Is Your Practice's Retirement Plan a Liability Trap?


Why A 401(k) can cause liability for dermatologists and how to mitigate this risk

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>> The authors have written frequently on how physicians are exposed to liability and tactics to reduce exposure. Most often, we cover medical malpractice and asset protection planning. In this article, we address a growing area of liability for all employers, including medical practices—exposure to employees for failings in the practice's qualified retirement plan. We provide an overview of the risk itself, the parties involved in plan administration and a few tactics to manage risks.

2018: THE YEAR OF QUALIFIED RETIREMENT PLAN (QRP) LIABILITY

During 2018 many medical practices became aware of a dangerous issue lurking in their retirement plans. Perhaps this is because many well-known companies and even universities, such as those in the following examples, faced significant lawsuits for their alleged failings in this area.

- General Electric 401(k) participants sued over poor-performing GE Asset Management funds. The lawsuit alleges that five funds managed by GE Asset Management, during the class period of January 1, 2011 through June 30, 2016, caused harm to plan participants due to underperformance.
- A Novitex 401(k) plan participant sued over alleged fiduciary breaches, among other claims. The suit accuses Novitex of failing to fully disclose the expenses and risks of the plan's investment options to participants, permitting "unreasonable expenses" to be charged to participants for plan administration.
- A plaintiff in the Gucci America, Inc. Retirement and Savings Plan accused the plan sponsor and its benefits committee of breaching fiduciary duties, including charging excessive administrative and investment fees to plan participants and by "selecting and retaining opaque, high-cost, and poor-performing investments instead of other available and more prudent alternative investments."
- The University of Chicago agreed to pay $6.5 million to settle a class action alleging that it failed its fiduciary duty to employees in ways that forced them to pay excessive fees in their retirement plan.

Note that in all these examples the employer was named in the lawsuit or paid the settlement. This is fundamental to understand because, as the employer, the company/university/medical practice already has an inherent fiduciary duty to its employees. It must manage their QRP, putting the employees' best interests first, which includes how it chooses the firm to run the plan and how they periodically review those services.

A business is exposed to many risks. Often, these risks can be offset through development of best practices and use of tools such as insurance. A retirement plan is no different. Ensuring that you have a detailed process is an important step in limiting the potential liability to which the business owner, trustees, and underlying investment committee are exposed. It is important to know your role as a fiduciary to the employees of your company.

The liability for a breach of your fiduciary role in managing the plan can be substantial. According to the Employee Retirement Income Security Act (ERISA) Section 409, "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary."

A civil action may be brought by a participant or beneficiary, or by another fiduciary. Even if a trustee delegates some of his or her fiduciary duties to others, the trustee is not completely relieved of fiduciary responsibilities because the trustee is obligated to monitor the performance of those to whom the duties have been delegated.

QRP MANAGEMENT 101

These are the key players involved in the ongoing management of a qualified plan:

Plan Sponsor/Trustee/Retirement Plan Committee

In a dermatology practice, the plan sponsor is typically the medical practice itself, the trustee(s) are one or more of the owners of the practice, and every practice will have a retirement committee, even if it is just one individual. To identify these parties, one should refer to the retirement plan's Plan Document or Summary Plan Document (SPD).

As fiduciaries under the Plan, the primary responsibilities of these parties are to:

1. Provide sufficient asset classes with different and distinct risk/return profiles so each participant can judiciously diversify his/her account.
2. Prudently select investment options.
3. Control and account for all investment, recordkeeping, and administrative expenses associated with the Plan.
4. Monitor and supervise all service vendors and investment options.
5. Prepare and maintain an investment policy statement.
6. Avoid prohibited transactions and conflicts of interest.

Investment Consultant/Advisor

In plans following best practices, the Retirement Plan Committee (the "Committee") retains an objective, third-party Consultant/Advisor (the "Advisor") to assist the Committee in managing the overall investment process. The Advisor will be responsible for guiding the Committee through a disciplined and rigorous investment process to enable the Committee to meet the fiduciary responsibilities outlined above. The specific duties and responsibilities of the Advisor are to:

1. Advise the Committee about the selection of asset classes.
2. Recommend Investment Managers for each asset class and monitor their performance.
3. Provide the Committee with quarterly reports.
4. Communicate with the Committee at least annually to review the IPS objectives and to evaluate the performance of Plan investment options with these objectives.
5. Handle plan participant enrollment and education.

