



# TAKING CHARGE OF YOUR FIDUCIARY RESPONSIBILITIES

For Plan Sponsors



# What You Need to Know About Managing Your Plan

By sponsoring a 401(k) plan, you've made an important investment in helping secure the future of your company's most valuable asset—your employees.

Many employers offer a retirement plan savings vehicle without being fully aware of their fiduciary responsibilities—and the risks and liability that can accompany 401(k) plans.

As a plan sponsor and a plan fiduciary, you have taken on certain responsibilities, intended to protect the plan's participants and beneficiaries, which were established by the Employee Retirement Income Security Act of 1974 (ERISA) and are monitored by the U. S. Department of Labor (DOL).

This guide is designed to help you understand these responsibilities and how to effectively manage the retirement plan you offer your employees. You'll also learn about certain services that can assist you with your fiduciary obligations.

## Inside This Guide You'll Find:

- What is a fiduciary
- What are the basic fiduciary responsibilities
- How ERISA Section 404(c) can help limit your liability
- The importance of documentation
- Why you need an Investment Policy Statement
- How to approach the investment selection and monitoring process
- What you need to communicate to participants
- Your plan administration responsibilities



# UNDERSTANDING FIDUCIARY RESPONSIBILITY

As a plan fiduciary, one of your responsibilities is to ensure that your 401(k) plan complies with the standards of the Employee Retirement Income Security Act of 1974 (ERISA), and its amendments. ERISA is the federal law that governs certain aspects of most private qualified retirement plans.

## Who is a Plan Fiduciary?

A fiduciary is any person who:

- Is named in the plan document as a fiduciary or is appointed as a fiduciary
- Exercises discretionary authority or control over plan assets and/or the management of the plan, or
- Provides investment advice for compensation with respect to plan assets

Plan fiduciaries have responsibility for the administration of the plan and the selection of investment options. Every plan must have a least one named fiduciary. It's been our experience that the plan sponsor is generally a named fiduciary.

The retirement plan investment committee members are also considered fiduciaries. The same holds true for the plan administrator, trustee and investment managers.

## Fiduciary Standards of Conduct

Generally, ERISA has "standards of conduct" that apply to all fiduciary actions. Fiduciaries have these duties:

<b>LOYALTY</b> To act solely in the interests of plan participants and beneficiaries (the "exclusive benefit" rule). This duty includes ensuring that plan expenses are reasonable and that benefits are paid.	<b>PRUDENCE</b> To act with the care, skill, prudence and diligence of a prudent person who has experience dealing with similar situations (the "prudent expert" rule). Fiduciaries are not required to be experts in every area of retirement plan management; they can hire outside advisors such as attorneys, accountants, administrators and investment managers.*	<b>DIVERSIFICATION</b> To diversify the investments of the plan in order to provide participants with an opportunity to affect the potential return and degree of risk and to mitigate the risk of investment losses.	<b>FOLLOW PLAN DOCUMENTS</b> To administer the plan in accordance with the documents and instruments governing the plan, assuming the documents comply with ERISA.	<b>PAY REASONABLE EXPENSES</b> To evaluate the reasonableness of the fees and charges paid by the plan, taking into account the level of services received for the fees paid.
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\* Retaining these advisors does not relieve plan fiduciaries of their fiduciary duties. They are still responsible for prudently selecting and monitoring these advisors.

## Protection for Participants and Plan Fiduciaries

Fiduciary responsibilities under ERISA were established to protect the interests of participants and beneficiaries, and to protect plan assets from misuse. By complying with ERISA, plan sponsors can also limit their potential liability.

# LIMITING LIABILITY WITH ERISA SECTION 404(c)

Many 401(k) plans seek to comply with the requirements of Section 404(c), a voluntary section of ERISA. 404(c) provides limited relief from fiduciary liability for retirement plans in which participants have independent control over their own plan investments. It allows the responsibility for investment losses to shift from the plan fiduciary to the participant, so long as certain requirements are met.

It's important to note that 404(c) doesn't eliminate the plan sponsor's or fiduciary's responsibilities. Even when participants direct the investment of their plan accounts among the plan's investment options, a plan sponsor or other plan fiduciary who selects plan investment options are still responsible for making prudent choices for the investment menu.

Here's a summary of the main requirements of Section 404(c):

ERISA Section 404(c) Requirements
Offer at least three diversified investment options
Inform participants that your qualified plan intends to comply with ERISA Section 404(c)
Provide sufficient investment information to plan participants so they can make informed decisions
Offer plan participants the opportunity to give investment instructions and receive written confirmation
Give plan participants the ability to change investment instructions at least quarterly
Communicate to plan participants when your plan adopts new provisions

## A Word About Expenses

- Remember, in terms of managing plan costs, no plan is free. All services have a cost.
- Expenses don't have to be the lowest, but they have to be reasonable for the type of service that is provided.
- What's really important is that plan fiduciaries understand what services they are getting for the fees they are paying.

# FIVE STEPS TO DELIVER ON YOUR RESPONSIBILITIES

Now that you know what some of your responsibilities are and why they are important, let's talk about how to deliver on them.

## One – Document Your Decisions

Ideally, you set up a due diligence file when you established your company's retirement plan. If not, now's a good time to start one. In this file, document decisions you make about your retirement plan; this will serve as evidence that you've satisfied your fiduciary requirements. Keep this information for a minimum of six years.

