Are You an ERISA Fiduciary?

by Marek Pfeil, CFA

The answer to this question is very important if you are managing a retirement plan that is governed by the Employee Retirement Income Security Act (ERISA). Sadly, it appears that there are still many plan sponsors who do not know that they are held to a very high fiduciary standard.

From my personal experience, many plan sponsors are unsure about the answer to this question, or they do not understand all of the responsibilities that come with being an ERISA fiduciary. This is unfortunate because it exposes the plan sponsor to significant risks that could have broader ramifications for their business and the participants in their retirement plan. A survey by the investment firm Alliance Bernstein provides some additional context. The firm surveyed 1,000 plan sponsors who qualified as fiduciaries under ERISA. When simply asked if they were fiduciaries, 49% of the respondents replied "no"! Another 6% stated that they were not sure or did not know. There is no good reason for answering this question incorrectly.[1]

Fiduciary Duties

Let's start with a basic definition of a fiduciary. Broadly speaking, a fiduciary is someone in a position of trust, acting for the benefit of others with a high duty of care and loyalty. From the perspective of ERISA, a fiduciary is any person who exercises discretionary authority or control over plan assets or administration, or gives investment advice. This means that fiduciaries are held to higher ethical standards of care. As such, fiduciaries responsible for overseeing a retirement plan governed by ERISA have several duties that they must fulfill.

- **Duty of Loyalty** - The plan's trustee owes the duty of loyalty to the participants and beneficiaries in the plan. The trustee must act solely in the best interest of the plan participants.
- **Duty of Prudence** - Actions by the plan sponsor must be made with care, skill, diligence and prudence. If a company lacks the necessary skills to act prudently, it should hire someone who can fulfill this role. Plan sponsors are not required to be experts in all of the areas needed to prudently manage a retirement plan and ERISA gives them the ability to hire third parties to assist as needed.
- **Duty of Obedience** - This is sometimes called the duty to document. The plan must be administered according to the plan document, and any rules and regulations that govern retirement plan administration.
- **Duty to Diversify** - A fiduciary must maintain a diversified investment lineup. Investment decisions must take into consideration the relationship between gains and losses.
- **Reasonable Expenses** - Plan sponsors must review the costs and expenses of the third parties hired to provide services to the plan. This is an important part of ensuring that costs are reasonable for the services being provided. ERISA does not require costs to be the lowest.

What Are The Consequences?

[1] DeLong, Jennifer. "DC Plan Sponsors: What Fiduciaries Don't Know Can Hurt Them", www.alliancebernstein.com, March 12, 2019.

The consequences of plan sponsors not fulfilling their fiduciary responsibilities can be significant.

- **Personal Liability** - Plan fiduciaries have personal liability for any actions that result in the mismanagement of the plan or plan assets. The limited liability that various corporate structures provide do not protect fiduciaries when their responsibilities under ERISA are not met.
- **Legal Action** - Lawsuits against plans have been steadily rising and many cases have focused on the required duties listed above.
- **DOL Audit** - Lastly, the Department of Labor (DoL) has been increasing its scrutiny on fiduciary governance during its plan audits. Plans that run afoul of their fiduciary responsibility may lose their qualified status and have to be terminated.

Some Remedies

There are several actions that companies can undertake to manage their fiduciary liability.

- **Hire Experts** - Plan sponsors should consider hiring knowledgeable experts to help them implement and manage a prudent plan governance process. Some (not all) of the experts may be able to serve in a co-fiduciary capacity and should commit to doing so in writing. It is important to note that plan sponsors should also continue to monitor their third parties.
- **Fiduciary Liability Insurance** - Another step plan sponsors can take to protect themselves from personal liability is to purchase fiduciary liability insurance. It is important to note that this is different from an ERISA fidelity bond. Fiduciary insurance helps protect plan sponsors from claims of breaches in fiduciary duties, standard of care and allegations of wrongful acts.
- **Fiduciary Training** - Lastly, plan sponsors should undergo a comprehensive fiduciary training program on a regular basis. This should help improve awareness and the overall operation of the plan.

We hope that this provides you a clearer picture of the basic plan sponsor fiduciary duties. In future newsletters, we will explore each of the duties in more detail. Additionally, in a couple of weeks, we will be holding a 30-minute webinar outlining the basic fiduciary duties and provide an overview of a prudent retirement plan governance process.

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