

# The Retirement Times

APRIL 2022

## The Risk of 401(k) Lawsuits: If It Can Happen to Them...



When a giant organization with extensive resources gets sued for alleged ERISA compliance failures — especially if the organization’s own service offerings include reviewing for such violations — that could very well be the canary in the coalmine for all other, lesser endowed firms. And that’s perhaps the key takeaway for plan sponsors in light of a complaint filed late last year against KPMG for an alleged fiduciary breach.

The lawsuit, filed by former KPMG 401(k) plan participants, names the firm’s fiduciaries — including its Board of Directors and Pension Strategy and Investment Committee — as defendants. Noting established requirements, it points to the high level of diligence and care imposed by ERISA on

fiduciaries and their responsibility to establish a prudent process for choosing service providers and investment options. It also cites their responsibility for ensuring these selections are appropriate on an ongoing basis. “Prudent and impartial plan sponsors thus should be monitoring both the performance and cost of the investments selected for their retirement plans,” the complaint states, “as well as investigating alternatives in the marketplace to ensure that well-performing, low-cost investment options are being made available to plan participants.”

The plaintiffs allege that KPMG, by failing to reduce its plan’s expenses or appropriately scrutinizing investment options, failed to meet the required standard of care. The complaint states the plan’s considerable assets under management should have given it substantial bargaining power to negotiate more competitive service rates. The plaintiffs allege excessive recordkeeping and administration fees, accusing KPMG of wasting plan and participants’ assets due to unnecessary costs. The suit alleges that the firm failed to conduct RFPs “at reasonable intervals ... to determine whether the plan could obtain better record-keeping and administrative fee pricing from other service providers.”

The complaint alleges that KPMG’s plan costs were more than twice that of its peers and that certain funds were maintained despite other available investment options that had lower costs and a history of better performance. Plaintiff’s counsel adds, “[d]efendants’ mismanagement of the Plan, to the detriment of participants and beneficiaries, constitutes a breach of the fiduciary duties of prudence and loyalty, in violation of 29 U.S.C. § 1104. Their actions were contrary to actions of a reasonable fiduciary and cost the Plan and its

participants millions of dollars.”

In arguing that plan costs were excessive, the complaint also states that the record-keeping market is highly competitive and that numerous vendors are “equally capable of providing high-level service.” The plaintiffs are seeking class-action status.

It is important to be aware that the number of ERISA lawsuits are growing. Litigation is expensive, even if fiduciaries have a spotless record of taking care of their ERISA responsibilities. It behooves the prudent fiduciary to explore every avenue to protect themselves whilst acting in the best interests of their participants.

*Please note, this article is based solely on the plaintiff's counsel filed complaint which is purposefully crafted towards an intended end. It does not include independently investigated facts, the defendants' perspective on the allegations, or any opinion of the author. It is always important to hear both sides of any argument and view the evidence before taking away any substantive opinion of the facts in issue.*

Sources:

<https://s32566.pcdn.co/wp-content/uploads/2021/10/401k-lawsuit-roundup-102921.pdf>

<https://www.plansponsor.com/familiar-erisa-complaint-filed-kpmg/>

<https://www.pionline.com/defined-contribution/kpmg-fiduciaries-face-erisa-lawsuit-former-401k-participants>

## Financial Hypochondria: When Investment Vigilance Becomes a Problem

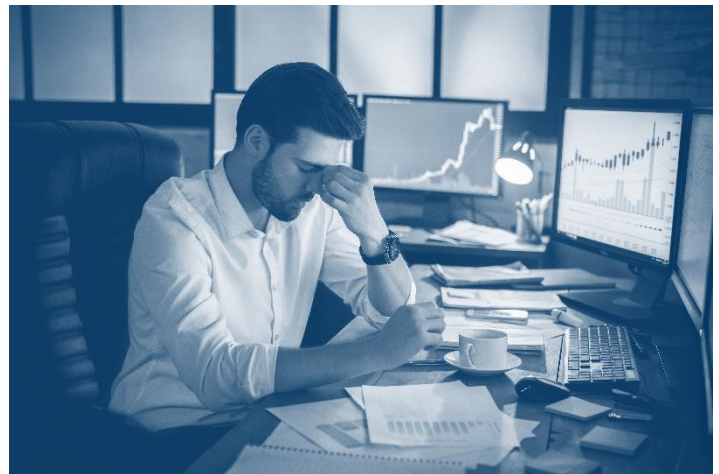
Plan sponsors invest much time and effort in improving employee financial literacy. They offer educational content, provide opportunities for group and individual consultation, and encourage participants to approach retirement planning proactively by staying on top of their investments. But what happens when workers go overboard with well-intended advice?

