Reinhart Attorneys at Law **CLE SERIES**

YOU ARE AN ERISA FIDUCIARY, NOW WHAT?

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Rebecca E. Greene
414-298-8244
rgreene@reinhartlaw.com

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700, Milwaukee, WI 53202
www.reinhartlaw.com

Rebecca E. Greene is a shareholder in Reinhart's Employee Benefits Practice where she advises a wide variety of clients that sponsor employee benefit plans, including private and publicly held businesses across many industries, as well as Taft-Hartley multiemployer benefit funds. Rebecca provides counsel to plan sponsors and plan fiduciaries on all issues for qualified retirement plans, health benefit plans, fringe benefit plans, and nonqualified deferred compensation arrangements including plan design, plan investments, prohibited transactions, service provider arrangements, plan document drafting and benefit claims. She also advises plan sponsors and plan fiduciaries on all aspects of compliance with the laws regulating employee benefit plans including ERISA, the Internal Revenue Code, COBRA, HIPAA, PPA and the ACA, corporate governance issues, fiduciary risk management and fiduciary compliance.

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Outline

- Fundamental Duties of an ERISA Fiduciary
- Minimizing Liability for ERISA Fiduciaries
- Hot Topics and Trends

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Fundamental Duties of an ERISA Fiduciary

Partnering for your Success

Who Is an ERISA Fiduciary?

- Named vs. functional fiduciaries
- Two hats doctrine
  - Fiduciary vs. settlor
  - Corporate officials
- Other types of fiduciaries
  - Appointing fiduciaries
  - Limited-purpose fiduciaries

ERISA Fiduciary Duties

- Duty of Loyalty (Exclusive Purpose)
- Duty to Act Prudently
- Duty to Diversify
- Duty to Follow Plan Documents
- Duty to Avoid Prohibited Transactions

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Duty of Loyalty (Exclusive Purpose)

- Activities and transactions on behalf of a plan must be for exclusive purpose of:
  - Providing benefits to plan participants
  - Defraying reasonable expenses of plan administration
- Fiduciary must be truthful with participants regarding plan terms and plan status

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Duty to Act Prudently

- Prudent person rule: Exercise same care, skill, prudence and diligence that another prudent person would exercise in similar circumstance
- Prudence is determined at the time of the decision and not subject to hindsight
- Keep detailed written records of decision-making process
- Consult with experts as necessary

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Duty to Diversify

- Plan investments must be diversified
- No bright line rules to satisfy the duty
- Fiduciaries should consider a variety of factors
- Failure to diversify can lead to costly penalties for fiduciaries

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Duty to Follow Plan Documents

- Fiduciaries must act in accordance with plan documents
- Fiduciaries may need to use competent service providers

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Duty to Avoid Prohibited Transactions

- Party in interest transactions
  - No transactions with parties in interest that constitute a transfer of goods or services between the party and the plan
  - Exceptions under ERISA section 408
- Self-dealing prohibitions
  - Fiduciary may not enter into transaction for his or her own benefit

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Minimizing Liability for ERISA Fiduciaries

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Minimizing Liability for ERISA Fiduciaries

- Fiduciary Training
- Employee Benefit Plan Governance
- Retain Qualified Professionals to Provide Advice
- Investment Policy Statement
- Bonding and Insurance

Fiduciary Training

- Not required under ERISA, but considered best practice
- Training should be periodic and ongoing
- Formal and informal training
- Importance of documentation

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Delegation of Fiduciary Duties

- Fiduciary duties may be delegated to a committee or third party
- Scope of authority and risk of liability varies based on responsibilities allocated
- Cannot delegate all fiduciary responsibility; duty to monitor delegation remains

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Delegation of Fiduciary Duties (cont.)

- Committee structure or third-party responsibilities should be clearly described in written documents
- Documentation of activities is important
- Avoid overlap of fiduciary and settlor duties

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Retain Qualified Professionals to Provide Advice

- Commonly outsourced services:
  - ➢ Investment
  - ➢ Recordkeeping
  - ➢ Accounting
  - ➢ Actuarial
  - ➢ Legal
- Pros of hiring qualified professionals:
  - Can reduce costs
  - Gain access to expertise in a particular field
  - Access to technology
  - Ensure legal compliance

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Retain Qualified Professionals to Provide Advice (cont.)

- Pitfalls of hiring third-party fiduciaries or service providers
  - Document hiring process
  - Should compare several potential providers
  - Unreasonable fees can lead to fiduciary violations
  - Bundled services for multiple plans can be risky
  - Termination and indemnification contract provisions usually one-sided

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Working with Professionals

- Duty to act prudently
- Duty to monitor
  - Fiduciaries are still responsible for determining whether services are proper and fees are reasonable
- Consultants can assist fiduciaries by performing specific functions; for example, monitoring investments
  - Should provide regular reports to the fiduciaries

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Working with Professionals (cont.)

- Limitations on attorney-client privilege in ERISA litigation
  - Sometimes communication between fiduciaries and plan counsel must be disclosed to plan participants
    - Participant considered the client
    - Participant entitled to disclosure of all administrative information related to their claims
    - Limitations to the exception

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Establish an Investment Policy

- Not required under ERISA, but helps fiduciaries properly manage plan assets
- Common aspects of an investment policy
  - Minimum quality and duration limits
  - Authorized asset classes
  - Liquidity considerations
  - Procedures for selecting, monitoring and replacing investments
  - Investment performance benchmarks
  - Directed brokerage
  - Plan objectives and goals

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Establish an Investment Policy (cont.)

- DOL recommended considerations when selecting funds and investment service providers
  - Does the fund have the objective qualifications to provide investment services for the plan?
  - Are the fees reasonable?
  - How does the fund company measure and report investment performance?
  - Has there been significant turnover in personnel, ownership or clients?

