

Fiduciary Liability

What every executive needs to know (and probably doesn't) about fiduciary liability.

If your company provides employees with retirement or healthcare benefits, anyone involved in the management of those plans takes on tremendous responsibility that puts their personal assets at risk if they're sued.

Under the Employee Retirement Income Security Act of 1974 (ERISA), people who oversee benefit plans – called fiduciaries – owe numerous duties to the plans' participants/beneficiaries. Fiduciaries can be held personally liable for errors or omissions in administering plans, or for any breach in their ERISA fiduciary duties. Yet, many of these people aren't even aware of their fiduciary status and duties – or the costly court cases they could encounter.

With ERISA civil cases continuing to increase, and plaintiffs frequently winning large settlements, it's critical that you understand fiduciary liability and how you can protect yourself, your managers and your company. If you're a small company, it's particularly important as you may be more likely than a larger company to have allegations of an ERISA violation.

Q. What is a fiduciary?

A. Under ERISA, fiduciary status is based on the functions performed for a plan. It's not a person's title. You're a fiduciary if you have any discretion in administering or managing a retirement or healthcare plan. Examples of fiduciary functions include the following:

- You control the plan's assets such as choosing the investment options or choosing the firm that chooses the options
- Hiring the plan's record keeper
- Appointing other fiduciaries, such as the plan trustee
- Making benefit determinations

Fiduciaries have a duty to act solely in the interest of plan participants and beneficiaries – not the company – when making decisions about the plans. Fiduciaries are also required to act as a prudent person who is familiar with how the administration of employee benefit plans would act under similar circumstances. And, as fiduciaries, they're held personally liable to the plan participants and beneficiaries for errors or omissions or any breach in their ERISA fiduciary duties.



Q. If I hire a third party administrator to manage the 401(k) plan, that transfers my liability, right?

A. No. You're still on the hook. Even if certain plan functions are delegated to an outside fiduciary, under ERISA law, the appointing fiduciaries always remain liable for the selection and monitoring of the outside fiduciary to ensure that they are serving the best interests of your plan participants. Also, if someone alleges that you participated in an outside fiduciary's breach of responsibility, concealed the breach or did not act to correct it then you could be liable as well.

Q. What are some of the exposures plan fiduciaries face?

A. Allegations of imprudent investing if a plan loses money or does not meet an employee's growth expectations. Also, errors or delays in responding to requests for investment changes, distributions and rollovers, paying excessive fees, not adhering to plan documents, failing to make contributions on a timely basis and engaging in numerous types of transactions specifically prohibited by ERISA.

*Towers Perrin Tillinghast

** Pension Governance, Incorporated and The Michel-Shalied Group ERISA Litigation Study, April 15, 2009.

Q. Why should I be concerned about fiduciary liability?

More than 9000 ERISA lawsuits are filed each year on average.* According to Towers Perrin Tillinghast, the average settlement or court award is \$994,000 and average defense costs are \$365,000. According to one study, over half of all ERISA cases are disposed in favor of plaintiffs during preliminary and substantive stages of litigation.**

Q. But won't my ERISA bond, employee benefits liability (EBL) or directors and officers (D&O) policy provide enough protection in case of litigation?

A. Not necessarily. An ERISA bond is a first party coverage that covers the plan for any loss caused by theft, but it doesn't cover fiduciaries for lawsuits brought by third parties. EBL coverage is generally limited to negligent distribution of information, record keeping, and enrollment, but EBL coverage normally excludes liability imposed under ERISA for breach of fiduciary duty. Similarly, D&O policies typically have broad exclusions for violations of ERISA. Fiduciary liability not only covers negligent administration of benefits, but also defense costs and your personal liability for actual or alleged breaches of a fiduciary duty in connection with an employee benefit plan.

Q. Why might a small company be more at risk of litigation under ERISA than a larger company?

A. Because smaller companies often don't have:

- experienced personnel dedicated to employee benefits
- adequate resources and expertise to properly evaluate advice, information and services rendered by outside plan providers
- Size and scale to negotiate lower fees
- Audits performed on their retirement plans each year by a CPA firm

Q. What should I do to protect myself and my company?

A. Learn all you can about ERISA's fiduciary requirements to ensure you're in compliance. Consult with your insurance agent to make sure you have fiduciary liability insurance to protect the assets of you, your plan managers and your company.

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