



RETIREMENT PLAN  
SERVICES

# Fiduciary Responsibility – An Employer's Guide



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## OVERVIEW

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#### **An introduction to the basics**

- Who is a "fiduciary"?
- The "D" factor: Understanding basic fiduciary duties and standards of conduct
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#### **Four areas of fiduciary responsibility**

- Management of Plan Operations
- Service Provider Selection & Monitoring
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### SECTION III

#### **Limiting fiduciary exposure and mitigating fiduciary risk**

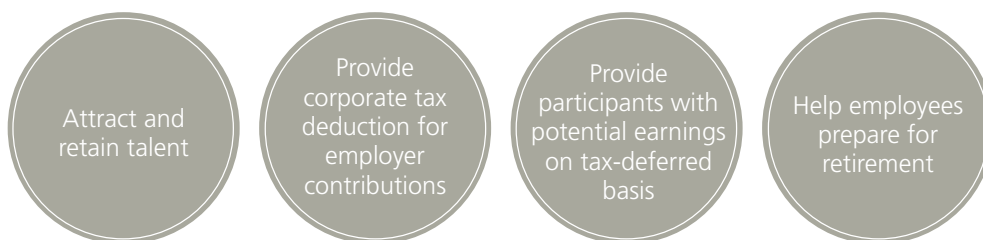
- Fiduciary Warranties
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### WHAT'S NEXT

# OVERVIEW

A qualified retirement plan is a valuable benefit. From attracting and retaining employees to showing your employees that you care, a plan that helps your employees save for retirement is a rewarding experience for everyone.

## Benefits of a plan



## But what can make a plan successful?

Simply put – it's meeting the expectations of your employees by giving them the tools and information that they need to save for their retirement. It also means meeting the fiduciary requirements set out in the Employee Retirement Income Security Act of 1974 (ERISA).

Primarily enforced by the Department of Labor (DOL), ERISA is the federal law that governs the administration of employee benefit plans. It aims to promote the interests of the participants and beneficiaries of those plans by establishing fiduciary standards of conduct, responsibility and obligations.

Under ERISA, fiduciaries have several duties, not least of which is to act solely in the interest of plan participants and their beneficiaries, with the exclusive purpose of providing benefits to them. And having a good understanding of those duties and requirements can help protect fiduciaries from liability.



## How this guide can help

This guide provides a high level overview of what is meant by **fiduciary** and describes four main areas of responsibility that you should be aware of. In addition to this guide, we also have the following checklists that you may want to consider reviewing to help you stay on track:

- Compliance & Due Diligence Checklist
- §408(b)(2) Compliance & Service Provider Checklist
- §404a-5 Compliance Checklist
- §404(c) Compliance Checklist
- Participant Disclosures & Compliance Calendar

Once you understand your fiduciary roles and responsibilities, you'll be in a better position to reduce your exposure to liability and help your employees reach their retirement goals. Being a fiduciary doesn't have to be complicated, as long as you approach the role with *prudence*.

**As helpful as these resources are, they do not constitute legal advice and should not be solely relied on. To be certain that you are in compliance with your fiduciary responsibilities, be sure to follow up with your legal counsel.**

### MORE FIDUCIARY RESOURCES:

The DOL's dedicated fiduciary website – [www.dol.gov/ebsa/fiduciaryeducation.html](http://www.dol.gov/ebsa/fiduciaryeducation.html)

A publication entitled "Staying on course", written by renowned ERISA Attorney Fred Reish. Using case study examples, it outlines many of the technical requirements of being a fiduciary.

Your Financial Representative and/or Third Party Administrator (TPA) are also great resources. They can help you establish processes that may help you stay in compliance.





# SECTION I

## AN INTRODUCTION TO THE BASICS

### Who is a “fiduciary”?

You can become a fiduciary under ERISA either by **functioning** as a fiduciary or by being **named** as a fiduciary in the plan document. And all fiduciaries, whether functional or named, are held to ERISA’s standards of conduct.

#### ● FUNCTIONAL FIDUCIARY

Under §3(21) of ERISA, if you exercise discretionary authority over plan management, administration or assets, or you render investment advice for a fee with respect to the assets of the plan, you are **functioning** as a plan fiduciary, even if you are not specifically named as a fiduciary in the plan document. Functional fiduciaries could include your plan’s service providers in certain situations\*.

