



Benefit Plan Governance: What You Don't Know Can Hurt You

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Benefit Plan Governance: Why Should I Care?

- **Protect employees' retirement savings/income**
 - Ensure appropriate investment options
 - Safeguard against participants overpaying for services
 - Avoid conflicts of interest
- **Clearer processes for plan administration**
 - Good governance increases transparency and avoids confusion about roles and responsibilities
 - Necessary even if administration is outsourced
- **Minimize litigation risk**
 - Unfavorable litigation outcomes are often a function of poor process, not a bad result
 - Understand when fiduciary communications are not privileged



Benefit Plan Governance: What's Involved?

- **Plan sponsor**

- Establish plan and determine plan design, including benefits to be provided
- Amend and terminate the plan
- May act in own interest

- **Plan administrator**

- Administer the plan, including discretionary decisions regarding interpretation of the plan and, when applicable, handling of plan assets
- With respect to ERISA plans, must act in accordance with ERISA's fiduciary requirements



**Am I an ERISA fiduciary?
What does that mean?**

Plans Subject to ERISA's Fiduciary Standards

- Apply to most private plans, absent an exception, including:
 - **Tax-qualified plans**
 - **Group health plans and many health and welfare arrangements**
- Generally, does not apply to governmental plans, top-hat plans, or certain church- or school-sponsored plans
 - But fiduciary duties under state law may apply; ERISA provides best practices



Not All Conduct Is Fiduciary

- Critical distinction between when the company (or its employees) acts in ERISA fiduciary capacity as compared to when it (or they) acts as the sponsor or “settlor” of a plan
- Fiduciary liability under ERISA exists only with respect to fiduciary conduct – ERISA fiduciary duties do not apply to settlor conduct
- ERISA fiduciaries and multiple roles
 - ERISA permits individuals to serve in dual capacities, but does not permit dual loyalties at the same time
 - An individual may be a corporate officer and a plan fiduciary, but when acting in a fiduciary capacity his/her decisions “must be made with an eye single to the interests of the participants”
- Fiduciary duties can be delegated, although plan sponsor or named fiduciary retains duty to monitor fiduciary delegees
- Establishing a fiduciary committee or similar structure helps establish critical guardrails between fiduciary and settlor conduct

Settlor Functions

Adoption, modification (amendment), and termination of a plan are “settlor” or plan sponsor functions

Business decisions that do not violate a specific ERISA provision or otherwise strip an individual of legally protected benefits are permissible settlor functions

Decision on how to fund plans is generally a settlor function, but decisions regarding use of employee contributions (e.g., premiums) and, when applicable, plan investments are fiduciary

Who Is an ERISA Fiduciary?

Generally, three ways to become a fiduciary

1. Named in plan
2. Appointed pursuant to procedure specified in plan
3. Function as fiduciary – exercise discretionary authority over management of a plan or plan assets or provide investment advice for a fee

