

2017 JOINT SPRING MEETING

**GROUP LEGAL SERVICES ASSOCIATION
SOLO, SMALL FIRM, AND GENERAL PRACTICE DIVISION
STANDING COMMITTEE ON GROUP & PREPAID LEGAL SERVICES
MAY 18-20, 2017
SCOTTSDALE, ARIZONA**

**SPECIAL TRUSTEES TOPIC
OVERVIEW OF FIDUCIARY DUTIES AND LIABILITIES: WORKING WITH
OTHERS AND AVOIDING PITFALLS**

**FRIDAY, MAY 19, 2017
8:00 - 9:00**

PRESENTER: RYAN CURTIS



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Ryan Curtis helps employee benefit plans, trustees, and administrators comply with important federal laws including ERISA, the Affordable Care Act, HIPAA and the Mental Health Parity and Addiction Equity Act.

Ryan drafts legally compliant and enforceable plan documents, agreements, notices and other policies and procedures; assists with IRS and Department of Labor audit defense and IRS plan corrections; and helps in reviewing benefit claims and negotiating and drafting contractual arrangements with professional service providers and other vendors.

As a litigator, Ryan has defended plans in benefit disputes, pursued plan participants who improperly received and retained benefits, and pursued investment managers who engaged in prohibited transactions and breached their fiduciary duty. He has also represented Taft-Hartley multiemployer plans to collect unpaid employee benefit contributions and withdrawal liability.

Before he went to law school, Ryan was a senior legislative analyst and performance auditor with the Arizona Office of the Auditor General. While there, he oversaw several audits of state agencies.

Overview of Fiduciary Duties and Liabilities: Working with Others and Avoiding Pitfalls

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Joint Spring Meeting
May 19, 2017
Scottsdale, Arizona

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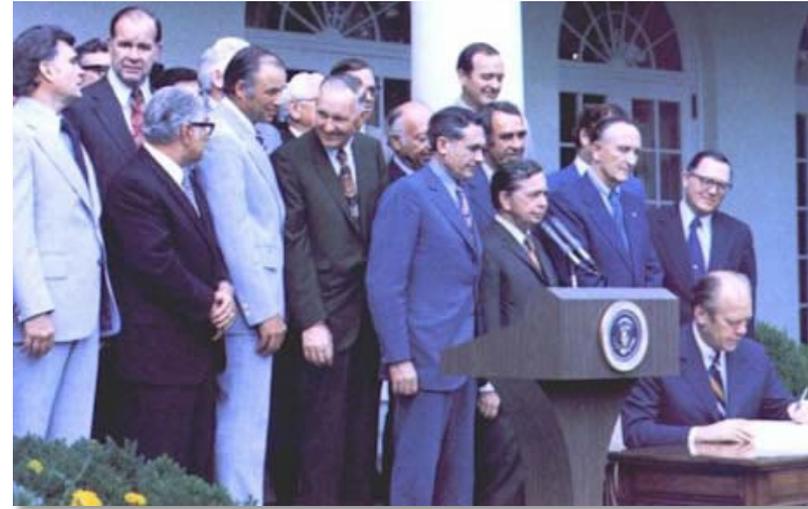


Review of ERISA Fiduciary Duties

WHAT IS ERISA?

ERISA History

- The Employee Retirement Income Securities Act (ERISA) was signed by President Ford in 1974.
- ERISA establishes minimum standards for retirement plans in private industry.
- Provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans.
- Governs fiduciary obligations to plans and plan participants
- Enforcement divided between DOL and IRS.



President Ford signing ERISA into law on September 2, 1974

ERISA: The Basics

Uniform system of regulatory oversight for employee benefit plans

Requires the disclosure of financial and other information concerning the plan to beneficiaries

Provides protection for plan participants and beneficiaries

Establishes fiduciary roles and responsibilities regarding retirement plans

Importance of Fiduciary Duties

“A pure heart and an empty head are not an acceptable substitute for proper analysis.”

- *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983).

Why is fiduciary status important?

- Fiduciary status carries with it high standards for conduct, and
- Potential personal liability if these standards are not met.
- ERISA provides for civil actions by participants, beneficiaries or the Department of Labor for breaches of fiduciary duty, including:
 - Damages and attorneys fees
 - Enforce rights under the terms of a plan
 - Enjoin any practice that violates ERISA or the terms of a plan – ERISA §502
- Improper administration can result in the loss of favorable income tax treatment for the employer and plan participants and beneficiaries.

