



FAQS FOR EMPLOYERS

ERISA Fiduciary Responsibility and Liability

Who is a fiduciary?

According to ERISA, a person is a fiduciary with respect to an employee benefit plan to the extent that such a person does any of the following:

- Exercises any discretionary authority or control over the management of a Plan or over the management or disposition of Plan assets.
- Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan.
- Has any discretionary authority or discretionary responsibility in the administration of such Plan.

Other activities that give rise to fiduciary status include:

- Appointing other Plan fiduciaries
- Selecting and monitoring Plan investment vehicles
- Selecting and monitoring third party service providers
- Interpreting plan provisions
- Exercising discretion in denying or approving claims

What is the significance of being a fiduciary?

Fiduciaries have important responsibilities and are subject to higher standards of conduct because they act on behalf of Plan participants and beneficiaries. Fiduciary responsibilities include:

- Acting solely in the interest of Plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.
- Carrying out their duties prudently.
- Following the Plan documents (unless inconsistent with ERISA)

What is the duty of loyalty?

As defined by ERISA section 404(a), a paragraph exists which is commonly referred to as the exclusive benefit rule and is considered to command a fiduciary's duty of undivided loyalty. Said duty of loyalty requires that Plan trustees avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with complete loyalty to participants. Further, the duty of loyalty may require that a fiduciary disclose material information that the fiduciary knows the participant does not have and will need in order to make an informed decision.

What is the prudence standard?

As defined by ERISA section 404(a), a paragraph exists which is commonly referred to as the prudent person rule. This means that a fiduciary's actions will be compared against those of a hypothetical prudent person to assure that the fiduciary acts with the care, skill, prudence and diligence under the circumstances.

What is the duty of disclosure?

Generally the duty to disclose material information is the core of a fiduciary's responsibility. At the request of a participant or beneficiary a fiduciary must convey complete and correct material information.

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What is the duty to monitor?

Generally the act of selecting Plan service providers is an exercise of discretion over the management or administration of the Plan or its assets. Thus the person selecting the service provider is considered a fiduciary. A fiduciary can be held liable for the acts or omissions of their delegate if they have knowledge of a breach of fiduciary duty by the latter. For this reason, contracts for service providers should permit termination by a Plan without penalty on reasonably short notice so that a Plan is not locked into an arrangement that is disadvantageous. After selection, the fiduciary is under a continuing duty to monitor the service provider's performance; to review and evaluate at reasonable intervals the performance of others to whom responsibilities are delegated.

How to select Plan fiduciaries?

Historical practice of naming "the company" as the Plan administrator in an attempt to shield individual directors and officers from liability has been ineffective as courts have found that employees, officers and directors, regardless of their title, who perform fiduciary functions are fiduciaries.

In fact, if the company is a fiduciary there is a question whether various company statements such as the company's outlook such as those in SEC filings, are construed as statements of an ERISA fiduciary. Further, naming the company as a fiduciary may also expose all individuals who act on behalf of the company to fiduciary liability- including the board of directors and top officers of the company.

Many companies also struggle with whether to designate the board of directors or a non-board committee as the Plan administrator or named fiduciary. Creating a committee populated with individuals who are top officers may leave duty to disclose.

How to Improve Your Fiduciary Process

The rules surrounding fiduciary responsibilities may seem complex, but complying with them doesn't have to be. Most of the requirements are commonsense tasks that are simply good business practices. Here is a listing of best practices broken down into three broad areas – plan operations, investment and communications.

Operational Practices

- Identify all Plan fiduciaries – whether named in plan documents or functional fiduciaries
- Establish procedures – create a paper trail to demonstrate compliance with ERISA rules
- Deposit contributions promptly
- Follow service provider hiring protocols – this helps you compare and contrast them against other potential providers and their fees
- Conduct annual reviews – this helps the Plan and its fiduciaries stay current and in compliance
- Satisfy all reporting and testing requirements

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Investment Practices

- Offer diversified investment options – an ongoing process of selecting and monitoring to ensure investments remain consistent with plan objectives
- Consider an Investment Policy Statement – this provides fiduciaries with guidelines or general instructions concerning types of investments and investment management decisions

Communications Practices

- Meet basic communications requirements – beyond providing legally required documents to participants, good communications help employees make better retirement planning decisions
- Offer more guidance – provide education on financial planning basics

Actions that Support Process Best Practices

- Offer a prudently designed Plan that's more likely to help employees work toward their retirement goals by using opt-out, rather than opt-in features (automatic enrollment and deferral increases)
- Document all Plan-related decisions
- Understand all fees associated with the Plan and provide full disclosure to participants
- Deliver a full suite of communications that address initial enrollment and ongoing communications and present information that's simple to understand, effective and helps create participant action
- Select a Plan provider that offers flexibility in the investment options available and Plan services provided, good value for the fees charged and superior relationship management – including the human touch

This information was developed as a general guide to educate Plan Sponsors, but is not intended as authoritative guidance or tax or legal advice. Each Plan has unique requirements, and you should consult with your attorney or tax advisor for guidance on your specific situation. In no way does advisor assure that, by using the information provided, Plan Sponsor will be in compliance with ERISA requirements.

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