

ERISA FIDUCIARY BASICS

Who is a fiduciary?

Two types of ERISA fiduciaries:

- **“Named” fiduciaries – named or identified in plan document.**
- **“Functional” fiduciaries – ERISA Sec. 3(21) – Generally, a person is a fiduciary with respect to a plan *to the extent* he exercises any discretionary authority or control respecting management of such plan or management or disposition of its assets...or has any discretionary authority or discretionary responsibility in the administration of such plan.**
- **Amending an ERISA plan typically is NOT a fiduciary act (though there are exceptions to this rule).**

ERISA FIDUCIARY BASICS

- ERISA Section 404(a)(1) Summarized: A fiduciary shall discharge his duties with respect to a plan *solely in the interest* of the participants and beneficiaries and**
- ***for the exclusive purpose of***
 - Providing benefits to participants and their beneficiaries and defraying reasonable expenses;
 - **With a high degree of care, skill, prudence and diligence under the circumstances then prevailing;**
 - **By diversifying investments so as to minimize risk;**
 - **In accordance with the plan documents insofar as such documents are consistent with Title I and Title IV of ERISA.**

ERISA FIDUCIARY BASICS

You are probably a Fiduciary if you:

- **Play a role in the selection of plan administrators;**
- **Play a role in the selection of plan investment advisors;**
- **Play a role in the selection (or retention) of plan investment funds;**
- **Advise employees regarding plan investment decisions;**
- **Make statements about merits of company stock fund available through the plan;**
- **Make decisions about the interpretation of a plan provision;**
- **Make decisions about a participant's eligibility for a specific plan feature (e.g. early retirement feature); and**
- **Make statements about possible or actual changes to a plan, or how certain company changes will affect an employee's rights under a plan.**

CASE LAW

LESSONS LEARNED

“Ministerial functions” are narrowly defined:

TPA who made benefit eligibility determinations is a fiduciary, despite claim that it was bound by terms of plan document. Guardsmark v. Blue Cross and Blue Shield of Tennessee, 313 F.Supp. 2d 739 (W.D.Tenn. 2004)

CASE LAW

LESSONS LEARNED

- Check writing authority rises to level of fiduciary authority. Guardsmark v. Blue Cross and Blue Shield of Tennessee, 313 F.Supp. 2d 739 (W.D.Tenn. 2004)
- Directed trustees are fiduciaries to the extent they follow orders contrary to ERISA. Kling v. Fidelity Management Trust Co., 323 F. Supp. 2d 132 (D.Mass. 2004), citing In Re Enron..., 284 F. Supp. 2d 511 (S.D.Tex. 2003).

CASE LAW

LESSONS LEARNED

- Plan Administrator was fiduciary when he made investment decisions for ERISA Plan, even though he was not a Plan Trustee nominally empowered to determine plan investments. DeCosta v. Rodrigues, 46 Employee Benefits Cas. (BNA) 2594 (9th cir. 2009)

CASE LAW

LESSONS LEARNED

Employers and executives with authority to appoint investment managers and other fiduciaries are themselves fiduciaries. Power to appoint and remove investment committee members carries with it a fiduciary duty to monitor their performance.

Kling v. Fidelity Management Trust Co., 323 F. Supp. 2d 132 (D.Mass. 2004); In Re Sears, Roebuck ERISA Litigation, 2004 U.S. Dist. LEXIS 3241; 32 Employee Benefits Cas. (BNA) 1699 (N.D. Ill 2004).

CASE LAW

LESSONS LEARNED

Regular meetings between broker and plan trustee caused broker to be fiduciary where broker was lone source of investment advice to plan over many years, and broker's suggestions were regularly followed. "[I]n the special case of those providing investment advice, the existence of discretionary authority is not necessary to a finding of fiduciary status." Ellis v. Rycenga Homes, Inc., 484 F. Supp. 2d 694, 706 (W.D. Mich. 2007).

PRACTICE SUGGESTIONS

- Prepare Official List of Intended Plan Fiduciaries
 - Indicate designated responsibilities of each fiduciary;
 - Indicate who has power to appoint/remove;
 - Make sure each such intended fiduciary is aware of role and responsibilities;
 - Review and update list regularly.
- Prepare and maintain calendar for various committee deadlines/tasks.

INVESTMENT COMMITTEE

- **Who appoints the Investment Committee?**
 - **Plan Document (unlikely but possible);**
 - **Typically, the Plan Administrator (usually the employer) appoints the Committee (action often undertaken by board of directors or other governing body – or a committee thereof).**

INVESTMENT COMMITTEE

Making such appointments is itself a fiduciary function;

- **Decisionmaking *process*/Documentation**
- **Must monitor performance**
- **Appointment of corporate officers and HR personnel common, but should be undertaken with extreme care (especially if employer stock is a possible investment option)**

INVESTMENT COMMITTEE

- **Typical Role of Investment Committee**
 - **Adopt Investment Policy Statement (IPS);**
 - **Implement and Oversee IPS;**
 - **Modify IPS from time to time as needed due to changes in law, plan document, plan demographics, other assumptions...;**
 - **Determine and monitor proper allocation of fiduciary responsibilities;**
 - **Selecting and monitoring investment advisors;**
 - **Selecting and monitoring plan investments in accordance with IPS;**
 - **Ensure compliance with ERISA (and, if applicable, ERISA § 404(c)).**

INVESTMENT POLICY STATEMENT

- Investment Policy Statements should set forth:
 - Policy objectives (investment objectives/philosophy, legal compliance, encourage participation by employees, etc.);
 - Processes for determining/monitoring investment options and outside advisors;
 - Breakdown of specific responsibilities.