Common Fiduciary Functions – Retirement

Interpreting plan documents to determine what benefits are available

Determining eligibility for benefits

Participant communications

Selection and oversight of service providers

Reviewing claims and appeals

Controlling/monitoring fees and expenses paid by plan and/or plan participants

Handling/overseeing the handling of plan assets

Selection of investment lineup

Common Fiduciary Functions – Health & Welfare

Interpreting plan documents to determine what benefits are available

Determining eligibility for benefits

Participant communications

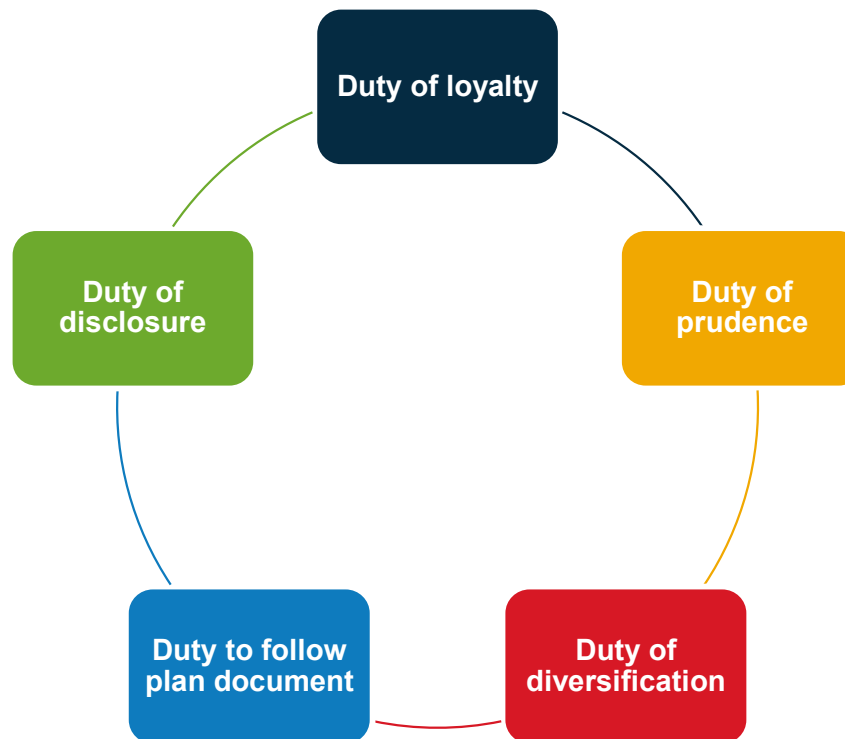
Selection and oversight of service providers

Reviewing claims and appeals

Controlling/monitoring fees and expenses paid by plan and/or plan participants

Handling/overseeing the handling of plan assets

ERISA Fiduciary Duties



Duty of Loyalty

- All actions as to the administration of an ERISA plan are taken “solely in the interest” of plan participants and beneficiaries for the “exclusive purpose” of providing benefits and paying reasonable expenses of the plan
- No inappropriate consideration of the plan sponsor in administration of the plan
 - No self-dealing, no adverse interest and no personal benefit (for committee or individual members)
 - No more than incidental benefits for plan sponsor
 - No kickbacks from service providers to the plan sponsor
 - Rebates resulting from activity within a plan
 - Discount on other services provided by a service provider as a result of contract with plan or for the benefit of plan

Duty of Prudence

- **Procedural prudence:** Is the process reasonable evaluated in real time (not hindsight)?
 - Investigation and evaluation of a course of action
 - Obtain appropriate input from competent outside advisers (e.g., consultants and attorneys)
 - Consistent with law and plan documents
 - Consistent with processes others engaged “in the conduct of an enterprise of like character and with like aims” would use
 - To the extent delegated, appropriate monitoring and oversight
 - Established by reference to documentation
- **Substantive prudence:** Is the decision appropriate?
 - Established by reference to whether a “hypothetical prudent fiduciary” would have taken the same action
- Which is easier to prove?

Other Fiduciary Duties

- **Duty to diversify** – Duty to diversify plan investments unless it is not prudent to do so
 - This generally does not apply for plans in which participants direct investments, such as 401(k) plans
 - However, must comply with ERISA's requirement that the plan offer a broad range of investments for participants to choose from
- **Duty to follow plan document** – Must follow the plan terms except to the extent inconsistent with ERISA
- **Duty of disclosure** – Must ensure participants and beneficiaries receive all required information about the plan and their rights under ERISA; information provided to participants must be accurate

Responsibility for Other Fiduciaries

Fiduciary is 100% liable for breach by another fiduciary (as a co-fiduciary) if

- Knowingly participates in or conceals breach
- Allows another fiduciary to breach duties by failing to abide by applicable duties
- Has knowledge of the breach and fails to make efforts to remedy

Named fiduciary who delegates fiduciary duties to an appointee pursuant to a procedure in the plan is not responsible for breaches of the appointee unless

- Appointment is a breach (generally, process/procedure is flawed)
- Failure to monitor
- Named fiduciary is liable as a co-fiduciary

Consequences of Failure to Meet Fiduciary Duties

Personal liability; equitable remedies (removal, bar)

- ERISA provides that a person who breaches their fiduciary duties is personally liable to make good to the plan any losses to the plan resulting from the breach; courts can impose equitable relief
- Removal as a fiduciary

Civil penalties

- ERISA 502(I): 20% of “applicable recovery amount” (amount ordered by a court or pursuant to a settlement agreement with DOL)
- Penalty may also be imposed in the case of knowing participation in another’s breach

Criminal prosecution

- Theft or embezzlement; violating ERISA reporting and disclosure requirements; coercive interference with a participant’s rights under ERISA (willful violations, fines and up to 10 years in jail)



