Employer Retirement Plans: Does the Manager Have Fiduciary Liability?

Fiduciary: a duty (from Latin *fiduciarius*, meaning "(holding) in trust"; from *fides*, meaning "faith", and *fiducia*, meaning "trust") is a legal or ethical relationship of confidence or trust regarding the management of money.

Over the past few months the prominence of the word "fiduciary" in the news has drawn attention to the definition of responsibilities of employers for retirement plans. The United States Department of Labor (USDOL) has been the driving force behind this increase in awareness. Yet the word remains largely misunderstood by most plan sponsors (i.e. employers.)

The most common question I get asked by practice administrators is **"Am I a fiduciary on our retirement plan, and if so, what does that mean?"** Unfortunately, there is no simple answer to this question.

The key to answering the fiduciary question is to identify if you exercise discretion or control over the plan. If you, as a practice administrator, exercise control over the plan itself or the assets then the USDOL has identified you as a fiduciary for your firm's retirement plan. As such, you get to enjoy all the increased liability and perks that come with that role.

The problem that encumbers most practice administrators is defining what constitutes discretion or control over the plan. Welcome to one of many gray areas in the retirement plan industry. Most plan sponsors feel confident that they have hired a "professional" who handles the plan and by default they are exempt from fiduciary duty. However, the DOL clearly states that **those who hired the service provider also**

have fiduciary responsibility.

To try and clarify the confusion the DOL has stated business decisions are not a fiduciary action. An example would be the decision to start a plan. This is simply a business decision aimed at rewarding or attracting employees. However, the steps to implement or maintain the plan are taken on behalf of the plan and may trigger fiduciary.

Now that we have established how to identify fiduciary decisions we should define what it means to be a fiduciary. Fiduciaries act on behalf of the participants of a plan and their beneficiaries. As such they are responsible to:

- Act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carry out their duties prudently;
- Follow the plan documents (unless inconsistent with ERISA);
- Diversify plan investments; and
- Pay only reasonable plan expenses.

Acting prudently under ERISA requires expertise in several different areas, such as investing. In order to fulfill their duty a fiduciary will want to hire someone with professional knowledge to carry out the investment function. Additionally, **acting with prudence would suggest that a process was used to make fiduciary decisions and this process should be documented.**

Being a fiduciary for a plan carries a lot of responsibility, and potential liability. Fiduciaries may be personally liable to restore losses to the plan or subject to fines for failure to carry out their duties in a manner consistent with basic standards of care.

The good news is that there are ways to reduce any potential liabilities. **Providing participants control over the**

investments decisions in their accounts is one common way to reduce potential liability.

However, by now you know that this is not as simple as it seems. In order to reduce liability participants must be given a broad range of investment options that allows them to diversify the risk. Additionally, participants must be given adequate information that enables them to make an informed decision about the different investment options offered. Even further, participants must be allowed to give investment instructions at least once a quarter, and perhaps more, depending on the volatility of the investment option. Finally, any relief granted to the fiduciary for allowing participants to direct their own investments does not extend to the fiduciary's responsibility to prudently select and monitor the investment alternatives in the plan.

A second option often used by plan fiduciaries is to hire service providers to handle fiduciary functions. This requires setting up an agreement that assigns liability for those functions selected to the hired party. Again, as always, this helps reduce liability but it does not relieve the plan sponsor from the duty to prudently hire select and monitor the service provider. This includes **determining if the service provider is following the guidelines established for their specific role.**

Deciding who is a fiduciary and what exactly that means is not an easy task. The most efficient way to reduce your liability is to make sure you **document the rationale behind your decisions.**

Finally, it may not be clear whether you are a fiduciary or not. The most effective way to reduce any potential liability is to **behave as a fiduciary** regardless of your actual status. This simply means to perform due diligence as a prudent person would and document the reasons for decisions. Most importantly, please remember that executing the will of the physicians does not necessarily relieve you of your fiduciary duty.

Definitions:

Plan Sponsor: the medical practice or employer

Plan Administrator or Third Party Administrator (TPA): ensures that money is being contributed into the fund, the proper asset allocation decisions are made and that payouts are promptly distributed among all qualified plan participants or beneficiaries.

Recordkeeper: Recordkeepers are responsible for the tasks associated with tracking participant accounts. Some of these tasks include providing daily, weekly, or monthly valuation; processing investment transactions and handling participant requests for loans. NOTE: Duties of Plan Administrator/TPA and Recordkeeper may be offered by a single entity.

Plan Provider: The Plan Provider is the investment company that manages your plan. A plan provider may be a brokerage, insurance company, mutual fund, or any other investment company.

Plan Advisor: Retirement plan advisors provide a wide variety of services, including investment policy statements, money manager reviews, participant education and enrollment and investment monitoring & reporting.

Resources
Plan Fees Disclosure Form
Understanding Plan Fees and Expenses

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Duff Meyer is the Institutional Advisor at **Carolina Wealth Management**. A frequent retirement plan speaker, he is dedicated to helping plan sponsors understand and improve their benefit. Duff continually writes articles and informative guides for plan sponsors that are featured in numerous publications and on the web. His entire financial career has been dedicated to helping plan sponsors find a better 401k. He is an advocate for plan sponsor, not the plan provider. He can be reached **here.**