Fiduciary Training 101

Presented by:

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Who is a Fiduciary?

A person is a fiduciary if he or she:

- exercises any discretionary authority or control over the management of the plan or exercises any authority or control over the management or disposition of plan assets;
- renders investment advice for a fee or other compensation or has any authority or responsibility to do so; or
- has any discretionary authority or responsibility in the administration of the plan.

Who is a Fiduciary?

- Avoiding a “fiduciary” title does <u>not</u> protect you from fiduciary responsibilities
- Fiduciary status is a functional test
- Ministerial vs. discretionary tasks
- Limited exception for certain advisors.

Who is a Fiduciary?

- ERISA requires the plan document to identify a named fiduciary ultimately responsible for the plan.
- ERISA also requires that plan assets be held in trust by one or more trustees.
- The named fiduciary may delegate its responsibilities to outside experts who are functional fiduciaries based on their actions.

Delegating Fiduciary Responsibilities

- Professional fiduciaries:
  - 3(21) Investment Advisor: Provides investment advice to trustees and trustees make final decisions. Advisor and trustees jointly liable.
  - 3(16) Plan Administrator: Responsible for day-to-day operations of the plan. Assumes liability for discretionary administrative decisions
  - 3(38) Investment Manager: Has discretion over the management of the plan or control of its assets. Assumes liability for investment decisions.
  - 403(a) Discretionary Trustee: Has exclusive authority and discretion to manage and control plan assets -- goes beyond duties of 3(38) investment manager
- The trustee's or plan sponsor's role in outsourcing is to prudently select and monitor fiduciary service providers. Outsourcing **does not** release a trustee or plan sponsor from all fiduciary responsibilities.
- Successful delegation is contingent on providing necessary, accurate and timely information to professional fiduciaries

Once a Fiduciary, Always a Fiduciary?

- A person who is a fiduciary for some purposes, may not be a fiduciary for other purposes.
- For example, an employer that also acts as a plan administrator wears two hats, and only when the employer acts in its fiduciary capacity must it comply with its fiduciary duties.
- Grantor vs. Settlor functions

What are a Fiduciary's duties?

- ERISA's 4 general fiduciary duties:
  - Exclusive Benefit Rule
  - Prudent Man Rule
    - A fiduciary must act with the care, skill, prudence and diligence under the circumstances that a prudent man acting in a like capacity would act
  - Diversification Rule
    - A fiduciary must diversify investments to minimize risk of loss unless it would be considered prudent not to
  - Plan Document Rule
    - A fiduciary must act in accordance with the Plan but only to the extent that the Plan is consistent with ERISA

What are a Fiduciary's duties?

- Specific fiduciary responsibilities include:
  - Determining participant eligibility
  - Approval of benefits
  - Selection of investment managers, advisors and other service providers
  - Review of investment performance and fees
  - Replacement of investment managers and trustees
  - General duties of loyalty and impartiality in decision-making

What is a Fiduciary's potential liability?

- A fiduciary who breaches fiduciary duties may be personally liable to the Plan and beneficiaries.
- A fiduciary may also be subject to:
  - DOL penalties equal to 20% of the amount recovered from the fiduciary as a result of a court order or DOL settlement.
  - IRS excise taxes for prohibited transactions
  - Criminal liability

Fiduciary Litigation

- Plan Sponsors have been the focus of significant litigation over the past 10 years.
- Much of litigation has focused on excessive fees, particularly involving offerings of retail class mutual funds instead of cheaper, virtually identical, institutional funds.

Tibble v. Edison (the cliffs notes version)

- 401(k) Plan investments selected by Edison's Investment Committee.
- 6 of the 40 mutual funds in the Plan were retail-class mutual funds, which had higher fees than alternatives available to institutional investors
- Participants/Beneficiaries sued claiming sponsor acted imprudently in investing the Plan's assets
- In 2015 the US Supreme Court ruled in favor of the Participants/Beneficiaries and imposed a "continuing duty to monitor trust investments and remove imprudent ones."

Focus on University 403(b) Plans

- A year after *Tibble*, at least 16 prominent colleges and universities faced breach of fiduciary duty lawsuits.
  - The list includes Cornell University, Columbia University, Massachusetts Institute of Technology, New York University, Northwestern University, University of Pennsylvania, University of Southern California, Vanderbilt University, and Yale University.
- To date, only one of these 16 – the University of Pennsylvania – has won a complete dismissal of the suit.

