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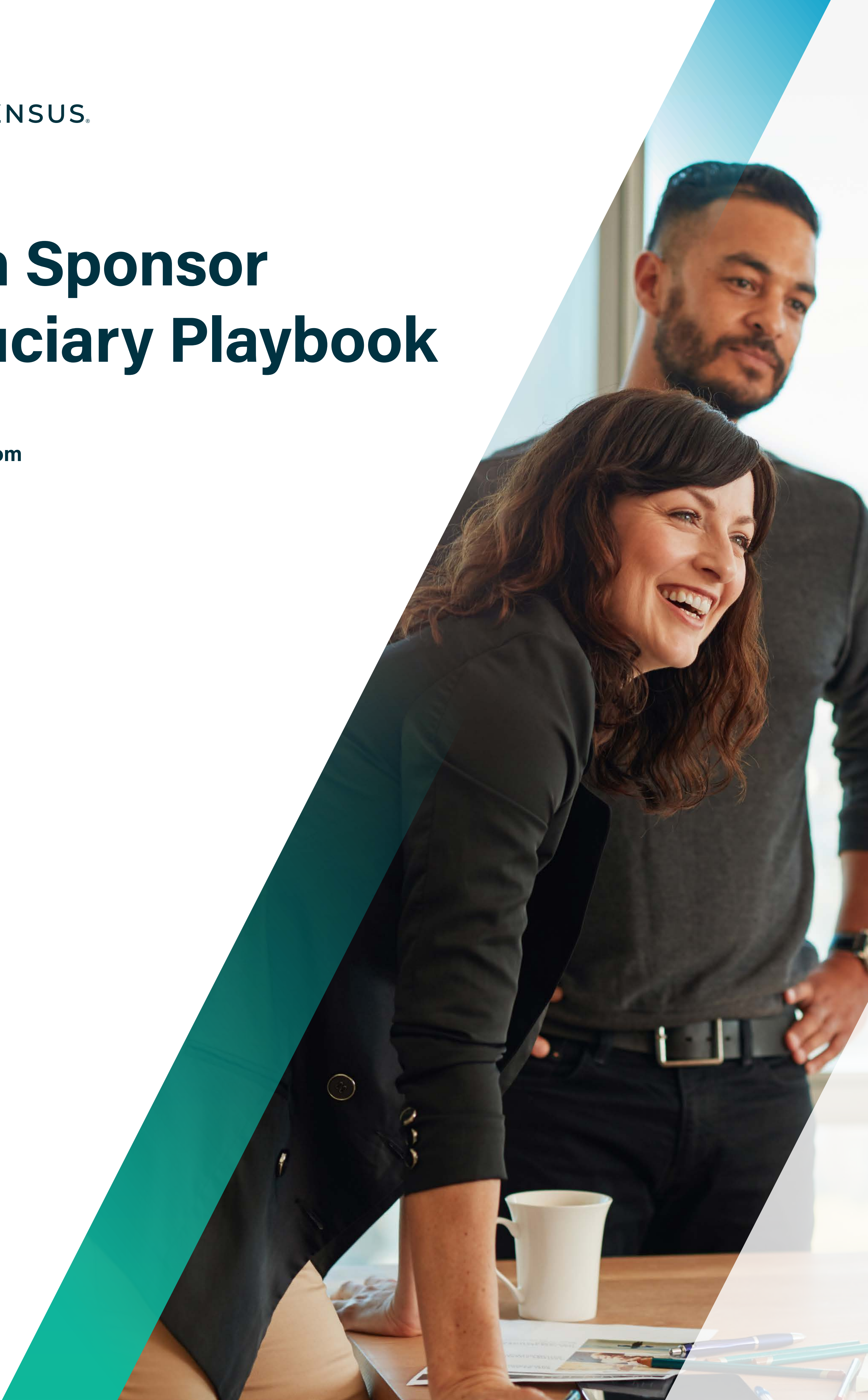
Plan Sponsor Fiduciary Playbook



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PLAYBOOK TIP

Use this playbook as a guide to keep your plan in compliance and avoid penalties.

Putting Together a 401(k) Game Plan

Establishing, managing, and administering a retirement plan requires a strong game plan. The table below outlines common misconceptions employers have about 401(k) administration to help you understand the landscape and your fiduciary responsibilities within it—so you can successfully execute your game plan.