INVESTMENT POLICY STATEMENT

IPS should describe:

- If applicable, need and manner for ERISA §404(c) compliance;
- Appropriate asset classes to include as investment options;
- Criteria for determining investment options;
- Manner of oversight of investment options and investment managers;
- Manner of documenting decisions;
- Process for amending/modifying IPS.

INVESTMENT POLICY STATEMENT

Typical IPS Investment Selection Criteria

- **Clearly identifiable investment objectives in fund documentation;**
- **Readily ascertainable fair market value;**
- **Evaluation of performance over appropriate time period (3 – 5 years typically);**
- **Comparison of fund performance with those of peers;**
- **Consistency of performance;**
- **Tenure of fund manager;**
- **Fees and expenses;**
- **Any “Unacceptables.”**

INVESTMENT POLICY STATEMENT

Potential IPS “Traps”

- **Too broad – IPS should set forth general standards, but an overly broad IPS will not fulfill objectives of setting forth a process for meeting fiduciary responsibilities.**
- **Too detailed**
 - **IPS should provide enough room for prudent decisionmaking, but should not contain too many “absolute” rules.**
 - **Too many specific requirements (e.g. requiring quarterly meetings instead of “periodic” meetings) can lead to issues of noncompliance with IPS-which can be dangerous in the event of litigation. Don’t overpromise!**

HIRING INVESTMENT ADVISORS

Conveying Fiduciary Status to Investment Advisors (current regs.):

- **Will the person “render investment advice to the plan?”**
 - **Does advice relate to value of securities or constitute a recommendation as to advisability or buying/selling securities; and**
 - **Does the person have discretionary control regarding purchasing/selling plan assets, or will his advice to plan which be a primary basis for plan decisionmaking.**
- **Is the investment manager receiving “compensation” for his/her advice?**
- **Proposed Regulations would broaden definition of fiduciary for investment advisors.**

HIRING INVESTMENT ADVISORS

Proposed Regulations published October 22, 2010 would broaden the circumstances under which a person providing investment advice is considered to be a “fiduciary.”

Additional circumstances under the proposed regulations that could result in the imposition of “fiduciary” status include:

- **Those providing appraisal or fairness opinions (e.g. with respect to valuation of employer stock)**
- **Those providing advice and recommendations as to the management of securities or other property (e.g. voting proxies), as well as those selecting the persons to manage such property**
- **Those providing advice to plan participants or beneficiaries.**

Written Comments to DOL due Jan. 20, 2011

HIRING INVESTMENT ADVISORS

- When Selecting Investment Advisors, consider (and document):
 - Advisor's experience/qualifications;
 - Advisor's view of its own fiduciary status (review fine print);
 - Advisor's investment philosophy;
 - Reasonableness of fees;
 - Other factors set forth in investment policy statement.

INVESTMENT FEES

- Plan fiduciaries must make themselves aware of all investment and service fees, direct and indirect (including revenue sharing), related to each plan investment.
- Plan fiduciaries must determine that such fees are reasonable under the circumstances.
- Plan fiduciaries must monitor fees.
- Plan fiduciaries must disclose fees to participants.
 - Disclose revenue sharing arrangements?

PRACTICE SUGGESTIONS

Navigating ERISA's Fiduciary Provisions:

- **The key is *Process*. Random, undocumented decisionmaking leads to trouble.**
- **Always be mindful of plan document language, written investment policies, summary plan descriptions, etc.**
- **Make sure that investment-related decisions (e.g. mutual fund selection) are *informed* decisions (remember “prudent expert” requirement). Consultation with professional advisors can be helpful to minimizing liability. Documentation is key.**

PRACTICE SUGGESTIONS

Navigating ERISA's Fiduciary Provisions:

- **Semi-annual or quarterly review of investment funds is generally advisable. Again, documentation is key.**
- **When in doubt, seek legal counsel. Liability risk often outweighs short-term costs.**
- **Always be 100% certain that oral and written employee communications are accurate.**
- **Turn off the Autopilot.**

Make sure you have a decisionmaking PROCESS!

ONLINE RESOURCES

- [WWW.DOL.GOV/EBSA](http://www.dol.gov/ebsa)
- Sample 401(k) Fee Disclosure Form
 - <http://www.dol.gov/ebsa/pdf/401kfefm.pdf>
- Examples of Worthwhile DOL Publications:
 - Meeting your Fiduciary Responsibilities:
<http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html>
 - Understanding Retirement Plan Fees and Expenses:
<http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html>

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Paisner~Litvin LLP is a boutique law firm located in suburban Philadelphia, specializing in management-side labor law, employment law and employee benefits law.

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