

Fiduciary Responsibility Basics

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Agenda

- What is a fiduciary, and why should I care?
- Who's my boss?
- Understanding your obligations
 - Financial oversight
 - Benefits payments
 - Collections
 - Securing data and privacy
- Delegating my duties
- Reporting to participants



What Is a Fiduciary, and Why Should I Care?

What Is a Fiduciary, and Why Should I Care?

- A fiduciary is *anyone*:
 - With discretionary authority or responsibility to:
 - Manage or control a plan or its assets
 - Exercise discretion in connection with plan administration
 - Who renders investment advice for a fee



Multiemployer Plan Fiduciaries



- Fiduciaries
 - Named fiduciaries
 - Trustees



- fiduciaries
 - Unnamed
 - Discretion or provide advice for a fee

Fiduciary Duties

- **Thou Shall:**
 - Exclusive benefit
 - Prudent person
 - Follow plan documents
 - Diversification
- **Thou Shall Not:**
 - Prohibited transactions



Consequences of Failure

- Participants and beneficiaries can file suit to recover benefits or enforce rights
- DOL and IRS penalties/fines
 - DOL: 20% penalty
 - IRS: 15% tax (can increase to 100%)
- Fiduciary is personally liable for restoring losses and returning profits lost due to violation



Consequences of Failure

Personal liability means:



Who's My Boss?

Fiduciary Basics

- A fiduciary is *anyone*:
 - With discretionary authority or responsibility to
 - Manage or control a plan or its assets
 - Exercise discretion in connection with plan administration
 - Who renders investment advice for a fee
- As a trustee, you are a fiduciary



Know Your Boss



Know Your Boss





Understanding Your Obligations



Understanding Your Obligations— Select Topics

- Financial oversight
- Benefits payments
- Collections
- Securing data and privacy

Financial Oversight

- Utilize experts (accounting, audit, investment consultant) but don't blindly rely on them
- Accounting: Plans with > 100 participants must obtain a financial audit annually
- Bonding: Fiduciaries that handle assets or property of an ERISA plan must be bonded by an IRS-approved surety



Financial Oversight

- Trustees are still responsible for operating the plan even if others are hired to assist in administration
 - Review participant communications
 - Request and review disclosures and policies
 - Document the monitoring process
 - Regularly RFP providers
 - Check actual fees charged



Financial Oversight

- As a perpetual fund, decisions should be based on long-term horizons (20-30 years)
 - But: Also evaluate expected returns over the near term (5-10 years)
- A plan can SINK faster than it can STEER



Benefits Payments

- Plan compliance
 - Benefits amount—Is benefit accurate?
 - Benefits form—Is form correction based on participant's record?
 - Benefits eligibility—Is form based on participant's marital status?
- Sufficient information
 - Does plan keep current participant addresses?
 - Does plan use a search service for returned mail?
- Accuracy of records
- Sufficient administrative procedures
 - Missing participant procedures
- How does board monitor that fund office is performing?

Benefits Payments

- Required beginning date/required minimum participation
 - Code requires benefits payments start no later than the April 1 following the later of calendar year of age 73 or calendar year of retirement
 - Plan can have earliest required start date but NOT later
- Does fund office have written procedure?
- Does fund office follow it?
- What happens to missing participants?
- How does board monitor the process working?

Benefits Payments

- Benefits payments also involve communications with plan participants
 - Duty to satisfy written disclosure obligations set forth in ERISA
 - Duty not to lie when asked
 - When a fiduciary speaks about benefits, it must speak truthfully
 - In some jurisdictions, duty to affirmatively disclose “material” information, even when not asked

Collections

- ERISA § 515 requires signatory employers to make benefits plan contributions per CBA
- Contributions are plan assets that must be monitored and collected by the trustees



Collections

- Failure to collect contributions owed to plan is a fiduciary breach (Adv. Op. 78-28A)
- Failure to establish and implement “reasonable, diligent, and systematic” collection procedures is a prohibited transaction (PTE 76-1)



Collections

- If prudent, file lawsuit in federal court to collect money due and owing to the plan
 - A plan successful in a 502(g) action gets mandatory award of contributions, interest, liquidated damages (up to 20%), attorneys' fees, and costs



Collections

- BUT: Don't throw good money after bad!
- May also be prudent to:
 - Agree to extended payment schedule
 - Accept less than the full amount of contributions owed
 - Accept less than the full amount of damages owed (i.e., waive interest or liquidated damages).



Securing Data and Privacy

- Protected health information and HIPAA
- Personal information
- Cybersecurity
 - Vendors
 - Fund office
 - Contractual duties

Securing Data and Privacy

- General Rule Concerning Use of Fund Information
 - Documents, data and other information is property of the fund and disclosure should be governed by statutory requirements and the rules of the governing plan documents concerning acceptable use.
 - Generally, keep documents confidential unless:
 - There is a benefit to participants and beneficiaries to disclose,
 - Statutory basis for disclosure,
 - Plan documents require disclosure unless illegal to do so, or
 - Information is in public domain.

Securing Data and Privacy

- Using Fund Information in a Remote Work Environment
 - Use of fund information in home and office work environment
 - Use of fund information on personal laptops, work computers, etc.
 - Review policies on use of approved devices, encryption, etc.
 - Review cybersecurity protocols (new DOL guidance)
 - HIPAA training for trustees and staff

Delegating My Duties

Monitoring Plan Professionals

- Selecting service providers
 - The DOL says a fiduciary should engage in an objective process designed to elicit information to assess:
 - Qualifications of the provider
 - Quality of the services offered
 - Reasonableness of the fees charged in light of the services provided
 - The process should be designed to avoid self-dealing, conflicts of interest, or other improper influence

Monitoring Plan Professionals

- Relationship With Service Providers
 - Trustees can delegate plan functions to others if allowed under the Trust Agreement.
 - Delegation must be in accordance with Trust terms.
 - Whether a service provider becomes a plan fiduciary depends upon whether they are delegated discretionary responsibilities versus ministerial duties.
 - All arrangements should be documented by written contracts and should specify whether the service provider is a fiduciary and, if so, for what duties it is a fiduciary.

Monitoring Plan Professionals

- Relationship With Service Providers
 - Trustees still retain the following fiduciary duties regarding service providers, whether provider is a fiduciary or nonfiduciary:
 - Selecting and contracting with service providers;
 - Monitoring service provider's performance;
 - Establishing and monitoring reasonableness of service provider's compensation;
 - Terminating service provider if appropriate.
 - Document monitoring efforts and decisions.

Monitoring Plan Professionals

- Monitoring Plan Professionals
 - Fiduciary reliance on information and advice from professionals
 - Fiduciary may rely on information, data, statistics or analysis furnished by persons performing ministerial functions for plan, provided she exercised prudence in selection and retention of such persons.
 - Fiduciary deemed to have acted prudently in such selection and retention if, in exercise or ordinary care in such situation, she has no reason to doubt competence, integrity or responsibility of such persons.

Reporting to Participants

Reporting to Participants

- Required disclosures (e.g., SPD, SBC, Funding Notice)
- Disclosing upon request
- Serious consideration
- Duty to not mislead or misinform
- Duty for accurate reporting

Key Takeaways

- Be aware of who is (and who is not) a fiduciary.
- Your house, your car, your boat.
- Know your boss.
- You are captain of multimillion-dollar aircraft carrier—your ship can sink faster than it can steer.
- Take reasonable steps to collect plan assets.
- Secure data and maintain privacy.
- Carefully select and then regularly monitor service providers.
- Provide accurate and not misleading information to participants.

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