PERCEPTION	REALITY
I don't have any fiduciary responsibility.	All plan sponsors retain some level of fiduciary duties—there's no way to outsource everything.
Third-party administrators (TPAs) take care of all my plan document and testing needs. I don't need to worry about how things run because I pay them to worry.	Third-party service providers are usually not fiduciaries. They only provide contract administrative services. Plan sponsors are ultimately responsible for knowing what their plan document says and making sure the plan operates according to that document.
All my participant notices are online so I don't need to send anything out.	The U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) have separate rules on electronic disclosures. Both require procedures to ensure actual receipt of the information. Recently, the DOL issued new electronic disclosure guidance requiring regular notices of the availability of documents online. Failure to meet the technical requirements for electronic disclosures is treated as failure to provide the required information. So, there is more to providing participant notices than just putting them online.
I don't have responsibility for investment decisions. My employees get to select whatever investments they want.	While the safe harbor provisions in Employee Retirement Income Security Act of 1974 (ERISA) Section 404(c) provides some relief for participant decisions (and indecision in the case of the Qualified Default Investment Alternative (QDIA), the plan sponsor is still responsible for prudent selection and monitoring of plan investment alternatives.
Our financial provider is responsible for plan investments.	Plan sponsors often believe that they have outsourced the investment management when they remain the responsible party.
A bank acts as trustee so I don't have to worry about the trust.	There are two kinds of trustees: directed and discretionary. The most common is directed. Directed trustees only act on the instruction of another fiduciary, so the plan sponsor usually retains all trustee responsibilities and pays someone else for the service.

Fiduciary Basics

As the employer, or "plan sponsor," providing the 401(k) plan, you incur fiduciary responsibility. To meet your fiduciary requirements, it's essential to understand the full range of responsibilities you face.

Q: Who is a fiduciary?

A: Under the Employee Retirement Income Security Act (ERISA), a fiduciary is any person who exercises discretionary authority or control over plan assets or administration or gives advice for a fee. Plan sponsors, plan trustees, plan administrators, 3(38) investment managers, and any fiduciary named in the plan document will always have fiduciary status.

Q: What is fiduciary responsibility?

A: Basic fiduciary duties involve acting solely in the best interest of plan participants and beneficiaries in providing plan benefits. There are ways to delegate responsibilities to other fiduciaries, but an employer will always be the main fiduciary with a duty to monitor the other fiduciaries.

Q: How do I know my fiduciary responsibilities?

A: Fiduciary duties and requirements are outlined and governed by ERISA. A fiduciary is also responsible for following the terms of the plan. See the Plan Sponsor Fiduciary Responsibilities section for more details.

Q: What happens if I do not meet the fiduciary responsibilities?

A: Failure to meet your fiduciary responsibilities can result in personal liability for any losses due to the breach. The DOL and IRS may assess civil and criminal penalties and excise taxes. A fiduciary may be removed or barred from being a fiduciary. 401(k) participants may sue plan sponsors for failing to act in the best interests of plan participants and their beneficiaries. Working with a financial advisor and/or an investment manager who understands the importance of upholding fiduciary governance structures can help you overcome this risk. You could also hire a TPA, recordkeeper, auditor, and/or legal counsel to help with the plan's administration.

Q: What is a pooled employer plan (PEP) and how does it affect my fiduciary responsibility?

A: The Setting Every Community Up for Retirement Enhancement (SECURE) Act created a new type of multiple employer plan called a PEP. Under a PEP, unrelated employers can join together and offer a retirement plan using a single plan document and Form 5500. The goal is to achieve economies of scale and bargaining power by combining many employers under one plan. A PEP is established by a pooled plan provider (PPP) who is the named fiduciary and plan administrator. It is expected that most PEPs will retain an ERISA 3(38) investment advisor. This combination will relieve employers who join the PEP from fiduciary responsibility for plan management, administration, and investments. Despite this reduction in potential fiduciary liability, employers will still retain fiduciary responsibility for the selection and monitoring of the PPP and other named fiduciaries. The employer will also have fiduciary responsibility over plan investments if a 3(38) investment advisor has not been appointed.

