solutions.