#### NAMED FIDUCIARY

Other fiduciaries are named in the plan document, such as the plan’s trustee. The **named** fiduciary is designated in the plan document by name or title to have authority to control and manage the operation and administration of the plan. The named fiduciary is often the employer – the plan sponsor. And, unless noted otherwise in the plan document, the plan sponsor will also be the plan administrator.

+ Generally, service providers, such as attorneys, accountants and consultants, performing their usual professional functions are ordinarily not considered fiduciaries.



## WHO'S WHO?

An overview of those involved in a qualified retirement plan:

### **PLAN PARTICIPANT**

Can include the **employee** who is, or may become, eligible to receive a benefit from the plan, and the **beneficiary** designated by the participant.

### **PLAN SPONSOR**

Employer or organization that establishes the plan.

### **PLAN ADMINISTRATOR**

Person responsible for the administration of the plan, like making important disclosures to plan participants and selecting the plan's service provider. Generally, the plan sponsor will serve in this capacity, unless another party is designated to do so in the plan document.

### **PLAN TRUSTEE**

Person or entity that has exclusive authority and discretion over the management and control of plan assets, unless the plan provides that the trustee is subject to the direction of a named fiduciary, or the authority to manage plan assets has been delegated to an investment manager.

### **FINANCIAL REPRESENTATIVE**

Person who may support the plan fiduciaries with their investment responsibilities.

### **TPA**

Person who may assist the plan sponsor with plan design, plan documentation, and ongoing plan administration.

### **RECORDKEEPER**

Provider that tracks the flow of money going in and out of the plan, and tracks participant account balances.

# The “D” factor

## Understanding basic fiduciary duties and standards of conduct

ERISA sets out fiduciary **duties** that must be adhered to, including the:

**Duty to act for the “exclusive purpose” of providing benefits and paying the “reasonable expenses” of the plan:**

Fiduciaries must act solely in the interests of participants and beneficiaries.

**Duty to be a *prudent expert* (i.e., *prudent man rule*):** Fiduciaries must be more than well-intentioned. They must perform their duties with care, skill, prudence, and diligence in each area in which they make decisions for the plan. The duty of prudence is generally satisfied if the fiduciaries, at the time a decision is made, give appropriate consideration to those facts and circumstances that are relevant to the particular decision and act accordingly. Thus, a fiduciary will generally be able to demonstrate that he or she acted prudently if he or she engages in a prudent process – meaning that the fiduciary gathered all of the information relevant to making a decision, reviewed the information, and consulted with an advisor, if needed.

■ **Duty to monitor:** After selection, the fiduciary is under continuing duty to monitor the performance of all service providers and investment options.

■ **Duty to disclose:** The plan administrator is responsible for providing employees with various disclosures, such as a Summary Plan Description (SPD), quarterly benefit statement, investment information and §404a-5 notifications.

**Duty to act in accordance with the plan document:**

Fiduciaries must strictly follow the terms of the documents governing the plan, unless they are inconsistent with ERISA.

**Duty to diversify plan investments:** ERISA provides that fiduciaries have a duty to diversify plan investments. For participant-directed plans, such as 401(k) plans, this duty generally does not apply to the investments that are directed by the participant, although to comply with §404(c), the plan sponsor must still select a broad range of investment alternatives for employees to select from. However, if the plan contains any investments that are not directed by participants, then the fiduciary will have a duty to diversify, unless it is clearly imprudent to do so.

**Duty to avoid engaging in prohibited transactions:**

Fiduciaries must avoid causing the plan to engage in transactions with “parties in interest” and must also avoid transactions that involve self-dealing or conflicts of interest, unless an exemption applies.



## • Be diligent with your “D”s •

Not all plan decisions are fiduciary in nature. A plan fiduciary can wear two hats – one as a fiduciary and one as the employer. For example, the decision to establish, amend or terminate a plan is a business decision that a person can make in his or her capacity as the employer. These types of decisions are not governed by ERISA’s fiduciary duties. However, the execution of business decisions regarding the plan is considered to be a fiduciary act, and compliance with ERISA’s fiduciary duties is required.

The duties outlined under ERISA are basic fiduciary guidelines that must be followed. Not doing so has its consequences. Yet, many fiduciaries find themselves in situations where they’ve breached their fiduciary responsibilities because they did not have the right information or support. That’s why it’s important to understand your role as a plan fiduciary.

