

RETIREMENT PLANS

A Primer on Plan Options, Fiduciary Duties & Potential Pitfalls

ACBA BENCH-BAR

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Faculty Biographies

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Elisa is a financial advisor with Hefren-Tillotson where she provides comprehensive financial planning, estate planning and investment advisory services for individuals, municipal pension plans, and qualified retirement plans. Prior to joining Hefren-Tillotson, Elisa was general counsel for Pittsburgh History & Landmarks Foundation and Station Square, and managed the community revitalization program for the National Trust for Historic Preservation in Washington, DC. Elisa graduated *magnum cum laude* from Tufts University; received her JD from Northeastern University School of Law, and holds her Series 7 and 66 securities licenses.

Nicholas J. Zapf, President of Dunbar, Bender & Zapf.

- Nick works with accountants, financial advisors and attorneys to help clients customize their retirement plan programs. He helps employers establish new 401(K) plans, modify the design of existing plans or add a second cash balance plan to increase contribution levels. Nick is a member of the American Society of Pension Professionals and Actuaries (ASPPA) and has attained the professional designations of Certified Pension Consultant (CPC) and Qualified Pension Administrator (QPA) through the ASPPA.

AGENDA

- Overview
- Retirement Plan Options
- Multiple Employer Plans
- Understanding Fees & Expenses
- Fiduciary Duties
- Recent Litigation

ERISA

Employment Retirement Income Security Act

Federal law that sets minimum standards for retirement plans in private industry.

- ❑ Must provide participants information about plan (features & funding)
- ❑ Sets minimum standards for participation, vesting, benefit accrual and funding
- ❑ Requires accountability of plan fiduciaries
- ❑ Gives participants the right to sue for benefits and breaches of fiduciary duty
- ❑ If plan is terminated, guarantees payment of certain benefits through the Pension Benefit Guaranty Corporation

