



RETIREMENT PLAN FIDUCIARY BASICS AND HOT TOPICS

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John is a shareholder with The ERISA Law Group, P.A. His practice is focused exclusively in the area of ERISA/employee benefits.

He represents clients, typically employers, relative to issues involving all kinds of employee benefit plans including 401(k), profit sharing, pension/defined benefit, 457, 403(b), nonqualified deferred compensation/409A, employee stock ownership ("ESOP"), governmental, 125/cafeteria, and health and welfare plans.

John counsels clients on a variety of plan related issues including fiduciary responsibilities, plan operations and administrative issues, plan failures and corrections, plan design, mergers and acquisitions, litigation, and plan qualification.

John is the Coeditor-In-Chief of a well established nationally circulated monthly newsletter entitled the *401(k) Advisor*. He is a Board Member and the Immediate Past President of the Boise Chapter of the Western Pension & Benefits Council.

Plan Fiduciary Basics

- ▶ How does this affect on my practice?
 - ▶ Qualified retirement plans are prolific
 - ▶ Trillions of dollars in private “qualified” plans alone
- ▶ Employee Retirement Security Act of 1974, as amended (“ERISA”)
 - ▶ The statute, regulations, and other guidance are detailed and complex
 - ▶ Main Objective: Protect participants and their retirement savings
 - ▶ In part, it defines fiduciaries, fiduciary duties, and consequences for breach of fiduciary duties.
 - ▶ Contrast – “qualification” issues. Beyond this discussion, but critical

Who Are The Fiduciaries?

- ▶ Named Fiduciaries
 - ▶ Those fiduciaries identified and named in the plan document
 - ▶ Typically, this is the plan sponsor/plan administrator/employer. But, it need not be
- ▶ Discretionary Authority Fiduciaries
 - ▶ Those who exercise any discretionary authority or control with respect to the management or disposition of plan assets. Also, those who have any discretionary authority or discretionary responsibility in administering the plan
 - ▶ Employees of the plan sponsor/employer with such authorities.
 - ▶ Plan committee members
 - ▶ Perhaps others

Who Are The Fiduciaries?

- ▶ Investment Advisor Fiduciaries
 - ▶ Anyone who renders investment advice for a fee or other compensation, directly or indirectly, with respect to any monies or property of a plan, or who has any authority or responsibility in that regard
- ▶ The categories collectively are broad
- ▶ Department of Labor has been developing new regulations over the past several years in effort to expand and refine the definition. Due out soon, but that has been the stated objective for many years now.
- ▶ Key is to recognize status as a fiduciary

Fiduciary Duty Standards

- ▶ Duty of Loyalty/Exclusive Benefit Rule
 - ▶ Discharge duties solely in the interests of the participants and beneficiaries
 - ▶ For the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan
- ▶ Act in accordance with the documents and instruments governing the plan

Fiduciary Duty Standards

- ▶ Prudent Expert
 - ▶ Act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims
- ▶ Diversify investments of the plan so as to minimize the risk of large losses
- ▶ Take action to identify and fulfill duties
 - ▶ Includes compliance with laws and regulations we will discuss
 - ▶ Engage in “procedural prudence” and document that process

Consequences of Breach of Fiduciary Duties

- ▶ Personal liability
- ▶ Liability for losses to the plan
- ▶ Government imposed monetary penalties
- ▶ Removal as fiduciary
- ▶ Criminal sanctions
- ▶ Liability for breaches by cofiduciaries
- ▶ Excise taxes
- ▶ Other

Hot Topics

- ▶ Summary List of Hot Topics
 - ▶ Fee Disclosure
 - ▶ 404a-5, 408(b)(2), Schedule C, excessive fee litigation
 - ▶ Late Deposits
 - ▶ Enforcement and Outreach Initiatives by DOL (and IRS)
 - ▶ Target Date Funds
 - ▶ Default Investments
 - ▶ ERISA Budget Accounts
 - ▶ Procedural Prudence/Fiduciary Training
 - ▶ Use of Brokerage Accounts
 - ▶ Lifetime income initiatives

Fee Disclosure

404a-5 Annual Notices

- ▶ New annual notice requirements
 - ▶ Required disclosures relating to plan fees and investments
 - ▶ Employer's responsibility
 - ▶ Initial notice generally by August 30, 2012
 - ▶ Potential for delay of second annual notice to set future timing
 - ▶ Specific content requirements
 - ▶ Ensure content is complete and accurate
 - ▶ Logistical issues; e.g., who is preparing and delivery issues
 - ▶ Raises profile of fee issues to participants and within industry
 - ▶ Questions regarding brokerage accounts

Fee Disclosure

404a-5 Quarterly Notices

- ▶ New quarterly notice requirements
- ▶ Most already providing quarterly notices pursuant to Pension Protection Act of 2006 (“PPA”)
- ▶ 404a-5 adds more detail
 - ▶ Actual amount of administrative and individual fees charged to particular participant during quarter
- ▶ Revives issues and questions regarding PPA requirements
- ▶ Delivery issues

Fee Disclosure

408(b)(2)