Fiduciary Pitfalls

Accidental Fiduciary

- Plan sponsor employees may be accidental functional fiduciaries by exercising discretionary authority over management of a plan
 - Procedural prudence
 - Duty of loyalty
- May be more common on health and welfare side
- Accidental fiduciaries are more likely to be unaware of the duty of loyalty and less likely to have documented procedural prudence (may only have substantive prudence available as a defense)



Uninformed Fiduciary

The image shows a document titled "EXPLANATION OF BENEFITS" with a yellow header. Below the title, it says "Group of terms below to help you navigate". The document contains a table with the following columns: TOTAL CHARGES, NON-COVERED CHARGES, DEDUCTIBLE, PROVIDER DISCOUNT/DISALLOW, and REMAINING COVERAGE. The values in the table are mostly 0.00. There is also a section for "CLAIM PAID" with a value of 0.00. The word "BENEFITS" is written in large yellow letters at the top of the page.

TOTAL CHARGES	NON-COVERED CHARGES	DEDUCTIBLE	PROVIDER DISCOUNT/DISALLOW	REMAINING COVERAGE
0.00	0.00	0.00	0.00	0.00

- Individuals may be fiduciaries without realizing/understanding their role
 - Who is named in plan, SPD, Form 5500?
 - Has the plan sponsor delegated fiduciary responsibility to a committee?
 - Is authority/responsibility limited to certain plans?
 - Does it already have fiduciary responsibility across all ERISA plans?
 - Does the plan specify a named fiduciary or a procedure for appointing fiduciaries?
- Uninformed fiduciary could be an individual or simply the employer (potential exposure for company leadership, board)

Don't Be Accidental or Uninformed

- **Determine who will serve in a fiduciary capacity**
 - Without action, plan sponsor serves as both settlor and fiduciary
 - Ensure proper delegation of authority (e.g., resolution from board, in plan document)
- **Consider whether to use a committee structure as compared to naming an individual**
 - Facilitates procedural prudence (e.g., a deliberative process)
 - Encourages or even necessitates documentation of the process
- **Consider delegation by the fiduciary (committee) of ministerial tasks to company employees**
 - Formal and standing
 - Ad hoc and documented in minutes

Fiduciary Exception to Attorney-Client Privilege

- Attorney's legal advice to a fiduciary generally is not protected by the attorney-client privilege
 - Reasoning is that the plan participants and beneficiaries are the “real” clients, not the fiduciaries
- Critical when an individual wears two hats – which hat is being worn when receiving legal advice?
- Important to distinguish legal advice to the fiduciary vs. to the settlor – separate meetings or a clear break in discussion is best to avoid inadvertent waiver of privilege
- DOL investigations – DOL steps into the participant's or beneficiary's shoes and DOL may apply the fiduciary exception
- Attorney communications and work product may not be protected from disclosure under the fiduciary exception when the administrative process has not been exhausted
- Exception no longer applies when the participant's or beneficiary's interests diverge from those of the plan, typically upon exhaustion of the claims and appeal process

Prohibited Transactions

- A transaction between a plan and a “party in interest” is not allowed, unless an exception applies
- Parties in interest include fiduciaries, service providers, employers, and employees
- ERISA/Code prohibited transactions (direct or indirect):
 - Party in interest transactions (sale, exchange or leasing of property; lending of money; furnishing of goods or services; transfer or use of plan assets; acquisition of employer stock or property)
 - Fiduciary self-dealing transactions (dealing with assets in own interest or account; acting on behalf of a party whose interests are adverse; receiving consideration personally from any party in transaction involving plan assets)
- ERISA begins with the assumption that all conduct is prohibited
 - Statutory exemptions include loans to participants; retention of service providers for reasonable compensation; investment of plan assets
 - Class and individual exemptions available to the extent administratively feasible and in the interest and protective of the rights of plan participants and beneficiaries



Common Prohibited Transactions

Acquisition of
company stock or
property

Plan loans to
employer

Payment of settlor
expenses from plan
assets

Failure to timely
remit participant
contributions

Participant loans not
in compliance with
plan document

Sale of assets by a
plan to a party in
interest (such as an
owner of the plan
sponsor)

Leveraging plan
assets to benefit plan
sponsor, such as
favorable service
provider terms



