Abstract

Research conducted by Abernathy Daley 401k Consultants ("Abernathy-Daley") has determined that approximately:

-43% of companies across the United States have at least one of four major red flag violations in their retirement plan that can lead to governance and compliance-related issues, which may result in violations, lawsuits, and/or fines.
-76% of American-based companies have at least one of four major red flag violations that represent a fiduciary failure from either the plan administrator or plan sponsor.

In total, approximately 84% of plans have at least one red flag violation that puts them at regulatory risk indicating their failure as fiduciaries.

Methodology

Abernathy-Daley analyzed the latest Form 5500 filings for 764,729 plans in our database, identifying and tagging each plan with any red flags from their most recent filing. We define red flag violations as either "infractions, fineable offenses, fiduciary failure, or plan malpractice." All red flags considered for this study are defined as plan mismanagement and, in some cases, malfeasance. Abernathy-Daley classifies red flags under two main categories: Regulatory Infraction Red Flags (RIRF) and Egregious Plan Mismanagement Red Flags (EPMRF). This analysis was performed on the total number of plans across the nation and parameters were introduced to determine the total number of plans that had at least one red flag within the two predetermined sets of red flags, which were divided by our view on severity.

Abernathy-Daley then extracted the raw data and analyzed it to determine the overall percentage of plans within the study that have at least one red flag in the RIRF category, one red flag in the EPMRF category, and the total percentage of plans that have at least one "Overall Red Flag". The findings of the Abernathy Daley study can be found below.

Analysis

Abernathy-Daley has found that 84 percent of plans across The United States have at least one potential regulatory infraction that we categorize as either a RIRF or EPMRF. **This alarming realization points to the overall state of the corporate retirement industry and the extent to which it is being improperly executed. After all, when 84% of any category of data indicates corporate mismanagement or a failure of a corporation's fiduciary responsibility to an employee, it is alarming.**

Not included in the figures above, but worth noting due to the gravity of mismanagement and the frequency of fines are the excessive fees for administrative services and employee investment choices. Abernathy-Daley published research in October 2024 demonstrating that at least 80% of plans in the United States are paying administrative fees in excess of the market rate. This research report focuses on administrative infractions; however, it is critical to note that overpaying for services and funds is also defined as fiduciary failure and can lead to class action lawsuits and fines.

Most reasonable observers would think that the overpaid administrators would be offering incredibly valuable advice that would keep the Plan Sponsors out of harm's way. Yet, from the data we have observed so far, it appears to be the exact opposite.

Key Findings

Firstly, our analysis of our database looked at the Regulatory Infraction Red Flags (RIRF), because they are the most severe violations. This category represents issues within the plan that can result in civil legal penalties, discovery leading to a trial, or both. For this category, we selected:

-Loss from fraud or dishonesty,
-No qualified default investment alternative (QDIA)
-Insufficient fidelity bond, and:
-Not 404(c) compliant[1]

328,833 retirement plans, approximately 43%, in The United States have at least one RIRF.

Next, Abernathy-Daley analyzed 764,729 defined contribution plans in the country and looked at the next category, Egregious Plan Mismanagement Red Flags (EPMRF). This category can be defined as plan issues that may not necessarily result in a fine, yet in our view indicate a total failure:

-Of the administrator in their fiduciary duty to the plan sponsor, and:
-Of the plan sponsor in their fiduciary duty to their employees

The specific violations in this category are:
-No automatic enrollment
-No corrective distribution of excessive contribution was made
-Non 404(c) with participant-directed accounts
-Failed to transmit payment on time.

584,113 retirement plans had at least one EPMRF in the U.S., representing approximately 76% of the total plans.

Lastly, we combined both categories to determine how many companies in America have at least one red flag, whether it be a RIRF or an EPMRF. Our findings determined that out of 764,729 plans, 639,741 companies have at least one red flag that either puts them at regulatory risk or proves their failure as a fiduciary, a staggering 84% of plans.

Monetary Penalties: Is Your 401(k) Plan at Risk?

