What Plan Sponsors Need To Know About Fiduciary Responsibilities

Pension Plan Specialists build relationships. Clear and honest communication is at the core of such relationships. That is the purpose of this Q & A guide for plan sponsors.

The Role of a Fiduciary: What You Need To Know

What is ERISA?

ERISA is the acronym for the Employee Retirement Income Security Act, a federal law put into effect in 1974. The act regulates employer-sponsored retirement and welfare benefit plans. One of the primary purposes of ERISA is to impose specific duties on plan fiduciaries.

What role does the Department of Labor (DOL) fulfill?

The DOL enforces ERISA. In fact, the agency fulfills similar responsibilities to that of a plan fiduciary. Specifically, they keep a close eye on employers to ensure that plan participants' best interests remain adequately served.

What are the main responsibilities of a Fiduciary?

ERISA requires specific duties of plan fiduciaries. A plan fiduciary must act solely in the interest of plan participants and beneficiaries. To ensure that the plan provides participants and beneficiaries with the benefits due to them and to keep expenses reasonable, a plan fiduciary must:

- Demonstrate Prudence: Act with care, prudence and diligence
- Diversify Investments: Diversify the investment options of the plan to minimize risk of large losses
- Adhere to the Plan: Act in accordance with the documents and instruments governing the plan

How do I know if I am a Plan Fiduciary?

In general, you are a "plan fiduciary" if you:

- Exercise discretionary authority and/or control over the administration of the plan
- Maintain any discretionary authority or discretionary responsibility in the administration of the plan
- Exercise any authority and/or control over the management or disposition of plan assets
- Render investment advice to the plan and/or its participants for a fee or other compensation whether direct or indirect

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Many people in my office help administer the plan. Are they all considered Plan Fiduciaries?

While you need to know who is a fiduciary, it is equally important to know who is not. In general, a person who performs certain ministerial administrative functions within the framework of the plan's policies, practices and procedures is not a fiduciary. For the most part, if someone on your staff cannot "act with discretion," then he or she is most likely not a fiduciary under ERISA.

Can a person be held personally liable for not fulfilling their obligations?

ERISA provides that any "person who is a fiduciary with respect to a plan who breaches any of the responsibilities by this title shall be personally liable to make good to such plan, any losses to the plan resulting from each such breach..."

What is an ERISA Fidelity Bond?

The Employee Retirement Income Security Act (ERISA) requires each plan to be insured by a fidelity bond to protect the plan assets. The required bond provides coverage for loss of property of an Insured Plan resulting directly from dishonest or fraudulent acts committed by an fiduciary or by the fiduciary's employees. The amount of the fidelity bond must be at least 10% of the value of the funds handled (minimum of $1,000) and generally need not be greater than $500,000.

In addition, under ERISA, fiduciaries may be held personally liable for breach of their responsibilities in the administration or handling of employee benefit plans. Fiduciary liability insurance to protect fiduciaries against lawsuits is available but is not required.

ERISA Quick Compliance Checklist

ERISA compliance starts with knowing the rules. Plan administrators and other plan officials can use this checklist as a quick diagnostic tool for assessing a plan's compliance. But remember: It is not a substitute for a comprehensive compliance rule.

If you answer "No" to any of the questions below, you should review your plan's operations because you may not be in full compliance with ERISA's requirements.

1. Have you provided plan participants with a Summary Plan Description, summaries of any material modifications of the plan, and summary annual report?
2. Do you maintain copies of plan documents at the principal office of the plan administrator for examination by participants and beneficiaries?
3. Do you respond to written participant inquiries for copies of plan documents and information within 30 days?
4. Does the Plan operate in accordance with the Plan/Trust documents?
5. Does your plan have a written investment policy statement?
6. Do the plan fiduciaries periodically monitor plan investments and prudently evaluate whether to keep or replace them and maintain adequate documentation of their reviews?
7. Are the plan investments compared to its peer group over varying periods of time?
8. Are the plan's investments diversified so as to minimize the risk of large losses?
9. Has a plan fiduciary determined that the investments are prudent and solely in the interest of the plan's participants and beneficiaries, and evaluated the risks associated with plan investments before making the investments?
10. Is your plan covered by a fidelity bond to protect against losses due to fraud or dishonesty?
11. If the plan permits participants to select the investments, has the plan provided them with enough information to make informed decisions?
12. Does the plan provide and track ongoing employee investment education?
13. Are the service provider arrangements reasonable and is the cost and quality of those services in line with the industry?
14. Do the plan fiduciaries meet regularly and keep well documented minutes of those meetings?
15. Is there a prudent fiduciary decision-making process and is there sufficient documentation to support their decisions?

