

The Retirement Times

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ERISA 3(38) Fiduciary Services

Most companies and organizations' human resources departments and C-suites are seeking efficiencies and risk mitigation for their entities. For those, and a myriad of other, reasons 3(38) fiduciary discretionary investment management services are getting a closer look by plan sponsors.

In exploring these 3(38) services it is important to understand that when you hear "3(38)" or "3(21)" it is understood that these are sections of ERISA that provide definitions for certain types of fiduciaries. As a result, it is important to understand there are significant differences between an ERISA 3(21) and 3(38) advisor in terms of investment services provided to the plan.



Simply stated, the ERISA 3(21) advisor makes investment recommendations to the plan fiduciaries (committee), but the decision to implement the recommendations and attendant legal responsibility still fall on the plan fiduciaries (oftentimes an authorized committee). "You can't blindly follow the recommendations of the 3(21) advisor. You have to make an independent decision, and though that's usually what the advisor recommends, you're not excused from making an informed decision just because the advisor recommended it," says Carol Buckmann, Esq.¹

Buckmann cautions, "You don't get told about the tremendous level of risk that you take on as the plan fiduciary when you start a 401(k)" Carol's insight revealed "...a litigation landscape littered with the lawsuits of plan sponsors who didn't do their due diligence." ... (in a 3(21) environment)¹

The ERISA 3(38) advisor encompasses the 3(21) responsibilities plus makes the actual investment selections and decisions based on plan needs and goals as conveyed to him by plan fiduciaries, so the 3(38) advisor is responsible for its own mistakes or mismanagement including reasonableness of performance and expenses. The plan fiduciaries are responsible for prudently selecting a good 3(38) and monitoring performance. But in terms of financial liability, if an ERISA 3(38) advisor is prudently appointed and monitored by the authorized fiduciary, the plan sponsor should not be liable under ERISA for the acts or omissions of the investment manager and will not be required to invest or otherwise manage any asset of the plan which is subject to the authority of the investment manager.²

A 3(38) Fiduciary may be a better choice for you if you want to maximize fiduciary liability protection for selection and monitoring plan investments, and/or have no internal plan fiduciary with the requisite expertise & credentialing to assume investment decisions and liabilities. Note that even a 3(38) cannot completely remove plan fiduciaries from all investment liability, as they retain the responsibility of monitoring the 3(38) advisor with regards to their suitability for the plan. However, the outsourcing of investment-related fiduciary responsibilities should also lessen the amount of time and attention that plan sponsors need spend administering their plan.

A 3(21) Fiduciary may be a better choice if you have the time, interest and investment expertise needed to monitor investment performance regularly, evaluate the 3(21)'s recommendations, and evidence that your investment decisions are in best interest of your plan participants while assuming the liability for determining reasonableness of investment costs and performance. The 3(21) advisor's job is to identify investments that are appropriate for the purposes of the plan and make appropriate recommendations to the plan's fiduciaries. The plan's investment committee is responsible for determining suitability for their plan from cost/benefit, risk/reward perspectives as well as appropriateness for your participants and plan goals.

Newly available pooled employer plans (you may have heard them referred to as PEPs) often incorporate a 3(38) investment advisor and other elements/entities meant to help plan sponsors offload even greater fiduciary responsibilities, potentially lower costs and streamline administration. If you are interested in learning more, ask your NFP/RPAG advisor about either 3(38) services or PEPs as an alternative.

¹ Carol Buckmann is a founding partner at Cohen & Buckmann PC, a boutique law firm practicing exclusively in the areas of employee benefits, executive compensation and investment adviser law. <https://www.forusall.com/401k-blog/3-21-fiduciary-vs-3-38/>

² ERISA Section 405(d)(1) https://advisor.morganstanley.com/the-trc-group/documents/field/t/tr/trc-group/Understanding_3_21_v_3_38_Fiduciary.pdf

What is an appropriate interest rate for plan loans?



Both, ERISA and the IRS requires that DC plan loans reflect a “reasonable rate of interest”.

DOL Reg Section 2550.408b-1 states that “a loan will be considered to bear a reasonable rate of interest if such loan provides the plan with a return commensurate with the interest rates charged by persons in the business of lending money for loans which would be made under similar circumstances.” A pre-existing DOL Advisory Opinion, 81-12A, suggests that plan sponsors should align their plan interest rate with the interest rate banks utilize.

The IRS has a similar requirement where they informally state that the Prime Rate plus 2% would be considered to be a reasonable rate. Some plans

use the Prime Rate plus 1%, or a rate based on the Moody's Corporate Bond Yield Average.

Plan sponsors should document justification for the plan loan interest rate selected.

Thanks for the Memories: Gratitude and Financial Wellness

So much about financial wellness has to do with cultivating a mindset that favors delayed versus immediate gratification. In the language of behavioral economics, the tendency to prefer short-term rewards is called hyperbolic discounting. This often leads to more impulsive decision-making, and it can feed excessive personal debt and hamper retirement readiness over time, whereas those (typically in the minority) who will wait for a larger reward are frequently described as “present-based.”

So how do you help your employees resist the “urge to splurge” and prioritize saving for retirement instead? It certainly seems like a tall order, given that it runs counter to tenets of fundamental human psychology. But what if the answer could be as simple as a little well-timed gratitude?



Interestingly, research out of the University of California, Riverside, Harvard Kennedy School and Northeastern University suggests that may just be the case. In a revealing experiment, subjects were offered either \$54 immediately or \$80 in a month. The participants were randomly divided into two groups and asked to write about an event from their past that elicited either happy, neutral or grateful feelings. Depending on what they wrote about, the researchers found that the subjects made quite different money decisions.

Those directed to write about a “grateful” memory were more likely to wait for the larger, delayed payout. Interestingly, subjects in the happy memory group were just as impatient as the neutral memory group. These findings are striking, especially given that the recalled memory didn’t have to be spending- or even money-related.

But how do these findings relate to financial decision making in the real world?



The Price of Impatience

While in this study the “cost” of impatience was limited to \$26, employees that struggle with delaying gratification and prioritizing saving for the future will no doubt pay a much higher price. They may need to remain in the workforce longer. They’ll also likely experience higher levels of stress, especially as they approach the date they hoped to retire by. They may also accrue excessive debt, which may adversely impact their standard of living — especially during their golden years.

How Employers Can Help

According to Forbes, building a culture of gratitude in the workplace has a tremendous upside — for both workers and employers. Employees tend to find working in a more grateful environment a more positive and rewarding experience. And being appreciated by people other than one's supervisor can provide a boost in morale. Teamwork is encouraged even as it exists alongside healthy competition. And while all of these organizational benefits take hold, it turns out that you may also be helping workers with their long-term financial decision making.

Companies are creating ecosystems of gratitude in a variety of ways. Some have instituted "Thankful Thursdays," where employees have the chance to publicly show appreciation for coworkers who've gone above and beyond with an award or small prize, followed by snacks for all as a tangible show of thanks on behalf of the company.



Fostering a culture of gratitude is like financial wellness programming "with benefits" — ones that can enhance your entire organization.

Sources

<https://cos.northeastern.edu/news/can-gratitude-reduce-costly-impatience/>

<https://www.forbes.com/sites/adriangostick/2021/07/22/thank-you-thursdays-even-once-a-week-gratitude-can-help-build-a-culture/?sh=332bf50127b3>

For more information regarding your retirement plan, please contact:

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