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Federal 401(k) Plan Would Create Fiduciary Litigation Risks

By **Amanda Amert, Kimberly Jones and Craig Martin** (April 28, 2026)

In the State of the Union address on Feb. 24, President Donald Trump previewed a new federal initiative to make a public retirement plan option available to all American workers who otherwise lack access to an employer-sponsored plan.[1] Given its massive size and scope, such a program would undoubtedly open the door to litigation concerning those benefits.

Calling it a "gross disparity" that nearly half of Americans lack access to an employer-provided 401(k) account, Trump announced that the federal government would soon provide universal "access to the same type of retirement plan offered to every federal worker." He added that beneficiaries under this plan would receive up to a \$1,000 annual matching contribution from the government.

Although this surprise announcement has drawn substantial interest from commentators, employee benefits attorneys and the millions of American workers who are eager to access an expanded menu of retirement plan options, details about the proposal remain scarce. And Treasury Secretary Scott Bessent's post-address promise to provide further information "in the coming weeks and months" has yet to come to fruition, leaving key questions unanswered regarding design, statutory authorization and enforcement.[2]

Even with most details of the proposal unknown, however, it seems likely that fiduciary litigation will be part of the landscape. Fiduciary governance of 401(k) and similar defined contribution plans is an extremely popular target for class actions under the Employee Retirement Income Security Act, and the largest plans are the most popular targets of all.

The prospect of a massive, federally administered, universal 401(k)-style retirement plan covering millions of private-sector employees who lack access to employer-sponsored plans raises novel and complex litigation issues that merit careful attention.

Private, employer-sponsored retirement plans have been the subject of ERISA class actions for the last two decades. Unlike private employer plans, the Thrift Savings Plan, or TSP, which is the retirement plan available to federal employees, is governed by the Federal Employees' Retirement System Act, not by ERISA.

Creating a similar federal plan for private-sector employees would implicate a wide range of legal issues, including the interplay between FERSA and ERISA. The two statutes provide similar statutory regimes, but fundamentally different remedial frameworks.

The substantial overlap between these statutes — particularly with respect to fiduciary obligations, the duty of prudence and prohibited transactions — suggests that a government-administered plan for private employees would likely inherit breach of fiduciary duty theories similar to those currently at issue in high-stakes ERISA litigation across the



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However, assuming this new plan would be governed by FERSA, the available forms of equitable relief and damages would be more limited than those that are available to ERISA plaintiffs, and it would also lack the depth of case law that has developed under ERISA. Proposing a government-sponsored plan of this magnitude therefore raises many potential litigation questions.

Below, we identify the historical predecessors that this new program might build on, and explore the extent to which current law may impose fiduciary obligations and provide participants with remedies for perceived breaches of fiduciary duty.

Combining Two Existing Programs

Although several key aspects of Trump's plan remain a mystery, it clearly draws inspiration from two existing statutory schemes: the TSP and the Saver's Match.

First, as Trump stated in his speech, the TSP is the "retirement plan offered to every federal worker."^[3] Since it was first offered in 1987, the TSP has grown to provide 7.2 million federal employees with a low-cost, 401(k)-style investment plan.^[4] The Federal Retirement Thrift Investment Board, or FRTIB, serves as a fiduciary.

Enrollment is automatic for covered employees, and participation is nearly universal among federal employees.^[5] According to the FRTIB, 95.9% of nonretirees were active contributors in 2024. The TSP reached \$1 trillion in total assets in 2025.^[6]

Second, Trump described a new program that would do more than just open the TSP to those without private employer plans — it would also provide up to a \$1,000 annual matching contribution from the federal government. This approach to matching is different from the TSP, which provides matching funds of up to 5% of a federal employee's salary.

The \$1,000 match likely comes from a different source: the 2019 Setting Every Community Up for Retirement Enhancement Act. The SECURE Act authorized a \$1,000 tax credit for low-income employees, and was later amended to convert the tax credit into a \$1,000 matching retirement contribution, known as the Saver's Match. The Saver's Match is set to be implemented in 2027 and is subject to means-testing.