Record Keeper and Third-Party Administrator (TPA)

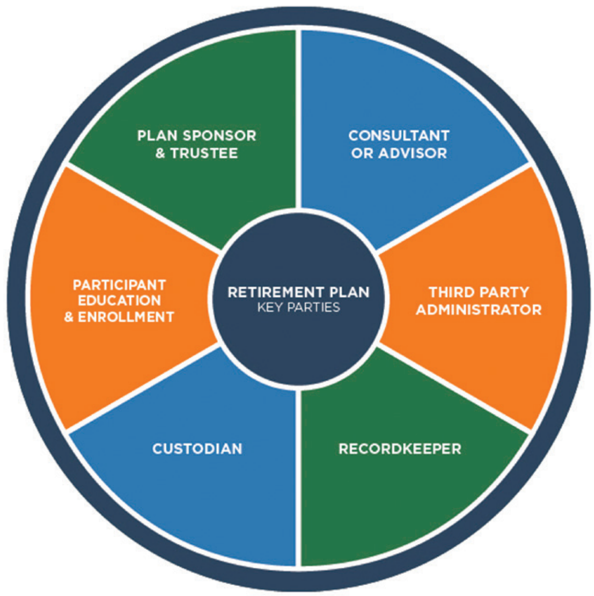
The record keeper and TPA is responsible for maintaining individual account balances, including these specific duties:

1. Maintain, update, and reconcile individual account balances.
2. Process contributions, distributions, investment election changes, and transfers.
3. Create and distribute quarterly plan and participant statements.
4. Complete annual compliance testing and reporting.
5. Provide an interface between Plan and Custodian.

Custodian

Custodians are responsible for the safekeeping of the Plan's assets. The specific duties and responsibilities of the custodian are:

1. Maintain separate accounts by legal registration.
2. Value the holdings.
3. Collect all income and dividends owed to the Plan.
4. Settle all transactions (buy-sell orders).
5. Provide monthly reports that detail transactions, cash flows, securities held and their current value, and change in value of each security and the overall portfolio since the previous report.



HOW TO REDUCE YOUR PRACTICE'S LIABILITY

A dermatology practice should consider various means of limiting personal exposure for claimed breaches of fiduciary duty. Aside from establishing robust procedural prudence, here are other approaches to help mitigate fiduciary liability:

- Secure fiduciary liability insurance to cover losses from the acts or omissions of plan fiduciaries. (This doesn't cover fraudulent acts and doesn't satisfy ERISA bonding requirements.) This coverage is different than the required fidelity bond in that it protects only the retirement plan. Fidelity bonds permit recourse by the insur-

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er against a trustee who engages in a breach of fiduciary duty.

- Delegate responsibility for investment decisions to an investment manager. This can be accomplished through a 3(21) co-fiduciary role or the 3(38) designation which provides sole discretionary decision making to a third-party investment manager.
  - A 3(21) Investment Advisor works with the trustees of the plan to recommend the investment lineup for the plan but doesn't have discretion over plan investments. If you prefer to maintain control of your plan's investments, you would want to work with a 3(21) advisor.
  - If your goal is to fully limit your fiduciary liability, choose a 3(38) Investment Advisor, who will have discretion and authority to manage the fund lineup.
- Allocate certain duties to others in accordance with plan procedures so that the scope of the trustees' duties is reduced. For example, an individual who is not a trustee may be designated as a fiduciary responsible for the participant loan program. (This is typically accomplished through an investment committee.)
- Allow participants to make their own investment decisions. If participant investment direction is implemented in accordance with Section 404(c) of ERISA, the trustees will be relieved of liability for the participant's investment decisions as to the participant's own account. (ERISA Section 404(c) requires the plan to provide participants a choice among at least three investment alternatives that are diversified and have materially different risk and return characteristics.)
- Conduct regular trustees' meetings, keep meeting minutes, and document the basis for any changes made, particularly investment decisions and decisions concerning applications for participant loans.

CONCLUSION: HAVE YOUR QRP REVIEWED

It is imperative that you periodically have a third-party firm review and identify potential issues in your 401(k) plan, as this analysis can identify material areas that are lacking. Establishing this process, in addition to the other actions recommended above, will help to reduce your personal liability for any potential breach of duty.

Maintaining and reviewing key advisory relationships that help your practice navigate the complex qualified retirement plan world should provide some additional peace of mind. Most importantly, an audit of your plan through an independent benchmark study will allow you to better understand the fees you are paying and the services being offered to your employees. ■

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