In 2024 alone, the Employee Benefits Security Administration's (EBSA)[1] legal proceedings restored nearly $1.4 billion to employee benefit plans, participants, and beneficiaries. EBSA's ensuing criminal investigations led to the 68 indictments and 161 convictions or guilty pleas, including from plan officials and corporate officers.[i] Further, the EBSA closed 729 civil investigations with $721 million in corrections in FY 2024. While this figure represents corrections rather than fines, it provides an indication of the scale of compliance issues addressed[ii]. In 2023, the number of settlements indicated a considerable increase to 42, compared with 31 in 2022, 26 in 2021, and just 12 in 2020.[iii]

In a more recent example – in January 2025, Vanguard, one of the largest plan custodians, paid $104.6 million in fines to the Security Exchange Commission for misleading investors regarding their Target Date Funds, along with $40 million in fines to the 401(k) plan participants[iv].

Summary

Research by Abernathy-Daley completed on our database of all U.S.-based pension plans filing a Form 5500 has determined that 43% of plans across the country have Regulatory Infraction Red Flags, 76% of plans have Egregious Plan Mismanagement Red Flags, and 84% of plans have at least one of either category of Red Flags. This research paints a dark picture of the retirement plan industry in America. Building off of our previous research on excessive fees, determining that 84% of plans across the entire United States have at least one major issue in their plan is an indictment of the retirement plan industry.

These two determinations suggest that employees and companies are not only overpaying for their retirement plans but they are also being underserved and exposed to unplanned risks. The breadth of the problem implies complacency within the industry and an overall willingness to minimize the effort put into advising the plan and its participants.

The data in our database indicates a general lackadaisical attitude toward building and implementing a high-quality retirement plan. The very structure of a retirement plan – one of the most important tools that makes retirement itself a possibility – must be battle-tested and almost invincible. The fact that our database clearly shows over 80% of all retirement plans have questionable red flags, is disconcerting at least, and unacceptable at best.

How Plan Sponsors Can Ensure Compliance with ERISA Requirements for 401(k) Plans

Ensuring compliance requires 401(k) plan sponsors to take a comprehensive and proactive approach. First, establish and maintain proper documentation, ensuring the plan document is fully up to date. Retain a copy of the IRS favorable determination letter or other documentation supporting the plan's tax-qualified status. Regularly amend the plan document for legislatively required changes, with bi-annual reviews. Identify plan fiduciaries in your documents and trust agreement, updating the agreement and defining their responsibilities annually. Properly appoint plan trustees and execute the trust agreement in accordance with the plan's trust provisions.

Employee education is another crucial component. Plan sponsors should provide sufficient training on a one-on-one basis while also conducting monthly or quarterly group meetings. Ensure administrative employees and plan participants are well-informed and document the educational content provided.

Additionally, implement a prudent investment review process. Establish a written investment policy statement and ensure the plan sponsor and fiduciary advisor prudently select and review fund performance at least yearly. Perform a benchmark analysis annually through an independent third party acting as a legal fiduciary. Ensure the plan offers a broad range of investment options and distributes Summary Plan Descriptions (SPDs) within 90 days of coverage. Provide notices of material changes through a Summary of Material Modifications (SMM) and offer detailed information about investment options, risks, returns, and fees.
To ensure participants have full control over their investments, allow them to change investments at least quarterly, though daily changes are preferred. Notify participants of the plan's ERISA 404(c) status. Monitor and control plan expenses by conducting a benchmarking analysis, which will help review service provider fees and ensure they are reasonable. Comply with fee disclosure requirements, such as those on Form 5500.

Finally, establish plan committees and appoint suitable members. Maintain service contracts with all plan fiduciaries and service providers. Implement and document processes that demonstrate compliance with ERISA standards, creating a framework of accountability and adherence to regulations.

Footnotes

[1] A plan is ERISA 404(c) compliant if it meets certain requirements to protect plan officials from liability for poor investment decisions by employees.
[2] EBSA is a division of the Employee Retirement Income Security Act and is a division of the Federal Government

[i] EBSA website - https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/contributory-plans-criminal-project.pdf
[ii] https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2024.pdf
[iii] https://www.asppa-net.org/news/2024/2/ebsa-enforcement-recovers-more-14b-fy-2023-

[iv] SEC Website:https://www.sec.gov/newsroom/press-releases/2025-21