

# Retirement Plan News Update

Brought to you by the Barnes Dennig Employee Benefit Plan Audit Team

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## FIDUCIARY RESPONSIBILITIES: 5 Ways to Minimize Your Liability

Each employee benefit plan covered under the Employee Retirement Income Security Act (ERISA) is required to identify at least one person or entity as a “fiduciary.” Plan fiduciaries include any person or entity that exercises discretion in administering and managing a plan. That ordinarily includes:

- The trustee
- Investment advisers
- All members of a plan’s administrative committee (if it has such a committee) and those who select committee officials

Note that attorneys, accountants and actuaries generally are not considered fiduciaries when they are acting solely in their professional capacities.

### Fiduciary Responsibilities

Fiduciary responsibilities include:

- Carrying out duties prudently
- Following the plan documents (unless inconsistent with ERISA)
- Diversifying plan investments
- Paying only reasonable plan expenses

Fiduciaries who do not follow the basic standards of prudent conduct may be personally liable. For example, plan participants can bring suit against fiduciaries for performance losses and court costs. In fact, the number of court cases brought by plan participants is increasing dramatically, especially as participants become more sophisticated about investment performance and the benefits of diversification, and have immediate access to relative performance results.

In addition, the Department of Labor (DOL) and the IRS can audit a plan at any time. If the DOL finds fault with the management of plan assets, they can file suit against

fiduciaries personally. The IRS can also disqualify the plan if it finds that the plan’s assets have not been managed for the exclusive benefit of the participants.

### Limiting Liability

Of course, a well-run plan provides benefits to its participants — and participants who are receiving adequate benefits are less likely to resort to litigation. But there are additional steps that fiduciaries can take to limit their liability.

1. **Document, document, document.** ERISA standards revolve around a basic theme: documented prudence. Fiduciaries are rarely surcharged by the courts for poor performance results when investment decisions are prudently undertaken and properly documented. On the other hand, fiduciaries have been held liable for taking imprudent risks that resulted in losses or substandard performance when deficient documentation and/or poor procedures were followed in making the initial investment decisions.

*Takeaway: Demonstrate that you have carried out your fiduciary responsibilities by properly documenting the processes used to carry out those responsibilities.*

2. **Diversify.** ERISA clearly states that a fiduciary must diversify the plan’s assets. And the courts have been quick to find fiduciary liability when it was apparent that diversification did not exist and a loss occurred. Here, it is important to note that “asset allocation” and “diversification” are not synonymous. Asset allocation guidelines determine the distribution of assets among various investment classes to attempt to yield the greatest possible return consistent with the portfolio’s risk parameters.

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Diversification is the risk-reduction process of choosing a broad range of different individual investments within a particular investment class. For example, if a fiduciary determines that 20 percent of assets should be placed in equities, then within that equity portfolio, assets should be diversified among a range of equity issues.

*Takeaway: Diversification objectives should be outlined in a well-thought-out Investment Policy Statement.*

- 3. Watch for conflicts.** Because of the high standard to which a fiduciary is held, the courts have been quick to find conflicts of interest (technically, “prohibited transactions”) when the fiduciary received “current economic benefit” from a transaction. Common prohibited transactions include the sale, exchange or leasing of land between the plan and the fiduciary (e.g., a physician who owns his professional building and sells the property to the plan). Foreign investments and loans from a plan to a plan participant (unless plan documents authorize loans and certain conditions are met) are also prohibited.

*Takeaway: A fiduciary should always be able to provide a satisfactory answer to the question, “As the plan fiduciary, do I stand to benefit or gain personally, either directly or indirectly, by the handling of the plan assets?”*

- 4. Consider bringing in the experts.** Because plan assets may represent the single most significant source of funds on which workers will depend during their retirement years, it is crucial that investment decisions be made with utmost diligence. It is for this reason that Congress, the IRS and the courts have strongly encouraged the appointment of professional investment advisors to manage plan assets. Here, fiduciaries may obtain a degree of protection from liability if the investment advisor has been prudently selected and monitored.

*Takeaway: Although you can reduce your liability by hiring an investment manager, you are still responsible for selecting a prudent investment manager and monitoring the manager’s performance.*

- 5. Monitor expenses.** ERISA requires the fiduciary to be responsible not only for developing an investment

policy and selecting “prudent experts” to implement that policy, but also for ensuring that investment transactions are executed at the best cost, and that commission dollars pay for services that benefit the plan and participants.

*Takeaway: The U.S. Department of Labor offers a downloadable 401(k) Plan Fee Disclosure Form on its web site ([www.dol.gov/ebsa/pdf/401kfefm.pdf](http://www.dol.gov/ebsa/pdf/401kfefm.pdf)) that helps compare investment product fees and plan administration expenses charged by competing service providers, regardless of how a particular service provider structures its fees.*

## Schedule Regular Reviews

If the above procedures are followed, a fiduciary’s exposure to liability can be significantly reduced. The key is to prudently monitor either the asset manager you’ve selected or the performance of assets under your management. The review process should include:

- An overall assessment of performance
- Review of reports from the service provider
- Checking actual fees charged against proposals or engagement letters
- Following up on participant complaints

The results and documentation used in the review should then be maintained as evidence of the process.

If you would like to talk further about ways to mitigate your company’s liabilities with respect to your qualified plans, please call your Director or Manager contact at Barnes Dennig at (513) 241-8313.

### SIDEBAR: Made A Mistake?

The Department of Labor’s Voluntary Fiduciary Correction Program (VFCP) encourages employers to voluntarily self-correct certain violations. The program covers 15 transactions, including failure to timely remit participant contributions and some prohibited transactions. In addition, the Department gives applicants immediate relief from payment of excise taxes under a class exemption. Similarly, the Department’s Delinquent Filer Voluntary Compliance Program (DFVC) assists late or non-filers of the Form 5500 in coming up to date with corrected filings. For an overview of both programs, [visit www.dol.gov](http://www.dol.gov).

