



Defined Pension and Defined Contribution Plans

Knowing and Understanding Your Fiduciary Responsibilities

By:

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With the change in the Department of Labor’s (DOL) view on who is a fiduciary, it is important to revisit some of the basics to the Employee Retirement Income Security Act of 1974 (ERISA) and the fiduciary duties it imposes. A Plan Sponsor, more than ever, needs to make sure they understand who the fiduciaries are and what their responsibilities are to the participants.

Title versus Function

Fiduciary status is based on the functions performed for the plan, not just a person’s title. The key to determining whether an individual or an entity is a fiduciary is whether you are exercising discretion or control over the plan. As a fiduciary you are the control person of not only the plan but also the process and the duties you have been entrusted with to act on behalf of and for the benefit of the participants. This fiduciary position you have been entrusted with and assumed carries with it certain legal requirements and responsibilities that you need to be aware of to reduce liability to keep you on the right side of the law.

Good governance of the process and on-going oversight activities require the Plan Sponsor:

- to know the relevant laws, regulations and fiduciary standards
- to develop maintain and adhere to a well designed investment policy,
- to use experts such as investment managers, advisors, trustees, custodians, consultants, etc and document the process utilized in their selection to monitor all the delegated activities of these experts,
- to control and account for all the fees in their plan,
- to avoid conflicts of interest and prohibited transactions.

Plan Sponsors must ensure they have good systems in place for proper oversight to mitigate any fiduciary risk exposure. There is a heightened importance in strengthening the fiduciary relationship between the Plan Sponsor and the plan participant and thus, there is potential for additional liability that all plan fiduciaries are exposed.

ERISA Background

- ERISA does not require that an employer provide a benefit plan, but if an employer provides benefits the employer must comply with ERISA. The requirements include preparing a written plan document and filing the plan document description and annual reports with the Department of Labor.

The ERISA Plan and General Requirements for Plan Fiduciaries

- Employee benefit plans include pension plans and welfare plans. An employee pension benefit plan (e.g., retirement and 401(k) plans) means any plan, fund or program which provides retirement income to employees or the deferral of income for a period extending to the termination of employment. The term “welfare plan” means a plan which provides benefits such as healthcare benefits or long-term disability plans. These terms are defined in 29 U.S.C. Section 1002. Definitions.
- Every benefit plan must be established and maintained pursuant to a written instrument. The plan must name one or more fiduciaries. ERISA allows, but does not require that a person serve in more than one fiduciary capacity. The named fiduciary may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan such as an investment manager and a trustee. The person who is named as a fiduciary with respect to the control or management of assets of the plan may appoint an investment manager. 29 U.S.C. Section 1102. Establishment of Plan.
- Naming a fiduciary for certain tasks does not absolve the plan sponsor from their duty as a fiduciary. The act of delegating fiduciary authority to a third party is in itself a fiduciary act. A fiduciary is required to undertake due diligence by fully venting any service provider and once any service provider is selected to monitor this service provider on an on-going basis. 29 U.S.C. Section 1105 (a). Liability for Breach of Co-Fiduciary.
- An investment manager is a person who has the power to manage, acquire or dispose of plan assets, is registered as an investment advisor under the Investment Advisors Act, and who has acknowledged in writing that he is a fiduciary with respect to the plan. 29 U.S.C. Section 1002(38). Definition.

Who Is a Fiduciary?

- ERISA requires that the Plan identify one or more named fiduciaries in the Plan document. The named fiduciaries are typically plan administrators and plan trustees. The named fiduciary has authority to control and manage the operation and administration of the Plan.
- A person may also be considered a fiduciary based on the conduct and authority of the person. ERISA, in fact, defines fiduciaries based on the functions which the person performs

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with respect to the Plan. ERISA provides that a person is a fiduciary with respect to the Plan to the extent that the person exercises any discretionary authority or control with respect to management of the Plan or the disposition of assets. ERISA also states that an individual that renders investment advice to a Plan for a fee or individuals that have discretionary authority or responsibility for administering a Plan are fiduciaries. 29 U.S.C. Section 1002 (21) (A). Definitions.

- A person can perform both fiduciary and non-fiduciary functions. Thus, a person may be a fiduciary with respect to certain functions, but may be entitled to act in their own interest for other functions for which they are not considered a fiduciary.
- ERISA provides that named fiduciaries may limit their fiduciary duties by properly allocating some or all of their duties under the Plan which also limits the named fiduciaries' liability for the responsibilities delegated. 29 U.S.C. Section 1105 (c). Liability for breach of co-fiduciary.

Persons Not Considered Fiduciaries

- The Department of Labor regulations state that individuals and entities which provide services to a Plan or render professional advice are not considered fiduciaries unless they have the discretionary authority or responsibility with respect to a Plan or its assets. The service providers which are generally not considered fiduciaries are actuaries, attorneys, accountants and consultants (other than investment advisors). 29 C.F.R. Section 2509. 75.5.

