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Fiduciary Overview

Am I a Fiduciary?

As a plan sponsor, you might ask yourself, “Am I a fiduciary?” In general, you become a fiduciary by either title or action. The Employee Retirement Income Security Act of 1974 (ERISA) defines a retirement plan fiduciary as a person or entity that does any of the following with regard to a plan:

- Exercises authority or control over the management of the plan or its assets;
- Provides investment advice for a fee; or
- Has discretionary authority or responsibility over plan administration.

Usually, ERISA requires that a retirement plan name a specific person, employee organization, or association as a fiduciary. Most often, the plan sponsor has the authority to designate one or more named fiduciaries who have the authority, control and responsibility to manage the operations of the plan. For example, retirement plan documents specifically name certain trustees as plan fiduciaries. These named trustees would satisfy ERISA’s fiduciary definition because they would have discretionary authority over the administration of the plan.

Plan sponsors can also name a directed trustee with the authority to perform only limited functions for the plan (e.g., processing plan distributions, processing trading instructions, retaining custody of plan assets). In carrying out these functions as instructed by a plan fiduciary, the directed trustee is a fiduciary, but only in a limited capacity. The directed trustee’s fiduciary liability is lessened by the fact that he or she merely reviews and determines the appropriateness of the instructions given by the plan sponsor or other plan fiduciary.

Because of ERISA’s broad fiduciary definition, fiduciaries of qualified retirement plans generally include the employer and its officers and directors (to the extent they perform functions included in the definition above), plan trustees, plan administrators, investment managers, and members of the plan’s retirement or investment committee.

Professional service providers are usually not considered fiduciaries if they offer legal, accounting, audit, recordkeeping, third-party administration or actuarial services. The services provided by these entities generally do not involve exercising discretionary control over the plan’s assets or administration.

Fiduciary Standards

Plan fiduciaries are required to act prudently and in the best interest of plan participants and beneficiaries when making decisions regarding the plan. When selecting plan investments, ERISA charges the fiduciary with diversifying plan assets in a manner that minimizes the risk of substantial losses. Generally, a participant-directed plan must offer at least three distinct and diversified investment options. ERISA section 404(c) provides that by allowing participants the right to direct the investment of their account balances, a plan can limit fiduciary liability with respect to losses arising from a participant’s investment decisions. In addition, a fiduciary must ensure that the operation of the plan is in accordance with the plan document and any other written policies (e.g., investment policy statement, loan policy, QDRO policy).

ERISA holds a fiduciary responsible for failure to report a known breach of duty by any other plan fiduciary. For example, a fiduciary may be held accountable for another fiduciary’s actions if he or she overlooks or conceals the acts of the co-fiduciary, or has knowledge of a fiduciary breach and fails to report or correct the breach.

If a fiduciary relies upon outside service providers such as financial advisors or recordkeepers, guidelines should be established to monitor their performance and to ensure that the third parties act prudently and in the best interests of plan participants and beneficiaries.

ERISA also provides guidance on the types of transactions that constitute a breach of fiduciary duty. A plan fiduciary breaches his or her duties by engaging in or allowing the following types of transactions

between the plan and a party-in-interest (which includes the employer, plan fiduciaries, service providers, or relatives of these parties):

- Selling, exchanging or leasing property;
- Lending money (other than participant loans);
- Furnishing goods or services;
- Transferring plan assets or using plan assets for a party-in-interest's or another individual's personal benefit; or
- Acquiring or holding employer securities with a value greater than permitted by ERISA.

The Department of Labor (DOL) may grant exemptions to the prohibited transaction rules.

Correcting a Fiduciary Breach

In the event of a fiduciary breach, the fiduciary should reverse the transactions that caused the breach and restore the plan to the same position it would have been in if the breach had not occurred. The fiduciary must also relinquish any profits arising from the transaction that resulted in a breach and is held personally liable for any losses arising from the prohibited transaction. The DOL has issued guidance on how plans may self-correct certain breaches. Plan participants may bring civil action against fiduciaries in the event of a fiduciary breach.

Limiting Fiduciary Liability

As mentioned previously, fiduciaries who don't follow the basic standards of conduct may be held personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions. Fiduciaries can limit their exposure to liability by taking some of the following actions:

- Identify your plan's fiduciaries and have an understanding of each fiduciary's role;
- Monitor the plan's cost, including recordkeeping, administration, and investment management costs;
- Make sure the plan is following any written documents;
- Be alert for conflicts of interest and potential prohibited transactions;
- Monitor the plan's investments and make changes to the fund lineup as needed;
- Establish a retirement committee and conduct routine meetings to review plan policies, procedures and operations; and
- Document decision making processes (e.g., selection of an investment provider).