Claim Trends

- Fiduciary claims raised in the 401(k) and 403(b) litigation may be generally summarized as follows:
  - Excessive administrative and recordkeeping fees
  - Use of multiple recordkeepers
  - Offering too may investment options
  - Inclusion of retail class as opposed to institutional class funds
  - Inclusion of actively managed fund options
  - Retention of underperforming investment options, including target date funds
  - Inclusion of proprietary funds in which employer or affiliated company has an interest
  - Inclusion of company stock (401(k) plans and ESOPs)

Best Practices for Fiduciary Protection

- Identify all fiduciaries and clearly identify and document roles and responsibilities.
- Appoint appropriate committees
  - If the plan sponsor is the plan administrator: consider appointing an administrative committee to act on behalf of the plan sponsor.
  - If the plan sponsor is responsible for directing the investment of assets: consider appointing an investment committee to select, monitor, and replace investment options.
- Educate committee members on their fiduciary responsibilities

Best Practices for Fiduciary Protection

- Retain independent knowledgeable professionals (i.e. ERISA attorneys, accountants, actuaries, etc.) to advise you.
- Determine the level of fiduciary/investment responsibility you wish to delegate.
  - Corporate discretionary trustee and/or investment manager, or investment advisor? Professional plan administrator or TPA?
- Adopt a prudent process to select service providers
  - Once selected, monitor the performance of the provider on a regular basis, and remove and replace any advisor that fails to perform adequately or properly.

Best Practices for Fiduciary Protection

- Hold regular meetings with consultants, service providers, and other advisors to review plan operation and investment activities.
  - <u>At least</u> one annual in-depth review to compare plan operation to plan documentation and verify compliance with IRS and DOL requirements.
- Review Plan financial reports and other information provided by service providers immediately, and <u>ask questions</u> about anything you do not understand.
- For participant-directed plans, comply with the requirements of ERISA § 404(c) to obtain relief from liability for losses that are the direct result of a participant's exercise of control over his or her account.

Best Practices for Fiduciary Protection

- Adopt a written Investment Policy Statement (IPS) for the plan, setting out the investment goals, strategies, and appropriate benchmarks.
- If responsibility for investment selection has not been delegated, the individual trustees, investment committee, or plan sponsor must prudently select the investment options (including the default investment option for participant-directed plans).
  - Options should constitute a broad range of investment categories
  - Options should be consistent with the written IPS and appropriate for the Plan and its participants
  - Options should be based on generally accepted investment theories and prevailing investment industry practices.

Best Practices for Fiduciary Protection

- Establish a process designed to monitor investments in accordance with the IPS, and remove or replace investments as appropriate.
  - Review at least annually, and more frequently if feasible.
  - Monitor fees and expenses and document what services the plan is receiving in exchange for the fees paid.
  - Consider a competitive benchmarking process every few years to understand the market for services.
  - If mutual funds are used, understand the share classes chosen, and investigate whether cheaper classes are available or appropriate, and whether any of the fees can be recaptured for the participants' benefit.

Best Practices for Fiduciary Protection

- Identify potential conflicts of interest
- Obtain fiduciary liability insurance coverage for plan fiduciaries.
- Document EVERYTHING.

Individual Fiduciary Checklist

- Attend Committee or plan meetings
- Review committee material prior to meetings
- Actively participate in discussions and ask questions
- Follow the Plan documents and applicable law
- Attend continuing education course(s) for retirement plan fiduciaries
- Rely on advice of professionals
- Do not advise individual participants, retirees, or beneficiaries.
- Avoid conflicts of interest.

Summary of Recommended Approach to Avoiding Liability

- Keep plan documents up to date
- Regularly review plan document for necessary changes
- Follow plan documents and applicable law
- Maintain and support educated staff and Committee members
- Make decisions prudently and deliberately, after due diligence
- Retain professional investment managers and consultants
- Hold regular Committee meetings
- Keep minutes, participant files, and financial reports
- Compare to benchmarks and peers
- Receive professional independent advice when necessary
- Conduct annual audits
- Voluntarily correct errors as they occur
- Maintain fiduciary liability insurance

A Little About Your Presenter

Ashley focuses her practice on Affordable Care Act (ACA) compliance, including employer reporting, employer mandate requirements, and employer shared responsibility payment assessment. Beyond the ACA, Ashley works hard to ensure that employer health and welfare plans are properly administered. If an error has already occurred, she has the expertise to develop and implement a solution.

As a member of the Firms' pension and employee benefits group, Ashley works diligently to condense and simplify the complicated and ultra-technical world of employee benefits into understandable, plain English advice for her clients. Ashley uses this straightforward approach to assist private, governmental, and nonprofit employers in the design, implementation, and maintenance of their employee benefit plans.

Ashley is dedicated to building long-standing, trusted relationships with her clients and understands that a single point of contact for timely resolution of employment-related issues is key. To that end, Ashley also spends a significant amount of her time helping clients navigate the prickly, and often unforgiving, landscape of the FLSA, HIPAA, COBRA, FMLA, ADA, and other employment-related legislation as well as everyday employment issues, like creation and application of employer policies and employee training.

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