Does It Really Matter When It Comes to Being a Fiduciary to a 401(k)… or Any ERISA Plan?

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Why Does it Matter?

- Because being a fiduciary means you have certain obligations to plan participants, plan sponsors, your employer and yourself!
- Increased litigation coupled with the Department of Labor’s (DOL) Conflict of Interest rule have caused increased concern and awareness*
- In a survey gauging the importance of advisor services, plan sponsors ranked regulatory guidance (31%) and investment due diligence (29%) as being most valuable*

Current Environment

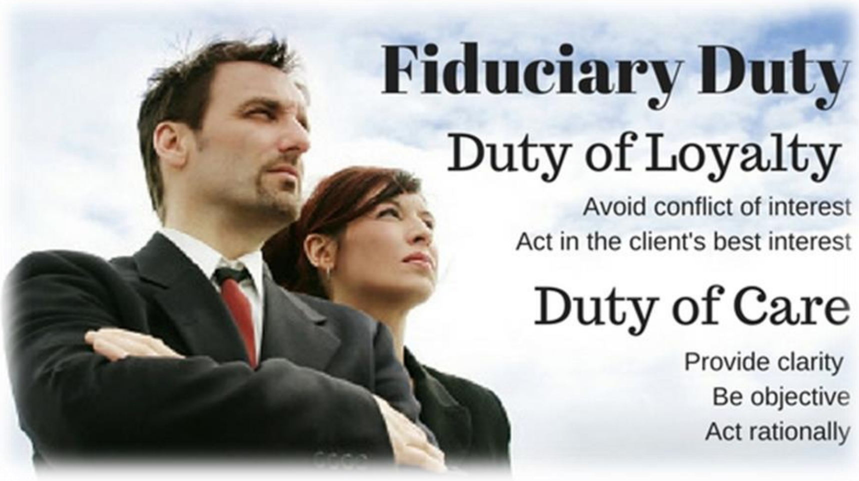
- DOL (and Litigators) Focus on Fiduciaries
- Increasing number of questions on how one markets their fiduciary services and what is their associated liability
- While proposed DOL fiduciary regulation was considered a certainty, many firms moved away from claiming non-fiduciary status while waiting for effective date (that never came)
- Many wire houses now have specialty groups that are considered fiduciaries to their clients' retirement plans
- Anticipate 401(k) advisors as additional defendants in class action lawsuits

A Fiduciary Refresher

ERISA Definition of a Fiduciary

In general, a fiduciary is an individual or entity (e.g., plan committee) who:

- Exercises *discretionary authority* or control over the management of a plan or over the management or disposition of its assets;
- Provides *investment advice* for a fee; or
- Has *discretionary authority or responsibility* in the administration of the plan



Who is a Plan Fiduciary?

- Plan Administrators and Administrative Committees
  - Such as Investment Committees, Retirement Committees, Boards of Trustees, etc.
- Plan Trustees
  - As stated in the plan adoption agreement
- Named Fiduciaries
  - Those fiduciaries as appointed in the plan adoption agreement
- Unintended Fiduciaries – Human Resource personnel
- Investment Professionals
  - Registered investment professional, investment manager, and others hired and paid to advise fiduciaries. Provides individualized advice based on the particular needs of the plan

Who is NOT a Plan Fiduciary?

Accountants, attorneys, actuaries and consultants

- Those who do not exercise discretionary authority or control of plan or assets.

Individuals who perform ministerial or administration functions

- Apply rules determining participation
- Calculate benefits and process claims
- Prepare reporting and maintain participant records

Service Providers

- Investment platform providers, TPAs, Attorneys (All can be deemed fiduciaries for their specific roles, but they are not the plan fiduciary)

Participants

Fiduciary Activities

- Selecting plan fiduciaries
- Selecting plan service providers
- **Providing investment advice for a fee**
- **Selecting investment options**
- **Monitoring plan investment options**
- Delegating fiduciary duties to service providers (i.e., investment managers)
- **Interpreting plan provisions**
- Exercising discretion in approving or denying benefit claims

Fiduciary Duties Under ERISA

The Employee Retirement Income Security Act (“ERISA”) sets the conduct required of a fiduciary:

- *Exclusive Benefit –*
  - Fiduciaries must act for the exclusive purpose of providing benefits to participants and beneficiaries
  - Defray reasonable expenses of administering the plan
- *Prudence –*
  - Fiduciaries have a duty to 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 act, including ensuring investments remain *prudent* investments
  - Follow the *“prudent expert”* rule – acting as an experienced or knowledgeable expert might
  - The test is whether a fiduciary’s decision was arrived at through a diligent investigation of the issues at the time of the decision and whether there was a reasonable basis for the decision that was made

If you lack the expertise to do so, ERISA requires you to hire professional assistance

Fiduciary Duties Under ERISA (cont.)

