



## **FAQS FOR EMPLOYERS** **ERISA Fiduciary Responsibility and Liability**

### **Who is a fiduciary?**

According to ERISA, a person is a fiduciary with respect to an employee benefit plan to the extent that such a person does any of the following:

- Exercises any discretionary authority or control over the management of a plan or over the management or disposition of Plan assets.
- Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan.
- Has any discretionary authority or discretionary responsibility in the administration of such Plan.

Other activities that give rise to fiduciary status include:

- Appointing other Plan fiduciaries
- Selecting and monitoring plan investment vehicles
- Selecting and monitoring their party service providers
- Interpreting plan provisions
- Exercising discretion in denying or approving claims

### **What is the significance of being a fiduciary?**

Fiduciaries have important responsibilities and are subject to higher standards of conduct because they act on behalf of Plan participants and beneficiaries. Fiduciary responsibilities include:

- Acting solely in the interest of Plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.
- Carrying out their duties prudently.
- Following the Plan documents (unless inconsistent with ERISA).

### **What is the duty of loyalty?**

As defined by ERISA section 404(a), a paragraph exists which is commonly referred to as the exclusive benefit rule and is considered to command a fiduciary's duty of undivided loyalty. Said duty of loyalty requires that Plan trustees avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with complete loyalty to participants. Further, the duty of loyalty may require that a fiduciary disclose material information that the fiduciary knows the participant does not have and will need in order to make an informed decision.

### **What is the prudence standard?**

As defined by ERISA section 404(a), a paragraph exists which is commonly referred to as the prudent person rule. This rule means that a fiduciary's actions will be compared against those of a hypothetical prudent person to assure that the fiduciary acts with the care, skill, prudence and diligence under the circumstances.

*Excellence • Principle • Integrity • Care*

---

Securities and Advisory services offered through LPL Financial, a Registered Investment Advisor, Member FINRA/SIPC.



## FAQS FOR EMPLOYERS ERISA Fiduciary Responsibility and Liability (continued)

### **What is the duty of disclosure?**

Generally the duty to disclose material information is the core of a fiduciary's responsibility. At the request of a participant or beneficiary a fiduciary must convey complete and correct material information.

### **What is the duty to monitor?**

Generally the act of selecting Plan service providers is an exercise of discretion over the management or administration of the Plan or its assets. Thus the person selecting the service provider is considered a fiduciary. A fiduciary can be held liable for the acts or omissions of their delegate if they have knowledge of a breach of fiduciary duty by the latter. For this reason, contracts for service providers should permit termination by a Plan without penalty on reasonably short notice so that a Plan is not locked into an arrangement that is disadvantageous. After selection, the fiduciary is under a continuing duty to monitor the service provider's performance; to review and evaluate at reasonable intervals the performance of others to whom responsibilities are delegated.

### **How to select Plan fiduciaries?**

Historical practice of naming "the company" as the Plan administrator in an attempt to shield individual directors and officers from liability has been ineffective as courts have found that employees, officers and directors, regardless of their title, who perform fiduciary functions are fiduciaries.

In fact, if the company is a fiduciary there is a question whether various company statements such as the company's outlook such as those in SEC filings, are construed as statements of an ERISA fiduciary. Further, naming the company as a fiduciary may also expose all individuals who act on behalf of the company to fiduciary liability – including the board of directors and top officers of the company.

Many companies also struggle with whether to designate the board of directors of a non-board committee as the Plan administrator or named fiduciary. Creating a committee populated with individuals who are top officers may leave duty to disclose.

### **Strategies to Manager Fiduciary Liability**

Here is a Fiduciary Conduct Checklist, drawn from ERISA and other major legislation governing fiduciary conduct.

---

*Excellence • Principle • Integrity • Care*

Securities and Advisory services offered through LPL Financial, a Registered Investment Advisor, Member FINRA/SIPC.



**FAQS FOR EMPLOYERS**  
**ERISA Fiduciary Responsibility and Liability**  
**(continued)**

- Keep current on the laws, regulations and Plan and Trust documents that govern portfolios managed.
- Maintain proper portfolio diversification. Managing risk and return through effective asset allocation is at the top of the hierarchy of investment decisions to be made by investment fiduciaries.
- Have and conscientiously follow a written investment policy statement to guide the management of each portfolio.
- Select prudent experts such as investment advisers and investment managers through a well-designed due-diligence process.
- Monitor the “prudent experts” as well as other key service providers such as recordkeepers, third party administrators and custodians to make sure they are satisfactorily performing the roles for which they were hired. Document any deliberations to consider retention or termination of service provider relationships.
- Control and account for expenses.
- Avoid self-dealing and conflicts of interest. Disclosure of conflicts of interest will not suffice in most fiduciary situations.

This information was developed as a general guide to educate Plan Sponsors, but is not intended as authoritative guidance or tax or legal advice. Each plan has unique requirements, and you should consult your attorney or tax advisor for guidance on your specific situation. In no way does advisor assure that, by using the information provided, Plan Sponsor will be in compliance with ERISA regulations.

*Excellence • Principle • Integrity • Care*

---

Securities and Advisory services offered through LPL Financial, a Registered Investment Advisor, Member FINRA/SIPC.