- ▶ Certain service providers to make certain disclosures to plan fiduciaries on or before July 1, 2012 (and upon changes or new arrangements)
- ▶ Exception to prohibited transaction rules for services to plan
- ▶ Requires that compensation is reasonable

- ▶ Explanation of services provided and compensation received
 - ▶ Direct compensation
 - ▶ Indirect compensation
- ▶ Fiduciaries must obtain, review, and assess for reasonableness
- ▶ Maintain
 - ▶ Example of documenting process
 - ▶ DOL is seeking during investigations

Fee Disclosure Schedule C

- ▶ New Schedule C added to Form 5500 a few years ago
- ▶ Employer reporting to Department of Labor detail regarding payments to service providers by plan
 - ▶ Sponsors should understand
- ▶ Complicated and detailed
- ▶ Often completed incorrectly

Fee Disclosure Litigation

- ▶ Wave of class action litigation against plan fiduciaries (and providers) over approximately last 10 years
- ▶ Continuing and many questions remain
 - ▶ Best position to defend by understanding arrangements and being able to demonstrate process in decision making
- ▶ Recent decisions and settlements of note
 - ▶ *Tussy v. ABB*
 - ▶ *Beesly v. International Paper*
 - ▶ *Nolte v. CIGNA Corporation*
 - ▶ *Tibble v. Edison*
- ▶ 404a-5 and 408(b)(2) provide roadmaps

Late Deposits

- ▶ Employee contributions must be deposited in a plan account as soon as reasonably practicable following pay date
- ▶ DOL focus for many years
 - ▶ Special correction program (“VFCP”)
 - ▶ Specific question on Form 5500 and required separate schedule if report late deposits
- ▶ Confusion regarding the standard remains and the issue continues arises frequently
- ▶ Important to identify and fix correctly
 - ▶ Tempting, but not advisable, to not appropriately correct given small dollar amounts typically associated with correction

Late Deposits

- ▶ Correction generally involves calculating lost earnings and allocating among affected participants
 - ▶ Various potential methods to accomplish calculations and allocations
- ▶ Logistically burdensome
 - ▶ Issues regarding distributions
- ▶ Continued reporting on Form 5500 required until issue fully corrected
- ▶ Form 5330 preparation and excise tax payments required (unless VFCP)
- ▶ Sometimes issue improperly characterized

Enforcement and Education Initiatives

- ▶ In general, increase activity by IRS and DOL relative to ferreting out problems and encouraging plan sponsors to ensure compliance
- ▶ Examples
 - ▶ Increased audit activity
 - ▶ 401(k) questionnaire/457 initiative
 - ▶ Increased outreach by DOL and IRS
 - ▶ Newsletters, alerts, phone forums
 - ▶ Philadelphia project
 - ▶ OIG report on plan audits
 - ▶ Focus on procedural prudence/internal controls (process and policies) and education to employer/sponsors and participants

Default Funds

- ▶ In participant directed plans, sometimes the plan fiduciaries must make investment elections for those who do not
- ▶ Questions regarding the extent of potential liability
- ▶ Optional DOL safe harbor regulations issued a few years ago that provide optional protections
- ▶ More important given increased implementation of automatic enrollment features
- ▶ Several requirements/conditions
 - ▶ Choosing an appropriate default investment ("QDIA")
 - ▶ Notice to participants with specific content
 - ▶ Other requirements and conditions

Target Date Funds

- ▶ Much discussion regarding these relatively new investment products
- ▶ Very popular
- ▶ DOL guidance in February 2013 issued in the form of “tips”
- ▶ TDFs will vary in terms of composition and objectives
- ▶ Bottom line: Understand the investment and the objectives; engage and document selection process

Qualification Failures

- ▶ Not “fiduciary” issue per se; IRS issue, but fiduciaries at risk
- ▶ Important related concept
- ▶ Qualification failures will occur when operations do not match plan terms and/or when plan documents are not timely updated
- ▶ EPCRS
 - ▶ Self-correction (“SCP”)
 - ▶ Voluntary correction (“VCP”)
 - ▶ Audit CAP
- ▶ Common/recurring qualification failures
 - ▶ Plan documents timely updated
 - ▶ Small balance cashouts
 - ▶ Excess contributions
 - ▶ Elections not implemented/honored

ERISA Budget Accounts

- ▶ Fee sharing used to pay plan expenses
- ▶ Increasingly common and popular
- ▶ Many questions remain
- ▶ Several versions/set ups
- ▶ Very little guidance
- ▶ Analyze and properly address issues
 - ▶ Plan document issues
 - ▶ Reasonableness
 - ▶ Proper movement and expenditure of funds
 - ▶ Plan asset issues
 - ▶ Recent Department of Labor Advisory Opinion

Conclusion

- ▶ There is increased focus from several angles on compliance with the many laws and rules governing retirement plans and the fiduciaries who administer them.
- ▶ It is more important than ever that fiduciaries recognize their status and duties, and undertake appropriate efforts to fulfill their duties in order to do the right thing for plan participants and also to protect themselves.

Questions?



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