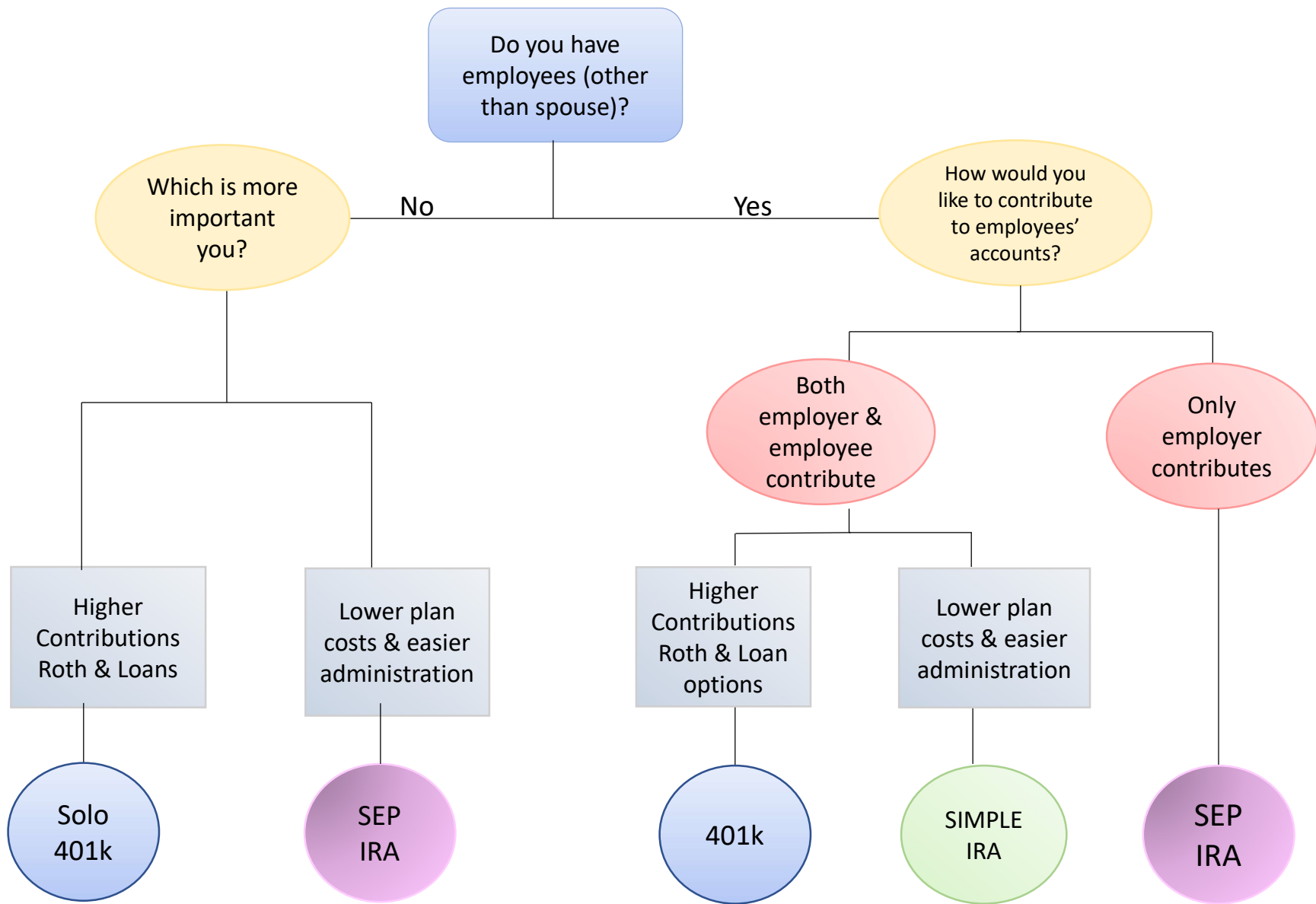
CHOOSING A PLAN

DEFINE YOUR GOALS BEFORE CHOOSING A RETIREMENT PLAN

Do you want:

- To maximize the amount YOU can save for your retirement?
- A plan funded by employer contributions? Employee contributions? Both?
- A plan allowing pre-tax and/or Roth contributions?
- Flexibility to skip employer contributions?
- A plan with the lowest costs? Easiest to administer?





TYPES OF PLANS

Which Plan Is Right For You?

- **IRA-based:** SEP IRAs (Simplified Employee Pension) and SIMPLE IRAs (Savings Incentive Match Plan for Employees)
- **“Qualified” Plans:** Defined Benefit Plans (Pensions)
Defined Contribution Plans
 - * Individual and Group 401(K) Plans
 - * Profit Sharing & Cash Balance Plans
- **Key Benefits:** Helps you and your employees save for the future
Provides Tax Advantages
Attract and retain employees

Types of Plans

Simplified Employee Pension (SEP IRA)

Key Benefits:

- Easy to set up (IRS Form 5305-SEP); minimal reporting requirements
- Employer creates individual SEP IRAs for each qualified employee
- Only the employer contributes; no employee contributions
- Employer contribution limit (pre-tax): 25% of compensation up to \$61,000 (for 2022)
- Same percentage contribution to all qualified¹ employees (no discrimination)
- Employer contributions are **discretionary** (reduce or skip in bad years) and tax-deductible for the business owner.

1. Age 21+, has worked for you 3 of last 5 prior years and earned \$650+ in 2021 & 2022

Types of Plans

“SIMPLE” IRA PLAN

“SIMPLE” = Savings Incentive Match Plan for Employees

- Businesses with 100 or fewer employees
- Established as an employee-owned traditional IRA (not Roth) but with higher contribution levels.
[see IRS Form 5304 or 5305-SIMPLE]
- Funded With:
 - (1) **optional** pre-tax employee contributions, and
 - (2) **mandatory** matching or non-elective employer contributions
- Can deduct contributions to a SIMPLE IRA from business income
- All contributions are immediately 100% vested.



NOTE: Employees can open a separate traditional or Roth IRA to save more money.

SIMPLE IRA PLANS

Employee Maximum Pre-Tax Contributions:

- \$14,000 (for 2022)
- \$3,000 (catch-up contribution for individuals age 50 and over)

Employer Contributions are either:

- Matching: For each employee who contributes, employer makes dollar-for-dollar match up to 3% of employee's pay. Match capped at \$14,000 (\$17K if age 50 or older). Lower percentage match permitted for 2 out of 5 years.

- OR -

- Fixed Contribution: For each eligible employee, employer contributes 2% of pay even if employee does not contribute to the plan. Compensation capped at \$305,000 for 2022.