In Section II, you’ll learn how to become an effective fiduciary, and the steps you could take to mitigate your fiduciary liability.

### NON-COMPLIANCE CAN HAVE CONSEQUENCES

**Breaching your fiduciary duties can result in:**

- Personal liability for plan losses
- Possible civil penalties and, in certain circumstances, criminal prosecution, fines and imprisonment
- Removal from your fiduciary role



# SECTION II

## AREAS OF FIDUCIARY RESPONSIBILITY



### Four main roles and responsibilities

Being a fiduciary does not have to be complicated or overwhelming. But it does involve being *prudent* about how the plan is managed, just like how you are prudent about how your business is managed.

- Generally, there are four areas of fiduciary roles and responsibilities:

Management of  
Plan Operations

Service Provider  
Selection &  
Monitoring

Investment  
Selection &  
Monitoring

Participant  
Communication

And each area can be effectively managed if you follow these basic principles:

- 1 Understand your fiduciary roles and responsibilities, and establish well-documented fiduciary processes around them
- 2 Review and monitor your providers and investment decisions, periodically
- 3 Communicate, communicate, communicate ... disclose fiduciary related matters to those who matter – your participants and beneficiaries
- 4 Document, document, document ... be sure discussions, decisions and outcomes are recorded and filed

Let's take a look...

# Management of Plan Operations

## Follow the plan document

The plan document describes the terms and conditions related to the operation and administration of a plan. Generally, it should contain the following information:

- Designation of the named fiduciary or fiduciaries
- Description of the benefits provided
- Standard of review for benefit decisions
- Eligibility criteria, e.g., classes of employees, employment waiting period, and hours per week
- Effective date of participation, e.g., next day or first of month following waiting period
- Amendment and termination rights and procedures, and what happens to plan assets, if any, in the event of plan termination
- How the plan is funded, e.g., employer and/or employee contributions

Both **named** and **functional** fiduciaries should be aware of the extent of their fiduciary duties, so they can ensure compliance with the applicable terms of the plan and ERISA by establishing *prudent* procedures.



## Develop due diligence procedures

Below are three ways fiduciaries can help ensure compliance with the plan document and their fiduciary duties, along with some best practices for your consideration, in consultation with counsel.

### ESTABLISH PROCEDURES

- Develop policies and procedures around administrative functions, such as reviews, reporting, contributions, withdrawals, etc., to help ensure the plan is properly managed.
- Review and, if necessary, implement internal safeguards and controls, as well as checks and balances, for all key plan processes. This can include monitoring the performance of delegates or other service providers.
- Prepare a calendar to help ensure the ERISA plan administrator fulfills his/her reporting and participant communication obligations.

### DOCUMENT DECISIONS

- Document actions in writing. As a general rule, meeting minutes should be taken whenever the plan is being discussed by those responsible for its management. These minutes can serve as important documentation to demonstrate that a prudent process was followed and that the plan was prudently managed.

### MAINTAIN A DUE DILIGENCE FILE

- Leave a paper trail ... maintain all documentation in a due diligence file. That way, if a legal issue ever arises, your documentation can help protect you. (See Section III)

You may also want to consider having an independent third party perform periodic, in-depth operational/compliance reviews that focus on the implementation and application of documented procedures.



# Service Provider Selection & Monitoring

## Seek expertise when needed

Under ERISA, plan fiduciaries are expected to act as **prudent experts**. Given the breadth of knowledge required to manage a plan, fiduciaries may want to consider partnering with a service provider that may have skill sets or expertise which the fiduciary does not have.

For example:

- A 3(16) Plan Administrator can help you with certain plan management responsibilities
- A 3(38) Investment Manager will select and monitor the investments for the plan
- A 3(21) Fiduciary can give you advice regarding the selection and monitoring of the investments for the plan
- A Financial Representative can help you, and your employees, better understand the investment options available
- A TPA can help you with plan audits and compliance testing
- A Recordkeeper can help you with your day-to-day plan administration

**REMEMBER:** Even though acquiring third party support can sometimes help provide the “expertise” required to prudently manage the plan, it does not absolve you of your fiduciary duties, which would now include monitoring the provider. That’s why demonstrating **procedural prudence** can also include documenting your hiring decision, the provider’s role and responsibilities, as well as related discussions and reviews.

