

Five-Point Fiduciary Checkup



Most fiduciary breaches are the result of a lack of prudence. Many plan sponsors are not aware that they are a fiduciary and don't understand what responsibilities and potential liabilities such a designation entails.

Following these steps should prevent most of the violations that lead to lawsuits:

1. Determine Who is a Fiduciary

Briefly, a fiduciary is anyone who (1) Exercises discretionary control over the management of the plan; (2) Has any discretionary authority or responsibility regarding plan administration; (3) Offers investment advice regarding plan assets and derives compensation from it. Although determining who exactly is a fiduciary depends on the facts and circumstances of each case, fiduciaries usually include the plan administrator, the plan administrative and investment committees, the investment manager and the broker/consultant — if the plan relies on his advice.

2. Review Basic Fiduciary Responsibilities

Fiduciaries must act in the best interest of participants and their beneficiaries. Although this is usually only a problem

involving cases of “self-dealing” (the classic example involves selling real estate at an inflated price to the plan), it also means that sponsors have a duty to keep costs reasonable. Finally, to quote ERISA, plan decisions must be made “with care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters in the conduct of an enterprise of a like character and with like aims.” This means that a fiduciary must seek outside expertise when lacking the requisite education, experience or skill.

3. Perform a Self Audit

ERISA stipulates that each plan must have a plan document and that the plan is operated according to the plan document. An annual spot-check of basic plan operations (e.g., rollovers, loans, hardship withdrawals, nondiscrimination testing, etc.) and a review of all required plan documentation will go a long way in preventing any potential problems.

4. Ensure a Sound Process is in Place for Investment Selection and Monitoring

Plan sponsors need a process in place for selecting and monitoring investments. Many advisors work with their clients by drafting a customized investment policy statement and helping their clients to monitor the investment

on a regular basis. The important point here is that a plan sponsor has a bona fide process in place that they can refer to should anyone question a plan's investment decision-making process.

5. Consider Buying Fiduciary Liability Insurance

Advisors need to apprise their clients of the potential liabilities associated with fiduciary status since fiduciaries can be held personally liable for breaches. In addition to the ERISA-required fidelity bond, advisors may want to raise the idea of buying additional fiduciary liability insurance for the plan. Large plans routinely buy such extra protection as it is relatively cheap and offers broad coverage.

By helping your client to better understand their fiduciary status, you will go a long way in helping them prevent future lawsuits.

About the Author

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