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HOW TO SUCCESSFULLY SHOULDER THE BURDEN OF FIDUCIARY RESPONSIBILITY

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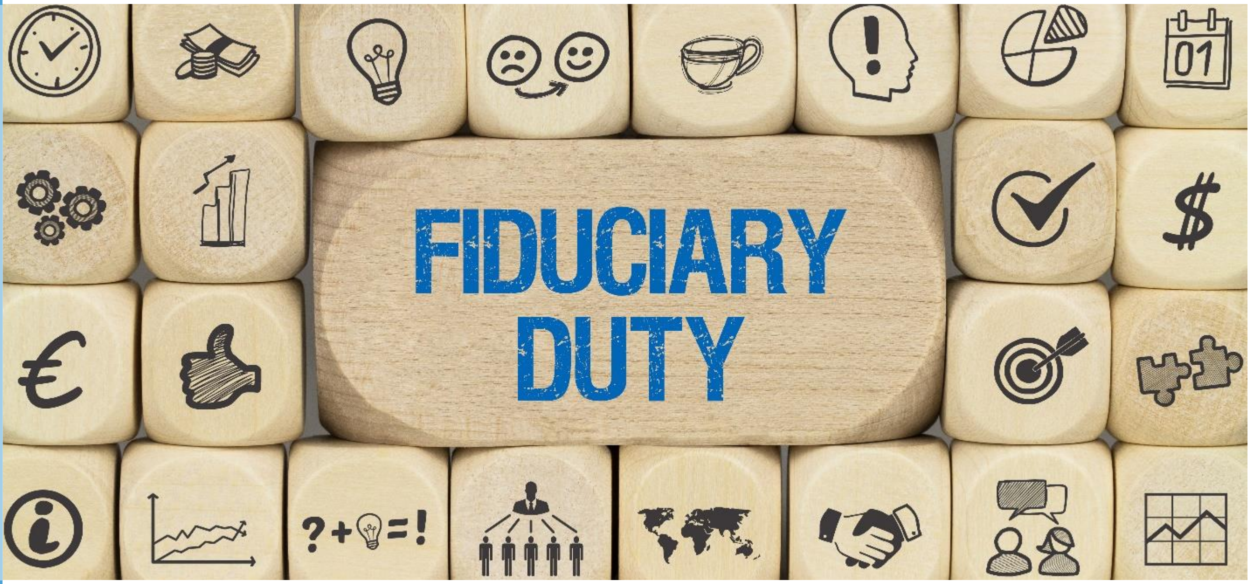

High fees, inappropriate investment options and conflicts of interest. This reads like a list of common "investor beware" pitfalls. In reality, these items account for a huge portion of lawsuits against retirement plans, according to recent findings by the Center for Retirement Research.

Who is ultimately responsible for steering plans through this thicket of liability? Plan sponsors have a fiduciary responsibility to plan participants, meaning they must act solely in the interest of participants (and their beneficiaries) and are required to carry out their work with prudence, as asserted by the Employee Benefits Security Administration.

But sponsors need not fear the prospect of shouldering a plan's entire fiduciary weight alone. The Employee Retirement Income Security Act of 1974 (ERISA) allows for employers to hire third parties that can fulfill many of the plan's responsibilities in the eyes of the law.

Here's a look at plan fiduciary roles, both internal and external to the employer.

Named Fiduciary and Plan Administrator | ERISA requires employers to designate in writing a specific person, office or committee as the plan's fiduciary. This role usually falls to the sponsor, who can then delegate certain fiduciary and non-fiduciary roles to third parties.

The plan administrator role is also usually fulfilled by the sponsor. Often, many of the plan's actual administrative functions are carried out by recordkeepers and other third parties, but on a non-discretionary basis, so the sponsor retains the fiduciary responsibility associated with this role, per ERISA section 3(16).

Investment Adviser | Sponsors can get assistance with much of their research on investment options to a third-party advisor. In this relationship, the investment adviser serves in a co-fiduciary capacity, but ultimate decision-making, and liability, still resides with the sponsor.

Investment Manager | ERISA 3(38) allows sponsors to delegate discretion over a plan's investment options to a third-party investment manager. This appointment, if executed prudently by the sponsor, transfers the fiduciary burden associated with the plan's investment options to the investment manager.

Whether sponsors are hiring discretionary or non-discretionary third parties, the most important determinant in whether they're faithfully carrying out their fiduciary role is if they've made prudent decisions. This is an admittedly ambiguous description, as one person's perception of prudence will differ from another's, but getting it right can mean withstanding a lawsuit against the plan.

For starters, prudence means the selection of a third-party service provider should be the result of a competitive process that compares their offerings and pricing against a representative cross-section of the marketplace. Their performance should be monitored on a continual basis, and they should be re-evaluated periodically both against expectations and relative to their competitors.

The Center for Retirement Research, whose findings drive home the importance of demonstrating prudent processes to fend off legal challenges, suggests more granular decisions need to be made with the same prudential processes as those used to hire service providers. These processes may be conducted by third-party providers rather than sponsors themselves.

In evaluating investment options, what questions might sponsors (or their delegates) consider to demonstrate that they've followed a prudent process? The "care, skill, prudence and diligence" that ERISA demands can be established when plan fiduciaries consider:

- Do investment options have multi-year track records of competitive performance versus appropriate market benchmarks?
- Are investment options diversified so that participants have the tools to soften the risk of large losses?
- Can the level of fees—both for investments and administration—be justified?

Plans don't need to have the best-performing or most-diversified investment options, or the lowest fees, to show that fiduciaries have conducted a prudent process. In fact, this process can reveal unacceptable tradeoffs in accepting these extremes, which validate spending a bit more or choosing non-obvious investment options.

Sponsors can alleviate some of their fiduciary burden by prudently selecting and monitoring third-party service providers; for the most part, however, they retain ultimate responsibility for the plan. Conducting and documenting the use of prudent processes in decision-making is essential to showcasing a fiduciary job well done

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