## Establish clear selection criteria

To select and effectively monitor a service provider, you should establish clear criteria for hiring them. For example, what expertise are they bringing to the table to help you? As part of that selection process, be sure to review their:

- Experience with plans similar to yours in size and makeup – based on performance and benchmarked results
- Level of service and support
- Competitiveness of fees for the level of service
- Credentials, including education, certifications, and licenses
- References and reputation

## INVESTMENT ADVICE VS EDUCATION

Generally, if a person provides investment advice to the plan or the plan participant regarding the investment of the assets in the plan or plan participant's account, respectively, then that person will be a fiduciary under ERISA. However, a person can provide investment education to either party without becoming a fiduciary. This chart can help you better understand the differences:

### ADVICE

Involves giving **specific** recommendations regarding investment selection.

Actions **are** considered fiduciary

### EDUCATION

Involves providing **general** information about saving and investing, such as:

- Facts about the plan's features and the types of investment options offered
- General financial and investment information such as risk and return concepts and tips on how to save
- Explanation of asset allocation models
- Interactive investment materials

Actions **are not** considered fiduciary

VS

## Know what's required under 408(b)(2)

To help you effectively evaluate covered service providers (CSP)<sup>‡</sup>, the ERISA §408(b)(2) regulation mandates that, before you enter into any arrangement with them, the CSP must provide you, the plan fiduciary, with written disclosures about their services, compensation and fiduciary status.

And with this information, you should then make an assessment of the *reasonableness* of the arrangement being entered into. Questions to consider: Is the CSP providing the necessary services? Are their associated fees reasonable? Are there any conflicts of interest?

**BENEFIT:** By reviewing and acting on the information presented, you will be better able to demonstrate the prudence of your selection decision. On the other hand, if a CSP does not provide you with their disclosures, you should consult with your legal counsel to determine whether entering into the arrangement may be a prohibited transaction.



### DOL'S GUIDANCE ON HOW TO MANAGE INCOMPLETE 408(B)(2) DISCLOSURES

If you entered into an agreement with a CSP and later discover that their disclosures were incomplete, you can protect yourself from a prohibited transaction by:

- Sending the CSP a written request for the missing information; the CSP has 90 days to respond.
- If the CSP fails to comply with your request, then notify the DOL within 30 days of the earlier of: a) the CSP's failure to comply with the written request for information; or b) 90 days after the written request.

And if information requested relates to future services and is not disclosed promptly after the 90-day period, the DOL states that plan fiduciaries must "terminate the contract or arrangement as expeditiously as possible," but in a *prudent manner*.

For more information, including access to a Sample Notice, go to:  
[www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html](http://www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html)

<sup>‡</sup> The ERISA §408(b)(2) regulation defines a CSP as someone who reasonably expects to receive at least \$1,000 in compensation for providing: Fiduciary services under ERISA or the Investment Advisers Act of 1940; or recordkeeping or brokerage services to individual account plans in connection with making an investment platform available; or accounting, actuarial, appraisal, auditing, banking, consulting, custodial, insurance, investment advisory, investment management, legal, recordkeeping, securities or other investment brokerage, third party administration or valuation services for which the CSP reasonably expects to receive indirect compensation.



## Follow documented monitoring processes

Did you know that your duty to act prudently doesn't end once you've selected a provider?

In fact, plan fiduciaries have an ongoing duty to monitor the provider's performance and to ensure the provider's performance complies with the terms of the plan, ERISA and any applicable contract.

To do this effectively, consider establishing ongoing review processes and performance criteria that can help you determine whether the plan is receiving the value-added, reasonably priced services that it bargained for. And don't forget to document the information you receive, and any related decisions that you make, to demonstrate ongoing procedural prudence.



### THE VALUE OF BENCHMARKING

Although not a fiduciary requirement, benchmarking is a good way for plan fiduciaries to evaluate a provider's performance.

**The following are some common benchmark criteria:**

- Participation rate
- Contribution and deferral rates
- Maximizing company match
- Utilization of catch-up contributions
- Utilization of goal setting tools

This analysis may be done when selecting providers and also as part of your periodic reviews of the provider's services and the plan's health.

# Investment Selection & Monitoring

## Offer diversified investment options

Selecting and monitoring investment options is one of the most important roles performed by plan fiduciaries.

Generally, plan fiduciaries should ensure that the plan has a well-balanced investment line-up. Yet, selecting those investment options is not easy.

