Fiduciary Focus

8 Steps to Reduce Your Fiduciary Liability

RPAG

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1 - Drafting Plan Policies & Charters

Fiduciaries need written guidelines that assist in decision-making and framing their individual responsibilities

- Investment Policy Statement (IPS)
- Committee Charter

A written **IPS** provides the committee with guidelines for managing plan investments (blueprint/road map)

An investment policy should evidence a robust process without being unduly constricting

If hiring an outside consultant, condition such appointment on adhering to an appropriate investment policy.

1 - Drafting Plan Policies & Charters

- A Committee Charter is a formal document used to delegate responsibility from the Named Fiduciary to the appropriate co-fiduciaries
  - Any delegation to co-fiduciaries must be done via a formal documentation process: Charter, board resolution, sign on & resignation.

2- Fiduciary Liability Insurance

- An insurance policy covering plan sponsor's directors, officers and fiduciaries
  - Must specifically cover "ERISA" claims
- Not the same as a fidelity bond – a fidelity bond protects the plan
- Fiduciary insurance protects fiduciaries and their personal assets from lawsuits alleging breaches of fiduciary responsibility
- Review or purchase policy that provides broad coverage

3 - Indemnifying Fiduciaries

- The plan sponsor should offer to indemnify employees who are fiduciaries with respect to fiduciary suits which may arise under ERISA
- Examples of permitted indemnification agreements are
  - Indemnification of a plan fiduciary by
    - An employer, any of whose employees are covered by the plan, or an affiliate of such employer, or
    - An employee organization, any of whose members are covered by the plan; and
    - Indemnification by a plan fiduciary of the fiduciary's employees who actually perform the fiduciary services

4 - Procedural Prudence

- How does ERISA define prudence?
  - Prudent “expert”
- What is procedural prudence?
  - Process used to make decisions:
    - Identify the issue under consideration
    - Become/hire an expert in this area
    - Determine action in best interest participants
    - Take action and document process & action
    - Review periodically for continued prudence

5 - Education and Documentation

- Plan fiduciaries should understand their responsibilities and obligations under ERISA
  - Create and implement fiduciary training program
  - Develop worksheets to document/monitor roles and responsibilities

- Fiduciaries must follow and document written procedures and actions that can demonstrate compliance with ERISA's fiduciary standards

6 - Hiring Consultants

- Fiduciaries/Trustees may look to hire outside professional trustees, investment managers, co-fiduciaries to help make plan decisions
- Fiduciaries/Trustees must carefully and prudently select and monitor any/all co-fiduciaries who are delegated fiduciary responsibilities.

6 - Hiring Consultants

- Lawyers, consultants and third party administrators might assist their clients with the practical implications of being a fiduciary by
  - Helping plan sponsor understand its responsibilities
  - Assisting with hiring a professional trustee or investment manager
  - Recommending the indemnification of certain fiduciaries
  - Recommending the purchase of fiduciary liability insurance

6 - Hiring Consultants

- 3(21) versus 3(38) fiduciaries
  - 3(21) – advice (no discretion)
  - 3(38) – management (discretion)
  - 3 (16) – Administrator fiduciary
  - Same standard of care
    - Prudent man standard
    - No higher standard for 3(38)
  - Practical shift of *responsibility*
  - Likely (but *not certain*) shift of *liability*
  - Serve as 3(21) and 3(38) at same time for same client in limited roles

7 - Required Distributions

- In general, fiduciaries are not liable for any losses due to a participant's investment choices if they are deemed to be compliant with ERISA §404(c) and regulations promulgated thereunder

8 - Conducting Periodic Audits

- Plan sponsors should conduct periodic self-audits to ensure that their plans are being administered in accordance with ERISA and the Internal Revenue Code
- The plan sponsor should be aware of the warning signs that indicate when a self-audit would be appropriate
- **Such annual financial audits should not be viewed or relied upon as comprehensive compliance audits**

Conclusions

Fiduciaries can minimize risk through	Written policies and charters
	Fiduciary insurance and indemnification
	Education and documentation
	Hiring and monitoring appropriate outside consultants
	Regulatory compliance for participant directed accounts
	Conducting periodic audits

Thank You

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