

# Fiduciary Responsibility: What It Really Means to You

## *Understanding Your Fiduciary Responsibility and Mitigating Risk*

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The changing landscape of today's economic and legal environment has increased the need for companies to reassess their fiduciary practices relating to their benefit plans. Market fluctuations, increased lawsuits and continuous regulatory changes make today the best time for plan sponsors to take a closer look at current practices and processes and determine areas for improvement.

To better understand fiduciary responsibility and best practice, let's first answer a few questions.

### Who Is a Fiduciary?

If you are a plan sponsor, then you are a fiduciary. A fiduciary has discretion in administering and managing the plan, or has control of the plan's assets, such as choosing the investment options or choosing the firm that chooses those options. In most small- to mid-sized companies, the fiduciary is almost always the CEO or President. He or she may share fiduciary responsibility with a committee or third-party fiduciary advisor. However, the employer cannot off-load fiduciary responsibility.

To help clarify, a fiduciary:

- Is responsible for selecting a committee who are responsible for administering the plan;
- May choose to hire a co-fiduciary to help administer the plan;
- Has personal liability;
- Cannot stop being a fiduciary unless the plan procedures are followed to ensure responsibilities are transferred to another plan fiduciary; and
- Must be an expert – or hire someone who is.

In the recent lawsuit *Walsh v. Principal Life Ins. Co.*, it was found that the service provider – Principal Life Insurance Co. – was not the fiduciary, and therefore not liable for the alleged losses of the plaintiff. What's important about this ruling is many companies mistakenly believe that the

insurance company, or investment provider, assumes fiduciary responsibility for the plan. Because you hire the service provider, you are the fiduciary.

### What Are Your Fiduciary Responsibilities?

To meet your responsibilities as a plan sponsor, the Employee Retirement Income Security Act (ERISA) sets standards of conduct for those who manage an employee benefit plan and its assets. The standards require:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carrying out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA);
- Diversifying plan investments; and
- Paying only reasonable plan expenses.

The ERISA standards are based on having a prudent and deliberate decision-making process, and diligently documenting that process. You are not required to make the best or perfect decision, but the process must be prudent and deliberate in reaching that decision. By carefully documenting your fiduciary practices and processes, you can demonstrate how you made the decisions and communicated them to the plan participants.

### How Can You Mitigate Fiduciary Risk?

As a plan sponsor, there are a number of ways to mitigate fiduciary risk:

- **Make certain that everyone serving as a plan fiduciary understands the role and responsibilities.** It is recommended to have fiduciaries sign a document that outlines responsibilities and risk. By doing so, you will ensure all fiduciaries act prudently. This is crucial if company stock is part of your plan.

- **Hold regular committee meetings** to discuss the plan, and address significant investment news that may affect your plan. Ensure that you have experts in the meetings to help guide your decision-making. There should be a clear consistent agenda to insure that all critical aspects of plan operation are consistently reviewed. This would include a consistent method of evaluating the investment managers, plan loans, hardship distributions and qualified domestic relation orders. Be sure to document the outcome of the meeting, even if no decisions are made.
- **Create and maintain an investment policy statement.** This statement serves as a road map to guide investment decisions as they relate to your plan. It is extremely important that all plan sponsors and fiduciaries follow the terms of the document, and that there is some relative flexibility. The investment policy statement is a commonly requested document during a Department of Labor audit.
- **Consider adopting a Committee Charter.** Committee Charters give the plan committee the guidance and direction on how all matters dealing with the plan should be followed and who within the committee has the responsibility to follow through on the matters at hand. For example, who has the authority to execute documents and agreements on the plan's behalf.
- **Ensure your defined contribution plan meets ERISA requirements under 404c.** Plan sponsors receive fiduciary relief, though you are still responsible for selecting and monitoring prudent funds from which participants may choose. Section 404c encompasses 11 specific directives that must be provided to the plan participants BEFORE investments are made and five directives that must be delivered to plan participants upon request. In addition, 401(k) plans that utilize an auto enrollment feature must remember to provide the 11 essential directives before any contributions reach the investment manager.
- **Provide diverse advice programs.** Although you are not required to provide advice or education, it is prudent to communicate as much as possible to ensure plan participants understand their options. The best fiduciaries can provide a record of everything they did to offer participants an opportunity to achieve their retirement goals.
- **Hire a service provider to handle fiduciary functions.** If you choose to share fiduciary responsibilities with a third party, you should require in writing the co-fiduciary's agreement and understand the extent of services and benefits provided. This co-fiduciary is bound by the duties of loyalty, prudence, diversification and following the plan document.

### Test Your Fiduciary Risk

	YES	NO
Have all fiduciaries been identified, with roles and responsibilities defined?	<input type="checkbox"/>	<input type="checkbox"/>
Do you have a formal committee to manage your retirement plan?	<input type="checkbox"/>	<input type="checkbox"/>
Have all committee members acknowledged their responsibility in writing?	<input type="checkbox"/>	<input type="checkbox"/>
Does your committee meet on a regular basis to manage the plan?	<input type="checkbox"/>	<input type="checkbox"/>
Does your plan have a Committee Charter?	<input type="checkbox"/>	<input type="checkbox"/>
Do you have a written investment policy statement?	<input type="checkbox"/>	<input type="checkbox"/>
Are you adhering to all ERISA standards?	<input type="checkbox"/>	<input type="checkbox"/>
Do you have fiduciary liability insurance?	<input type="checkbox"/>	<input type="checkbox"/>
Are your investment vehicles appropriate for the portfolio size?	<input type="checkbox"/>	<input type="checkbox"/>
Do you have a standard procedure to communicate to plan participants?	<input type="checkbox"/>	<input type="checkbox"/>
Do you have signed agreements from all service providers detailing responsibilities, fees and service standards?	<input type="checkbox"/>	<input type="checkbox"/>

### To Sum Up – What Does All This Mean?

As a plan sponsor, you automatically have fiduciary responsibility to the employees who participate in your plan. It is also quite possible that you may not be fully qualified to act as the sole fiduciary. Therefore, it is crucial that you include that expertise which could be someone on your board or executive team. Or, you may choose to hire someone outside your company who can serve as the co-fiduciary.

In summary, you should:

- Fully understand the ERISA standards and your fiduciary responsibilities;
- Act solely in the interest of the plan participants and beneficiaries;
- Document all processes and fiduciary practices, and
- Hire knowledgeable experts to help mitigate personal risk.

### About the Author

Anthony J. Pascazio, a director in the Bridgewater Township, New Jersey office, focuses on consulting and business development activities for corporations and nonprofits with an emphasis in the life sciences sector. Tony assists corporations with qualified and nonqualified deferred compensation, executive benefit plans, actuarial services, design and implementation of 401(k), 403B, 457B plans and payroll, as well as human resource information systems.

Tony also provides financial, estate and investment management services to high net worth individuals and institutional clients. Prior to joining Solenture, Tony was the vice chairman and co-founder of International Planning Alliance, LLC, one of the nation's largest privately-owned multiple disciplinary financial services organizations.

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