What are the duties of a fiduciary?

- To act in the interests of plan participants and beneficiaries for the exclusive purpose providing benefits and defraying reasonable expenses of administering the plan – ERISA §404(a)(1)(A)
- A fiduciary must act “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters” would act – ERISA §404(a)(1)(B)
 - The “prudent person” standard is an objective standard based upon how a person with experience and knowledge of a certain area would act in a given situation
 - If a fiduciary lacks the expertise for an area, then (as a “prudent person”), the fiduciary must obtain expert help
- A fiduciary must diversify plan investments in order to minimize the risk of loss unless it would not be considered prudent not to do so – ERISA § 404(a)(1)(C)
- A fiduciary must act in accordance with the Plan documents (but only to the extent the Plan is consistent with ERISA requirements)– ERISA §404(a)(1)(D)
 - This means a fiduciary must know what the plan says, understand what ERISA requires, and act in accordance with both

Loyalty Defined

Loyalty: giving or showing firm and constant support or allegiance to a person or institution

(synonyms: faithful, true, devoted)



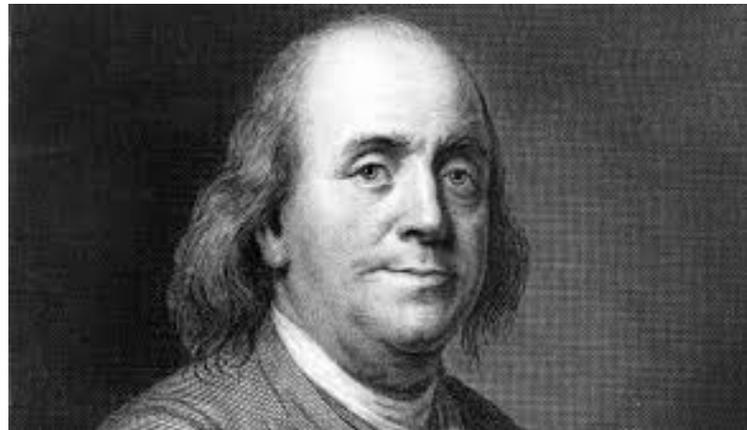
Duty of Loyalty

- A command to avoid conflicts of interest and self-dealing
- An obligation to make decisions without favoring the interests of the fiduciary or any other party over the interests of participants and beneficiaries
- Fiduciaries are not prevented from taking acting that incidentally benefit the employer/plan sponsor as long as the duty of loyalty standard is otherwise met
- Places an affirmative obligation on plan fiduciaries to only pay reasonable expenses from the Plan

Prudence Defined

Prudence: Acting with or showing care for the future

(synonyms: wise, well judged, sensible, judicious, sage, shrewd, well advised)



Duty of Prudence

- Requires following a careful and thorough deliberative process
- Involves investigation and due diligence to allow the fiduciary to make an informed evaluation and decision
 - Focuses on process and documenting those processes
 - Doesn't require a "crystal ball"
- Requires knowledge or recognition that expert assistance is necessary
 - Includes an obligation to make reasonable selections of experts and a continuing obligation to monitor the work of any experts retained



Identifying ERISA Fiduciaries

Who is considered a fiduciary?

- It's easy to think of anyone who has responsibility for the investment of plan assets or anyone who renders investment advice as a fiduciary, but under ERISA plan fiduciaries also include:
 - Anyone who exercises any authority or discretionary control over the management of a plan or disposition of its assets, and
 - Anyone who has any discretionary authority or discretionary responsibility in the operation of the plan
 - - ERISA §3(21)(A)

What fiduciaries does ERISA require?

- ERISA requires a trustee to hold plan assets and allows for fiduciary investment advisors
- ERISA also requires a Plan to identify a “Named Fiduciary” and a “Plan Administrator” in its Plan Document
- Review Plan Document and Summary Plan Description
- Understand who fiduciaries are

What if Employer is the Named Fiduciary and Plan Administrator under the terms of a Plan?