SIMPLE IRA

				Option 1	Option 2
	Employee Compensation	Deferral Percentage	Amount Deferred	Dollar-for-dollar match up to 3% of pay ²	Non-elective 2% of pay ³
Attorney 50 +	\$600,000	Max.	\$17,000 ¹	\$17,000	\$6,100
Attorney <50 yr.	\$400,000	Max.	\$14,000	\$12,000	\$6,100
Paralegal	\$60,000	6%	\$3,600	\$1,800	\$1,200
Assistant	\$45,000	0%	\$0.00	\$0.00	\$900
Law Firm: Total Contribution				\$30,800	\$14,300

1. \$14,000 max. contribution. \$3,000 “catch-up” for employees age 50 & older.
2. May be reduced to 1-2% but for no more than 2 out of 5 years
3. Maximum salary taken into account is \$305,000 for 2022

Individual 401(K)

401(K) plan designed for self-employed individuals or small business owners (regardless of business structure) who have no other full-time employees (other than spouse).

- Make contributions as both employee & employer
- Employee : Defer up to \$20,500 (plus \$6,500 catch-up if age 50 and older)
- Employer profit sharing contribution: Up to \$40,500
- Total contribution: \$61,000 (\$67,500 with catch-up contribution)
- Not subject to ERISA

Individual 401(K)

Advantages:

- High contribution limit @ \$61,000 (\$67,500 if age 50 or older)
- Roth option available (unlike SEP)
- 401(K) Loans may be permitted (unlike a SEP)
- Contributions are discretionary
- Can accept rollovers from an IRA, SEP, or prior-employer 401(K),



Disadvantages:

- Set up (more paperwork) and on-going administrative costs (generally higher than a SEP)
- May not meet future needs (business grows/more employees)

