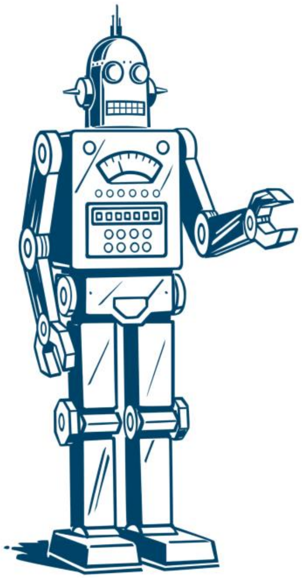
The Building a Better Fiduciary Series



Between the new Fiduciary Rule and media coverage of lawsuits citing a breach of Fiduciary duty, being a Fiduciary may seem like nothing short of a nightmare. Don't let it cause you to short circuit! ***It is time to build a better Fiduciary.***

Step by step, we are giving you the tools you need to reach your Fiduciary best. Understand your role, follow simple procedures and best practices, learn how your service providers can better serve you, and improve outcomes for your Participants. After all, knowledge is power.

Get started today and ***Build a Better Fiduciary***.

Part Two. Delegating Fiduciary Duties

In Part One: Understand the Basics, we covered what it means to be a Fiduciary, what the Fiduciary duties include, and the consequences for a breach in Fiduciary duty. Now that you understand Fiduciary Basics, we are well on our way to *Building a Better Fiduciary*.

You'll recall that each Plan must have at least one Fiduciary named in the Plan Document, specified as either an individual or position held. The Employee Retirement Income Security Act (ERISA) states that the Fiduciary or Fiduciaries named in the Plan Document "have authority to control and manage the operation and administration of the plan." ERISA also gives the Plan the option to "employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or…appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan." In short, you are able to delegate some of your Fiduciary duties and mitigate risk. The following section of ERISA explains that assets must be held in a trust with one or more Trustees.[1] A Trustee can be an individual or an institution such as a bank or trust company. The Trustee or group of Trustees is generally given exclusive authority and discretion over the management of Plan assets unless a Co-Fiduciary Investment Manager is hired. The Named Fiduciary may appoint an ERISA 3(16) Plan Administrator to serve as a Fiduciary, responsible for all or a portion of the daily operation of the Plan.

With plan-related litigation and regulatory scrutiny on the rise, Plan Sponsors may be looking for options to lower their fiduciary exposure and aid in the management of their plans. Although Plan Fiduciaries can never fully delegate their fiduciary duty, hiring a Co-Fiduciary can fulfill these needs based on the level of discretion the Plan Sponsor desires. When

[1] Assets are not required to be held in a trust if they are held in insurance contracts.

considering if a Co-Fiduciary is right for you Plan, it is important to look past the title and get into the nuts and bolts of what services and value your Plan is receiving for the cost.

There are two distinct types of ERISA Co-Fiduciary Services regarding investments: *3(21) and 3(38).*

ERISA 3(21) Fiduciary - The Investment Advisor

In its original text, Section 3(21) of ERISA, contains the definition of a Fiduciary. [2] Based on this definition, a person is a fiduciary with respect to a Plan if he or she "(1) exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any responsibility to do so, OR (3) has any discretionary authority or discretionary responsibility in the administration of such plan".

An ERISA 3(21) Fiduciary Advisor is hired to provide investment advice and recommendations to the Plan Sponsor, Trustees, or Investment Committee for a fee. Their main function is to provide information to assist in the investment decision making process. The 3(21) Fiduciary does not have discretionary authority over investment decisions. The Plan Sponsor maintains ultimate decision making authority with the ability to accept or reject the 3(21) Advisor's recommendations. The Plan Sponsor and contracted 3(21) Investment Advisor share fiduciary responsibility and liability regarding the investment of Plan assets.

ERISA 3(38) Fiduciary - The Investment Manager

In part, the original text of ERISA Section 3(38) states that an Investment Manager is a fiduciary who has the power to manage, acquire, or dispose of any asset of a plan.[3]

Contrary to the 3(21) Investment Advisor, the ERISA 3(38) Fiduciary Investment Manager has been appointed to have full authority over the investment decision of the Plan's assets. The 3(38) Investment Manager has discretion over the selection, monitoring, and replacing process for the Plan's investments, many times within the guidelines of the Plan's Investment Policy Statement. While the Plan Sponsor has relinquished their duty to select, monitor, and replace investments and delegated this responsibility to the contracted 3(38) Investment Manager, they remain liable for selecting and monitoring this provider, as with any service provider.

In Conclusion

The term "Fiduciary" comes with several duties and responsibilities, as well as significant liability. The good news is that a retirement plan can have several Fiduciaries working towards making the Plan the best that it can be. While the Named Fiduciary cannot delegate all of their responsibility, certain roles can be assigned to others in the firm or hired professionals.

As with selecting any service provider, Plan Sponsors should consider the services they desire as well as the level of discretion they want to retain and ensure that the decision to

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[2]. The final "Definition of the Term 'Fiduciary'; Conflict of Interest Rule" is effective as of June 7, 2016 with an applicability date of April 10, 2017. While this legislation changes the definition of a fiduciary, it does not materially change the definitions of an ERISA 3(21) or 3(38) Fiduciary.
[3] Swisher, Pete. 401(k) Fiduciary Governance: An Advisor's Guide. 2nd Edition. Pages 40-47.

hire the provider is in the best interest of the Plan and participants. The costs of the services should be reasonable compared to the value received. The process for selecting a Co-Fiduciary should be fully documented and maintained with Plan records.

Is hiring a Co-Fiduciary for Investment Services right for your Plan?

Contact Ekon Benefits today to learn about our ERISA 3(21) and 3(38) offerings!