Fiduciary Considerations

Retirement plan sponsors need to know risks and responsibilities

Any company that sponsors a retirement plan faces fiduciary obligations mandated by the Employee Retirement Income Security Act of 1974 (ERISA). To avoid potentially substantial legal and regulatory costs and reputational risk – as well as possible plan disqualification and harm to plan participants – plan sponsors and their fiduciaries need to be diligent in understanding and fulfilling those obligations.

Do You Know Your Fiduciary Duties?

The role of fiduciary carries great responsibility as well as risk if not handled correctly.

Federal laws require retirement plans subject to ERISA to have a fiduciary because someone must be in charge of this arrangement on an ongoing basis. Retirement plans are not "set it and forget it" arrangements – someone has an ongoing duty to attend to the ERISA plan.

Failure to meet fiduciary obligations can result in lawsuits filed by employees. Plans are also subject to Department of Labor audits, which can lead to penalties when employers don't fulfill their fiduciary duties.

Thus, while employers generally understand the value of offering retirement plans and see them as an important employee benefit, the associated fiduciary duties can be a source of concern.

This is largely because fiduciary duties are not fully understood. In fact, in cases where employers fail to meet their obligations, a failure to understand fiduciary risk is the No. 1 reason why.

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When Do These Duties Begin?

Fiduciary duties are defined under ERISA by an actions-or-responsibilities rule. Either you are specifically given a responsibility to do a fiduciary task for the plan or, without being named, take some discretionary action over the plan. This, by its nature, is not a black-and-white rule; you must look at a party's conduct and his or her obligations for the plan. Examples of fiduciary responsibilities or actions include:

- Appointing other plan fiduciaries or service providers
- Selecting plan investments
- Denying or approving claims
- Interpreting the plan

According to ERISA rules, the written terms for each covered plan should name and describe the duties of at least one named fiduciary. Many prototype plans include the employer as a named fiduciary. Within the plan, the named fiduciary may have the ability to appoint a plan administrator, who has the fiduciary duties for much of the plan's day-to-day administration. In many plans, the plan administrator remains the employer.

What Do These Duties Mean for Most Employers?

A business organization such as a corporation, a limited-liability company or partnership acts through people — shareholders, directors, partners, LLC members, executives and employees. When people start acting on behalf of a corporation, you can identify who is a fiduciary for the plan.

ERISA recognizes that delegation of plan responsibilities among individuals is a necessity. For many plans, fiduciary responsibility is commonly delegated to:

- A retirement committee appointed to absorb most of the named fiduciary duties of the plan.
- Various individuals appointed to be plan administrator.
- Outside trustees named to hold the assets and assist with aspects of plan administration.
- Investment advisors retained to manage the investment selection and monitoring of plan assets.

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You might be thinking: "This sounds great. If I'm an employer, can I simply delegate away all the fiduciary duties and sit back? What if I'm a member of the board of directors with authority to delegate power under the ERISA plan? If I delegate away all the fiduciary duties, do I really have anything left to be worried about? Why can't I just vote to place everything in the hands of the retirement plan committee, the plan administrator, human resources and an outside trustee?"

Unfortunately, the law is not so simple. Directors remain fiduciaries to the extent they have responsibility for any fiduciary functions. If the directors have the authority to select other plan fiduciaries, this is a fiduciary act. Does this mean the full weight of the plan's fiduciary duties falls on the shoulders of this director? No, but his or her fiduciary responsibilities and liability remain constant for certain acts. A director in this case would be liable for:

- The selection and retention of other fiduciaries. The director would have to monitor the appointed fiduciaries on an ongoing basis and document such review prudently. There could be liability for outsourced duties if the director did not appropriately monitor the conduct of the other party.
- Any other obligations specified in the plan document.
- Breaches of any other plan fiduciaries (that is, "co-fiduciaries") to the extent the director knew or should have known about the breach and did not act to correct the problem.

The Vital Role of Continuing Education

Even when authority is delegated, determining who is an ERISA fiduciary is complicated. Continuing education is the key to understanding the complex maze of ERISA fiduciary duties. The Department of Labor recognizes the importance of fiduciary continuing education and is even asking on audits what steps employers are taking to provide continuing education to their ERISA fiduciaries.

Fiduciary board training can help educate plan sponsors on the risks and responsibilities associated with being an ERISA fiduciary. Furthermore, hiring an investment professional experienced in retirement plans will add fiduciary protection.

Fiduciary continuing education cannot be solved by a one-size-fits-all program. Look for a solution designed to fit the needs of your directors. Some of the features of training could include:

- Dialogue concerning key fiduciary risks for your organization's ERISA plans, nonprofit governance or both
- Practical identification of fiduciary risks and methods to mitigate them
- Discussion of proper internal controls for fiduciary processes
- Convenient scheduling to meet the needs of your board
- Expertise from attorneys well-versed in fiduciary management

Education programs to manage risk are now standard in the retirement industry. Qualified partners should be expert at providing solutions for retirement plans.

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