Tulsa Employee Benefits Group

Fiduciary Duties, Liability, and Best Practices

for Retirement Plans Subject to ERISA

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Agenda

- Intro
  - Why is fiduciary duty important?
  - Who is a fiduciary?
- Duties
- Liability
- Best Practices

Intro

Why is fiduciary duty important?

- A fiduciary is in a position of trust and confidence.
- Your employees are counting on you and you're in the best position to do what's best for them.
- Your actions have significant consequences for them; e.g. costs, investments
- You are individually liable.
- Increased litigation and Dept of Labor scrutiny

Who is a Fiduciary?

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A Fiduciary is anyone who has or exercises any discretionary authority or control over the management or administration of the plan, or gives investment advice for compensation (direct or indirect)

Types of fiduciaries

PRIMARY FIDUCIARIES

1. Employer as Plan Sponsor
2. Plan Administrator
3. Discretionary Trustee
4. Plan Committee Member
5. Other functional unnamed

CO-FIDUCIARIES

1. 3(38) Investment Manager
2. 3(21) Investment Advisor
3. 3(16) Administrator
4. Directed Trustee

Fiduciary Duties

Fiduciary duties

- Act solely in the interests of participants exclusively to provide benefits and pay reasonable plan costs
- Act as a “prudent expert”
- Diversify investments to minimize risk
- Follow plan documents
- Select, monitor, replace service providers, appointed fiduciaries, investments
- Avoid prohibited transactions and self-dealing

Fiduciary Liability

Liability considerations

- Delegating duties
- Co-fiduciaries
- Personal liability
- Scope:
  - Errors, omissions, breaches of duty
  - DOL, participants/beneficiaries, litigation, co-fiduciaries
  - Civil penalty of 20% of recovery amount
  - Prohibited transaction 15% excise tax
  - Criminal penalties for embezzlement etc

Top liability risks

- Excessive Costs
- Inadequate investment monitoring
- Lack of a prudent process
- Conflicts of interest/self-dealing

Excessive costs

- Not identifying and understanding EACH cost component
- Not evaluating EACH cost component to determine reasonableness
- Not determining if a service provider is actually performing services
- No cost analysis with competitive quotes, RFPs, benchmarks
- No negotiation of costs
- Not choosing lowest cost share class for same fund management
- Using the recordkeeper’s proprietary funds with higher costs
- Allowing salespeople to determine costs

Investment monitoring

- No formal, quarterly monitoring process
- Review but no action taken
- No comparison to benchmarks and peers
- No review of investment-related expenses
- No add’l review of Target Date Funds
- No add’l review of Stable Value fund
- No Qualified Default Investment Alternative

Prudent process

- Selecting, monitoring, replacing investments
- Monitoring service providers and appointed fiduciaries
- Analyzing each cost component and determining if costs are reasonable
- Following Committee Charter
- Following an Investment Policy Statement
- Documentation

Conflicts and self-dealing

- Using proprietary funds of the recordkeeper or trustee
  - Costs and performance
  - Incentives and discounts
  - Minimum fund requirements
- Payments to affiliated entities
- Actions benefiting the Employer (e.g. banking)
- Revenue sharing arrangements

Fiduciary Best Practices

Basics

- Understand your duties
- Determine what you and your employees need
- Know the marketplace
- Hire experts for services based on your needs
- Get written service agreements
- Understand and follow your Plan document
- Obtain fiduciary liability insurance and indemnify individuals
- Document all decisions and actions

Governance

- Written Committee Charter
- Investment Policy Statement
- Quarterly review of investments and administration
- Annual review of costs and big picture
- Document all decisions and actions

Costs

- Identify and understand EACH cost component
- Determine if EACH cost is reasonable and appropriate based on value
- Consider competitive quotes, RFPs, benchmarks
- Negotiate and set all costs; consider fixed dollar costs rather than percentage of assets
- Understand who and how much is being paid to each party
- Choose lowest cost share class for same fund management

Cost Components

- Investment fund management (fund expense ratio)
- Recordkeeping/Custodian/Platform
- Investment monitoring
- Participant education and guidance
- Plan administration, compliance, reporting
- Trustee
- Independent auditor (if required)

Investment monitoring

- Comply with ERISA Section 404(c)
- Monitor quarterly; formal, written, action
- Past performance, peers, indices, expenses, management, etc.
- Follow Investment Policy Statement
- Closer review of TDFs, Stable Value, and QDIA

Prudent process

- Create and follow a process for all decisions
- Take action as necessary
- Documentation

Conflicts and self-dealing

- Identify all potential conflicts
- Consider carefully
- Focus on what's best for participants
- Don't benefit the employer or individuals
- Fully document your decision
- Avoid prohibited transactions unless exempted

Q&A