## Two – Establish an Investment Policy Statement

An Investment Policy Statement (IPS) is the foundation for the plan's investment decisions. It establishes objectives for managing the plan's investments, including criteria for investment selection, evaluation and monitoring. Using an IPS enables a more disciplined and systematic approach in your decision-making.

While an IPS is not explicitly required under ERISA, the DOL has issued guidance stating that having an IPS is consistent with the fiduciary obligations of loyalty and prudence. Specifically, an IPS can help:

- Carry out your fiduciary responsibilities in compliance with legal guidelines
- Shield fiduciaries from complaints and potential legal action
- Create a clear, comprehensive record that demonstrates your prudent planning and procedures
- Establish a framework for determining the selection, monitoring and termination of plan investments

## Three – Select Investment Options

Your next step is to choose investment options that are consistent with the objectives set forth in the IPS.

Section 404(c) regulations explain that participant-directed plans, such as 401(k) plans, should offer a "broad range of investment alternatives." In effect, a plan's investment options should be diverse enough to provide participants the opportunity to:

- Materially effect potential returns and degrees of risk
- Choose from at least three core diversified investment alternatives, each of which have different risk and return characteristics
- Choose among available investment options to achieve a portfolio that has risk and return characteristics within a range normally appropriate for the participant
- Diversify investments in order to minimize the risk of large losses.

## It's About Process – Not Just Results

The test of prudence focuses on the fiduciary's conduct in investigating, evaluating and selecting the plan's investment options. It is the process a fiduciary uses that becomes central to his or her fulfillment of ERISA's fiduciary requirements.

Of course, performance and fees are important. But, it's important to understand that ERISA's fiduciary responsibility standards may not be satisfied by selecting investment options based only on above-average, short-term investment results, or by selecting the lowest cost service provider. In fact, fiduciaries could fail to satisfy ERISA's fiduciary responsibility standards by selecting investment options based on these criteria alone. Appropriate funds for your plan are not necessarily the least expensive and short-term performance does not necessarily indicate long-term performance. Rather, it is the process a fiduciary uses that may ultimately determine whether or not the prudence requirement under ERISA has been met.

## Four – Monitor Investment Options

As a fiduciary, one of your duties is to oversee and monitor the performance of funds offered to plan participants. This responsibility includes the preparation of fund performance review reports along with analysis of data in these reports.

Fiduciaries typically choose to either handle this responsibility themselves or hire an independent investment advisor to prepare the reports and assist in the reviews.

## Five – Communicate to Participants

For plans seeking to comply with ERISA Section 404(c), certain participant communications are required to enable them to exercise control over their investment decisions. Plan fiduciaries need to provide participants with:

- A Summary Plan Description (SPD) before enrollment, which is usually prepared and supplied by your Third Party Administrator (TPA). Simply distribute the SPD to your participants.
- A written notice that your plan intends to qualify as an ERISA Section 404(c) plan. This notice should be included in your SPD.
- A statement of Material Modifications and Summary Annual Report at specified times, which your TPA will provide.
- A general description of investment objectives and risk and return characteristics of each fund, including information on the type and diversification of assets in the investment line up.
- Instructions on who to contact to give investment instructions and specific limitations on transferring among investment options.

The above information is not a comprehensive list of every requirement under ERISA Section 404(c). Please consult your legal and/or tax advisor for more information.

## A Closer Look at “Prudence, Process and Conduct”

To comply with ERISA's fiduciary responsibility standards, fiduciaries must demonstrate a prudent decision process, which ideally is outlined in the plan's IPS. Prudently selecting plan investment options involves:

- Determining the plan's requirements
- Gathering and reviewing specific information about each investment option, such as investment objective, strategy and style, type of assets, manager expertise and experience, risk and return characteristics, and investment performance
- Consulting experts when appropriate
- Making decisions that are reasonable based on the available information

# MANAGING YOUR ADMINISTRATIVE RESPONSIBILITIES

Just as you are responsible for oversight of investment decisions for your plan, you are also responsible for monitoring the administrative aspects of your plan. Your Third Party Administrator helps by overseeing your plan documentation, compliance and other administrative services.

Fiduciaries selecting 401(k) plan service providers should also consider the type and quality of services offered compared to the plan's service needs. This review should look at the number of available investment options; loan services; live client service representatives; telephone voice response and internet service capabilities; participant communication and investment education programs; reporting services; and the fees and expenses the plan will pay.

Once your plan is established, on an ongoing basis, ERISA imposes a number of reporting and disclosure requirements. For example, plan fiduciaries must:

- File an annual report and Form 5500 with the government each year.
- Obtain an ERISA fidelity bond of at least 10% of plan assets for individuals who handle plan funds. (This is not the same as liability or errors and omissions insurance). ERISA bonds are inexpensive and readily available. Your business insurance agent can generally help you secure the coverage you need.
- Arrange an independent CPA to audit the plan annually if your plan has 100 or more participants (at the beginning of the plan year).
- Submit deferrals on a timely basis. Generally, this means your employees' money must be deposited as soon as administratively feasible, but no later than the 15th business day of the month following the month in which the amounts were withheld from participants' paychecks. This is a common fiduciary oversight that plan fiduciaries should avoid.





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RP-0386-1219 Tracking #1-930002 (Exp. 12/21)