



# **Fiduciary Duty in Retirement Plans**

## **The facts to combat the fiction when assessing fiduciary risk**

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# Agenda

- Fiduciary Responsibility
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  - Determining Fiduciary Status
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- Fiduciary Delegation
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- Fiduciary Governance
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# Fiduciary Responsibility

- The Employee Retirement Income Security Act of 1974 (ERISA) imposes 4 standards of care to which retirement plan fiduciaries are expected to adhere:
  - Exclusive Benefit Rule
  - Prudent Person Rule
  - Adherence to Plan Document
  - Diversification of Available Investment Options
- ERISA's fiduciary standards are considered to be among the highest standards of care in American law.
- Fiduciary responsibility imputes fiduciary liability.

# Fiduciary Responsibility

## Exclusive Benefit Rule:

- Fiduciaries must operate the plan in the best interests of the plan participants and their beneficiaries.
- Do not act in a manner that gives rise to a direct or indirect conflict-of-interest laden prohibited transaction.
  - Prohibited transactions include:
    - Transferring or using plan assets for the benefit of any plan fiduciary or party-in-interest;
    - Selling, exchanging or leasing property between the plan and a party-in-interest;
    - Lending money or other extension of credit between the plan and a party-in-interest; and,
    - Furnishing goods, services or facilities between the plan and a party-in-interest.
- Parties-in-interest include plan fiduciaries, service providers, certain officers and directors, certain relatives of individuals who are parties-in-interest, and certain related entities and organizations.
- Limited prohibited transaction exemptions exist.

# Fiduciary Responsibility

## Prudent Person Rule:

- Fiduciaries are required to act with the same care, prudence, skill, and diligence that a knowledgeable person would use.
  - Fiduciaries are not always experts with regard to all aspects of plan management.
  - Compliance with this standard may require the hiring of experts such as attorneys, accountants, consultants and investment managers.
    - Fiduciaries are not absolved of their liability simply because certain functions have been delegated.
    - Prudent selection and monitoring of hired experts is required.

# Fiduciary Responsibility

## Adherence to Plan Document:

- The plan document is the employer’s “manual” for operating and administering the plan.
- The document must be kept in compliance with ERISA, the Internal Revenue Code, and any other applicable laws and regulations.
- Deviation from the plan document’s provisions in many cases constitutes a fiduciary breach.
- Levy the document’s provisions consistently, regardless of sympathetic circumstances.

# Fiduciary Responsibility

## Diversification of Available Investment Options:

- Offer a diverse range of investment options to participants.
- Include investment options with materially different risk and return characteristics and investment objectives.
- Evaluate, select, and monitor available plan investment options using a documented diligence process.

# Fiduciary Responsibility

## Who is a fiduciary?

- Anyone specifically named in the plan document as a fiduciary (i.e. the plan sponsor (employer), the Board, the retirement plan committee).
- Persons performing certain discretionary (i.e. decision-making) functions on behalf of the plan, including administrative and investment functions.
- Any person rendering investment advice in exchange for a fee or other compensation.
- Any person who specifically accepts fiduciary responsibility in a services contract or otherwise.

## Who is generally not a fiduciary?

- Anyone performing ministerial or administrative services for the plan who has no discretionary authority.
- Attorneys, actuaries, accountants, and consultants who do not specifically accept fiduciary responsibility in their service contracts.
- Recordkeepers and third-party administrators that do not specifically accept fiduciary responsibility in their service contracts.

# Fiduciary Responsibility

Specific responsibilities that may present fiduciary implications include:

- Establishing the plan by adopting a written plan document;
- Following the document's provisions, including determinations of eligibility to participate in the plan, vesting schedule enforcement, and loan and distribution eligibility determinations;
- Ensuring that participants have the information about the plan and available investments necessary to make informed decisions;
- Remitting contributions in a timely manner;
- Purchasing and maintaining the appropriate fidelity bond (10% of plan assets minimum);
- Retaining and evaluating service providers and ensuring the reasonableness of their fees in light of the services provided;
- Selecting and monitoring the performance of available investment options (typically in line with an investment policy statement); and,
- Providing compliance oversight and making decisions required to comply with applicable law.

Certain ministerial and settlor responsibilities are non-fiduciary.

- Adopting discretionary plan document amendments that alter participant benefit levels is a settlor function.
- Providing purely ministerial services within a framework of policies, interpretations, rules, practices and procedures made by other persons will usually not constitute fiduciary activity.

# Fiduciary Responsibility

- Fiduciary status is not an all-or-nothing proposition
- You are only a fiduciary to the extent you are performing fiduciary functions
- For instance corporate officers
  - Must wear a fiduciary hat with respect to service related to their involvement with plan governance or a committee charged with governance
  - May not have a fiduciary hat when acting strictly in a corporate capacity

## The same holds true for service providers

- Service provider are fiduciaries duty to the extent they
  - Provide investment advice to committee members or plan participants for compensation
  - Act as a plan trustee
- Service provider is not a fiduciary to the extent they
  - Act only as a non-discretionary recordkeeper
  - Provide non-discretionary investment information or education

# Fiduciary Responsibility

Fiduciary liability may be limited (or mitigated) by:

- Adhering to ERISA's standards when discharging fiduciary duties;
- Avoiding prohibited transactions;
- Documenting decisions and actions;
- Allowing participants to direct the investment of their accounts;
- Complying with ERISA section 404(c), if elected;
- Establishing a qualified default investment alternative (QDIA);
- Obtaining required fidelity bonding; and,
- Purchasing optional fiduciary liability insurance.

In the event of a fiduciary breach, established correction methods are available through the Department of Labor and IRS.

Fiduciary breaches that remain uncorrected may give rise to personal financial liability and/or penalties.