The Employee Retirement Income Security Act ("ERISA") sets the conduct required of a fiduciary:

- *Diversification –*
  - Duty to ensure that plan assets are well diversified in an effort to avoid large losses (exception for employee stock ownership plans (ESOPs))
  - Obtain sufficient information to understand the investments prior to making the decision
  - Continually monitor the investments and remove imprudent ones
- *Documents –*
  - Fiduciaries must follow the terms of the plan document and other governing documents (e.g., investment policy statement) unless inconsistent with ERISA
  - Understand the provisions of the plan and follow them

Investment Fiduciaries

The Investment Company Act of 1940 defines an "investment advisor" as any firm or person that:

- For compensation is engaged in the business of providing advice to others or issuing reports or analyses regarding securities
- Includes money managers, investment consultants and financial planners
- Excludes certain organizations and individuals (e.g., brokers (maybe??), lawyers, accountants)
- Fiduciary duty imposed by operation of law as a result of a relationship of trust established between the advisor and client

The Act and its regulations specify acceptable conduct

Two Types of Investment Fiduciary

3(21) Investment Advisor	3(38) Investment Manager
Acts as co-fiduciary with the plan sponsor	Acts as the sole investment fiduciary
May assist with drafting an Investment Policy Statement (IPS)	Drafts the Investment Policy Statement (IPS)
Recommends investments to the plan sponsor and assists with investment selection process	Selects plan investments for the plan sponsor
May monitor investments and suggest changes as appropriate; non-discretionary advisor	Monitors and replaces investment options as appropriate (no approval required by plan sponsor); discretionary advisor
May provide education for participants	May provide education for participants

Engage Your Clients Regardless of Your Role

- Know your client and its business environment
- Understand their culture
- Educate and engage the plan committee on their responsibilities
- Understand employee demographics – millennials, baby boomers, skilled, etc.
- Keep clients informed of regulatory/legislative changes and the impact on their plan
- Competition is fierce – so find ways to distinguish your services

Fees

- Average advisory fees for a $100 million 401(k) plan decreased by 9% in 2018 from the year prior, according to Fi360, a fiduciary consulting firm. The fee — around $71,000, or 7 basis points on plan assets — has declined 20% since 2013.
- Fees among smaller 401(k) plans have rebounded from historic lows, the Fi360 data show. The average fee for a $10 million plan has increased 13% since 2017, to $28,000, or roughly 28 basis points. That's 12% higher than in 2013.
- If acting as a 3(38) investment manager, additional fee is typically 2-5 basis points

Legislative Update:

Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019

The Secure Act (Passed by House Ways and Means Committee)

- Small employer start-up credit; greater of $500 or the lesser of:
  - $250 times the number of nonhighly compensated employees eligible or
  - $5,000
- Small employer credit of $500 per year (up to 3 years) if plan has automatic enrollment
- Repeal prohibition on contributions to a traditional IRA by a person who has attained age 70 ½
- Allows long-term part-time employees to participate in a 401(k) plan; eligible if worked three consecutives years of service and completes at least 500 hours in each year (can still exclude this group from nondiscrimination, coverage and top-heavy rules)

The Secure Act (cont.)

- Penalty free withdrawals for any “qualified birth or adoption”
- Increase the mandatory age for required minimum distributions to age 72
- Businesses able to treat ERISA plan adopted before the due date, including extensions, of the tax return for the taxable year as having been adopted as of the last day of the taxable year.

Saving for the Future Act

- The first $2,500 in savings goes to a worker's *UP-Savings* account, an accessible account for non-routine expenses.
- Additional contributions then go to a worker's *UP-Retirement* account.
- Workers are automatically enrolled to contribute 4% of their own earnings, but may opt out or select a different contribution level. Worker contributions automatically rise to as high as 10%.
- Establishes a minimum employer contribution to a savings plan of 50 cents per hour worked. The minimum rises to 60 cents after two years and then rises with wage growth.
- Businesses with fewer than 100 workers may simply make contributions through payroll into UP Accounts run by the federal government. UP Accounts are portable, low-fee, and worker-owned.
- Employers receive a tax credit worth 50% of their minimum contributions to their first 15 workers, and 25% of their minimum contributions to their next 15 workers.
- The smallest employers (10 or fewer workers) may opt out of employer contributions; if they do, workers get UP Account access and a direct, individual credit for their savings
- fiduciaries of UP Accounts will be a federal Board, appointed by the President and confirmed by the Senate

Retirement Enhancement and Savings Act (RESA)

- Re-introduced by the Senate Finance Committee (originally introduced in 2016)
- Similar to the Secure Act
- Use of open multiple-employer plans
- Encourages portability of lifetime income products
- Modification of hardship distribution rules

Thank You!

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