Trump thus appears to be proposing to combine a public defined contribution plan similar to the TSP with the \$1,000 Saver's Match federal contribution. And the statement that the program will be open to everyone who does not have access to an employer-sponsored 401(k) plan suggests that there would be no means-testing for this new program.

Based on a 2025 article from the Pew Charitable Trusts, this means the plan would be available to the 56 million people whose employers do not currently offer 401(k) plans.^[7]

Allowing Limited Breach of Fiduciary Duty Claims Through FERSA

As a retirement plan sponsored by the federal government, this new program could be governed by FERSA, similar to the TSP. FERSA provides some of the same types of relief available to ERISA plaintiffs. It authorizes private suits against any covered fiduciary who breaches the duty of prudence or engages in a prohibited transaction.^[8]

FERSA also defines key fiduciary concepts, like the duty of prudence and prohibited

transactions, using language that is nearly identical to ERISA's.[9] A handful of TSP beneficiaries have filed breach of fiduciary duty suits under FERSA — though none of those cases track the classic ERISA fact pattern involving allegations of imprudently selected and retained funds.[10]

Like ERISA, FERSA also limits private plaintiffs to equitable relief, and pursuant to Title 5 of the U.S. Code, Section 8477(e)(1)(A), makes fiduciaries personally liable "for any losses to [the TSP] resulting from each such breach or violation," may require fiduciaries "to restore to [the TSP] any profits made," and states that they "shall be subject to such other equitable or remedial relief as a court considers appropriate."

Although equitable relief is available for harm to the plan, Title 5 of the U.S. Code, Section 8477(e)(5), provides an important limitation on remedies sought against FRTIB members: A suit against an FRTIB member cannot give rise to "monetary damages or any other recovery of money." [11] This bar does not prevent monetary recovery from non-FRTIB fiduciaries, however.[12]

While FERSA specifically designates the FRTIB members as fiduciaries, as stated in Title 5 of the U.S. Code, Section 8477(a)(3)(C)-(D), "any person who has or exercises discretionary authority or discretionary control over the management or disposition of the assets of the [TSP]" is also a fiduciary.[13] This provision may capture members of the Employee Thrift Advisory Council, which is composed of federal union and management representatives who advise the FRTIB on investment policies and plan administration.[14]

Furthermore, Title 29 of the Code of Federal Regulations, Section 2584.8477(e)-2(b)-(c), empowers the executive director of the FRTIB to "allocate authority and responsibility for the investment and management" of the several fund options that are available under the TSP plan. Such third-party investment managers of a new government-sponsored plan could be fiduciaries and, in theory, could be vulnerable to claims for monetary damages under FERSA.

Separately, a TSP beneficiary may theoretically obtain monetary damages from FRTIB members for an ERISA-like breach of fiduciary duty claim under the Federal Tort Claims Act. FERSA specifically contemplates FTCA suits,[15] and the courts have rejected the argument that the FTCA is an inappropriate vehicle for breach of fiduciary duty claims.[16] However, FTCA plaintiffs remain constrained by the requirement that the defendant fiduciary is a member of the FRTIB.[17]

Overall, while traditional breach of fiduciary duty claims under FERSA remain untested, the limited authority interpreting the statute suggests that a well-pled action is viable — subject to restrictions on the form of available relief. Whether the Trump administration plans to limit beneficiaries to these established vehicles for relief or instead opts for a more remedy-protective approach remains to be seen.

Numerous Questions Remain

To date, Trump's proposal has raised more questions than answers for the 56 million American workers who are not eligible for an employer-sponsored 401(k) plan. In addition to the availability of remedies for perceived mismanagement of the plan, other open questions include who will be eligible to participate, what types of investment options will be offered, whether employees will be auto-enrolled, and how the program will be funded.

