

# 401(k) Plan Checklist

As fiduciaries to their 401(k) plans, plan sponsors need to make prudent decisions about their plan investments and service providers and periodically reconsider, or “monitor”, those decisions. The law — ERISA — requires that the monitoring be done at appropriate intervals.

Unfortunately, it is not always clear how often the reviews must be done to be appropriately timely. As a result, while there isn’t a requirement to review the services and investments on a calendar basis, many fiduciaries have decided on a conservative, or “better safe than sorry”, approach of monitoring on at least an annual basis.

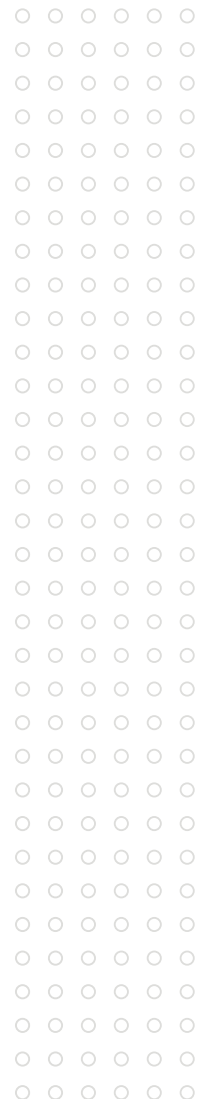
In addition, some fiduciary decisions can be made as “best practices” to improve their plans and participant outcomes. The term “best practice” refers to going above and beyond what the law requires.

Finally, not all plan decisions are fiduciary decisions. Those are called “settlor” decisions, referring to the entity that sets up, or “settles”, the plan. For example, a plan sponsor can, without fiduciary concerns, decide to set up a plan, how to design the plan, what contributions to make to the plan, and whether to terminate the plan. And the plan sponsor can make those decisions in its own best interest.

This Checklist includes important decisions about 401(k) plans that, as a “safe” matter, should be monitored or made on an annual basis. It covers fiduciary decisions that are mandated by ERISA, fiduciary best practice decisions, and settlor/employer best practices. To help distinguish, the Checklist labels the issues as Fiduciary, Best Practices, and Employer.

Unfortunately, it’s not manageable to cover all issues for plan sponsors on a single, straightforward checklist. This Checklist should be viewed as a helpful tool to perform some of the most important responsibilities and best practices.

Also, this Checklist focuses on the year-end decisions. To the extent that the decisions have been made earlier in the year, they may not need to be revisited at the end of the year.



FIDUCIARY ISSUES FOR REVIEW

Let’s start with the fiduciary issues for the year-end review. The fiduciaries of 401(k) plans must perform these duties on a regular basis. The yearend is a good time to make sure they have been done or, if not, the time to take these steps:

- ❑ **Fiduciary: investment review.** Fiduciaries are legally responsible to prudently select and monitor plan investments, and where appropriate, to remove and replace plan investments. The two most important considerations are quality of investment management and costs of the investments. Each plan investment should be reviewed to decide if it should be kept in the plan. Any imprudent investments should be removed when the decision has been made that they are not likely to perform well in the future or are more expensive than other competitive investments.
- ❑ **Fiduciary: review of service provider operations, issues, and costs.** As with investments, the plan sponsor, and the officers and managers who make plan decisions, are fiduciaries and must prudently monitor the plan’s service providers. That may require reviewing information about the services provided by competitors and the fees charged for those services. If the cost of a service is clearly out of line with marketplace charges for similar services, fiduciaries should negotiate lower fees or change providers.
- ❑ **Fiduciary: review of “missing participants”.** The Department of Labor is actively investigating plans to see if they are keeping track of their missing participants, and if they are not, the DOL is asserting fiduciary breaches. For this purpose, the DOL considers a missing participant to be a former employee with an account balance who cannot be located or whose whereabouts are known but who is not responsive to plan communications. Either way, the DOL’s position is that plan fiduciaries have a duty to keep current records of all participants’ contact information. In many cases, a plan’s recordkeeper will have systems that can help fiduciaries locate former employees who are still participants. Fiduciaries should obtain reports, at least annually, from their service providers and, if there are missing participants, the fiduciaries should work with the service providers to locate those participants.
- ❑ **Fiduciary: review of cybersecurity issues.** Cybersecurity has become one of the dominant issues of our times. Plan fiduciaries have a responsibility to safeguard participants’ deferrals and investments. To satisfy that duty, one step is to understand the steps that their companies and their plan providers are taking to safeguard participant data and money. Also, in many cases the source of a cybersecurity problem is with an individual participant. Fiduciaries may decide that it is better to try to avoid problems than it is to correct them. In that regard, fiduciaries can communicate at least annually with participants the need to protect their plan login information.