- Individuals to whom the Employer explicitly delegates specific fiduciary responsibilities
 - Such delegation can be accomplished by Board of Director Resolutions or by adopting a Committee Charter
 - Failing to have an explicit delegation of responsibilities from the Employer to the Committee and from the Committee to
 - Individual Committee members or
 - To individuals not on the Committee,Can have unexpected consequences

How else can someone become a fiduciary?

- Fiduciary status is also based on the functions performed for the Plan, not just a person's title
- In other words, a person or persons will also be considered a fiduciary based on their conduct and authority (these are sometimes called “functional” or “deemed” fiduciaries), so
 - Anyone who exercises any authority or discretionary control over the management of a Plan or
 - Anyone who has any discretionary authority or discretionary responsibility in the operation of a plan is a Plan Fiduciary

Who Isn't a Fiduciary?

- People who do not have the power to make any decisions as to plan policy, interpretation, practices or procedures, but who perform administrative or “ministerial” functions within a framework of policies, interpretations, rules, practices and procedures made by others – DOL Reg. § 2509.75-8 Q & A D-2
 - Application of rules for determining eligibility
 - Calculation of service and compensation for determining benefits
 - Preparing employee communication materials
 - Maintaining service and employment records
 - Preparing Government reports
 - Advising participants of their rights and options under a plan
 - Collecting and applying contributions as provided in the plan
 - Processing claims
 - Making recommendations to others for decisions with respect to plan administration

Who Else Isn't a Fiduciary?

- Individuals and entities that perform services at the direction of plan fiduciaries or under policies and procedures implicitly established by plan fiduciaries are not fiduciaries unless they have discretionary control or responsibility over plan administration or management
 - Third party administrators and recordkeepers take the position that they do not have discretionary control or responsibility with respect to plan administration or management and generally explicitly disavow fiduciary responsibility with respect to plan management leaving ultimate responsibility with plan fiduciaries
 - Attorney and accountants are generally not fiduciaries even though they may provide advise about fiduciary obligations

Context

- Remember, under ERISA plan fiduciaries include:
 - Anyone who exercises any authority or discretionary control over the management of a plan or disposition of its assets, and
 - Anyone who has any discretionary authority or discretionary responsibility in the operation of the plan
- And, a fiduciary must act in accordance with the Plan documents (but only to the extent the Plan is consistent with ERISA requirements)
 - This means a fiduciary must know what the plan says, understand what ERISA requires, and act in accordance with both
- Take time to look at the Plan Document, particularly any actions to be taken by the Plan Administrator



Determine What Fees
Get Paid by the Plan

What Fees Can't Be Paid with Plan Assets

- A Plan is not permitted to pay the expenses of “settlor” functions.
- The terms “Settlor” and “Non-Settlor” come from the common law of trusts
 - In common law, a “settlor” is defined as the party who places property in a trust for the benefit of the beneficiaries

Commonly Accepted Settlor v. Non-Settlor Functions

- Settlor Functions not payable out of plan assets:
 - Determining eligible classes of employees and the level of benefits to be provided
 - Making the decision to establish or terminate a plan
 - Altering the level or types of benefits
 - Plan design or re-design expenses
- Non-Settlor Functions payable out of plan assets:
 - Amending the plan to comply with changes in the law
 - Auditing the plan
 - Performing and monitoring plan testing
 - Legal, accounting and consulting fees to keep a plan in compliance with law
 - Complying with ERISA reporting and disclosure obligations

Paying Plan Expenses Take Aways

- Educate yourselves about what constitutes Settlor vs. Non-Settlor Functions
 - The distinction isn't always intuitively obvious
 - If in doubt, consult legal counsel or other expert consultant
- Remember the Duty of Loyalty
- Document the basis for the Committee's decision



Co-Fiduciary Liability

Co-Fiduciary Liability: Can I Mind My Own Business?

- **NO**. See ERISA § 405

- In addition to any other liability, a fiduciary shall be liable for a breach of fiduciary responsibility **of another fiduciary** with respect to the same plan in the following circumstances:

- if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Co-Fiduciary Liability

- If a fiduciary knows of a breach or imminent breach, the fiduciary must take reasonable efforts to remedy the breach:
- **Reasonable Efforts:**
 - Notify other fiduciaries;
 - Notify DOL;
 - Determine what is reasonable under the circumstances
- **Unreasonable:**
 - Do nothing
 - Resign

Co-Fiduciary Liability

DOL Interpretive Bulletin 75-5

Situation:

- Trustee proposed using a contractor for a construction project without bidding.
- Trustee could not answer other trustees' questions about basis of choice, costs, or other bids.
- Many trustees argued this violated fiduciary duties, but a majority still supported awarding the contract without bids.