Refer to Multnomah Group's Fiduciary Responsibility Guide and Checklists for additional information.

# Fiduciary Delegation

Fiduciary responsibility may be delegated to the plan sponsor's internal delegates.

- Delegation helps to ensure the full and timely discharge of all duties that arise from plan sponsorship.
- Delegation does not absolve delegating fiduciaries of their fiduciary status, responsibilities and/or liabilities, however.

Fiduciary responsibility may be delegated by the plan sponsor's governing Board to a Retirement Plan Committee.

- Committee members typically have decision making authority, rendering them fiduciaries.
- The Board may choose to indemnify Committee members from fiduciary liability, usually except in the case of gross negligence or willful misconduct.

# Fiduciary Delegation

Retirement Plan Committees are established and governed by a Charter, which is adopted by resolution of the Board.

The Charter:

- Delegates fiduciary, settlor, and ministerial responsibilities related to the overall management of the plan to a Committee.
- Defines the Committee's membership, typically by title, and each member's term.
- Indicates each Committee member's specific responsibilities.
- Describes the frequency with which the Committee will meet (usually quarterly) and how meetings will be run (i.e. meeting invitees, quorum constitution, meeting minutes requirements, etc.).

# Fiduciary Delegation

Fiduciary responsibility may also be delegated to external services providers.

- Delegation of responsibilities to service providers does not absolve the delegating fiduciaries of their fiduciary liability with regard to actions taken by the service provider.
- Select and monitor external service providers carefully.
- Hiring external service providers that are experts in a particular aspect of plan management will help a plan sponsor meet ERISA's prudent person rule.

Depending on the circumstances, service providers to which responsibilities have been delegated may or may not become fiduciaries to the plan.

- For example, recordkeepers, attorneys and accountants are typically not fiduciaries, whereas registered investment advisers and/or other investment professionals may be.
- Refer to the services contract with the service provider to determine whether the service provider has agreed to act in a fiduciary capacity.

Refer to the Multnomah Group's [ERISA Fiduciary Responsibility: Fiduciary Reliance on Registered Investment Advisers](#) white paper for additional information.

# Fiduciary Delegation

Sponsors may further delegate external parties to assume specified duties under ERISA

## 3(16) Fiduciary

Administrator under ERISA and has ERISA reporting and disclosure duties

- Provide SPDs
- Provide Benefit Statements
- Provide 404(a)(5) Participant Disclosures
- Provide Plan Document (upon request)
- Sign and File Form 5500
- Arrange for Plan's Financial Audit

## 3(21) Fiduciary

Person who renders investment advice for a fee

- Either adviser has investment discretion, or
- Non-discretionary advice is provided as follows:
  - On a regular basis
  - Under a mutual agreement
  - Advice will serve as primary basis for decisions
  - Advice will be individualized to needs of the plan

## 3(38) Fiduciary

Investment manager under ERISA

- Must have discretionary authority
- Must be RIA, bank or insurance company
- Must acknowledge fiduciary status in writing

# Fiduciary Delegation

The complexity of the structure and size of a Committee typically reflects the complexity and size of the plan.

- Larger plans may create more than one committee, such as a Retirement Plan Investment Committee and a Retirement Plan Administration Committee.
- Smaller plans typically create one Retirement Plan Committee.
- Generally, Committee membership is limited to as few as 4 and as many as 10 people, including a chairperson.

# Fiduciary Delegation

Committee members:

- Typically represent the employer's human resources, finance, business affairs, and legal departments, though membership can expand to other departments as well.
- Are not required to be experts in all aspects of retirement plan management so long as the appropriate experts are hired to assist the Committee in conducting its business when necessary.
- Should be notified of their appointment in writing and be required to acknowledge and accept their fiduciary duty in writing.
- Should serve a term that is long enough to establish desired continuity, typically 1-3 years or more depending on the Committee member's role.

The Committee is typically required to periodically (usually on an annual basis) report its endeavors to the Board or another similarly functioning body or person(s).

# Fiduciary Governance

- Assess past governance practices to determine their potency and efficiency.
- Review plan documents during the assessment phase to determine whether design changes are desired, and to ensure that current plan provisions are being followed consistently.
- Develop fiduciary governance documents.
  - The Committee Charter is a fiduciary governance document that should be followed closely.
  - An investment policy statement is another example of a fiduciary governance document that is typically adopted as a guide for evaluating, selecting, monitoring, and if necessary, terminating investment options available to participants under the plan.
  - Other governance documents, such as a fee policy statement, may be adopted.
  - Fiduciary governance documents are typically reviewed annually to ensure that revisions are made, if necessary.
  - All fiduciary governance documents should be closely followed as a matter of ongoing governance.

# Fiduciary Governance

- Decisions, strategies and actions should always be documented and kept on file for at least 7 years.
- Refer to the Multnomah Group's white paper [Retirement Plan Committee Best Practices, Simplified](#) for additional information.

# Five Fiduciary Fictions

1. Plan Sponsors can hire XYZ service provider who will assume their fiduciary duties
  - Plan Sponsors always retain fiduciary responsibility to select and monitor delegated fiduciaries.
2. My service provider is a fiduciary
  - Maybe. Duties and liabilities are often limited by the terms of the service agreement.
3. Fee reasonableness = Lowest fee available
  - Fees need to be assessed against services rendered and, ideally, outcomes achieved.
4. An Investment Policy Statement is Required / Terrible
  - Neither is right. Having a good Investment Policy Statement can be tremendously beneficial. Having an Investment Policy Statement and not following it can be a road map for a plaintiff's attorney.
5. 404(c) / QDIA / SAFE HARBOR, etc. is the silver bullet
  - Fiduciary duty is an ongoing responsibility, there are no single solution or right answer.

Fiduciary duty is a process. There is no destination.

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