The good news is that, although you have an ongoing duty to select and monitor the investment options available through the plan, there are **three safe harbors** available with respect to participant-directed plans that can help fiduciaries reduce their liability for losses resulting from investments.





## Limit your fiduciary liability for investment losses

### SAFE HARBOR #1 ... LIMIT LIABILITY WITH 404(C)

ERISA §404(c) may relieve plan fiduciaries from liability for losses resulting from participants' direction of their investments. And, although not mandatory, if plan fiduciaries want to obtain the fiduciary relief it offers, they must comply with its provisions, which include:

- Provide all employees with the disclosures and notifications outlined under the §404a-5 regulation
- Notify employees that the plan is designed to comply with §404(c), and therefore the fiduciary may not have liability for losses resulting from their investment choices
- Provide employees with the ability to:
  - Choose from a broad range of investment alternatives consisting of at least three core diversified investment options with materially different risk and return characteristics
  - Make changes to their investment elections at least quarterly, or as frequently as the market volatility of the particular investment option dictates

NOTE: If the provisions of §404(c) are not followed, you may not qualify for relief under §404(c) and could be held liable for any investment losses suffered by employees, even if the investments were directed by them.

## SAFE HARBOR #2 ... LIMIT LIABILITY WITH QDIA

In situations where an employee does not provide instructions regarding the investment of their plan accounts, such as when there is a change in investment provider or in an auto enrollment, plan fiduciaries can limit their liability by investing such employee's contributions in a qualified default investment alternative (QDIA), as outlined under ERISA §404(c)(5).

There are three types of investments that can qualify as a QDIA:

### Lifecycle or Target Date Funds

Based on employee's age, retirement date or life expectancy

### Asset Allocation Portfolios

Based on the average employee's risk tolerance

### Managed Accounts

Funds managed by either a 3(38) Investment Manager or the plan's trustee

All QDIAs have the following characteristics in common:

- Invest based on generally accepted investment theory
- Are inherently diversified to minimize the risk of large losses
- Focus on long-term appreciation and capital preservation through a mix of equity and fixed-income exposures

NOTE: Although a QDIA can provide a safe harbor for plan fiduciaries, it does not relieve them of their responsibility to prudently select and monitor the QDIA.

## QDIA GUIDELINES THAT MUST BE FOLLOWED:

- Provide participants and beneficiaries with the QDIA notice at least 30 days before they become eligible to participate in the plan or their money is initially invested in the QDIA, and generally at least 30 days prior to the start of each plan year thereafter. Generally, the QDIA notice must contain a description of the QDIA, as well as information about its performance, fees and expenses.
- Provide participants and beneficiaries, on whose behalf the investment in a QDIA is being made, the opportunity to direct the investment of assets in their accounts.



### SAFE HARBOR #3 ... LIMIT LIABILITY WITH FUND MAPPING

In the event there are certain changes in investment options under a plan, such as when there is a change in the investment provider, plan fiduciaries may need to direct (or map) a participant's or beneficiary's assets as they are transferred from an existing investment option to another.

In such situations, plan fiduciaries may be able to rely on the mapping fiduciary relief offered under ERISA to limit their liability, if they take the following measures:

- Ensure the plan satisfies all §404(c) requirements before the transfer
- Ensure the new investments' characteristics (i.e., risk and rate of return) are reasonably similar to the existing investments'
- Ensure the participant or beneficiary is given:
  - 30-day advance notice of the change in investment options,
  - Information regarding the existing and new investment options, and
  - An explanation that, if he or she doesn't make an investment selection, the existing investment will be transferred, or mapped, into a reasonably similar investment.

NOTE: If the requirements of this safe harbor are not satisfied, then the fiduciary relief may not be available.



## Consider an Investment Policy Statement

An Investment Policy Statement (IPS) is a document that provides fiduciaries with a framework to help them detail the standards by which investment decisions are made and monitored, and investment performance is measured under the plan. Generally, an IPS may:

- Outline a plan's investment goals and objectives
- Identify the investment alternatives
- Document the process and criteria for selecting and monitoring the investment options and/or managers
- Highlight the types of educational and advisory services available to help employees make decisions

Although not required under ERISA, an IPS can help fiduciaries demonstrate *prudence* with regards to how the investment options offered under the plan were selected and monitored. This could also prove to be advantageous if the plan is ever audited by the DOL down the road.