Co-Fiduciary Liability

DOL Interpretive Bulletin 75-5

Solution:

- Trustees in the minority must take reasonable steps to prevent action.
- Seek federal injunction under ERISA 502(a)(3), notify DOL, publicize the vote.
- If take reasonable actions, and violation still occurs, those Trustees in the minority will not have liability for actions of the majority.

However:

- If a Trustee in the minority did nothing or simply resigned without taking action, that Trustee would be guilty of a co-fiduciary breach.

Co-Fiduciary Liability

- Take Aways
 - Fiduciaries have affirmative duty to watch for breaches by other fiduciaries.
 - When aware of a breach or imminent breach, you must take reasonable actions.
 - You can meet your fiduciary duty in your area, but violate co-fiduciary duty for other areas if you fail to take reasonable actions.
 - You cannot “mind your own business” or “resign” when it comes to other fiduciaries’ breaches.



Handling Audits

Handling Audits

- **Department of Labor Audits**
 - Audit Authority: ERISA § 504 / 29 U.S.C. § 1134
 - Audits Increasing
 - Types of audits
 - Random selection
 - Possible issue
 - Known issue / possible criminal issues
 - New / comprehensive health plan audits
 - May include claims processing, benefits as provided in plan, document compliance, Mental Health Parity, ACA § 1557 nondiscrimination requirements, etc.

Handling Audits

- **Department of Labor Audits**
 - Possible causes for audit
 - Review of annual 5500 filing
 - Information from other government entities
 - Media driven (articles, industry journals, litigation)
 - Participant complaints

Handling Audits

- **Department of Labor or IRS Audits**
 - Things to consider:
 - Notify legal counsel
 - Determine scope of audit and issues identified
 - Review any applicable fiduciary liability policy and consider notifying carrier right away
 - Have legal counsel serve as primary contact with DOL and attend all interviews
 - Carefully track all responses and documents provided

Claims, Appeals and Litigation

- Benefit denial claims against plan
- Be familiar with and follow claims and appeals procedures
- Review litigation limitations period in claims and appeals procedures
 - For example, plan may require participant to file suit within 90 days of final appeal determination, or right to sue is waived.

Standard of Review

Fiduciary Liability

- If Administrator has discretion, decisions must be upheld unless decision was arbitrary and capricious.
 - *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 866 (9th Cir. 2008).
- An action is **not** “arbitrary and capricious” if it was reasonable and made in good faith.
 - *Barnett v. Kaiser Foundation Health Plan*, 32 F.3d 413, 416 (9th Cir. 1994).
 - *Sznewajs v. U.S. Bancorp Amended and Restated Supplemental Benefits Plan*, 572 F.3d 727, 734-35 (9th Cir. 2009).

Standard of Review

Fiduciary Status

- Structural/financial conflicts result in reduced deference.
 - *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 112 (2008)
- Such conflicts do not exist in some types of plans.
 - Example: Multiemployer plans
 - *Anderson v. Suburban Teamsters of Northern Illinois Pension Fund Board of Trustees*, 588 F.3d 641, 648 (9th Cir. 2009).