Today, stock market data is available 24/7 with just a few clicks on links. And this development, in many ways, has been a double-edged sword. While it has made investing a lot more accessible for many, it's become all too easy to fall into a pattern of checking portfolio performance daily — or even multiple times a day — especially after doom scrolling clickbait financial headlines during periods of heightened market volatility.

And this isn't helpful.

According to Frank Murtha, Ph.D., cofounder of MarketPsych, such behavior can create a myopic focus that may blur an investor's long-term perspective. It could also lead to a state of heightened anxiety and the kind of cognitive errors that may result in faulty short-term financial decision making. When a health coach is working with a client, they motivate healthy behaviors, but not in the extreme. For example, the coach might recommend working out a several times a week, though not several times each day. Similarly, participants should be encouraged to have a healthy amount of investment awareness, while avoiding extreme hypervigilance.

On the other hand, prescriptively dictating how frequently participants should check their 401(k) or 403(b) or governmental plan balances without addressing their underlying fears is shortsighted. It's also unlikely to be effective, as such financial fears rarely stem from a mere



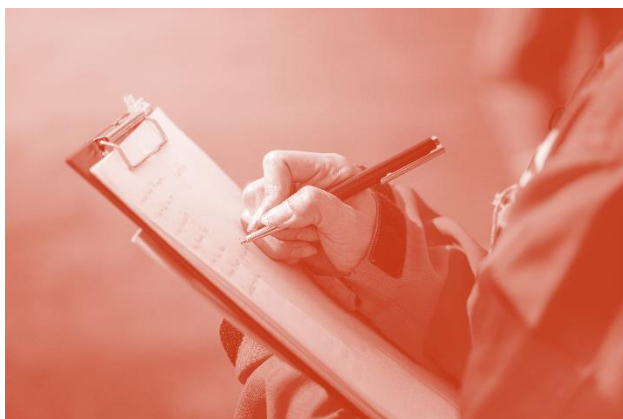
lack of information. When an investor acknowledges and comes to terms with their uncomfortable emotions, they're often better positioned to find healthier coping mechanisms for the uncertainty and risks that inherently come with investing.

At that point, things like providing a broader historical context for stock market performance and explaining how asset allocation and dollar cost averaging can mitigate risk become much more helpful. And it goes without saying that so long as investment strategy does not match up with investor risk tolerance, such work can remain a stubbornly uphill climb. But once participants accept that a certain amount of risk and uncertainty is necessary to reach financial goals, it becomes much easier to put a plan in place to better manage financial stress — whether that includes meditation, taking a walk or turning to a trusted friend or advisor.

In the end, it's important to remember that investing decisions are ultimately emotional ones — centered on hopes and dreams for the future. And any financial discussion that fails to take that fundamental truth into account risks missing the forest for the trees.

Source: <https://www.apa.org/news/podcasts/speaking-of-psychology/stock-market-anxiety>

## IRS/DOL Audits Are Increasing Dramatically Are You Ready?



### Facts you should know

If your plan has not been recently audited, it is likely only a matter of time before the Internal Revenue Service (IRS) or the Department of Labor (DOL) comes knocking. If/when you are notified of an audit, early preparation can help streamline the process, keep the investigation narrow, as well as potentially avoid financial costs of potential penalties and interest.

DOL and IRS audits focus on different issues guided by their specific jurisdictions.

The DOL is responsible for the enforcement of labor laws set forth in the Employee Retirement Income Security Act of 1974 (ERISA). ERISA is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry in order to provide protection for individuals covered by these plans. The DOL can enforce penalties for breaches of ERISA fiduciary conduct and can even sue fiduciaries for these breaches on behalf of a plan and its participants. In cases of the most egregious misconduct, the DOL can initiate criminal proceedings that may result in jail time for plan fiduciaries based on investigations dealing with fiduciary conduct breaches and prohibited transactions.

The IRS audit focuses on taxation issues and the IRS can enforce infractions under the Internal Revenue Code (Code). Infractions can result in additional taxes plus penalties, and interest. The IRS is concerned with compliance with the Code as it impacts on the plan's tax qualified status. This can take the form of review of plan provisions, testing, controlled group issues, etc.

Both the DOL and the IRS select plans for audit primarily by random selection; but can also be initiated as a result of responses (or lack thereof) to certain questions on the Form 5500, failure to transmit participant contributions to their selected investments in a "timely manner," participant complaints and other breaches of fiduciary or administrative duties. Current litigation activity, bankruptcy filings and media reports can also trigger DOL investigations. Also, the DOL may refer a case to the IRS if it discovers compliance infractions under the Code and vice versa if the IRS discovers what it believes to be potential fiduciary breaches impacting the plan under investigation.

