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FIDUCIARY SERVICES

The word **"fiduciary"** is today's hottest buzzword in the retirement plan industry. It is used with such frequency that it can be easy to ignore the importance of understanding who is a plan fiduciary and what their responsibilities are. A business owner who establishes a retirement plan for themselves and their employees will always have a fiduciary duty to the plan and plan participants.

Wait, am I a fiduciary?

ERISA and the related regulations provide that the following are plan fiduciaries:

- Anyone with discretionary authority or control of the management of the retirement plan or assets held by the plan
- Anyone who has discretionary authority over the administration and operation of the plan
- Anyone who renders investment advice for a fee or other compensation

If you simply follow plan procedures or perform administrative tasks, you are likely not a fiduciary. For example, if you are a payroll clerk and your company has established methods of depositing employee funds on the payroll date, you are not a fiduciary just because you initiate a deposit. If, as the payroll clerk, you decide to postpone the deposit because the stock market is declining, you have made yourself a fiduciary concerning that decision.

In general, every retirement plan features the following fiduciaries:

- Employer or Plan Sponsor
- Plan Administrator (not to be confused with Third Party Administrator [TPA])
- Trustee
- Investment Advisor or Investment Manager

Okay, so I am a fiduciary. What does that mean?

As a plan fiduciary, you have co-fiduciary liability. Simply put, each fiduciary is responsible for the acts (good and bad) or failures to act of other fiduciaries of the same plan.

A plan fiduciary has a heightened standard of care regarding the plan. They are to:

- Act solely in the interest of plan participants and their beneficiaries
- Follow the terms of the plan documents
- Diversify investments in the plan to minimize the risk of significant losses
- Avoid self-dealing and conflicts of interest
- Monitor and oversee the paid service providers, and ensure paying only reasonable expenses

The claim of no expertise or knowledge in investment or retirement plan compliance will not relieve individuals of their personal liability as a fiduciary.

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I run a business. Can I get help?

Yes! While it is true that you will always have a fiduciary responsibility regarding the retirement plan, you can hire expert service providers to assist you. Your responsibility then becomes monitoring the service providers that you have hired. Common service providers that you can employ to help are:

- **Investment Advisor (ERISA 3[21] Co-Fiduciary)** – These advisors will generally be responsible for participant education and monitoring and benchmarking of the plan investments. You have the final decision about all investment decisions.
- **Investment Manager (ERISA 3[38])** – These investment managers oversee the plan investments. They monitor and benchmark the offerings and make changes as they see fit. You simply monitor the service provider, but it is not your responsibility to critique the investment decisions.
- **Third-Party Administrator (TPA)** – A good TPA can save you a lot of headaches. A TPA can assist with compliance and nondiscrimination testing, maintenance of plan documents, eligibility, vesting, contribution calculations, and timely notice delivery and tax filings.

If you are still concerned about your fiduciary liability, you can purchase fiduciary liability insurance. This insurance protects the employer/owner from claims of mismanagement or fiduciary breach/errors.

What are some best practices I should follow?

- **Establish a plan committee that meets regularly (at least once per year)**
  - Who is on the committee?
    - Owners, Partners, CFO, Controllers
    - HR or Payroll Managers
    - Investment Advisor or Investment Manager
    - Trustees and named fiduciaries
  - What is the agenda?
    - Review recent plan amendments
    - Review/discuss the investment earnings and performance
    - Review plan fees/service providers
    - Review compliance reports for IRS nondiscrimination testing
- **Deposit employee 401(k) deductions and loan repayments timely**
  - Small plans – seven business days from the check date
  - Large plans – as soon as administratively feasible
  - We recommend making the deposits simultaneously as you are preparing the payroll or having your payroll company automatically remit the information to your recordkeeper on the payroll date
- **Periodic (at least every three years) review of fees and benchmark with other service providers. You don't have to select the cheapest or lowest cost—they simply need to be reasonable.**
- **Keep plan documents up to date**
- **For any errors, follow the Department of Labor or Internal Revenue Service correction programs**
- **Maintain copies of administrative reports, investment statements, and tax filings**