### IPS GUIDELINES

#### Implementation Steps

Consider your employees' demographics, investment knowledge, retirement horizon

Determine the plan's investment options based on your participant base

In doing so, consider if the plan's designated investment alternatives (DIA) provide:

- Diversified risk and return potential
- Variety of asset classes and investment styles
- Good management and performance

#### Ongoing Monitoring Steps

1

Monitor compliance with the plan's IPS by regularly reviewing all appropriate investment options based on your evolving employee demographics

2

Monitor the performance of the underlying investment managers and change the DIAs, as required

3

Modify the IPS as needed and maintain your documentation, including relevant reports and reasons for your decisions, in a due diligence file

# Participant Communication

## UNDERSTANDING THE VALUE OF EMPLOYEE ENGAGEMENT

As a plan fiduciary, an important consideration is the health of your plan, i.e., strong participation and deferral rates. To achieve this, you'll need to help your employees become engaged about their retirement by:

- From a fiduciary standpoint – meeting the disclosure requirements under ERISA
- From a non-fiduciary standpoint – providing value-added education and support

And when a plan is committed to both communication and education, employees have a better-rounded picture of the plan's features and benefits, and the resources available to help them take control of their retirement. *Let's take a look.*

### Meet mandatory disclosure requirements

Under ERISA, the plan administrator, usually the plan sponsor, must provide employees with certain disclosures and notifications about the plan, investment options and related fees, so they, in turn, have the information they need to make informed decisions.

The type of disclosures these plan fiduciaries must provide is dependent on their specific circumstances. For example, §404a-5 plan and investment disclosures apply only to plans that have participant-directed accounts. Or, meeting §404(c) requirements apply only to plans whose fiduciary wants to take advantage of the safe harbor it provides. While others, like the provision of the "Summary Plan Description", apply to all plans.

As a plan fiduciary, it's important for you to be aware of the disclosures that you must provide, and be sure to provide them in accordance with what's required under ERISA.



## EXAMPLES OF MANDATORY DISCLOSURES

**Summary Plan Description:** A document that explains how the plan works, including features, benefits and the employees' rights under ERISA.

**404a-5 Plan and Investment-Related Disclosures:** Disclosures that inform employees of the plan and investment-related information associated with the plan. Plan administrators must furnish this information to eligible employees on or before the date they can first direct the investments in their account. Changes to the plan-related information must also be provided 30 to 90 days in advance.

**Participant Quarterly Statement:** Provides employees with information about the fees charged to their accounts, their account balances and vested benefits.

**Summary Annual Report:** Summarizes what's in the plan's Form 5500 Annual Report.

**Blackout Notice:** Notifies employees of a transaction freeze at least 30 days in advance of a change in recordkeepers or investment options.

## Provide value-added education and support

The benefit of providing your employees with value-added education is becoming increasingly recognized, as noted in the 2012 "Benefits & Behavior: Spotlight on the Benefits of an Employee-Centric Enrollment Experience" study:

*Focus on enhancing the employee benefits "user experience"—in the form of communications and education delivered via multiple channels – can ultimately lead employees to greater confidence in their benefits decision-making, greater satisfaction with their overall benefits package and greater loyalty to their employer.¥*

As a result, the use of an Education Policy Statement (EPS), although not a fiduciary requirement, is also becoming a common practice. Why an EPS?

¥ Benefits & Behavior: Spotlight on the Benefits of an Employee-Centric Enrollment Experience, September 2012, Guardian Life: [www.aboutemployeebenefits.com/reports/Spotlight-on-the-Benefits-of-an-Employee-Centric-Enrollment-Experience.pdf](http://www.aboutemployeebenefits.com/reports/Spotlight-on-the-Benefits-of-an-Employee-Centric-Enrollment-Experience.pdf)

**Generally speaking, just like an IPS documents your plan's investment objectives, an EPS can be used to document your plan's communication objectives.**

It does so by containing:

- Overview of the plan
- Education goal – identifies the plan's challenges (e.g., contribution rates) and how they will be addressed
- Education objective – identifies the type of campaigns being rolled out to help employees better understand their retirement objectives and investment options
- Education strategy – identifies how the education program will be rolled out and measured
- Education calendar – outlines a year-long schedule for the various campaigns
- Roles and responsibilities – identifies who will deliver and measure the education program
- Results – measures a campaigns effectiveness against pre-determined metrics

**Also, if used together, an IPS and EPS can complement each other. For example, consider including the following topics in an EPS:**

- Financial planning and strategies, such as diversification principles
- Asset allocation concepts, such as target date and risk-based investment options
- Relevance of performance vs returns
- Investment fees
- Retirement savings/planning calculators

And if documented in an EPS, a plan fiduciary may be able to demonstrate the prudent steps he/she took to provide employees with the information and support they needed to help them make informed decisions.