The answers to those questions will be instrumental in shaping the litigation landscape

because they bear directly on potential class sizes, the scope of damages and the relevance of parallel ERISA case law — factors that are sure to be highly material to enterprising members of the plaintiffs bar.

Yet another open question — whether Trump's proposal can be implemented without new legislation — has elicited conflicting answers from administration officials.[18]

Moreover, it is unclear how high-stakes litigation could affect the administration and enforcement of a retirement plan of this size and scope, or how the possibility of litigation might help shape the program. For example, the administration may need to weigh the litigation risks associated with higher-risk, higher-reward investment options and are likely to closely monitor administrative fees.

Overall, stakeholders will need to closely monitor the developments in this space in order to understand the proposal's consequences for participants and fiduciaries.

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[1] <https://apnews.com/article/donald-trump-transcript-state-of-union-2026-c13e2a07df999b464b733f4a6e84dbd4>.

[2] <https://thehill.com/policy/healthcare/5754278-bessent-trump-retirement-plans-reconciliation/>.

[3] <https://apnews.com/article/donald-trump-transcript-state-of-union-2026-c13e2a07df999b464b733f4a6e84dbd4>.

[4] <https://fedgovtoday.com/podcast/how-the-tsp-hit-900-billion-and-why-nearly-90-of-feds-are-winning-with-it>.

[5] https://www.govinfo.gov/content/pkg/CMR-Y3_F31_25-00196114/pdf/CMR-Y3_F31_25-00196114.pdf.

[6] <https://stwsolve.com/tsp-reaches-1-trillion-what-it-means-for-your-retirement-savings/>.

[7] <https://www.pew.org/en/research-and-analysis/issue-briefs/2025/06/workers-without-access-to-retirement-benefits-struggle-to-build-wealth>.

[8] See 5 U.S.C. § 8477(e)(3)(A)–(C).

[9] See § 8477(a)(3) (incorporating ERISA definition of fiduciary); compare § 8477(b)(1)(B) with 29 U.S.C. § 1104(a)(1)(B) (near-identical definitions for duty of prudence); compare § 8477(c)(2) with 29 U.S.C. § 1106(b) (near-identical definitions for prohibited transactions).

[10] See, e.g., *Rasooly v. Peine*, No. 15-CV-04540-JD, 2016 WL 3443382 (N.D. Cal. June 23, 2016) (duty of prudence claim premised on the FRTIB's allegedly improper handling of a California Department of Child Services garnishment request, which resulted in the removal of funds from the plaintiff's TSP account); Dkt. 36 (Order Denying Motion to Dismiss), *Mehle v. Saul*, No. 03-0111 (GK), (D.D.C. Apr. 9, 2004) (duty of prudence claim premised on the FRTIB's settlement of a lawsuit initiated by the plan).

[11] See also *Natty v. Adm'r of Thrift Savings Plan and or Legal Dep't (DOES)*, No. 2:22-CV-08926-CAS, 2023 WL 3852677, at *4 (C.D. Cal. June 5, 2023).

[12] See § 8477(e)(5) (prohibition on "monetary damages or any other recovery of money" only applies to FRTIB members).

[13] See also § 8477(a)(3)(C)–(D) (further defining "fiduciary" as "any person who, with respect to the [TSP], is described in section 3(21)(A)" of ERISA).

[14] <https://www.frtib.gov/board-members/>.

[15] See § 8477(e)(3)(C)(ii).

[16] *Garcia v. United States*, 996 F. Supp. 39, 42–43 (D.D.C. 1998); *Natty*, 2023 WL 3852677, at *5.

[17] § 8477(e)(4)(G); *Garcia*, 966 F. Supp. at 43.

[18] <https://www.cnn.com/2026/02/25/business/retirement-new-savings-plan-trump>, <https://thehill.com/policy/healthcare/5754278-bessent-trump-retirement-plans-reconciliation/>.