Plan Sponsor Fiduciary Responsibilities

1. **Act solely in the plan's best interest**

   The number one rule for all plan sponsors providing benefits to their participants and beneficiaries is to act in their best interest. This should be the first question you ask yourself when making any plan decisions.

2. **Act with prudence**

   ERISA requires a plan fiduciary to act with prudence. This involves carefully considering all courses of action for the plan's success, but also requires you to:

   - Seek out the guidance of experts to help guide the plan.
   - Document the decisions you make and your decision-making process, including how and why you choose providers, how providers are monitored, and how you measure the plan's success.

3. **Pay only for necessary and reasonable plan expenses**

   Plan sponsors must only pay for expenses that are necessary for smooth plan operation. These expenses must also be "reasonable."

   Reasonableness can be difficult to assess. The first step is to determine the fees you're paying to the service provider. Review their fee disclosure and ensure you understand the direct and indirect fees being paid. The next step is to get quotes from other service providers to see if the fees you're paying are comparable. You do not have to utilize the lowest cost service provider. The final step is to document the process and the reasons for your choice of service provider.

4. **Follow plan documents**

   Both ERISA and the Internal Revenue Code require that a plan be established and maintained in a plan document. The document and operation of the plan must also conform to the regulations under IRC §401(a). Your plan document serves as the foundation for plan operations. It will contain provisions for allocating fiduciary responsibility for administration, funding, and payment of benefits. A fiduciary must act in accordance with the terms of the plan document to the extent they are not inconsistent with ERISA.

5. **Comply with disclosure requirements**

   There are a number of DOL and IRS participant disclosure requirements plan sponsors must meet to ensure you avoid penalties and qualification issues.

   - **Investment and fee disclosure (ERISA 404(c)):** If the plan investments are participant directed, and the employer is intending to satisfy the requirements of ERISA 404(c), plan sponsors must provide them with sufficient information to make informed choices. Providing an investment and fee disclosure fulfills the sufficient information requirement and acts as an insurance policy for the fiduciary—it protects you from poor investment choices participants might make.
   - **Fee disclosure (ERISA 404(a)(5)):** Plan sponsors must obtain fee disclosures from all plan providers, and this information must be relayed to all plan participants in a timely manner.
   - **Other disclosures:** Depending on plan type and provisions, these can include safe harbor notice, summary plan description (SPD), summary of material modification (SMM), summary annual report (SAR), auto-enrollment notice, and employee benefit statements, among others.

6. **Diversify investment options**

   A fiduciary may want to diversify the investments of the plan so as to minimize the risk of large losses, unless circumstances prove this to not be prudent. There are no strict rules to follow to ensure diversity, but generally, there should be a broad range of conservative to aggressive investments to account for participants with different levels of investment sophistication and risk tolerance.

Penalties

Potential penalties for failure to fulfill your fiduciary obligations may include the following:

- A fiduciary may be held personally liable for the restoration of any losses or profits made through the use of plan assets.
- Monetary penalties may be issued for failure to disclose plan information to participants.
- The DOL and IRS can assess civil penalties, excise taxes, and criminal penalties for other compliance failures.
- In some cases of compliance failure, the DOL can remove fiduciaries and seize control of all plan management.

Failure to fulfill your fiduciary obligations has serious consequences.

AVOID THESE COMMON ERISA FAILURES

FAILURE to deposit plan contributions and loan repayments in a timely manner.

FAILURE to sign plan documents.

FAILURE to monitor fund performance and fee costs.

FAILURE to offer diversified fund selection.

NOTE: Your financial advisor and TPA will help you fulfill these duties, but you bear ultimate responsibility for them.

Types of Fiduciaries

NAMED FIDUCIARY

Every plan must have at least one person or entity designated in the plan documents as the fiduciary of the plan. The named fiduciary may:

- Hire a service provider such as a recordkeeper, third-party administrator, or auditor
- Interpret plan provisions

INVESTMENT FIDUCIARY

The investment fiduciary is responsible for selecting the investment funds available within the plan. The investment fiduciary:

- Selects and monitors 3(38) investment managers
- Sets investment policies for the plan

INVESTMENT MANAGER

The investment manager, also known as a 3(38), assumes full discretionary responsibility for selecting and monitoring plan investments. Under ERISA, the investment manager must be a bank, insurance company, or registered investment advisor.