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Establish an Investment Policy (cont.)

- Procedures for monitoring investment funds
  - Plan fiduciaries required to prudently monitor selected funds
  - ERISA does not include specific procedures for investment monitoring
  - DOL guidance for monitoring investments
    - Quarterly reviews
    - Annual reviews

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Establish an Investment Policy (cont.)

- Investment performance should be measured against appropriate benchmark
- Litigation may result from investments considered either too risky or too conservative
- No presumption of prudence for ESOPs

Bonding and Insurance

- ERISA requires fidelity bond to protect the plan against losses resulting from fraudulent acts or dishonesty
- Fiduciary liability coverage
  - Provides insurance for fiduciaries against allegations of fiduciary breach
  - Not required by ERISA
- Indemnification clauses in plan documents

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Hot Topics and Trends

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Hot Topics and Trends

- New Fiduciary Rule
- Revenue Sharing and Float
- Reasonableness of Fees
- Target Date Funds ("TDFs")
- Brokerage Windows
- Economically Targeted Investments ("ETIs")

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Prior Fiduciary Rule

- A person is a fiduciary to the extent they provide "investment advice" relating to plan assets for compensation
- Five-part test of "investment advice":
  - Provides recommendations relating to investing or value of securities;
  - On a regular basis;
  - Under a mutual agreement or understanding that;
  - The advice constitutes the primary basis for an investment decision; and
  - Is individualized based on the plan's or the participant's needs

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New Fiduciary Rule

- A person is a fiduciary if they receive compensation for providing certain recommendations regarding certain investment-related activities or policies
- Categories/types of covered recommendations:
  - Advisability of investing assets in plan/IRA
  - Advisability of investing assets that are being rolled over/distributed from a plan/IRA
  - Management of assets
    - Investment policies and portfolio composition
    - Selection of investment advisors/managers
  - Amount, form and destination of rollovers/distributions from plan/IRA

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New Fiduciary Rule (cont.)

- Recommendation: A communication based on content, context and presentation that suggests a particular course of action
  - Objective inquiry
  - The more individuality tailored, the more likely to be a recommendation
    - Examples:
      - Providing a list of securities specifically selected for the recipient
      - Providing a "referral" of an investment advisor
  - Series of actions can be a recommendation when considered together

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New Fiduciary Rule (cont.)

- Carve-outs from fiduciary definition
- Exceptions to the new fiduciary rule
- New prohibited transaction exemptions
  - Commissions and revenue sharing
  - Advisor to sell debt securities

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New Fiduciary Rule (cont.)

- Know your fiduciary responsibilities
  - Review fiduciary practices and polices
  - Investment policy statements
  - Selection and monitoring duties
- Confirm compliance with employee exception
  - Review employee job duties, compensation structure
- Education materials and participant communication
- Ensure investment fiduciaries are complying with the Final Rule
  - Brokers vs. investment advisors?
  - Contract modifications
  - New contracts
- Modifications to RFPs

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Revenue Sharing

- Payments from plan investments that recordkeepers use to offset or pay for plan expenses
- DOL Advisory Opinion 2013-03A
  - These payments are not plan assets based on rules of ordinary property rights
  - These arrangements are still subject to duty to monitor despite not being plan assets

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Float Income

- Interest earned from a redemption account when a 401(k) participant requests a distribution of benefits
- Courts seem to distinguish float income from typical revenue sharing
  – Float income is not a plan asset
  – Participants suffer no harm
- Float income should be factored into analysis of reasonableness of fees, which requires disclosure by service provider

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Reasonableness of Fees

- Fiduciaries must ensure fees are reasonable for services needed to operate plan
  – Direct vs. indirect fees
  – 408(b)(2) disclosures assist fiduciaries in determination of reasonableness of fees
- Recent increased scrutiny
  – New fiduciary rule
  – Continuing excessive fee litigation

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Reasonableness of Fees (cont.)

- Evaluation strategies:
  - Request for proposal
  - Benchmarking
- Factors to consider:
  - Cost of services
  - Scope of services
  - Experiences with the service provider
  - Experiences with other service providers
  - Plan objectives and goals
  - Marketplace reputation
  - Whether the services are meeting plan needs
  - Depth of available services

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Target Date Funds ("TDFs")

- Automatically rebalances investments to become more conservative as the participant nears retirement
- Often used as a plan's QDIA
- DOL preparing to release final rules
- Why the concern?
  - Fiduciary duties
  - Risk to plans

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Target Date Funds ("TDFs") (cont.)

- Plan fiduciaries should:
  - Establish process for comparing and selecting TDFs
  - Establish process of periodic review
  - Understand the fund's investments and allocation
  - Review and compare fund's fees
  - Develop effective communications regarding TDFs
  - Use available resources and information to evaluate
  - Document all due diligence taken

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Brokerage Windows

- Allows participant to select from an array of investment choices
- DOL beginning process of creating rules
- DOL seems particularly concerned with fiduciary duties related to this form of investment

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Economically Targeted Investments ("ETIs")

- An investment selected for its collateral benefits
- Plan fiduciaries must be focused on plan's financial returns and risk to beneficiaries
- 2008 guidance from DOL advised plan fiduciaries to document the use of noneconomic factors considered to prove compliance with ERISA

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Economically Targeted Investments ("ETIs") (cont.)

- DOL determined 2008 guidance unduly discouraged consideration of environmental, social and governance factors
- Interpretive Bulletin 2015-01
  - Environmental, social and governance factors not always collateral consequences
  - Investing plan assets in ETIs does not violate fiduciary duties if return and risk to beneficiaries is appropriate

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Questions?

Thank you!

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