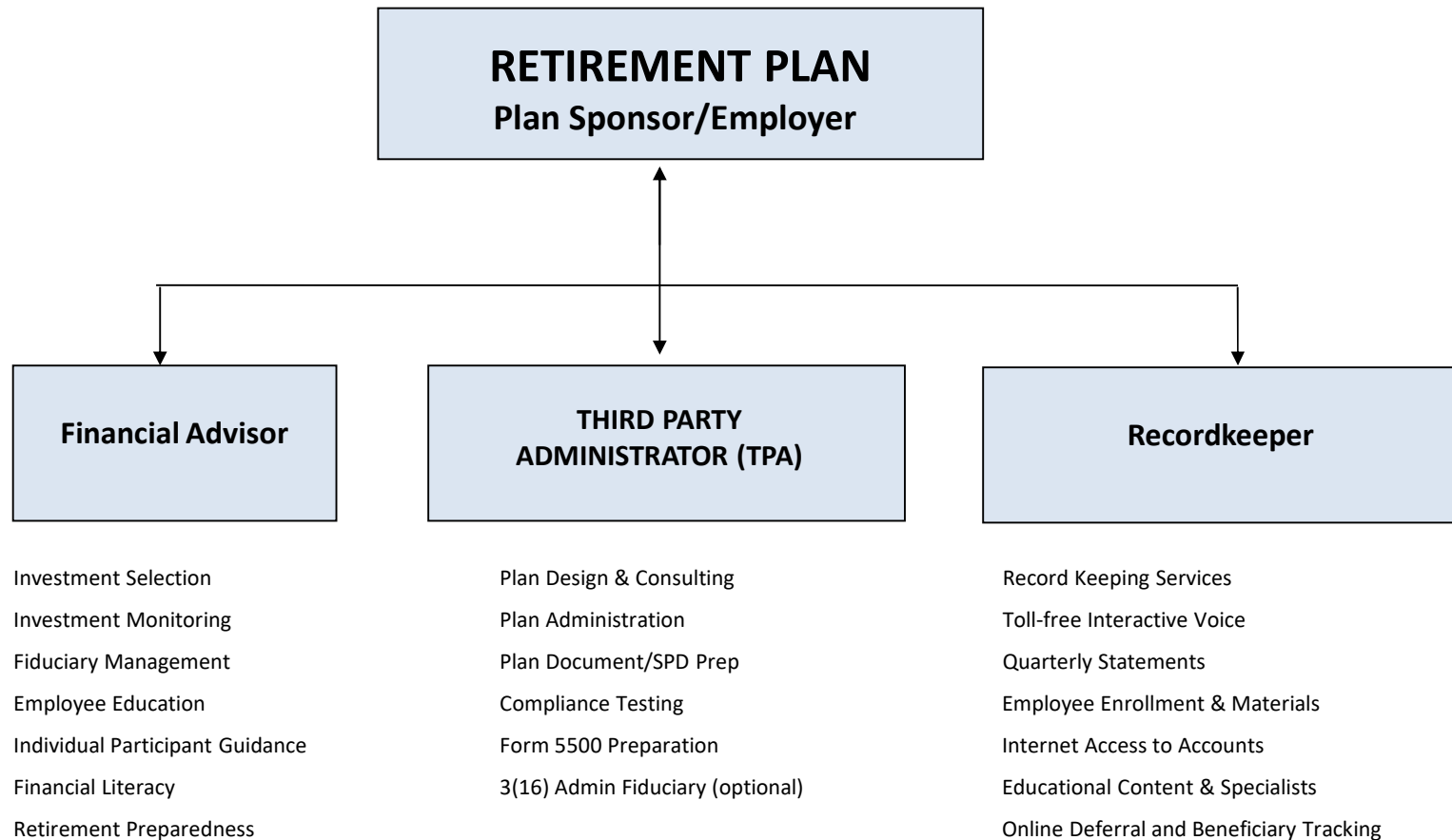
Additional Plan Design Options

In addition to SEP and SIMPLE IRAs and individual 401(K) plans, the following plan design options exist for medium-to-large sized companies:

- Profit Sharing
- 401(k) Profit Sharing
- 401(k) with Safe Harbor
- New Comparability Profit Sharing with 401(k)
- Defined Benefit (including Cash Balance Plan)

