

YOU ARE AN ERISA FIDUCIARY, NOW WHAT?

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

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ERISA Fiduciary Duties

- Exclusive purpose (duty of loyalty)
 - 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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ERISA Fiduciary Duties (cont.)

- Duty to act prudently
 - Prudent person rule: Exercise same care, skill, prudence and diligence that another prudent person would exercise in similar circumstance
 - Procedural prudence v. eventual outcome
 - Keep detailed written records of decision-making process

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ERISA Fiduciary Duties (cont.)

- 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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ERISA Fiduciary Duties (cont.)

- 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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ERISA Fiduciary Duties (cont.)

- 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 § 408

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ERISA Fiduciary Duties (cont.)

- Self-dealing prohibitions
 - Fiduciary may not enter into transaction for his or her own benefit
- Cigna Corp. litigation
 - Allegations of failure to diversify, engagement in self-dealing
 - Settlement: agreed to engage in outside monitoring of investments and remove options to invest in Cigna Corp or any subsidiaries

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Minimizing Liability for ERISA Fiduciaries

Partnering for your Success

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
- Fiduciaries unable to delegate all fiduciary responsibility

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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
- Overlap of fiduciary and settlor duties should be avoided

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Retain Qualified Professionals to Provide Advice

- Investment consultant
 - Consultant can assist fiduciaries by performing specific functions related to duty to monitor investments
 - Prudent person standard used
 - Fiduciaries still responsible for determining whether investment services are proper and fees reasonable

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Retain Qualified Professionals to Provide Advice (cont.)

- Pitfalls of hiring third-party fiduciaries or service providers
 - Fiduciaries should carefully document hiring process
 - Best practice is to compare several potential providers
 - Unreasonable fees can lead to fiduciary violations
 - Risk of accepting bundled services for multiple plans
 - Termination clauses in contracts

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Establish an Investment Policy

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

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Establish an Investment Policy (cont.)

- Procedures for selecting funds
 - DOL ERISA Advisory Council's "Guidance in Selecting and Monitoring Service Providers" provides fiduciaries with questions to consider
 - May need experts to help identify, monitor and handle underperforming investments

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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

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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

Partnering for your Success

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

Revenue Sharing (cont.)

- Plan fiduciaries must be able to calculate fees paid and fees must be reasonable
- Fiduciaries should understand how revenue sharing is received, used and allocated

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Who Is a Fiduciary for Providing Investment Advice?

- Current test for when an individual becomes a fiduciary by providing investment advice is based upon five-prong test
 - Providing investment advice
 - On a regular basis
 - Under a mutual agreement or understanding
 - The advice constitutes basis for investment
 - The advice is customized to the plan's needs

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DOL's Proposed Definition of Fiduciary

- A person would become a fiduciary if he or she provides investment advice for compensation to:
 - A plan, plan fiduciary, participant, IRA or IRA owner
- AND EITHER
 - Directly or indirectly represents or acknowledges fiduciary status OR
 - Provides the advice under an agreement that it is specifically directed to the recipient as investment advice

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DOL's Proposed Definition of Fiduciary (cont.)

- Examples of investment advice
- Carve-outs from fiduciary definition
- New prohibited transaction exemptions
 - Commissions and revenue sharing
 - Advisor to sell debt securities

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DOL's Proposed Definition of Fiduciary (cont.)

- Four differences between existing rule and proposed rule
 - Advice related to IRAs
 - Removal of regularity requirement
 - Removal of mutual understanding requirement
 - Advice with respect to investment management

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DOL's Proposed Definition of Fiduciary (cont.)

- Implications for plan sponsors
 - No need for immediate action
 - Individuals providing advice or services to employee benefit plans or IRAs most significantly impacted
 - May need to renegotiate contracts with service providers

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Regulatory Focus on Common Investment Options

- Target date funds ("TDFs")
 - Reduce the percentage of stock holdings as the fund nears its target date
 - DOL preparing to release final rules
 - Why the concern?
 - Fiduciary duties
 - Risk to plans

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Regulatory Focus on Common Investment Options (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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Regulatory Focus on Common Investment Options (cont.)

- Brokerage window
 - 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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Regulatory Focus on Common Investment Options (cont.)

- 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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Regulatory Focus on Common Investment Options (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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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

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Limitations on Attorney-Client Privilege in ERISA Litigation (cont.)

- Factors to consider
 - Who is the client?
 - What was the purpose of the communication?
 - Joint representation
 - Claims and appeals
 - DOL proceedings
- Limitations to the exception
 - Does not apply to settlor functions
 - If counsel is advising on a fiduciary's personal liability

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Is There a Breach if a Participant Suffers No Harm?

- Spokeo v. Robbins
 - Can Congress confer constitutional standing on plaintiffs who have not suffered a concrete injury to allow them to sue for violations of fiduciary duty?
 - If no, participants may lose right to sue under ERISA for certain fiduciary breaches
 - No harm requirement in ERISA
 - Plan fiduciaries should carefully document actions and reasoning

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Questions?

Thank you!