INVESTMENT ADVISOR

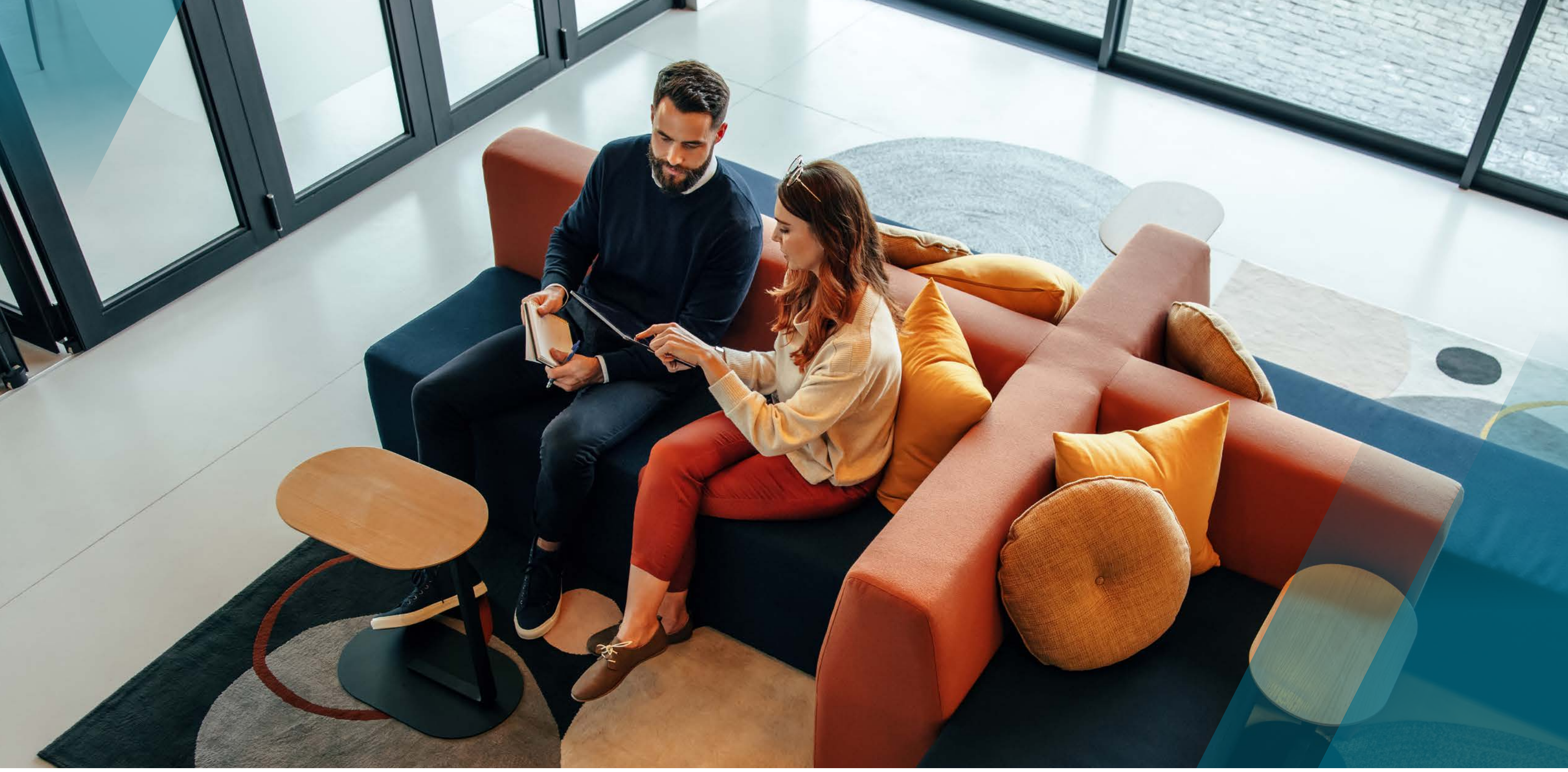
A 3(21) investment advisor shares the fiduciary responsibility with you, although you still have the responsibility to monitor the performance of the 3(21) fiduciary. Financial advisors can become the 3(21) investment advisor if they provide investment advice for a fee.

