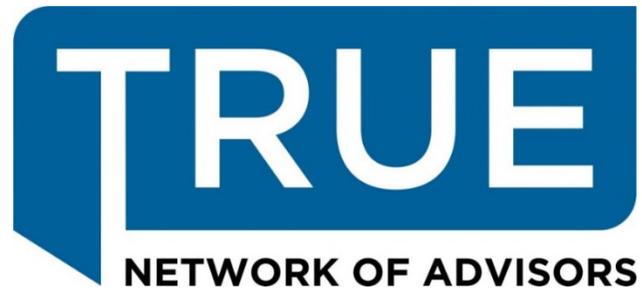


Fiduciary Responsibilities for Health & Welfare Plan Sponsors



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Federal Vaccine Requirements for Employers

- ▼ Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly
- ▼ Requiring Employers to Provide Paid Time Off to Get Vaccinated
- ▼ Still No OSHA Vaccine ETS
 - ▼ Rumors **WERE** that the delay is due to blowback from business leaders and lobbying efforts
 - ▼ May have caused Biden administration to reconsider how it should work or reconsider issuing altogether
 - ▼ Now, expected in the **“coming days”**

Fiduciary Roles

- ▶ **ERISA-covered benefit plans are required to have fiduciaries.**
- ▶ **There are various fiduciary roles under ERISA, including:**
 - ▶ **Named Fiduciary**
 - ▶ **Plan Administrator**
 - ▶ **ERISA Section 3(21) Fiduciaries:**
 - ▶ **Discretionary Fiduciary.**
 - ▶ **Investment-Advice Fiduciary.**
 - ▶ **Trustee**

Fiduciary Roles: Plan Administrator

- ▶ The "plan administrator" is a fiduciary under ERISA Section 3(16).
- ▶ The plan administrator can be:
 - ▶ An individual.
 - ▶ A committee, such as a plan administrative committee.
- ▶ The plan sponsor is the default administrator if the plan does not designate otherwise.
 - ▶ The plan sponsor is the employer.
- ▶ The plan administrator generally has discretion over the administration of the plan.

Fiduciary Roles: Section 3(21) Fiduciary

- ▶ Discretionary or *De Facto* Fiduciaries
 - ▶ Exercises **any discretionary authority** or discretionary control over the management of an employee benefit plan
 - ▶ Exercises **any authority** or control (discretionary or otherwise) over the management or disposition of plan assets
 - ▶ Provides **investment advice** regarding plan assets for a fee or other compensation, whether direct or indirect, or has any authority or responsibility to do so
 - ▶ Has any discretionary authority or responsibility in the administration of the plan

Fiduciary Roles: Trustees

- ▶ **Trustees must be appointed by the named fiduciary or named in the plan document or trust agreement.**
- ▶ **The plan's trustee has the exclusive authority to manage and control the plan's assets, except:**
 - ▶ **Directed trustees.** An entity such as a custodial bank may be delegated authority to control plan assets as a directed trustee.
 - ▶ **Investment managers.** Investment managers may be delegated the authority to manage plan assets.

Understanding Fiduciary Actions

- ▶ **Fiduciary duties apply to fiduciary actions.**
- ▶ **Fiduciary duties do not apply to non-fiduciary actions, which are either:**
 - ▶ **Plan sponsor ("settlor") functions.**
 - ▶ **Non-discretionary, ministerial functions.**

Fiduciary Actions

- ▶ **Fiduciary actions include:**
 - ▶ **Interpreting plan terms**
 - ▶ **Deciding claims and appeals**
 - ▶ **Investing plan assets**
 - ▶ **Drafting communications with participants**
- ▶ **Discretionary decisions that involve an element of choice or judgment are typically fiduciary in nature**

May Be Considered Non-Fiduciary Actions

- ▶ Plan sponsor ("settlor") functions generally include:
 - ▶ Establishing or terminating a plan
 - ▶ Designing or amending a plan
- ▶ Non-discretionary, ministerial functions include:
 - ▶ Applying plan rules to participation, benefits, and service
 - ▶ Preparing benefit statements and providing plan information
- ▶ **Best Practice: Assume everything is a fiduciary action**
 - ▶ Proper consideration
 - ▶ Documentation