16. Did the employer or other plan sponsor send participant contributions to the plan on a timely basis?
17. Did the plan pay participant benefits on time and in the correct amounts?
18. Did each participant receive the required fee disclosure notice?

If you answer "Yes" to any of the questions below, you should review your plan's operations because you may not be in full compliance with ERISA's requirements.

1. Has the plan engaged in any financial transactions with persons related to the plan or any plan official? (For example, has the plan made a loan to or participated in an investment with the sponsor company?)
2. Has any plan official used the assets of the plan for his/her own interest?
3. Have plan assets been used to pay expenses that were not authorized in the plan document, were not necessary to the proper administration of the plan, or were more than reasonable in amount?

Service Provider Regulations (Section 408(b)(2))

The Department of Labor requires that companies that provided services to qualified retirement plans disclose their fees to plan sponsors. These are new regulations to provide plan sponsors with the proper tools to evaluate their responsibilities to monitor fees.

Participant Fee Disclosure (Section 404(a))

Participant directed individual account plans are required to disclose fees that are charged to the participants' accounts. The fees required to be disclosed are for administrative and investment expenses. The participant is required to receive notification at least annually on the fees that may be charged against their account and quarterly disclosures on the fees that were actually charged against their account. In addition, the investment company is required to provide a comparative chart to help participants determine the investment expenses by fund.

ERISA Section 404(c)

Are there actions a plan and its fiduciaries can take to lessen potential liabilities?

ERISA Section 404(c) offers plans and plan fiduciaries limited protection when participants are allowed to make certain investment decisions.

Does such control mean your employees are fiduciaries? No, however, if 404(c) is found to apply, the participants and beneficiaries usually are responsible for any losses their accounts may have incurred due to their own investment decisions.

How does 404(c) work?

Compliance with ERISA Section 404(c) is voluntary. The DOL regulations provide a framework within which a plan may be considered a "404(c) plan" and potentially reduce fiduciary liability. However, 404(c) is not a safe harbor. The legal system would determine whether a plan satisfies section 404(c).

In general, under ERISA Section 404(c), a plan fiduciary must offer participants:

- A broad range of investment options (at least three diversified core investment categories with different risk/reward characteristics)
- The ability to personally select among the plan's investment options
- The opportunity to transfer among investment options at least quarterly
- Certain information and disclosures automatically and upon request

What else can fiduciaries do?

"Procedural Prudence" means a fiduciary must make decisions consistent with established procedures and processes. Prudence is not necessarily measured by results, but rather by a measure of conduct. Maintain clear, written plan processes and procedures.

Qualified Default Investment Alternatives (QDIA)

Plan sponsors that wish to have full fiduciary protection under Section 404(c) should setup a QDIA fund. The Department of Labor has outlined acceptable funds that can be used for a QDIA. The funds are generally a life-cycle or target retirement date funds, balanced funds, or professionally managed accounts. A notice needs to be provided to participants.

Why You Should Establish an Investment Policy Statement

What is the purpose of an Invest Policy Statement (IPS)?

Section 402(b)(1) of ERISA states that plans must "provide a procedure for establishing and carrying out a funding policy in a method consistent with the objectives of the plan." One common way to fulfill such a responsibility is to develop what is called an Investment Policy Statement (IPS). It is a document that states the plan's specific goals and objectives. In general, an IPS needs to address five main objectives: The intended purpose of the plan, its long-range investment framework, an outline of the investment selection, a monitoring and replacement process, and a clear definition of related investment duties and responsibilities.

What are the benefits of an IPS?

There are several advantages in creating an IPS. These include:

- **Documentation:** An IPS provides for written documentation as to the policies, practices and procedures for making investment selections
- **Clarification:** An IPS provides for a clear baseline and framework to ensure continuity in its adherence and helps negate "second-guessing"
- **Communication:** With an IPS, participants can be assured that there is a logical and disciplined approach to the process
- Protection: An IPS can serve as your first line of protection against potential fiduciary liability

Who is responsible for drafting the IPS?

Like all fiduciary documents, an investment policy statement needs to be carefully drafted, then thoroughly reviewed by the plan sponsor and advisory team. An IPS takes many forms. Generally a plan's investment advisor or asset custodian will provide guidance in drafting an appropriate IPS.

As with all matters regarding your plan, you can and should consult with your legal counsel for expert assistance.