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Your role as a fiduciary

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Involving trust, especially with regard to the relationship between a trustee and a beneficiary

Before you can begin to understand your role as a fiduciary you must first understand ERISA, the Employee Retirement Income Security Act, which was enacted in 1974. The main purpose of ERISA is to protect the interests (plan assets) of employees and their beneficiaries who are enrolled in employee benefit plans. The Act was designed to regulate employer-sponsored retirement and welfare benefit plans, with the primary purpose of imposing specific duties on retirement plan fiduciaries.

The U.S. Department of Labor (DOL) is responsible for enforcing ERISA. The role of the DOL is to keep a close eye on employers to ensure that plan participants' best interests are sufficiently served.

ERISA imposes specific duties upon plan fiduciaries, such as:

Duty of loyalty

Also known as the "exclusive benefit rule", a fiduciary must perform their duties solely in the best interest of the plan participants, acting without personal economic conflict when making decisions as a corporate fiduciary. This includes defraying reasonable expenses of administering the plan.

Duty to act prudently

As a "prudent expert" rule, a fiduciary must perform with the "care, skill, prudence, and diligence...that a prudent man acting in a like capacity and familiar with such matters would use..." [ERISA 404(A)(1)(B)]. Acting in good faith is not sufficient; plan sponsors may need to consult with an expert if they do not have the expertise on their own. A prudent decision-making process can be more important than the outcome of a decision, which is why it's important to properly document all decisions and meetings.

Duty to diversify investments

One requirement for ERISA 404(c) protection includes diversification. A fiduciary should act to diversify investments so as to minimize the risk of large losses, unless it was clearly prudent not to do so based on the specific circumstances. To be clear, diversification is measured with respect to the plan's entire assets, not at the level of the individual manager or investment option.

Duty to follow plan provisions

A fiduciary must follow the terms governing plan documents, but only to the extent that they are consistent with ERISA. For this reason, plan document provisions and all plan-related documents (e.g., investment policy statement) should be reviewed periodically and kept up-to-date. Remember, consistency across all plan-related documents is essential.

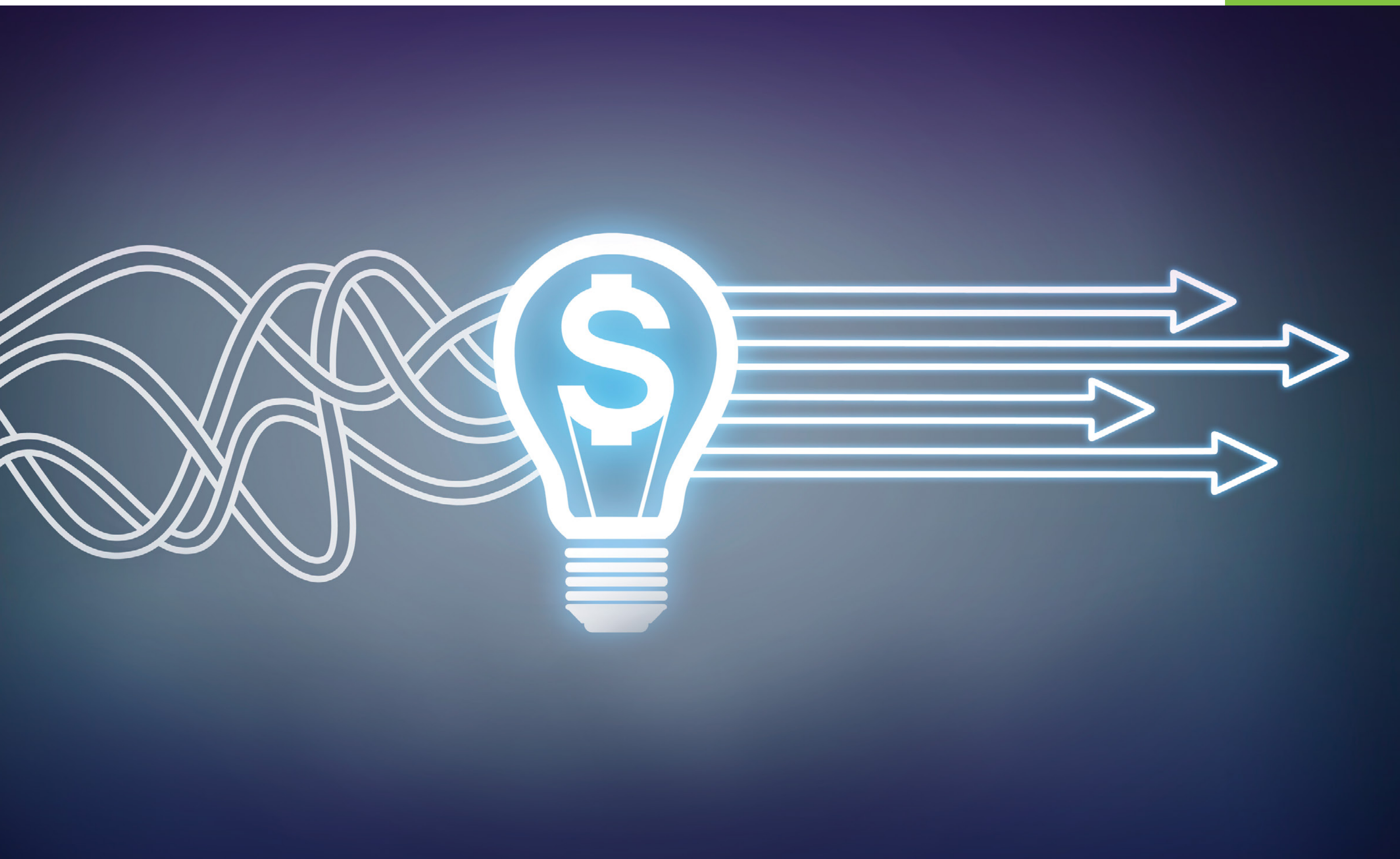
Who is a fiduciary?