Standard of Review

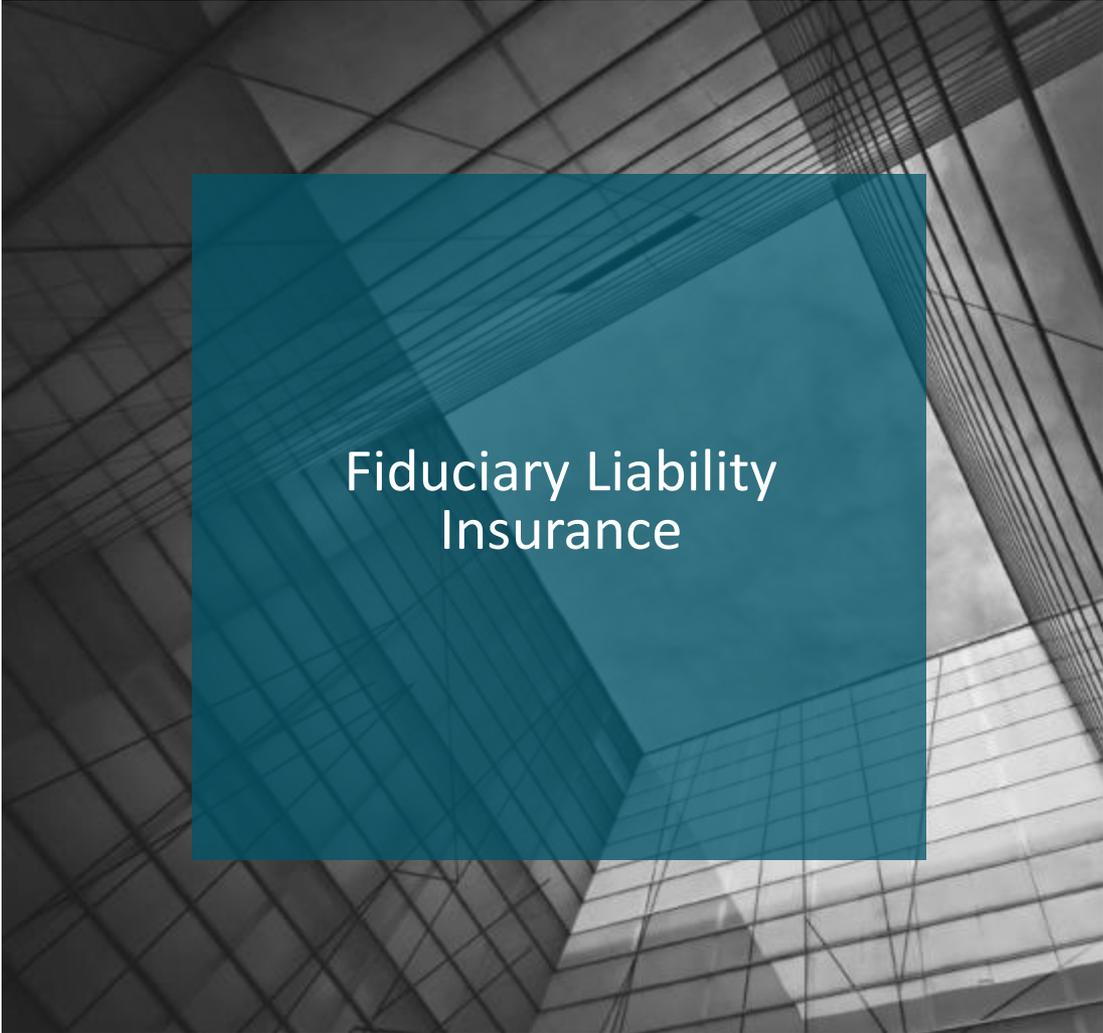
Fiduciary Liability

- Standard of Review: Abuse of Discretion or De Novo Review
 - ERISA allows plans to grant broad discretionary authority to administrators.

Deference to plan administrators “preserves the ‘careful balancing’ on which ERISA is based [and encourages] . . . Resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the administrator rather than worry about unexpected and inaccurate plan interpretations that might result from de novo judicial review.”

- *Conkright v. Frommert*, 559 U.S. 506, 507 (2010).

- Courts review de novo, unless administrator has discretion to interpret plan terms.
 - *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (9th Cir. 1989)
 - *Burke v. Pine Bowes Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1023 (9th Cir. 2008)



Fiduciary Liability Insurance

Fiduciary Liability Insurance

- **Do you need to file a claim?**
 - Review terms of policy?
 - Who is covered?
 - What is covered?
 - What are the notice requirements?
- **Consult with experts**
 - Legal counsel
 - Insurance broker
 - Carrier representative

Final Take Aways

- Know what your Plan documents say and identify your obligations
- Document allocations of fiduciary responsibility
- Establish a practice of periodically reviewing plan administrative functions
- Document Decisions, Policies, and Procedures
- Review IRS and DOL Websites for guidance and insight
 - <http://www.irs.gov/Retirement-Plans>
 - <http://www.dol.gov/ebsa>
- Remember what it means to be loyal and prudent
- Get good advice
- Review fiduciary liability insurance policy



Questions?

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