The Duties of a Fiduciary

- ERISA sets forth four general rules which a fiduciary is required to adhere to when acting as a fiduciary. 29 U.S.C. Section 1104. Fiduciary Duties.
 1. Exclusive Benefit Rule – The fiduciary must discharge duties with respect to the Plan for the exclusive benefit of the participant and their beneficiaries. 29 U.S.C. Section 1104 (a) (1) (A). Fiduciary Duties.
 2. Prudent Man Rule – A fiduciary must act “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity” would act. This rule is derived from the common law of trusts. This is an objective standard based upon how a person with experience and knowledge of a certain area would act in a given situation. If a fiduciary lacks the expertise for a certain area then the fiduciary must obtain expert help. 29 U.S.C. Section 1104 (a) (1) (B). Fiduciary Duties.
 3. Diversification Rule – A fiduciary must diversify investments in order to minimize risk of loss unless it would be considered prudent to not diversify investments. 29 U.S.C. Section 1104 (a) (1) (C). Fiduciary Duties.

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4. Plan Document Rule – A fiduciary must act in accordance with the Plan documents, but only to the extent that the Plan is consistent with ERISA requirements. Thus, a fiduciary must know and act in accordance with the Plan and must have sufficient knowledge of the ERISA requirements. 28 U.S.C. Section 1104 (a) (1) (D). Fiduciary Duties.
- Prohibited Transactions – In addition to the four general fiduciary rules, ERISA contains a “prohibited transaction” rule. This rule prohibits specific types of transactions. The purpose of the rule is to prohibit transactions which offer a high potential for insider abuse. The rules fall into three categories restricting transactions between a Plan and participant in interest; transactions between a Plan and a fiduciary; and the transfer of property to a Plan by a party in interest. 29 U.S.C. Section 1106. Prohibited transactions.
 - It should also be noted that ERISA provides that certain transactions such as loans to participants or beneficiaries are exempt from the prohibited transaction rule. 29 U.S.C. Section 1108. Exemptions from Prohibited Transactions.

Liability for Fiduciary Duty and Insurance

- ERISA imposes personal liability on a fiduciary that breaches fiduciary duties. If there is a loss caused by a breach of fiduciary duty, the fiduciary must make the Plan whole by restoring any losses caused by the breach and by restoring to the Plan any profits which were made through the use of Plan assets. 29 U.S.C. Section 1109. Liability for Breach of Fiduciary Duty.
- ERISA, although providing that a provision of a Plan that attempts to relieve a fiduciary from fiduciary duties is void, does provide that a fiduciary of a Plan can maintain fiduciary liability insurance coverage for the Plan and all of the fiduciaries. 29 U.S.C. Section 1110. Exculpatory Provisions; Insurance.

ERISA Civil Enforcement Scheme

- ERISA provides that civil actions to obtain appropriate relief for a breach of fiduciary duty may be brought by a participant, a beneficiary, a fiduciary or the Secretary of Labor. 29 U.S.C. Section 1132 (a) Civil Enforcement.
- The statute provides that civil actions may be brought to recover benefits due under the Plan, to enforce rights under the terms of the Plan or clarify rights to future benefits under the terms of the Plan.
- The statute provides that a participant, beneficiary or fiduciary may bring a civil action to enjoin any practice which violates any provision of ERISA or the terms of the Plan.

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- Attorney fees and costs may be awarded to the prevailing party. 29 U.S.C. Section 1132 (g) (1). Civil enforcement.

Can a Fiduciary Terminate Its Fiduciary Duties?

- **Yes.** Fiduciaries who no longer want to serve in that role cannot simply walk away from their responsibilities, even if the plan has other fiduciaries. The fiduciary needs to follow plan procedures and make sure that another fiduciary is carrying out the responsibilities. Form 56 – Capital Letter for Notice Concern Fiduciary Relationship - Internal Revenue Section 6036 and 6903.

Conclusion

In helping to operate your company's retirement plan as a member of the Retirement Plan Committee, Investment Committee, or in many other roles, you will find yourself in a new role - that of a Fiduciary. Remember, it is the functions you perform for a plan which may make you a fiduciary, not your title. As a Fiduciary you will be subject to a higher standard of conduct because you are now acting on behalf of participants and their beneficiaries in your company's retirement plan. You must act as a Prudent Man would act in like circumstances which include the ability to hire third parties when you do not possess the knowledge, but you must also continue proper oversight which involves processes and procedures.

As Fiduciary laws change for employers, plan sponsors, plan advisors and plan participants it is the Plan Fiduciary who is charged with overseeing that the retirement plan that is being created and offered is complying with the ERISA and Department of Labor rules and regulations.

This article was written by Deborah A. Castellani, CFA and William C. Conrad with OTB Strategic Consulting, Inc. and Akros investments, Inc.

Ms. Castellani and Mr. Conrad have more than 50 years of experience working with ERISA Plan providers to deliver strategies and programs that help Plan Sponsors, Plan Fiduciaries and Plan Participants to understand and mitigate the complexities of making and documenting plan decisions. For information as to how Akros can help you with your duties as a Fiduciary, please see Fiduciary Assessment at <http://www.akrosinv.com/Services.html>.

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