In general, you are a fiduciary if you have any discretionary authority or discretionary responsibility in the administration of a plan, exercise any authority and/or control over plan assets, or render investment advice to the plan and/or its participants for direct or indirect compensation. Typically, you are a fiduciary by nature if you are in any of the following roles:

- Plan sponsor
- Plan trustee
- Plan administrator
- Administrative or investment committee
- Investment manager

It is equally important to understand who IS NOT a fiduciary. Generally, anyone who performs ministerial administrative functions within the framework of the plan policies or practices is not a fiduciary. They may include the following roles:

- Directed trustee
- Recordkeeper
- Attorney
- Accountant
- Actuary
- Third-party administrator
- In-house benefits analyst



ERISA provides that “Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach…”. However, there are ways to limit a fiduciary’s risk, such as knowing what the DOL would look for in an audit:

- Written policies and procedures
- Documentation of decisions made, and other evidence that policies and procedures are being followed
- Compliance with ERISA 404(c) to the extent that the plan has declared itself to be a 404(c) plan
- Appropriate fidelity bond coverage – 10% of plan assets up to a maximum of $500k or $1 million for plans with employer stock

What is an ERISA fidelity bond?

ERISA 412(a) requires that each plan fiduciary and every person who handles plan assets maintain a fidelity bond. An ERISA fidelity bond is a type of insurance that protects the plan against losses caused by acts of fraud or dishonesty.

Limiting fiduciary exposure

Although plan fiduciaries have primary responsibility for the operation and administration of the plan, ERISA 404(c) provides relief from holding fiduciaries liable for investment decisions made by participants. For participants who exercise control over their plan investments, 404(c) generally shifts the responsibility for the resulting investment returns from the fiduciary to the participant.

While compliance with 404(c) is voluntary, most fiduciaries try to take advantage of this important protection. However, there are specific requirements that plan sponsors must satisfy to comply, such as:

- The critical step of notifying participants that the plan intends to comply with ERISA 404(c) and that fiduciaries may not be liable for losses resulting from participants’ investment instructions
- Offer at least 3 or more investment options with materially different return and risk characteristics
- Provide participants with sufficient investment information to make informed decisions, including a participant fee disclosure upon initial eligibility and annually thereafter
- The ability to select among available investments, including the ability to transfer funds on a frequency based on the volatility of the investments or at least quarterly
- Opportunity to receive written confirmation to participants of their investment instructions

If an investment option includes employer stock/securities, a plan sponsor must also pass voting and other shareholder rights on to participants and have procedures in place to protect the confidentiality of participant holdings and transactions in stock. The fiduciary responsible for monitoring compliance must also be identified.


ERISA

PLAN COMMITTEE

Establishing a plan committee

The investment committee has important governance responsibilities in assuming the successful management of plan assets. Your committee should include individuals with backgrounds in plan administration, finance and investments. You may want to establish two committees: one for plan administration and another for plan investments as they require different skill sets.