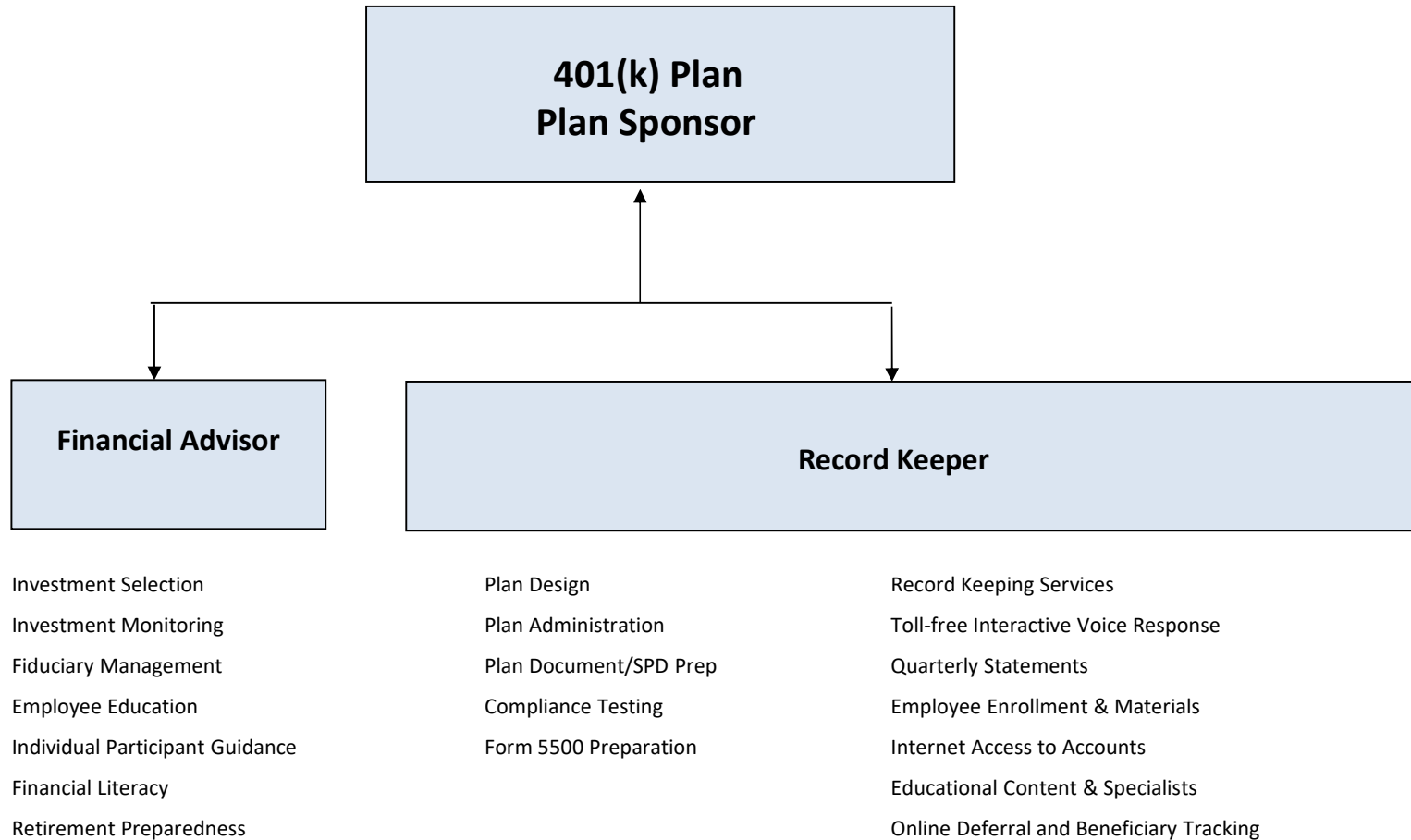
Know the Players

“Unbundled” Plan Set-up



Know the Players

“Bundled” Plan Set-up



Required 401(K) Documents

- **Plan Document**
- **Plan amendments and corresponding resolutions**
- **Summary Plan Description (“SPD”)**
- **Summary of Material Modifications (“SMM”)**
- **Trust Documents (if applicable)**
- **Summary Annual Report**
- **Evidence of Fidelity Bond (if applicable)**
- **Fiduciary Liability Insurance Policy (if obtained)**
- **Notice to plan participants that Plan intends to comply with §404 (c)**

Required 401(K) Documents

Service Agreements - including all applicable costs - with

- 401(K) Plan Recordkeeper
- Third Party Administrators
- Financial Advisor

Participant Documents (may be retained in personnel file)

- Enrollment form
- Beneficiary designations
- Deferral amount/changes
- Requests for loans and hardship withdrawals

Required 401(K) Documents

Form 5500 (including all schedules)

Records of non-discrimination testing

Fiduciary Review

- Investment Policy Statement
- Investment Performance Reporting
- Plan Cost Disclosure
- Form ADV Part II

Plan Design: Profit Sharing

- Contribution limit- up to \$61,000
- Age and earning considerations
- Emphasize discretionary
- Dial up, dial down
- New Comparability (Group Allocation)

Plan Design: 401(k) Plans

- Deferrals permitted up to \$20,500 for participants under age 50
- Deferrals permitted up to \$27,000 for participants age 50 and older
- Traditional pre-tax or Roth deferrals permitted
- Discrimination Testing
 - Highly Compensated Employees (HCE's) versus Non-Highly Compensated Employees (NHCE's)

Safe Harbor 401(k) Plan

- Exemption from ACP/ADP testing
- Two Basic Formulas:
 - **3% Non-Elective**
 - 100% match on employee contribution up to first 3% of pay and 50% match on next 2% (4% max)
 - Plan may adopt 3% non-elective safe harbor up to 30 days prior to plan year end.
 - Plan may adopt 4% non-elective safe harbor up to 12 months after plan year end
- 100% vested immediately
- Required for each elected year
- Notice requirements

Cash Balance Plans

ADVANTAGES



Greater Tax Savings

The ability to make larger contributions in a Defined Benefit Plan results in greater tax deductions for business owners.



Larger Retirement Benefits

Substantial benefits can accrue over a shorter period of time enabling business owners to maximize retirement savings.



Employee Retention

Defined Benefit Plans allow business owners to offer key employees attractive benefits while simultaneously increasing personal savings.

Ideal Cash Balance Plan Candidates

- Owners who want to save more for retirement, deductions
- Owners typically at least 40 years old
- Companies with consistent profits, salaries over \$305K
- Smaller closely held businesses, typically 25 lives and under
- Business succession

Case Study – No Existing Plan

- New Business / New Owner
- Additional Tax Deductions
- Not Familiar with Plan Design Options or Associated Costs
- Maximize Benefit to Owner

Case Study – Inside The Numbers

	Employee Deferral	3% Safe Harbor Non Elective	Additional Discretionary	Catch Up	Total Cost Employer	% of Total Cost
Owner	\$20,500	\$9,150	\$31,350	\$6,500	\$67,500	88.21%
Staff		\$6,109	\$2,912		\$9,021	11.79%
Total					\$76,521	

- \$67.5K better than \$20.5K
- 88 cents on the retirement dollar stays with owner
- Tax deferrals for owner and tax savings for company

SECURE Act

▪ Tax Credits

- Start up plan tax credits for up to 50% of “Qualified Start Up Costs”
- Automatic Enrollment Credit; \$500 for the first 3 years

- ## ▪ New Plan Adoption
- Deadline to adopt a plan is earlier of the extended due date employer’s tax return or funding due date of plan.

