

Fiduciary Responsibilities



Many of the actions needed to operate a qualified retirement plan involve fiduciary decisions. This is true whether you hire someone to manage the plan for you or do some or all of the plan management yourself. Controlling the assets of the plan or using discretion in administering and managing the plan makes you (or the entity you hire) a plan fiduciary to the extent of that discretion or control. Thus, fiduciary status is based on the functions performed for the plan, not a title. Be aware that hiring someone to perform fiduciary functions is itself a fiduciary act.

Some decisions with respect to a plan are business decisions, rather than fiduciary decisions. For instance, the decisions to establish a plan, to include certain features in a plan, to amend a plan, and to terminate a plan are business decisions. When making these decisions, you are acting on behalf of your business, not the plan, and therefore, you would not be considered a fiduciary for this purpose. However, when you take steps to implement these decisions, you (or those you hire) are acting on behalf of the plan and thus, in making decisions, may be acting as fiduciaries.

Basic Responsibilities

Those persons or entities that are fiduciaries are in a position of trust with respect to the participants and beneficiaries in the plan. The fiduciary's responsibilities include:

- Acting solely in the interest of the participants and their beneficiaries;
- Acting for the exclusive purpose of providing benefits to workers participating in the plan and their beneficiaries, and defraying reasonable expenses of the plan;
- Carrying out duties with the care, skill and diligence of a prudent person familiar with such matters;
- Following the plan documents;
- Diversifying plan investments.

These are the responsibilities that fiduciaries need to keep in mind as they carry out their duties. The responsibility to be prudent covers a wide range of functions necessary to the operation of a plan. Since all these functions must be carried out in a prudent manner, it may be in your best interest to consult experts in the various fields, such as plan administration, investments and accounting.

For some functions there are specific rules to help guide the fiduciary. For example, if the plan provides for withholding of 401(k) elective deferrals or participant loan repayments from employees' paychecks for depositing to a plan, those monies must be deposited timely. The law states that this must be accomplished *as soon as it is reasonably possible to do so*, but no later than the 15th business day of the month following the payday. If the employer can reasonably make the deposits in a shorter time frame, it must make the deposits at that time (e.g., 2-3 business days). The Department of Labor has proposed a safe-harbor that may allow certain employers seven (7) business days to transfer plan assets from the employer's account into the plan's account.

LIMITING LIABILITY

With fiduciary responsibilities, there is also some potential liability. However, there are actions you can take to demonstrate that you carried out your responsibilities properly as well as ways to limit your liability.

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Employee Benefit Services

Emphasis should be placed on the development of procedures and strategies to continually safeguard and manage plan assets to the desired retirement goal rather than simply focus on short term results. For example, if you or someone you hire makes the investment decisions for the plan, every investment is not required to be a “winner” as long as it was part of a prudent and diversified investment portfolio designed to meet the overall objectives for the plan. Since a fiduciary is required to carry out activities through a prudent process, you should document the decision-making process (through an “investment policy”) to demonstrate the rationale behind the decision at the time it was made.

In addition to the steps above, there are other ways to limit potential liability. Profit Sharing, Money Purchase Pension and 401(k) plans can be set up to provide participants the right to direct the investments in their accounts. Participants must have sufficient information on the plan’s specific investment options. If properly executed, this type of plan limits the fiduciary liability for investment decisions made by participants. You can also hire a service provider or providers to handle some or most of the fiduciary functions, setting up the agreement so that the person or entity then assumes some liability. However, as a fiduciary, you are responsible for selecting and monitoring the underlying investments that participants are permitted to choose from.

FIDUCIARY LIABILITY INSURANCE

Fiduciary liability is personal, absolute and unlimited. Fiduciaries are personally liable for their actions. A fiduciary liability policy protects the personal assets of a plan fiduciary due to allegations of breach of fiduciary duties. A fiduciary insurance policy can cover the following actions:

- Breach of fiduciary duties
- Negligent errors and omissions
- Improper disclosures to plan participants
- Remiss investment advice
- Imprudent choice of outside service provider
- Faulty advice of counsel
- Improper amendments to plan documents

BONDING

Persons handling plan funds or other plan property generally must be covered by a fidelity bond to protect the plan against fraud and dishonesty. The only plans exempt from this requirement are those plans that only cover an owner and his or her spouse.

HIRING A SERVICE PROVIDER

Even if you hire a financial institution or retirement plan professional to manage the whole plan, you retain some fiduciary responsibility for the decision to select and retain that person or entity as the plan’s service provider. Thus, you should document your selection process and monitor (at least annually) the services provided to determine if a change needs to be made.

Some items to consider in selecting a plan service provider:

- Information about the firm itself: affiliations, financial condition, experience with retirement plans, and assets under their control;
- A description of business practices: how plan assets will be invested, if the firm will manage plan investments or how participant investment directions will be handled, and proposed fee structure;
- Information about the quality of prospective providers: the identity, experience, and qualifications of the professionals who will be handling the plan’s account; any recent litigation or enforcement action that has been taken against the firm; the firm’s experience or performance record; if the firm plans to work with any of its affiliates in handling the plan’s account; if the firm has fiduciary liability insurance; and if the firm has errors and omissions coverage.

Once hired, these are additional actions to take when monitoring a service provider:

- Review the service provider’s performance;
- Read any reports they provide;
- Check actual fees charged;
- Ask about policies and practices (such as trading, investment turnover, and proxy voting); and
- Follow up on participant complaints.

For more information, see *Understanding Retirement Plan Fees and Expenses* and a sample fee disclosure form at www.dol.gov/ebsa. Click on “Publications,” then “Compliance Assistance For Retirement Plans” to access *401(k) Plan Fees Disclosure Tool*.