ERISA requires the plan document to name the plan investment fiduciary and plan administrator. Most plan documents name the plan sponsor/employer for both roles, typically being the company's board or owner. It's standard practice for a named fiduciary to delegate duties to a plan committee or someone not specifically named as a fiduciary under terms of the plan document. The key to successful delegation is ensuring that all those charged with executing these duties understand the importance of their role. One way to do this is to have all committee members sign a document that they understand and acknowledge they are plan fiduciaries.

One of the roles of a plan fiduciary may be to review and select recordkeepers, investment advisors, educators, trustees and other plan service providers. While these professionals provide valuable assistance to the committee, keep in mind that the selection of these professionals is, in itself, a fiduciary responsibility.

The process of establishing prudent process is called "procedural prudence". This tactic is effective in managing fiduciary liability and should be the focus of the committee when establishing processes and controls for the committee to follow. The courts often look more closely at the process than the results of decisions, so be sure to keep detailed meeting minutes to document how and why decisions were or were not made. Documentation is the hallmark of a strong fiduciary process.

Identify the right people for your plan committee. Be sure to educate committee members about their responsibilities, and ensure they know when they are a fiduciary and when they are not.

Consistent with the theme of procedural prudence, a properly drafted Investment Policy Statement (IPS) can be instrumental toward helping plan fiduciaries fulfill their duties. The IPS reflects the plan's specific goals and should outline five main objectives:

- The intended purpose of the plan
- Its long-range investment framework
- An outline of the investment selection process
- A monitoring and replacement process
- Clear definition of related investment duties and responsibilities

Like all fiduciary documents, the IPS should be carefully written and thoroughly reviewed by the plan sponsor and the plan's advisors and/or consultants. An IPS can be rather extensive, but the benefits it provides are invaluable:

- Written documentation as to the policies, practices and procedures for making investment decisions
- Clear baseline and framework to ensure continuity in its adherence and help deter "second-guessing"
- Establishes protection against potential fiduciary liability
- Ensuring participants that there is a logical and disciplined approach to the process

Being a fiduciary can be a rewarding experience if you use appropriate care and diligence when acting on behalf of your plan and its participants. The ERISA checklist that follows may provide you with some guidance, but remember it is not a substitute for a comprehensive compliance review.

If you answer “No” to any of the following questions, your plan may be at risk of not complying with ERISA’s requirements.

Processes and procedures	Yes	No
Are plan fiduciaries educated with respect to their duties and obligations?		
Do plan fiduciaries meet regularly and keep well-documented minutes of those meetings?		
Is there a prudent fiduciary decision-making process, and is there sufficient documentation to support actions taken?		
Are the quality and costs of services provided by your provider and investment advisor benchmarked at least every 3 years to ensure they are reasonable and in line with industry norms?		
Is your plan covered by a fidelity bond against losses due to fraud and dishonesty?		
Did the plan obtain exemptions from the DOL for any financial transactions with persons related to the plan or any plan official (for example, if the plan made a loan to, or participated in an investment with, the employer)?		

Administration		
Does the plan operate in accordance with applicable documents, statutes and regulatory requirements?		
Does the employer or other plan sponsor remit participant contributions to the plan or trust on a timely basis?		
Does the plan pay participants’ benefits on time and in the correct amounts?		
Are all reporting and disclosure requirements being met (e.g., Form 5500)?		
Are required notices and other communications sent to participants timely?		
Have you provided plan participants with a summary plan description, summary annual report (annual funding notice for defined benefit plans), enrollment materials and summaries of any material modifications of the plan?		
Do you respond to written participant inquiries for copies of plan documents and information within 30 days?		
Do you maintain copies of plan documents at the principal office of the plan administrator for examination by participants and beneficiaries?		
Does the plan provide and track ongoing employee communications and investment education?		

Investment related		
Does your plan have a written investment policy statement or funding policy? If so, is it followed?		
Has a plan fiduciary determined that the investments (and their associated risks) are prudent and solely in the interest of the plan’s participants and beneficiaries?		
Are the plan’s investments diversified to minimize the risk of large losses? Or, if the plan permits participants to select investments, does the plan offer diversified investment options?		
If participants are permitted to select their investments, has the plan provided them with enough information to make informed decisions, including required fee disclosures?		
Do plan fiduciaries periodically monitor plan investments and prudently evaluate whether to keep or replace them, and maintain adequate documentation of their reviews?		
Are the plan’s investments compared with appropriate benchmarks and peer groups over varying periods of time?		

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