- ## ▪ Required Minimum Distributions
- raised to age 72

- ## ▪ Inclusion of Part-Time Employees
- Employers must allow part-time employees, who are at least age 21, to contribute to a 401(k) plan if the employee worked 3 consecutive 12 month periods with 500 or more hours.

- ## ▪ Qualified Birth or Adoption Distribution
- Participant may request a distribution of up to \$5,000 within one year following birth or adoption of a child.

Plan Limits – Numbers to Know

Age Range	401(k) only	401(k) w/ Profit Sharing	Cash Balance (Avg)	Total
35 - 39	\$20,500	\$61,000	\$91,100	\$152,100
40 - 44	\$20,500	\$61,000	\$116,800	\$177,800
45 - 49	\$20,500	\$61,000	\$149,700	\$210,700
50 - 54	\$27,000	\$67,500	\$191,900	\$259,400
55 - 59	\$27,000	\$67,500	\$246,200	\$313,700
60 - 65	\$27,000	\$67,500	\$301,200	\$368,700

	ERISA	Employer Contrib.	Employee Contrib.	ROTH Option	Loans Allowed	Contribution Limit
IRA	No	No	√	√	No	\$6,000 < 50 \$7,000 50+
SEP	No	√	No	No	No	\$61,000 (limited to 25% of compensation)
Simple IRA	√	Mandatory	√	No	No	\$14,000 < 50 \$17,000 +50
Solo 401(k)	No	√	√	√	√	\$61,000 < 50 \$67,500 50+
401(k)	√	Optional	√	√	√	\$20,500 < 50 \$27,000 50+
Safe Harbor 401(k)	√	Mandatory	√	√	√	\$20,500 < 50 \$27,000 50+

Conversion of Pre-Tax 401(K) to Roth 401(K)

- From 2006 until September 27, 2010
 - Pre-tax 401(k) balances were not allowed to be converted to a 401(k) Roth account
- Small Business Jobs Act of 2010 created In-plan Roth Rollover Conversion (IRR) to designated Roth
- American Taxpayer Relief Act of 2012 created in-plan Roth transfer
- 2013 In-Plan Roth Transfers, No Distribution Event Required

Roth Conversion Participant FAQs

Whether conversion is right for an individual depends on a number of factors:

- Tax free earnings
- Whether tax rates lower now than when distribution made
- Estate tax planning: With Roth IRA there are no RMDs, leaving entire amount to beneficiaries
- Do you need withdrawals within next 5 years?
- Where is money coming from to pay taxes on the conversion amount?

Multiple Employer Plans

- ERISA prevented “Open MEPs” – plans with no relationship among employers other than participation in a MEP.

- **SECURE Act** –
 - ✓ Easier for small businesses to create MEPs;
 - ✓ Eliminated “one bad apple” liability risk
 - ✓ Allows single Form 5500 filing (with single audit)

- **Looking Forward**
 - ✓ Fiduciary responsibility?
 - ✓ How will administrative & recordkeeper providers be chosen?
 - ✓ Required degree of involvement of participating employers?
 - ✓ IRS proposed MEP rules in Federal Register 03/28/2022

Plan Expenses – Who Pays?

Per GAO report 4 in 10 people in 401(K) plans believed they weren't paying any fees¹.

- ❑ Reasonable “administrative” expenses allowed (Financial advisors, recordkeeping, audit, compliance testing by TPA)
- ❑ Who Pays –
 - Employer/Plan Sponsor,
 - Employees/Plan Participants
 - Shared Costs
- ❑ Overt Fees vs. Embedded Expenses



1. GAO-21-357 Published 7-27-2021

Six Basic Fiduciary Responsibilities

- 1. Act solely in the interest of participants and beneficiaries.**
- 2. Carry out duties with skill, prudence & diligence.**
- 3. Follow plan documents.**
- 4. Diversify plan investments (choose & monitor).**
- 5. Pay only reasonable expenses for administration & investing.**
- 6. Avoid conflicts of interest.**

It's been a bull market for litigation

Abbott v. Lockheed Martin - \$62M

Tussey v. ABB, Inc. - \$55M

Spano v. Boeing - \$57M

Martin v. Caterpillar, Inc. - \$16.5M

Krueger v. Ameriprise Financial - \$27.5M

Sweda v. University of Penn. - \$13M

Clark v. Duke University - \$10.65M

Tracey v. MIT \$18.1M

Vellali v. Yale University Pending

Divane v. Northwestern Dismissed

Legal Fees Awarded to Schlichter, Bogard & Denton:

Lockheed @ \$20.67 million

Tussey @ \$18.3 million

Litigation Issues

ERISA: 29 U.S.C §1103(c): Assets of a plan must “be held for the exclusive purpose of providing benefits to participants ... and defraying reasonable expenses of administering the plan.”

