

**ERISA
FIDUCIARY LIABILITY**

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AN OVERVIEW

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I. ERISA

A. Principal Goals

1. Protection of interests of participants and beneficiaries to enforce benefit plan obligations -- fiduciary obligations
2. Regulation and protection of private pension plans
 - a. Disclosure and reporting to participants
 - b. Standards of conduct
 - c. Minimum standards of participation, vesting and funding
3. Government Enforcement
 - a. Department of Labor
 - b. IRS
4. Federal insurance for private defined benefit plans

Pension Benefit Guaranty
Corporation

B. Scope of Coverage

1. Pension Plans -- any plan which
 - a. provides retirement income to employees; or
 - b. results in a deferral of income by employees for periods extending to the termination of covered employment; and
 - c. is established by employer, union, or both.
 - d. Generally does not include:
 - wages; bonus programs;
 - one-time payments
2. Welfare Plans: plans providing for
 - a. medical or hospital care or benefits
 - b. benefits in the event of sickness, accident, disability, death
 - c. apprenticeship or other training programs
 - d. daycare centers, scholarship funds, or prepaid legal services

C. Pension plans

1. Qualified pension plans

a. Tax Benefits

- (1) Employer contributions deductible in year made
- (2) Investment earnings tax-deferred
- (3) Employees generally taxed at distribution

b. Loss of tax benefits if plan does not satisfy minimum statutory standards or discrimination tests

2. Types of pension plans

a. Defined benefit plans

b. Defined contribution plans, including

- (1) Money purchase pension plans
- (2) Profit-sharing plans
- (3) Stock bonus plans
- (4) 401(k) plans

D. Reporting and Disclosure

1. Annual return/report – Form 5500
2. Summary Annual Report for participants and beneficiaries receiving benefits
3. Summary Plan Description (SPD)
4. Summary of Material Modifications

E. ERISA Fiduciary Standards

1. Who is a fiduciary?
 - a. Discretionary authority regarding management of plan or disposition of plan assets
 - b. Renders investment advice for a fee
 - c. Discretionary authority regarding administration of plan
2. Acts not considered as fiduciary
 - a. Establishment of plan and plan funding
 - b. Setting or amending plan benefits or terms
3. General Fiduciary Standard (Section 404)
 - a. Act for exclusive purpose of providing benefits to participants and beneficiaries

and for defraying plan expenses

- b. Prudent man standard
- c. Duty to diversify plan investments to minimize risk of large losses
- d. Act in accordance with plan documents if consistent with ERISA

4. Specific Fiduciary Standards-
Prohibited Transactions
(Section 406)

- a. Transactions between plan and party-in-interest prohibited unless subject to an exception
- b. Conflict or self-dealing transactions - transactions with plan fiduciaries - prohibited

5. Liability for Breach of Fiduciary Duties

- a. Personal liability for losses of plan
- b. Disgorge profits
- c. Removal as fiduciary
- d. 20% penalty
- e. Attorneys fees and costs

6. Discrimination (Section 510)

II. FIDUCIARY LIABILITY POLICIES – COVERAGE ISSUES

A. Identify Insured Plans

1. Pension plans may need to be specifically identified in endorsement
2. Multi-employer or multiple employer plans
3. Plans formed during policy period

B. Identify Insureds / Insured Capacity for each Plan

1. Directors, trustees and officers of Plan Sponsor and each Plan
2. Employees of Plan Sponsor or Plan
3. Plan administrator / third-party service providers
4. Coverage for acts as fiduciaries under ERISA
 - a. Plan sponsor – non-fiduciary acts not covered
 - b. Employee claims generally not covered (other than ERISA Section 510)

C. General Scope of Coverage

1. Breach of fiduciary duty under ERISA
2. Administration of Employee Benefits

D. Waiver of Recourse

1. ERISA allows insurer recourse against breaching fiduciary
2. Recourse by insurer can be waived if part of premium paid by employer, employee organization, or fiduciary

E. Exclusions

1. Benefits due or to become due
 - a. Defense costs
 - b. Coverage if liability of natural person
2. Failure to maintain insurance or bond
3. Discrimination (other than ERISA Section 510)
4. Civil penalties (other than ERISA penalties)
5. Employer contributions owed by employer to Plan

III. CURRENT AREAS OF CLAIM ACTIVITY

A. Cash-Balance Pension Plans

1. Hybrid plans – features of defined benefit and defined contribution plans
2. May reduce potential future benefits to long-term employees under defined benefit plans

3. Portability attractive to newer employees
 4. Fiduciary issues:
 - a. Anti-cutback claims based on “wearaway” effect
 - b. Inadequate disclosures
 5. Legislative and regulatory review
- B. Duty to diversify issues
1. Use of proprietary plans
 - a. Failure to diversify
 - b. Violation of exclusive benefit rule
 2. Spin-offs
 - a. Pension plans – special rules for investment in company stock
 - b. Spin-off creates new company; possible loss of statutory protections
- C. Disclosure Issues
1. Expansion of possible defendants
 - a. Third-party administrators
 - b. Investment advisors

2. Duty to disclose
 - a. Corporate plans / reorganization
 - b. Change in benefits
 - c. Tax consequences