## **BENEFITS OF OFFERING BOTH COMMUNICATION & EDUCATION**

- Provides employees with a more complete picture of the plan provisions and investment options
- Helps them better understand their plan and their retirement objectives
- Empowers them with the information and tools they need to take control of their retirement



# SECTION III

## LIMITING FIDUCIARY EXPOSURE AND MITIGATING FIDUCIARY RISK



There are additional ways to help limit fiduciary exposure. Below, we've listed four examples. To determine what makes sense for your plan, based on its size and unique needs, follow up with knowledgeable retirement plan experts.

### Fiduciary warranties

- Warranties provide specific assurance from the investment provider to the plan fiduciary with regard to the provider's fund line-up.
- Generally, the investments are selected and monitored by the provider in a way that meets ERISA standards.

### Fiduciary liability insurance

- ERISA permits the purchase of fiduciary liability insurance to cover liability or losses occurring by reason of a breach of fiduciary duty.
- If the insurance is purchased with plan assets, the insurance policy must permit recourse. In other words, it must allow the insurer to try to collect any losses from the fiduciary if the fiduciary has breached his or her duties.

### Plan committees

Plan committees can help limit fiduciary exposure by sharing the responsibility with others participating in:

- Plan governance
- Plan administration
- Oversight of the plan's investment options

Plan committees can also help demonstrate that prudent steps were taken with regard to the plan's administration and management. That's why minutes should be taken at every meeting and retained in the plan's due diligence file.

Committee members can include senior executives and personnel from Human Resources, Finance and Operations. They can also include the "experts" the plan has hired, such as a Financial Representative or TPA.

All committee members should be aware that they have a fiduciary responsibility and liability under ERISA. When new members are added, they too should be trained to understand their fiduciary responsibility and liability.

## Due diligence file

When government agencies audit a plan, or in the event of a lawsuit, being prepared with evidence of **fiduciary prudence** is imperative. That's why it's important to document and keep records of all communications (i.e., disclosures, meeting minutes, plan related documents, reports, reviews, audit tests, assessments, participant notices, etc.) that pertain to your plan in a dedicated and readily accessible due diligence file.

### SAMPLE MATERIAL FOUND IN A DUE DILIGENCE FILE



#### Management of Plan Operations

- Plan document
- Plan testing
- Form 5500 filings
- Plan audits

#### Service Provider Selection & Monitoring

- §408(b)(2) disclosures
- Service agreements
- Selection & monitoring criteria and documentation
- Meeting discussions

#### Investment Selection & Monitoring

- Investment Policy Statement
- Prospectuses
- Selection & monitoring documentation
- QDIA documentation

#### Participant Communication

- ERISA §404a-5 notice
- Summary plan description
- Quarterly statements
- Other notices (Blackout, QDIA)


# WHAT'S NEXT

Congratulations! By reviewing this information you are one step closer to realizing that, as important as the plan fiduciary role is, it does not have to be onerous or overwhelming.

In fact, when you look at the basic elements that make up the *prudent man rule* under ERISA, you'll notice that they are similar to how you would run your business:

General <b>fiduciary</b> principles		General <b>business</b> principles
Establish and follow well-documented fiduciary processes, once you understand your role	1	Establish and follow well-documented business processes
Review and monitor your providers and investment decisions, periodically	2	Review and monitor your business objectives, partners, markets, etc.
Communicate to your participants and beneficiaries	3	Keep all stakeholders informed
Document	4	Document

And remember, you are not alone. Even though as the plan fiduciary, you are responsible for the plan and accountable for your decisions and actions, or lack thereof, you can enlist the services of retirement plan experts. From ERISA attorneys and accountants to Financial Representatives and TPAs, knowledgeable retirement plan professionals are available to help you.



## • John Hancock is here to help.

We have many tools and resources aimed at helping you better manage your fiduciary responsibilities, including several handy checklists that you can reference to help you identify any gaps and stay on track. Contact us to learn more.





# Notes

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