PLAN ADMINISTRATOR

Under ERISA Section 3(16), the plan administrator must ensure all filings with the federal government and all plan participant disclosures are made in a timely manner. The plan administrator is generally the person responsible for the day-to-day operation and administration of the plan. These duties include determining eligibility, computing plan contribution amounts, maintaining plan records, preparing and filing plan informational returns, furnishing employee notices, information and reports, interpreting plan provisions, and determining the benefits allocated to each individual. Typically the plan administrator is fulfilled by the plan sponsor, however, they can outsource these duties to another party, such as a financial advisor or third-party administrator.

TRUSTEE

ERISA Section 403 requires plan assets to be held in a trust which is managed by one or more trustees. A trustee is either named in the trust or plan document or appointed by a person who is a named fiduciary. A trustee has exclusive authority and discretion to manage and control the plan assets; however, a plan can provide that the trustee is subject to the direction of a named fiduciary who is not a trustee ("directed trustee"). The trustee is not the same as the custodian of the plan.



Plan Sponsor Best Practices for Maintaining ERISA Compliance

- Operate your plan within ERISA 404(c) safe harbor provisions. Meeting the requirements of 404(c) protects you from penalties, civil action, and criminal action in the event your plan's performance is in question.
- Identify a purpose and the main objectives for the plan. Include how the objectives will be monitored and measured so you can document progress or address lack of progress.
- Regularly review all parties associated with the plan, the plan itself, and its fees and expenses. Have a policy to determine how all parties are monitored, the frequency of the review, and benchmark against the industry to ensure costs are reasonable. Be sure to retain all plan records.
- Work with your financial advisor and/or investment manager to monitor plan investments and expenses as required by ERISA, and to stay informed about ERISA updates.
- Provide information that allows your participants to make informed investment decisions.
- Make sure that all plan fiduciaries are eligible to serve as ERISA fiduciaries. Fiduciaries should create policies and procedures that help ensure the administration of the plan follows regulations and the document. Refer to ERISA Section 411 for specific eligibility criteria.
- Think about purchasing optional fiduciary liability insurance. This is different from the fidelity bond that protects the plan against losses caused by fraud or dishonesty. The fiduciary insurance protects fiduciaries against a breach of fiduciary duties, negligence in administrations of the plan, or claims based solely on their role as fiduciary.

Financial Advisor Fiduciary Support

Working with a financial advisor who has a strong understanding of fiduciary responsibility and ERISA compliance not only enhances your strategy but also provides an added layer of fiduciary support to your plan.

When selecting a financial advisor, look for someone who possesses the knowledge base to assist you with the appropriate fiduciary tasks or offers a retirement plan that has a fiduciary service included. Some key criteria to consider when choosing a financial advisor are that they:

1. Understand the laws and compliance regulations surrounding 401(k) plans.
2. Understand fiduciary requirements and are willing to help you identify your fiduciary options and make decisions in the plan's best interest.
3. Provide plan Investment Policy Statement (IPS) assistance. The DOL has stated that the creation and adoption of a written IPS is consistent with ERISA's fiduciary obligations. A sound IPS includes the overall investment strategy, list of potential investment categories, performance monitoring statement, and intention to comply with ERISA 404(c), if applicable. Your financial advisor can provide information on how to draft an IPS for your plan.
4. Select diversified investment offerings for your plan.

POST-GAME WRAP UP

You can build a successful 401(k) plan for your participants, save time, and maintain ERISA compliance when you work with a fiduciary-focused financial advisor and Ascensus.

A PARTNER YOU CAN TRUST

Ascensus is the largest independent recordkeeping services provider, retirement plan third-party administrator, and government savings facilitator in the United States.[1]

153,700+ retirement plans administered[2]

4.7+ M retirement plan participants[2]

$818+ B in assets under administration[2]

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Winner in the recordkeeping category[4]

Retirement Leader of the Year[5]

[1] Cerulli Associates. *The Cerulli Report: U.S. Retirement Markets 2023*. December 2023.
[2] As of June 30, 2024.
[3] PLANSPONSOR. 2023 Defined Contribution (DC) Survey. February 2024.
[4] PLANADVISER. 2023 Retirement Plan Adviser Survey. March 2024.
[5] With Intelligence. With Intelligence Mutual Fund & ETF Awards. June 2024.

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