Regulation, Litigation & Enforcement

Investment Advice Fiduciary

- DOL final rule defines an investment advice fiduciary as someone who
 - Makes a recommendation of any investment transaction or investment strategy,
 - Receives a fee for the recommendation, and
 - Either
 - Makes investment recommendations to investors as a regular part of that person's business and circumstances indicate that the recommendation (a) is based on a review of the retirement investor's individual needs or circumstances; (b) reflects the investment provider's professional or expert judgment, and (c) may be relied upon by the retirement investor to advance the investor's best interest, or
 - Acknowledges they are acting as an ERISA fiduciary with respect to a recommendation
- If a person is an investment advice fiduciary, must comply with class exemptions, which were also amended by the rule
- Rule effective September 23, 2024 (with 1-year transition period for class prohibited transaction exemptions)
 - Challenged in court; litigation ongoing

Retirement Plan Litigation

Excessive investment and/or recordkeeper fees

- Compares fees to similar plan investments or other recordkeepers
- Range of reasonable judgments of fiduciaries

Underperforming investments

- Underperforming compared to similar investment options
- E.g., target date fund litigation

ESG

- Plaintiffs challenge the inclusion of environmental, social, and governance (ESG) investments in plan

Plan forfeitures

- Use of forfeitures to reduce employer contributions vs. to reduce plan expenses
- Permitted under IRS proposed regulations and typically plan document

Health & Welfare Plan Litigation & Enforcement

Lawsuits challenging health plan fees

- Application of commissions
- Application of rebates
- Provider discounts/administrative fees

Mental health parity litigation/enforcement

- Written non-quantitative treatment analyses
- Plan exclusions
- DOL enforcement

Cross-plan offsetting challenges

- Litigation (including health plans suing large TPAs)
- DOL settlement

Health & Welfare Plan Litigation & Enforcement

Wellness plan nondiscrimination challenges

- Nicotine user fees

Transparency requirements

- Removal of gag clauses
- Prescription drug reporting
- Transparency tools
- Compensation disclosures

Emergency room services

- Compliance with ACA's emergency service provisions

Service provider investigations and litigation

- TPAs, insurance companies, PBMs
- Investigations focused on fees
- Preemption

DOL Enforcement Responsibility

- Oversight with respect to employee benefit plans covering more than 153 million people
 - **Retirement:** 765,000 plans
 - **Health and welfare:** 3,420,000 plans
 - **Health:** 2,800,000 plans
 - **Other welfare:** 620,000 plans
- DOL has authority to investigate potential violations of ERISA; investigatory authority includes authority to request documents and conduct interviews and site visits
 - It is important to cooperate with the investigator, but consider ways to narrow the scope of the investigation or information provided to reduce burden
- Investigations can take several months to several years to resolve

DOL Enforcement Recoveries & Results

Monetary recoveries – \$1.4 trillion

- 30% from terminated vested participant project (missing participants)
- 29% from other investigations (split between other retirement plan and H&W investigations)
- 31% from informal complaint resolution (highlights from EBSA include getting a life-saving heart transplant approved, obtaining COBRA coverage to continue mental health treatment)

Non-monetary results include

- Elimination of illegal plan provisions
- Improved fiduciary governance
- Increased access to mental health benefits
- Removal and barring individuals from serving as fiduciaries



Recommended Practices

Fiduciary Recommended Practices for All Plans

Maintain plan documents in compliance with ERISA and ensure administrative practices comply with plan document

Conduct regular fiduciary committee meetings

Document meetings and decisions with sufficient detail to demonstrate consideration of all important details; keep documents organized

Conduct regular RFPs for service providers (including TPA, PBMs, brokers and consultants)

Understand the fee structure for each plan provider and take prudent steps to conclude that fees and expenses charged by plan providers are “reasonable”

Fiduciary Recommended Practices for All Plans

Monitor service providers and other delegates (including TPA, PBMs, brokers and consultants)

Monitor significant/high-profile regulatory developments and related enforcement; case law developments

Safeguard participant data through implementation of cybersecurity best practices

Maintain fiduciary liability insurance and ensure adequate coverage

Recommended Practices for Retirement Plans

Establish a fiduciary committee that meets quarterly to review plan investments; review fees at least annually

Separate fiduciary and settlor committees or individuals

Maintain and monitor investment policy statement

Hire investment manager or investment advisor

Recommended Practices for Health & Welfare Plans

1

Establish a welfare plan fiduciary committee (or similar structure) that meets regularly

2

Maintain plan claims procedures; administer claims in accordance with procedures (oversee and monitor claims administrator)

3

Conduct regular RFPs for pharmacy benefit managers (and all service providers)

4

Ensure compliance with MHPAEA, HIPAA

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