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October
2015

benefit insights®

A Plan Fiduciary's Responsibilities

Many employers establish retirement plans without being fully aware of their fiduciary responsibilities. It is imperative to know whether you are a fiduciary and, if so, what your responsibilities are because there are risks for the unwary. A fiduciary that breaches any obligation or duty can be held personally liable to make good any losses incurred by the plan resulting from the breach, even if the breach was made unknowingly. Pleading ignorance or inexperience will not be adequate defense.

The Employee Retirement Income Security Act of 1974 (ERISA) imposes rigorous standards for fiduciaries—those who manage a retirement plan and its assets. Therefore, it is important that all fiduciaries be aware of their responsibilities and understand and comply with ERISA's fiduciary provisions.

Following is a general overview of who the plan's fiduciaries are, their required duties and steps to limit liability.

Who or What is a Fiduciary?

You become a fiduciary under ERISA by title or by action including the following:

- Being named in the plan document or being appointed as a fiduciary;
- Exercising discretionary authority or control over plan assets and/or the management of the plan; or
- Providing investment advice for a fee.

Every plan must have at least one fiduciary named in the plan document (either a person or an entity). Many times the plan sponsor is the named fiduciary. If the plan sponsor keeps some or all of those duties, its officers or principals who perform those duties are ERISA fiduciaries.

Further, the appointment of a fiduciary is itself a fiduciary act. So, whoever appoints the officers or committee members has a duty to prudently select those persons and to periodically review their work to make sure they are doing their job. Typically it is the board of directors or corporate president who appoints the fiduciaries. As a result, the board members or the president are also fiduciaries.

In general, professional service providers offering legal, accounting/auditing or third-party administration services are not considered fiduciaries because they do not exercise discretion or control over the plan.

Fiduciary Duties

The primary duty of all ERISA fiduciaries is to act in the sole interest of the plan and its participants and beneficiaries. You must:

- Act with the care, skill, prudence and diligence of a prudent person who is familiar with retirement plan matters;
- Follow the plan documents;
- Pay only reasonable plan expenses;
- Diversify plan investments; and
- Avoid conflicts of interest and self-dealing in directing plan transactions.

Expertise in a variety of areas is required of fiduciaries. Fortunately, you can act to limit potential exposure by relying on competent outside advisors to assist with complicated matters. Your obligations do not end with the selection of a service provider because ERISA imposes an ongoing duty to monitor with reasonable diligence the providers in order to ensure that they are meeting the plan's expectations.

Consequences of a Fiduciary Breach

In addition to being held personally liable for a fiduciary breach, you may be personally liable to restore plan losses resulting from violations as well as forfeit any realized profits. The DOL will also assess a civil penalty against you and, in extreme cases, you may be subject to criminal penalties.

You can be held liable for both your direct actions or for the actions of co-fiduciaries. If you become aware of an improper action on the part of a co-fiduciary and do nothing, you also become liable for that breach.

Regardless of how well the fiduciaries in a plan perform their duties, it is inevitable that mistakes can be made. Several self-correction programs are available for correcting errors. However, self-correction is not available for all violations.

Steps to Limit Liability

There are actions that can be taken to demonstrate that your responsibilities were carried out properly as well as other ways to limit liability which are described below.

Documenting Decision-Making Processes

In order to demonstrate that you acted prudently, you should fully document in writing the process used in making fiduciary decisions.

For example, an Investment Policy Statement can provide important documentation that demonstrates you are meeting your responsibilities regarding plan investments. It is a written guideline which outlines the process for selecting, reviewing and changing the plan's investments. Although ERISA does not specifically require an Investment Policy Statement, it is one of the first things that the DOL will ask to see when they audit a plan and will want proof that it was followed.

Monitoring Plan Expenses

The prudent fiduciary must understand what expenses are being charged and what services are being provided for those fees. Thanks to the fee disclosure regulations, you are no longer in the dark about how much compensation plan providers are receiving from various sources, directly or indirectly. It's a great thing because you have the duty to only pay reasonable expenses and that was often hard to analyze when the plan providers didn't have to disclose their fees.