Fiduciary Responsibilities & Duties

- ▶ **Duty of Loyalty / *Exclusive Benefit Rule***
 - ▶ Duty of undivided loyalty to plan participants and beneficiaries
 - ▶ Act for the sole purpose of providing benefits to plan participants
 - ▶ Only pay reasonable plan expenses
- ▶ **Duty of Prudence**
 - ▶ Act with the care, skill, and diligence that a prudent person who is familiar with the matter would use under similar circumstances

Fiduciary Responsibilities & Duties

- ▶ **Duty to administer the plan in conformity with the plan document(s)**
 - ▶ **Includes the plan document, trust document, investment policy statements, or other policies.**
- ▶ **Duty to diversify the investments of the plan.**

Prohibited Transactions

- ▶ **Fiduciary duty to avoid prohibited transactions**
- ▶ **Certain transactions between a plan and a "disqualified person" or "party in interest" are specifically prohibited by law.**
- ▶ **Prohibited transactions include, for example:**
 - ▶ **The sale, exchange, or lease of property between a plan and a disqualified person.**
 - ▶ **An act of self-dealing by a plan fiduciary by which plan income or assets are used for his or her own interest.**
 - ▶ **Lending money or extending credit between a plan and a disqualified person.**
 - ▶ **Furnishing goods, services, or facilities between a plan and a disqualified person.**

Potential Penalties

- ▶ **Fiduciaries can be held personally liable for violations of ERISA's fiduciary duties.**
- ▶ **Other potential penalties include:**
 - ▶ **Civil penalties**
 - ▶ **Excise taxes**
 - ▶ **Equitable remedies**
 - ▶ **Criminal penalties**
- ▶ **ERISA fiduciary class action suits are on the rise in several types of cases including:**
 - ▶ **Fee disclosure and transparency issues**
 - ▶ **Conflicts of interest among fiduciary advisers**
 - ▶ **Employee stock ownership funds (ESOPs)**

Fiduciary Best Practices

- ▶ **Establish Governance Structure**
 - ▶ Identify positions and responsibilities
 - ▶ Designate authority
 - ▶ Plan committee?
- ▶ **Understand delegation of responsibility under committee charters and plan documents.**
 - ▶ Ask: Is this within my responsibility?
 - ▶ **Should you ask?** Is this a fiduciary function?
- ▶ **Be willing to dedicate the time and effort required.**
- ▶ **Read meeting materials in advance and prepare questions.**

Fiduciary Best Practices

- ▶ **Understand what expenses can be paid from plan assets.**
 - ▶ **Begin with general assumption that paying anyone for plan services is a prohibited transaction.**
- ▶ **Maintain records of decisions to ensure consistency in applying plan terms to participants and beneficiaries**
- ▶ **Seek expert assistance when needed**
 - ▶ **Attorneys**
 - ▶ **Brokers, Consultants**
 - ▶ **Actuaries**
- ▶ **Generally understand plan terms and operation, including:**
 - ▶ **Eligibility for participation**
 - ▶ **Vesting, withdrawal, distributions, loans**
 - ▶ **Participant communications and disclosures**

Review Plan Documents & Materials

- ▶ **Official Plan Governance Documents:**
 - ▶ Plan Document
 - ▶ Trust agreement
 - ▶ Investment Policy Statement
- ▶ Other administrative policies (e.g., cybersecurity policy)
- ▶ Summary Plan Description (SPD)
- ▶ Fiduciary committee by-laws or charters
- ▶ Minutes from fiduciary committee meetings
- ▶ Forms 5500 Annual Reports
- ▶ Employee Handbooks

Governing Documents to Review (cont.)

- ▶ **Fiduciary liability insurance documents**
- ▶ **Service provider agreements**
- ▶ **Investment manager agreements**
- ▶ **Investment advisor agreements**



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