BEST PRACTICES

Let’s turn next to the best practices that plan sponsors and fiduciaries can adopt to improve their plans and outcomes for their participants. Those include:

- ❑ **Best practice: review of investment policy statement.** ERISA does not require that plans have investment policy statements (IPS). However, they can be helpful as guidelines in the performance of the fiduciary duties for a plan’s investments. It is advisable to review the IPS on a regular basis. That serves at least three purposes. First, the fiduciaries should make sure that they are following the terms of the IPS when monitoring and replacing investments. Second, the fiduciaries should determine if the IPS terms continue to be appropriate, for example, due to changes in the investment marketplace or due to newly available investments. Third, an IPS serves as an educational tool for plan fiduciaries to learn and be reminded of their responsibilities.
- ❑ **Best Practice: review of participant-related issues.** A review of participant success in participating in the plan can help fiduciaries identify and correct any issues with plan participation. It can also help with decisions about new products and services for the plan. A review of participant success includes looking at the following metrics and comparing them to similar companies. A plan’s service providers can help provide the needed data.
  - Participation.
  - Deferrals.
  - Participant Investing.
  - Retirement Readiness.
- ❑ **Best practice: report on legal changes, including issues of focus for IRS and DOL guidance and audits, and fiduciary litigation issues.** While not required, plan fiduciaries can better perform their jobs if they are aware of current developments in plan laws and regulations, government enforcement focuses, and the reasons for fiduciary lawsuits. As a result, fiduciaries should consider having an annual training session by their service providers.
- ❑ **Best practice: report to Board of Directors.** In most cases, the Board of Directors has appointed the officers or plan committee members who make the fiduciary decisions about their retirement plans. Under ERISA, that means that the Directors are fiduciaries for selecting and monitoring the officers and/or committee members. An annual report to the Board will help the Directors properly perform their monitoring duties.
- ❑ **Best practices: report on industry trends.** One way to get information about best practices is to have a plan’s service providers report to the fiduciaries annually about what changes they are seeing in the retirement plan universe. What new services are being adopted by other employers? What changes are being made to plans by similar companies? Equipped with this kind of information, fiduciaries and employers can make decisions about improving their plans and participant outcomes.

OTHER EMPLOYER DECISIONS

While best practices equal or exceed the law’s fiduciary standards, there are some decisions that an employer can make in its own interest—without any fiduciary implications. Here is an important example of those types of decisions and one that is particularly timely in light of recent retirement plan legislation:

**□ Employer: review of plan design.** It is helpful to review the design of a plan for at least two reasons. First, circumstances may have changed since the plan was initially established and, as a result, a different design for the plan may be appropriate. For example, a plan may have a “safe harbor” design to satisfy testing issues. However, the plan may have since adopted automatic enrollment and a different contribution structure may be more consistent with the employer’s goals. A second reason is that, over time, the laws change and there may be new requirements or opportunities for plan design changes. As an example of an opportunity, beginning in 2024, a plan may decide to make matching contributions for student loan payments (called QSLPs-qualified student loan payments) made by eligible employees. This may be a good opportunity for an employer that hires college graduates but may not have any relevance to an employer with primarily blue-collar workers. Fiduciaries should ask their plan service providers to report on changes in retirement plan laws and help make decisions about the opportunities for improving the plan and for appealing to the participants. An example of a required change, also beginning in 2024, is that long-term part-time employees must be allowed to defer into the employer’s 401(k) plan. A long-term part-time employee is one who has worked at least 500 hours per year (but less than 1,000 hours) for 3 consecutive years for the employer. There isn’t a choice. This is a mandatory provision. (Note that, the requirement is reduced to 2 consecutive years in 2025.) As with the optional provisions, fiduciaries should meet with their providers to discuss the new requirements in the years ahead.



CONCLUDING THOUGHTS

A well run 401(k) plan will reflect a good combination of fiduciary compliance, adoption of best practices, and employer driven plan design.

However, to best do those jobs, employers and fiduciaries need information. Fortunately, almost all of the needed information is available through plan providers, including advisers who are focused on serving 401(k) plans. To make sure that they are getting the information and advice they need, fiduciaries and employers should ask their advisers and providers for their help. Equipped with that information and with advice based on the experience and expertise of the plan providers, employers and fiduciaries will be in a good position to make decisions that are legally required and that improve their plans.

While these steps can be taken over the course of the year, these materials provide a yearend Checklist to make sure that they are made by the end of the year.

One way to use this Checklist is to have a yearend meeting with the plan’s adviser and providers and to go through each item on the checklist. By the end of that meeting, every box should be checked. In that case, fiduciaries can be confident that many of the important decisions have been made and implemented. On the other hand, if any boxes are not checked, fiduciaries and employers should develop a follow up plan with their providers to finish the work.

While this Checklist is not a complete list of all responsibilities for fiduciaries, it is can help with many of the most important responsibilities.



The descriptions of law and analysis in this Checklist are current as of October 2023, are general in nature, are intended to be educational and not legal advice, and do not constitute a legal opinion that may be relied on by third parties. Readers should consult their own legal counsel for information on how the Checklist applies to their individual circumstances and to determine if there have been any relevant developments since the date of the Checklist. Fiduciaries have a wide range of responsibilities, many of which are beyond the scope of the Checklist and the discussion herein.

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