# Why Retirement Plan Sponsors are Always on the Hook for Liability

## By Ary Rosenbaum, Esq.

Whoever said the road to hell is paved with good intentions might have been a retirement plan sponsor. While setting up a retirement plan is a good intention, a plan sponsor's lack of diligence in reviewing what is going on with the plan has the unfortunate consequence of possibly resulting in potential liability for a breach of fiduciary duty. This article is about why plan sponsors are always on the hook for liability and what they need to avoid that hook at all costs.

Whether as a plan sponsor or as an individual trustee, employers and their leadership have an inordinate amount of responsibility in their roles as plan fiduciaries. The problem is that, all too often, plan sponsors and plan trustees are unaware of all their responsibilities; by ignoring these unknown responsibilities; they unwittingly subject themselves to potential civil liability. As individual plan trustees, that liability may even involve personal liability.

Fiduciary duty is the highest duty of care at equity and law, so the responsibility that comes with that duty is almost limitless. A plan sponsor can be taken advantage of when it comes to their money, but they are on the hook if something happens to the money belonging to plan participants. When you are dealing with someone else's money, you need to exercise greater care than your own money. The problem with fiduciary responsibility, is that not only is a fiduciary concerned with their job, they also are responsible for the jobs they delegated to third parties, and may be liable for things that they may be unaware of and that were done without malice to plan participants.

One of the biggest misconceptions out there is that, since a plan sponsor can delegate many of its duties to third parties, these delegations can eliminate a plan sponsor's liability as a fiduciary liability. The problem with that logic is that it isn't true. Hiring a service provider is itself a fiduciary function. If a plan sponsor hired a third party administrator (TPA), an ERISA attorney, or a financial advisor that are either incompetent or crooked, the plan sponsor is still ultimately responsible for the negligence and/or criminal activity by their service providers. While errors and malpractice by plan providers may be remedied by legal action to recover damages, it will not limit or eliminate a plan sponsor's liability as a fiduciary because they bear responsibility as a plan fiduciary to remedy these breaches.

When it comes to selecting service providers, it should be done through a process of reviewing competing providers and finding the best one at a reasonable cost. The employer should always document the process of provider selection and retention because such records can bolster a plan sponsor's claim that they exercised their duties as plan fiduciaries competently.

Plan sponsors also have a fiduciary responsibility when it comes to selecting mutual funds for participant directed retirement plans. Another major misconception is that a plan sponsor's liability is limited under ERISA Section 404(c) as long as they provide a list of investment options for participants to invest in. ERISA 404(c) is a process that limits a plan sponsor's fiduciary liability measured by the amount of education offered to plan participants so they can make informed decisions in the direction of their retirement account. The plan sponsor must develop an investment policy statement (IPS) with their investment advisor to document how plan investments are chosen. The plan sponsor must also review their mutual fund lineup with their investment advisor on a semi-annual or annual basis to ensure that the investments remain consistent with the terms of the IPS. All decision-making on plan investments by the plan sponsor in conjunction with their investment advisor must be

documented in writing.

Plan sponsors do not simply breach fiduciary responsibility because of errors or malfeasance by plan providers or by themselves through embezzlement or prohibited transactions. Innocent mistakes and oversights by the plan sponsor can unwittingly expose them to liability for a fiduciary liability. Just as the road to hell is paved with good intentions, so is the road to a breach of fiduciary responsibility.

The duty to act prudently is one of a plan sponsor's main fiduciary responsibilities under ERISA. One of the major concerns with retirement plans these days and one of the most highly litigated points is plan costs. It is the plan sponsor's fiduciary responsibility to ensure that plan expenses are reasonable, especially now that plan sponsors get a disclosure of fees from their plan providers. It is incumbent on plan sponsors to determine whether the fees they are paying for plan services is reasonable as to what is offered in the marketplace. Plan sponsors are not obligated to use the lowest cost provider; rather, they just need to ensure that they are paying a reasonable fee based on the services provided to the plan. Plan sponsors can avoid this potential pitfall by working with an independent ERISA consultant or ERISA attorney to compare fees in the retirement plan marketplace.

A court decision in California federal court added another wrinkle to a plan sponsor's fiduciary responsibility. The large California utility, Edison International, was found to have breached their duty of prudence because they chose retail mutual funds for their plan investments, when they could have chosen, less expensive institutional class shares of the very same mutual fund. Edison International was liable because they paid retail, instead of buying at a discount. There was no malfeasance by Edison, just laziness in not bothering to understand that an institutional share class of mutual funds was available and would have saved plan participants in mutual fund expenses. It's just another pitfall that plan sponsors have to avoid as plan fiduciaries. It is incumbent on the plan sponsor to hire a service provider, like a financial advisor, who can steer them to institutional share classes of mutual funds when the plan has achieved a size of critical mass.

Plan sponsors can always minimize fiduciary liability; they can never fully eliminate it. How can a plan sponsor minimize fiduciary liability? The first step is to obtain fiduciary liability insurance to protect the plan sponsor and individual trustees from liability. Of course, good practices implemented with an independent financial advisor, TPA, and ERISA attorney will help. The retention of a trust company as the plan's trustee won't minimize liability, but will drag them in to share some of the potential liability as a plan fiduciary. The newest form of limiting fiduciary liability is the retention of an ERISA 3(38) fiduciary, where they delegate fiduciary responsibility to an investment advisor, bank, or insurance company to make decisions on the plan and bear the risk of liability for making that decision. This gives the plan sponsor significant cover and limitation in liability. Another option is for the plan sponsor is to abandon their single employer plan and join with other, unrelated employers and participate in a multiple employer plan (MEP). Another option is hiring a plan provider to serve as an ERISA §3(16) administrator who will be a named fiduciary and have the bulk of the liability in running the plan. However, it should be noted that hiring an ERISA fiduciary wouldn't fully eliminate plan sponsor's fiduciary liability because hiring a fiduciary is a fiduciary function. Beware of plan providers who make such claims.

Plan sponsors can blame the problems of their plans on others, but ultimately they bear the brunt of liability as plan fiduciaries. A plan sponsor must be aware of all their fiduciary duties or at least, hiring several plan providers that do. Great liability is avoided by understanding the great responsibility as a retirement plan sponsor.

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