Institutional Advisors

How 401(k) Pooled Employer Plans Can Mitigate Fiduciary Risk and Responsibilities

Background

Employers that offer a 401(k) retirement plan to their employees take on significant fiduciary risk and responsibilities as well as administrative duties. These fiduciary responsibilities are often held personally by the senior executives/owners of an organization, so it is important for all involved to understand the roles and obligations in managing a single employer 401(k) plan. Responsibilities include managing plan expenses, selecting and monitoring the plan's investment options, sending participant notices, reporting taxes, and ensuring compliance with regulations. Typically, most employers do not have the internal expertise on staff to manage most of these responsibilities and may outsource part of the administrative burden. However, even with outsourcing some of the administrative services, most of the fiduciary risk still typically lies with the employer.

Role of a plan fiduciary and potential risks

The Employee Retirement Income Security Act of 1974 (ERISA) includes certain protections by requiring those who exercise discretionary control or authority over plan assets, plan management, or plan administration to be subject to a fiduciary standard. Examples of those who are typically considered plan fiduciaries would include plan administrator, plan trustee, as well as members of a plan's investment committee. It is common that this would include the CEO and the CFO as well as the head of HR.

According to the Department of Labor (DOL), "The primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses. Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA. They also must avoid conflicts of interest. In other words, they may not engage in transactions on behalf of the plan that benefit parties related to the plan, such as other fiduciaries, services providers or the plan sponsor."[1]

The DOL further states that "Fiduciaries who do not follow these principles of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets. Courts may take whatever action is appropriate against fiduciaries who breach their duties under ERISA including their removal." As a result, failure to fulfill these responsibilities and act in a manner that looks out for the participants' best interest can lead to potential financial penalties and/or legal liabilities.

Focused areas for managing a 401(k) plan

Examples of essential areas for managing a 401(k) plan would include:

Investment selection and monitoring

Employers must prudently select and monitor investment options offered.

Compliance and regulatory requirements

Employers must comply with various regulations, including ERISA, the Internal Revenue Code (IRC), and the DOL regulations. Examples of the various requirements include providing required participant disclosures, filing annual reports, monitoring contribution limits, and performing nondiscrimination testing.

Fees and expenses

Employers are responsible for ensuring that the plan's fees and expenses are reasonable and adequately disclosed to participants. Failure to monitor and control these costs can erode participants' retirement savings over time.

Participant education and communication

Employers must also provide participants with sufficient information and education about the plan to help them make informed decisions about their retirement savings.

Pooled employer plans and their impact on fiduciary risk reduction

Pooled employer plans (PEPs) were introduced under the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which was enacted in December 2019 and offers a new approach to managing 401(k) plans. A detailed background on PEPs can be found in our PEP whitepaper published November 2023.

As a quick summary, a PEP is a defined contribution retirement plan that allows unrelated employers to participate through a pooled arrangement in a single consolidated plan. A PEP must designate a pooled plan provider (PPP) responsible for the performance of all administrative duties, providing for a substantial reduction in the administrative burden and fiduciary risks for employers. As PEPs reflect the pooling of assets, this may also provide for overall lower costs to both participants and employers. Importantly, PEPs can also provide improved retirement outcomes for participants with access to financial wellness tools and participant communications from established recordkeeping providers.

PEPs typically provide for a fully bundled retirement plan offering that can significantly reduce the fiduciary risks and administrative burdens faced by employers, as most roles and responsibilities are usually transferred to professional fiduciaries who have the expertise and resources to effectively manage retirement plans. This can result in better investment options and improved outcomes for participants. The bundled service offering would generally include:

- The PPP, which is the overall fiduciary for the PEP and its operations, including acting as the 3(16) plan administrative fiduciary.
- The recordkeeper, who will typically provide full recordkeeping services, participant education, and financial wellness tools.
- The investment manager, who takes on the fiduciary responsibility as 3(38) investment fiduciary

While much of the fiduciary responsibilities may be transferred to the PPP in a PEP, individual plan sponsors still do maintain some level of fiduciary responsibility. This would include the decision to join a PEP and ongoing monitoring of the PEP and its service providers.

