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## 7 Things Every ERISA Fiduciary Should Know

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When it comes to workplace retirement plans, there are three kinds of people: people who are ERISA fiduciaries and know it, people who aren't ERISA fiduciaries and know it, and people who are ERISA fiduciaries and don't know it.

If you're in the first or last category — well, here are seven things that every ERISA plan fiduciary should know.



**If you're a plan sponsor, you're an ERISA fiduciary.**

Fiduciary status is based on your responsibilities with the plan, not your title. If you have discretion in administering and managing the plan, or if you control the plan's assets (such as choosing the investment options or choosing the firm that chooses those options), you are a fiduciary to the extent of that discretion or control. If you're not sure, there's a good chance you are.

**For the very most part, you can't offload or outsource your ERISA fiduciary responsibility.**

ERISA has a couple of very specific exceptions through which you can limit — but not eliminate — your fiduciary obligations. One has to do with the specific decisions made by a qualified investment manager — and, even then, you remain responsible for the prudent selection and monitoring of that investment manager's activities on behalf of the plan.

The second exception has to do with specific investment decisions made by properly informed and empowered individual participants in accordance with ERISA Section 404(c). Here also, even if your plan meets the 404(c) criteria (and it is by no means certain it will), you remain responsible for the prudent selection and monitoring of the options on the investment menu (and, as the *Tibble* case reminds us, that obligation is ongoing).

Outside of these two exceptions, you're essentially responsible for the quality of the investments of the plan — including those that participants make. Oh, and hiring a 3(16) fiduciary? You're still on the hook as a fiduciary for selecting that provider.

**If you're responsible for selecting those who are on the committee(s) that administer the ERISA plan, you're an ERISA fiduciary. If you are able to hire a fiduciary, you're (probably) an ERISA fiduciary.**

The power to put others in a position of power regarding plan assets is as critical — and as responsible — as the ability to make decisions regarding those investments directly.

**Hiring a co-fiduciary doesn't keep you from being an ERISA fiduciary.**

All fiduciaries have potential liability for the actions of their co-fiduciaries. If a fiduciary knowingly participates in another fiduciary's breach of responsibility, conceals that breach, or does not take steps to correct it, both are liable.

**Your liability as an ERISA fiduciary is personal.**

That's right, the legal liability is personal (you can, however, buy insurance to protect against that personal liability — but that's likely not the fiduciary liability insurance you may already have in place).

**An ERISA fiduciary can't just quit and walk away.**

The Department of Labor cautions that "fiduciaries who no longer want to serve in that role cannot simply walk away from their responsibilities, even if the plan has other fiduciaries. They need to follow plan procedures and make sure that another fiduciary is carrying out the responsibilities left behind. It is critical that a plan has fiduciaries in place so that it can continue operations and participants have a way to interact with the plan."

**As an ERISA fiduciary, you're expected to be an expert — or to hire help that is.**

ERISA's "Prudent Man" rule is a standard of care, and when fiduciaries act for the exclusive purpose of providing benefits, they must act at the level of a hypothetical knowledgeable person and must reach informed and reasoned decisions consistent with that standard. The Department of Labor notes that "[l]acking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions."



As an ERISA plan fiduciary, it's never too late to start doing the right things the right way. But doing the right things means understanding what is expected of you — and appreciating the implications.

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