The problem is that with this added information comes added responsibility. So it's not important enough to get the fee disclosures—you have to benchmark your fees to determine whether they are reasonable. You are not required to pay the lowest fees, but you have to determine whether the fees you are paying are reasonable for the services you are provided.

Letting Participants Direct Their Accounts

Another way to limit liability is to allow participants to direct their own accounts. ERISA Section 404(c) allows fiduciaries to transfer investment responsibility to participants who direct the investment of their accounts. Generally, you are not liable for losses resulting from the participant's exercise of investment control if all of the ERISA 404(c) rules are satisfied. However, you retain responsibility for the selection and monitoring of the investment alternatives that are made available to the participants.

Much of the recent litigation in this area has involved the fiduciary's failure to monitor investment menus after initial selection. Therefore, you should review the menu on an ongoing basis and document your actions in the same way the initial selection was documented.

There are a number of 404(c) requirements including offering a broad variety of investments so the participant can diversify; giving the participants sufficient information to make informed decisions about their investments; and participants must be able to transfer money between options at least quarterly.

There are also very specific disclosure requirements including general plan information about how to manage and change their investment options and full disclosure on any plan administration and/or individual expenses that might be paid out of their account.

Avoiding Prohibited Transactions

ERISA prohibits fiduciaries from engaging in a variety of transactions that are inherently tainted by conflicts of interest. Specifically, you may not engage in transactions with the plan in which you use plan assets for your own interest, act for a party whose interests are adverse to the plan or plan participants or receive compensation from a party dealing with the plan.

Bonding and Insurance

ERISA requires that every fiduciary of the plan and every person who "handles funds or other property of such a plan" are required to be bonded. The amount of the bond is 10% of the amount of the plan's assets as of the beginning of the plan's fiscal year. Unless the plan holds company stock, the maximum amount of the bond is $500,000. The bond protects the plan, not the fiduciary, against loss by reason of acts of fraud or dishonesty on the part of persons required to be bonded.

You can obtain fiduciary liability insurance that provides coverage for expenses such as legal defense or monetary judgments. These policies differ based on features such as deductibles, exclusions, etc., so it is important to work with a property and casualty agent who understands the nuances of ERISA fiduciary liability.

Administrative Responsibilities

Fiduciaries are responsible for overseeing the administration of the plan and should be familiar with the plan's terms, loan policy, etc. There are many aspects to plan administration including:

- Enrolling and covering the right employees;
- Timely correction of problems with regard to testing failures or operational issues;
- Authorizing distributions and loans;
- Timely deposit of employee contributions; and
- Complying with reporting and disclosure requirements.

Timely Deposit of Employee Contributions

Deposits must be made as soon as they can reasonably be separated from the company's assets, but no later than the 15th business day of the month following the month withheld. The

15th business day of the month following withholding is not a safe harbor and many times funds can be segregated within days of being withheld. For plans with under 100 participants there is a "safe harbor"—if the deposits are made within seven business days of withholding, they are considered to be timely.

Reporting and Disclosure Requirements

Fiduciaries are subject to a number of reporting and disclosure requirements. One is the annual filing of Form 5500 with the DOL. Form 5500 is a government mandated return comprised of a main document and, in some cases, multiple schedules that report information relating to the plan and its operation.

Other disclosures must be made to the plan participants. A summary plan description (SPD), which is a "plain English" summary of the plan's provisions, must be provided to new participants and, in general, every five years. After the SPD is distributed, you must continue to make participants aware of material changes to the plan through explanations called summaries of material modifications. Also required is a summary annual report which is a snapshot of the financial schedules attached to Form 5500.

Conclusion

It is important for fiduciaries to focus on all aspects of maintaining the plan including the selection and monitoring of investments and service providers; paying reasonable expenses; and overseeing the administration of the plan. Decision-making processes should be put in place and actions documented in writing demonstrating that these processes were followed.

Fiduciary duties are myriad and complex. Fortunately, you can seek guidance from competent outside advisors who have experience with these complex rules.

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