

## **Fiduciary Responsibility Linked to Increased Insomnia**

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*This is the first in a series of three articles on fiduciary concerns.*

The growing number of class-action lawsuits brought on behalf of participants in retirement plans covered by ERISA is understandably raising the level of concern among plan trustees and sponsors. Fiduciary responsibilities and personal liability have become the latest water cooler topics within the HR community, not to mention the most basic question – am I a fiduciary? The new “F” word is causing sleeplessness for plan sponsors and employees responsible for benefit plan administration.

### **The Big Picture**

Concerns over the Social Security system and continued failures of defined benefit pension plans have caused a marked increase in the attention being given to defined contribution plans, particularly those featuring participant-directed accounts. ERISA covers over 700,000 retirement plans in the U.S. Plans of public and private companies, as well as nonprofit and government plans, are subject to the same rules, regardless of size. Class action lawsuits against plan fiduciaries and government lawsuits exposing a variety of improprieties in the investment industry, have increased concern about the proper execution of fiduciary responsibilities. The issue of investment management fees charged to plan participants is getting increased attention as well.

In May of 2004, the Department of Labor (DOL) launched its Fiduciary Education Campaign called “Getting it Right—Know Your Fiduciary Responsibilities.” Out of that came a booklet titled “*Meeting Your Fiduciary Responsibilities*”, which is available on the DOL’s website, at (<http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html>). While ignorance was never bliss for plan fiduciaries, this campaign sets the stage for DOL to say “we told you.” The convergence of class-action litigation and the government’s interest in a stable private retirement system has substantially increased concerns of all plan sponsors, particularly because plan fiduciaries have unlimited personal liability.

### **Am I a Fiduciary?**

You are a fiduciary if you perform fiduciary acts, even if you are not named as a plan trustee. The DOL booklet states “A plan’s fiduciaries will ordinarily include the trustee, investment advisers, all individuals exercising discretion in the administration of the plan, all members of a plan’s administrative committee (if it has such a committee), and those who select committee officials.” Clearly, a CEO who can name, or replace, a plan fiduciary is himself a fiduciary. We learned that many years ago (*Martin v. Harline*, D. Utah, 1992) and it resurfaced in the Enron case. Kenneth Lay filed a motion to dismiss claims against him as a plan fiduciary, since he was not named as a fiduciary. The DOL submitted a brief supporting the idea that he was a fiduciary and the court dismissed the defense motion. The final outcome of the case is pending.

Human resources personnel often believe they are not plan fiduciaries because they are not named as such and/or have no investment committee responsibilities. However, exercising discretion regarding any service provider to a plan, including decisions regarding custodians, third-party administrators and providers of employee education, makes one a fiduciary.

## Delegation is Not a Solution

Under ERISA, fiduciaries have potential liability for the actions of their co-fiduciaries, so a fiduciary cannot escape liability by pointing fingers. Furthermore, while hiring investment advisors may result in shared responsibility, it doesn't eliminate it. A fiduciary is required to use due diligence in hiring and regularly monitoring the activities of all service providers to the plan. Very often, employees who have fiduciary responsibilities delegate as many of them as possible so that they can focus attention on their "real" jobs. While delegation is a necessity in an effective corporate structure, it is a double-edged sword in a fiduciary setting.

## Participant-Directed Plans are No Panacea

Many plan sponsors and fiduciaries believe that they can be relieved of liability by letting plan participants make their own investment decisions. While ERISA suggests this possibility, it only applies to the specific investment choices that are made by participants. Further, there are approximately 20 conditions that must be met before this "safe harbor" can be relied on. If these conditions are not met, the fiduciary could be in a worse position, having given choice to participants, while remaining liable for the outcome of the investment decisions. For example, participants must be given "enough information to make an informed investment decision." This creates a substantial requirement for employee education, without specific guidelines. If an education provider gives "investment advice," it becomes a fiduciary. If they don't, has the participant really been given "enough information to make an informed decision"? The standard is based on the "average" employee – not a mid-level executive with investment experience.

Perhaps the most overlooked issue is that fiduciaries have a continuing responsibility for due diligence regarding the selection and oversight of investment choices. For instance, it is not enough for fiduciaries to offer several mutual fund choices and think their work is done. Recent litigation against plan fiduciaries is focused primarily on their failure to disclose information about company stock in 401(k) plans. That concept will likely be extended to mutual funds offered in a plan. At a minimum, fiduciaries must consider fund expenses, performance relative to peer groups, and stewardship issues in making continuing decisions about mutual funds being offered – and be certain this information is made available to participants on a timely basis.

To compound this problem, divergent schools of thought exist regarding the number of investment choices offered to employees. In 2004, two notable studies were issued. One suggested that participants were not being given enough investment choices – another concluded they had too many! See these articles: ([http://www.bc.edu/centers/crr/papers/wp\\_2004-15.pdf](http://www.bc.edu/centers/crr/papers/wp_2004-15.pdf)) and ([http://pages.stern.nyu.edu/~mgruber/working%20papers/adequacy\\_investment\\_choices\\_offered\\_401k.pdf](http://pages.stern.nyu.edu/~mgruber/working%20papers/adequacy_investment_choices_offered_401k.pdf)).

## Closing Thoughts

If you are reading this article, you may be a retirement plan fiduciary. As such, unlimited personal liability exists, as do plenty of opportunities to make errors causing that exposure to surface. In our next article, we will provide solutions for some of the most common problems facing investment fiduciaries of retirement plans.

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