

How Fiduciary Duty and Cognitive Decline Intersect

With dementia cases on the rise, plan sponsors have a duty to protect assets and shelter participants from financial fraud.

Reported by [REMY SAMUELS](#) | Art by SHOUT

Plan sponsors have a fiduciary responsibility to protect participants and their retirement assets for as long as they remain in the plan, and it can become particularly challenging when workers experience cognitive decline in their later years.

According to the National Institutes of Health, aging of the U.S. population is expected to cause the number of new dementia cases per year to double by 2060, and researchers have estimated that 42% of Americans older than age 55 eventually develop dementia. In addition, approximately two-thirds of Americans experience some form of cognitive impairment by age 70, the NIH [reported](#).

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At the same time, the Federal Trade Commission in March published that U.S. consumers [reported](#) losing more than \$12.5 billion to fraud in 2024, which represents a 25% increase over the prior year.

With more participants keeping their assets in-plan after retiring or otherwise terminating employment, these facts will affect those with fiduciary duty, as plan sponsors have a responsibility to oversee participants assets in their later years, when they are more likely to experience cognitive decline and be vulnerable to financial fraud.

What Is the Fiduciary Duty?

Kelli Send, senior vice president of Francis LLC, says the Employee Retirement Income Security Act does not carve out any specific actions that fiduciaries must take to protect this particular population of participants. However, the duty for plan sponsors to work in the sole best interest of the participants still applies.

Marcia Wagner, founder and owner of the Wagner Law Group, says trust law was intended to provide protections for individuals who lacked the capacity to care for themselves, such as widows—in a very different time period—and children. The starting point to successful protections these days, however, is the identification of individuals who have dementia or Alzheimer's disease.

"Even for trained individuals, that is not an easy task, and efforts by a plan administrator to make such a determination will likely be either over-inclusive or under-inclusive," Wagner explains. "Dementia and Alzheimer's conditions worsen over time, so one cannot identify a point in time when the fiduciary obligation might adhere."

She says some plans have language dealing with the transfer of responsibility when a guardian or conservator is appointed by a court, but it is unclear how frequently those provisions are implemented.

Wagner adds that in the preamble to the 1992 ERISA 404(c) regulations, one of the circumstances indicating the absence of independent control was the legal incompetence of the participant or beneficiary in instances when the fiduciary accepting the instruction knows the participant or beneficiary to be incompetent. However, the Department of Labor indicated in a footnote that the department did not intend to impose an affirmative duty on the implementing fiduciary to evaluate a participant's or beneficiary's competence.

"While that statement may technically still be correct, it is also clear that increased attention is being paid to this issue," Wagner notes. "For example, fiduciary training materials are now addressing this issue, at least from the perspective of informing plan fiduciaries of signs that a participant may have dementia."

A difficult issue also arises when a plan administrator has concern about the mental status of a participant, and a power-of-attorney designation or a change in beneficiary is needed. Wagner says changes in designation of beneficiary in these circumstances may lead to litigation, with allegations that the change in beneficiary was the result of "undue influence."

Jason Key, managing director and head of consultant relations at TIAA, says although there is no fiduciary duty that directly correlates to cognitive decline, "it has to be considered."

He says there are some regulatory tools that financial firms can refer to, such as FINRA Rule 2165, which allows broker/dealers to place a temporary hold on the release of funds or securities from a participant's account when there is reasonable belief that they are being exploited.

In addition, he says FINRA Rule 4512(a) requires broker/dealers to make a reasonable effort for each of their non-institutional customer accounts to obtain a name and contact information of a trusted contact person.

"I think those two tools are a good example of things that advisers and plan sponsors can do to make sure that we're protecting participants that experience cognitive decline," Key says.

How Plan Design Can Protect Aging Participants

Michael Kreps, a principal in Groom Law Group, says while employers cannot give investment advice, they can use education to help guide participants toward the right decision, and most of the major recordkeepers offer advisory options that will guide people to a fiduciary.

"The key is: You don't want folks that are no longer capable of making decisions to make key decisions with their life savings," Kreps says.

While managed accounts and advisory programs are not for everybody, Kreps argues that the right solution can play a critical role in helping people prepare for retirement before they start to experience cognitive decline.

He says one of the benefits of including something like a guaranteed income solution in plan is that it gives people an "easy button" on the decumulation side and frees them of having to engage heavily with a drawdown strategy. Employees tend to opt into these solutions near the time of retirement, which, for most people, is before cognitive decline starts.

Improving Technology

Send argues that the industry needs to recognize this population when offering benefits and consider how participants will interact with the benefits. For example, she says, making websites more accessible and providing paper participant statements is important for aging populations who may experience cognitive decline.

"One of the things that I was most excited about with the SECURE 2.0 [Act of 2022] is the requirement that [recordkeepers] have to send one paper statement per year," Send says. "I think that's really important for those older workers that really are not tech savvy."

She adds that it is important for recordkeepers to develop educational and advice platforms that will be of value to this population, as not everyone is comfortable logging into different websites and scanning QR codes. She emphasizes that having access to a trusted adviser is also key for this population.

In addition, she says plan sponsors have an opportunity during open enrollment to increase education about wills, as general will packages include health care power of attorney and a financial power of attorney.

"Industry statistics [show that] 40% of Americans don't even have a will," Send says. "So what the plan sponsor can do is help facilitate some of those things by offering that as part of their EAP programs or part of their benefits package, or by offering a financial planner that is conflict-free."

In terms of protecting participants from experiencing financial fraud, Key says having advanced technology is critical. At TIAA, he says, the firm focuses on training employees to ensure they can detect and deescalate potential fraud.

"But even before that, it's our investment in technology that stops a lot of fraud before it reaches a person," Key says. "From a plan sponsor and participant perspective, the first and one of the most beneficial things a participant can do is simply register for their account and enable dual-[factor] authentication. That goes a long way in protecting them down the road from any sort of fraudulent attempt that may happen to their account."

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