How 401(k) Pooled Employer Plans Can Mitigate Fiduciary Risk and Responsibilities

The chart below provides a summary of the various roles and how they can be coordinated within a PEP.

	Single Employer 401(k)	401(k) Pooled Employer Plan		
	Employer	Employer	PPP	Investment Manager
Fiduciary decision to join PEP and/or monitor service providers				
Select plan type and monitor overall service providers	X	X		
Overall fiduciary for the plan and its operations				
Named fiduciary and plan sponsor	X		X	
3(16) administrative fiduciary responsibilities				
Manage plan document/summary plan description (SPD)	X		X	
Participant notices	X		X	
Approve loans and distributions	X		X	
Form 5500 prep and signature	X		X	
Plan compliance and audits	X		X	
3(38) fiduciary investment management responsibilities				
Development of the plan's investment policy statement	X			X
Selection and monitoring of investment options	X			X

KeyBank

Conclusion

Managing a 401(k) retirement plan involves significant fiduciary risks and administrative responsibilities for employers. However, the introduction of PEPs provides a compelling alternative that can help employers reduce these risks and administrative burdens. By joining a PEP, employers can benefit from reduced fiduciary liability, economies of scale, professional management, and simplified administration. Overall, PEPs offer a promising solution for employers looking to provide a secure retirement savings option for their employees while minimizing the challenges associated with plan management.

For more information, please contact your KeyBank Institutional Advisor.

KeyBank Institutional Advisors collaboratively engages stakeholders to understand their organization's strategic mission, values, and goals. Our advisors are professionals supported by subject matter experts across client disciplines/market segments. Combining our expertise with an understanding of the client, we recommend and implement customized, coordinated financial solutions.

KeyBank

[1] "Fiduciary Responsibilities," U.S. Department of Labor, accessed April 2024, https://www.dol.gov/general/topic/retirement/fiduciaryresp.

Pooled Employer Plans (PEPs) are a new type of multiple employer plan for which the Department of Labor (DOL) and IRS guidance is still pending in a number of areas. An employer participating in the plan retains certain fiduciary responsibilities, including responsibility for retaining and monitoring the Pooled Plan Provider (PPP), for determining the reasonableness of its fees, and for periodically reviewing the plan as a whole. Among other responsibilities, the PPP acts as the 3(16) plan fiduciary. Transamerica does not act as a 3(16) plan fiduciary.

Key Bank Institutional Advisors is the marketing name under which KeyBank National Association (KeyBank) offers investment management and fiduciary services to institutional clients.

Banking and trust products and services are provided by KeyBank, Member FDIC. KeyBank and its affiliates do not provide tax or legal advice. Individuals should consult their personal tax advisor or attorney before making any tax-related investment decisions. Investing involves risk, including the potential loss of money invested. Past performance does not guarantee future results. Asset allocation and diversification do not guarantee a profit or protect against loss.

Non-deposit products are:

NOT FDIC INSURED • NOT BANK GUARANTEED • MAY LOSE VALUE • NOT A DEPOSIT • NOT INSURED BY ANY FEDERAL OR STATE GOVERNMENT AGENCY

Securities offered through Transamerica Investors Securities Corporation (TISC), member FINRA, 440 Mamaroneck Avenue, Harrison, NY 10528. Your Retirement Outlook® and Brighten Your Outlook® are registered service marks of Transamerica. Transamerica is not affiliated with KeyBank, Pentegra, nor their affiliates. 3259237 12/23

This material is provided solely for informational purposes and does not constitute investment, tax, legal or accounting advice on the matters addressed. Pentegra Services, Inc. is not affiliated with KeyBank National Association or Transamerica.

©2025 KeyCorp.® All rights reserved. 241216-2923379.05

NMLS ID 399797