The number of IRS/DOL audits are increasing dramatically as DC plans become more complex and statutes and regulations evolve.

Failure to respond to an IRS questionnaire or a DOL audit investigation or Information Request Letter is comparable to sending an invitation for the regulator to crack your plan open, make themselves comfortable, and spend weeks exploring all actions impacting the plan.

The DOL and the IRS will initiate an audit by sending an Information Request Letter indicating the date of its on-site visit to review documents and conduct interviews with individuals who have responsibilities in the administration of the plan. The letter will detail the information to be made available to for auditor – typically in advance of the on-site visit.

Currently, the most litigated fiduciary issue is the “reasonableness” of plan fees. As a result, not surprisingly, fees have also come under the scrutiny of the DOL. Evidencing (documenting) the reasonableness of fees paid by plan participants is quickly becoming the most frequently investigated fiduciary issue.

The following is a partial list indicating common items for potential review.

- Corporate or plan committee minutes
- Documentation of fees and expenses and of their reasonableness
- Fiduciary training
- Service agreements and engagement letters
- Fee disclosure statements - 408(b)(2)
- List of parties-in-interest and plan fiduciaries
- List of plan fiduciaries and delegation of responsibilities
- Trustee and/or investment committee minutes
- Plan documents, SPD, trust agreements, investment policy statements, Committee Charter
- Summary annual reports
- Participant statement samples
- Evidence of fidelity bond, fiduciary liability insurance policy, if any

Auditors are likely to ask if the plan fiduciaries are participating in ongoing fiduciary education programs.

### **Preparing for the audit**

Upon receipt of an IRS or DOL Information Request Letter it would be beneficial to begin preparing early for the audit event in order to achieve the best and most efficient outcome.

The more cooperative and efficiently the audit progresses the more positive the experience is likely to be. Being defensive or uncooperative would be counterproductive and would likely alienate the auditor. Proper planning for the audit will leave you better prepared for questions and typically helps to avoid any further potential inquiries.

One important suggestion is to not seat the auditor in front of your plan filing cabinet and let them find whatever they may need.

The auditor will be looking for specific items as indicated in their Information Request Letter. Providing the auditor exactly what they've requested, but only what they've requested, is your best course of compliance whilst simultaneously keeping the investigation narrow in scope. Suggesting they look through your files, in addition to being less efficient, can lead to the auditor uncovering issues that could result in more negative outcomes than those which they originally intended to review.

Consider adjusting your schedule to be available during the audit in the event of questions the auditor may have. You may want to delegate another team member to oversee the audit and deferring final decision-making to you. Notify other members of your plan administration team that your plan is being audited so they can be available to assist. Definitely notify your ERISA attorney, plan consultant, administrator, recordkeeper and investment advisor in the event that they may be helpful.

If the Information Request Letter identifies a significant potential concern a team meeting, prior to the audit, with appropriate attendees (internal or external) may be helpful to review the Information Request Letter, review plan provisions and procedures, and prepare for any questions.

Know that if you need more time to be fully prepared for the audit it is common for plan sponsors to request, and receive, a reasonable delay of the visit after providing an explanation as to why it may take more time to be fully prepared. Auditors recognize that it is not unusual to request additional time to obtain data that may not be immediately accessible.

Most DOL/IRS plan audits result in minimal issues or minor administrative errors that can be easily remedied. If a more substantial issue is found, know that it is probably much better to remedy it now than at some later date when it becomes more cumbersome administratively and/or more financially impactful to remedy.

**For more information, please contact your financial professional at 315-551-6618 or [dcronin@crownrisk.com](mailto:dcronin@crownrisk.com).**

*Distributions before the age of 59 ½ may be subject to an additional 10% early withdrawal penalty. This is for informational purposes only; we suggest that you speak with a tax professional about your individual situation.*

432 North Franklin St. Suite 20 Syracuse, NY 13204 | 315-428-3830 | [www.crownrisk.com](http://www.crownrisk.com)  
Securities offered through Hazard & Siegel, Inc., 5793 Widewates Parkway, DeWitt, NY 13214 Member FINRA/SIPC. Advisory Services Offered through Hazard & Siegel Advisory Services, LLC an SEC Registered Investment Advisor Disclosures: <https://bit.ly/KF-Disclosures>  
ACR# 4483780 03/22