Primary Litigation Issues

- **Quality and Quantity of Investment Options**
- **Use of Proprietary Funds (conflict of interest)**
- **Investment Fees**
- **Record Keeper Fees & Revenue Sharing**
- **Failure to Seek RFPs for Service Providers**
- **Use of Annuities**

Tracey et al. vs. M.I.T

1. Alleges that Fidelity, as record keeper, engaged in a quid-pro-quo arrangement with MIT & charged excessive fees (among other allegations).
2. MIT disregarded recommendation of outside law firm and consultant to alter relationship with Fidelity.
3. Dean of Sloan School email, *“If we are not switching to Vanguard or TIAA-CREF, I am going to expect something big and good coming to MIT from the Johnson family.”*
4. Abigail Johnson, Fidelity’s CEO, donated \$5M to MIT
5. Case Settled for \$18.1 million (2019).

Sweda V. University of Pennsylvania

403(B) Plan: Over \$4 billion in assets using Vanguard funds & TIAA-CREF

- Case Filed 2016; District Court dismissed in 2017; 3rd Circuit reinstated 2019
- SCOTUS declined to review petition reverse appeals court decision
- Settled for \$13 million in 2021
- Breach of Fiduciary Duty re: failing to negotiate lower fees and improper investments
- 3rd Circuit Court found fiduciary breach claims are inherently factual, relate to the merits and should not be decided at the motion-to-dismiss stage. No. 17-3244 Slip Opinion (3d Cir. 5-2-19)
- **Impact: Move to discovery phase; increases settlement potential**

Sweda v. University of Pennsylvania

Dissenting Opinion

Third Circuit Senior Judge Jane Richards Roth's dissent:

The majority decision encourages litigation against fiduciaries of large plans and places them *“in an unenviable position, in which [they have] every incentive to settle quickly to avoid (1)expensive discovery and further motion practice, (2) potential individual liability for named fiduciaries, and (3) the prospect of damage calculations, after lengthy litigation, with interest-inflated liability totals.”*¹

Any recovery to plan participants may not be meaningful because *“a substantial portion... are instead diverted to attorney's fees.”*²

1. Slip Op., Roth J., dissenting at 1.
2. Id. at 3, 7

Sulyma v. Intel

ERISA's statute of limitations bars claims brought after the earlier of:

6 years after the date of the last action which constituted part of the violation,

OR

3 years after the earliest date on which plaintiff had actual knowledge of violation

ISSUE: For purposes of 3-year limit, what constitutes "actual knowledge?"

Sulyma v. Intel

Background:

- Intel 401K plan included “alternative investments” with higher fees such as hedge funds and commodities. Performance lagged compared to index funds and comparable portfolios.
- Plaintiff’s Claim: Breach of fiduciary duty and failure to adequately disclose investment risks.
- District Court ruled for Intel based on 3-year SOL holding that comprehensive notices and disclosures to plan participants/plaintiff resulted in “actual notice.”
- 9th Circuit reversed holding that if Sulyma never looked at documents he cannot have “actual knowledge.”

Sulyma v. Intel

SCOTUS: Justice Alioto

- “Does a plaintiff have ‘actual knowledge’ of information contained in disclosures that he receives but does not read or cannot recall reading? We hold that he does not, and therefore affirm.”
- Other sections of ERISA statute provide for “constructive knowledge” but not for the statute of limitations section [see §413(a)(2)(A)]
- Decision doesn’t preclude an argument of “willful blindness.”

Must plan administrators require explicit acknowledgements that participants have read disclosures?

BITCOIN

- Fidelity to offer Bitcoin as an investment option for 401(K) plans**
- Employers would choose it as an investment option.**
- Allocation limited to 20% of employee's account by Fidelity**
- Warning from the Department of Labor**
- High risk; employer liability issues.**

Questions

Thank You!

