Association Retirement Plans

COURSE 201 – FIDUCIARY RESPONSIBILITY AND COMPLIANCE

U.S. Chamber of Commerce

Learning Objectives

What You Will Learn

- Employee Retirement Income Security Act (ERISA) plan requirements
- Who is a fiduciary, what are the fiduciary standards, and selected fiduciary functions
- Key areas of compliance

Outline

- ERISA's Plan Requirements
- Fiduciary Definition
- Fiduciary Standards
- Other ERISA Roles and Duties
- Prohibited Transactions
- Fiduciary v. Settlor v. Ministerial Functions
- Compliance, Reporting and Disclosure
- Key Questions To Ask

ERISA Plan Requirements

ERISA requires plans to:

- Be established and maintained pursuant to a written instrument that provides for one or more named fiduciaries who have the authority to control and manage the operation and administration of the plan. A named fiduciary is a fiduciary who is named in the plan or who, through written procedures, the employer or employee organization that established the plan identifies as the named fiduciary.
- Provide a procedure for establishing and carrying out the plan's funding policy.
- Describe the procedures for allocating the responsibilities to operate and administer the plan, including any fiduciary responsibilities.
- Provide a procedure to amend the plan and the persons with that authority.
- Specify the basis on which payments are made to and from the plan.

ERISA Fiduciary Definition

A person is a fiduciary with respect to a plan to the extent the person:

- Exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets;
- Renders investment advice for a fee or other compensation, direct or indirect, with respect to any money or other property of the plan or has any authority or responsibility to do so; or
- Has any discretionary authority or discretionary responsibility in plan administration

Fiduciary status is functional – if it walks like a duck, it is a duck.

ERISA Fiduciary Standards

A fiduciary must discharge his or her duties with respect to a plan **solely** in the interest in participants and beneficiaries and:

- For the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan;
- With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- By diversifying the investments of the plan to minimize the risk of large losses, unless under the circumstances, it is clearly prudent not to do so; and
- In accordance with the documents and instruments governing the plan to the extent the documents and instruments are consistent with ERISA.

A pure heart and empty head are no defense.

ERISA Roles and Duties

Role	Description	Duties
Named Fiduciary	A fiduciary who is named in the plan or who, through written procedures, the employer or employee organization that established the plan identifies as the named fiduciary.	• Control and manage the operation and administration of the plan • Exercise overall control of the plan, fiduciaries and other service providers • Delegate fiduciary responsibilities and monitor delegations • Adjudicate claims • **For an ARP, the association or committee will be the named fiduciary**
Plan Sponsor	The employer, for a single employer plan, the employee organization for a plan maintained by an employee organization, or for a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.	• Establish the plan • Design the plan • Ensure the plan is in compliance with the Code and ERISA requirements • **For an ARP, the association will be the plan sponsor**

ERISA Roles and Duties

Role	Description	Duties
Plan Administrator	The person specifically designated by the terms of the plan. If an administrator is not so designated, the plan administrator is the plan sponsor.	Provide required notice to participants and file government disclosures. **For an ARP, the association is the plan administrator, unless a service provider is designated as such.**
Investment Manager	Any fiduciary (other than a trustee or named fiduciary) who has the power to manage, acquire, or dispose of any plan assets, acknowledges their fiduciary status in writing, and who • Is a register investment adviser under the Investment Advisers Act; • Is not a registered investment adviser under the Investment Advisers Act, but is registered as an investment adviser under State law • Is a bank under the Investment Advisors Act; or • Is an insurance company that is qualified to manage, acquire, or dispose of plan assets under state law	Determine and make actual plan investments. **For an ARP, the association is the investment manager, unless another entity is designated as such.**

Prohibited Transactions

- The sale or exchange, or leasing of any property between the plan and a party in interest.
- The lending of money or extension of credit between the plan and a party in interest.
- The furnishing of goods, services or facilities between a plan and a party in interest.
- The transfer to, or use by, or for the benefit of a party in interest, of the income or assets of the plan.
- Any act by a party in interest who is a fiduciary who deals with the income or assets of the plan in his own interest or for his own account.
- The receipt of any consideration for his/her own personal account by a party in interest who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.
- Action in any transaction involving a plan on behalf of a party (or representing a party) whose interests are adverse to the interest of the plan or the interest of its participants or beneficiary.
- Acquiring on behalf of the plan, any employer security or employer real property that is not qualified or that exceeds certain limits.

Party in Interest

- A fiduciary;
- A person providing service to the plan;
- An employer whose employees are covered by the plan;
- A 50% or greater owner of an employer;
- A family member of any of the above;
- A union or other employee organization whose members are covered by the plan;
- An entity that is owned 50% or more by any of the above (except family members);
- An employee, officer, director or 10% owner of the employer, the union, a service provider or a related entity; or
- A partner or joint venturer of the employer, the union or a service provider.

Statutory Exemptions

- Office Space and Necessary Services. A party in interest may contract or make reasonable arrangement for the provision of office space, legal, accounting and other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid. Reasonable compensation is determined by a comparison of what the plan would be required to pay for similar service to an entity that is not a party in interest.
- Participant Loans. Loans made by a plan to participants are exempt if certain requirements are met.
- Loans to ESOPs.
- Banks and Similar Financial Institutions. To the extent a bank becomes a trustee of a plan's assets, it is a fiduciary to the plan. Plans and parties in interest may also use these same banks for customary banking services.

Prohibited Transaction Examples

Hiring

- Plans sponsor hires a participating employer as a service provider
- Plans sponsor hires a relative as a service provider

Personal services

- Plan service provider gives discounts for non-plan services, such as banking, legal, or financial, to the plan sponsor or family members

Quid pro quo

- The plan sponsor will use the service provider if the service provider gives the plan sponsor business
- The service provider will give the plan sponsor business if the plan sponsor uses the service provider

- Revenue Sharing/Fees
  - Revenue sharing is used to pay for settlor functions, such as encouraging employers to participate
  - Investment manager uses investment fees or commissions to pay for fiduciary to attend conferences at expensive resorts
  - Plan sponsors charges fees to employers/participants for items other than reasonable services

Fiduciary v. Settlor v. Ministerial Functions

Fiduciary	Settlor	Ministerial
Interpreting plan provisions and making discretionary judgments on plan operation.	Establishing, amending and terminating a plan.	Applying administrative rules established by plan fiduciaries.
Appointing, removing, or supervising trustees, investment managers, service providers and others.	Deciding to add new features or designs.	Making benefit calculations and nondiscretionary review of calculations.
Managing plan investments.	Deciding on eligible coverage groups.	Providing participant orientation or general education.
Reviewing and approving payment of plan expenses from plan assets.	Making funding/contribution decisions.	Preparing government mandated filings.
Establishing plan policies and procedures.		Making scrivener functions.

Compliance, Reporting and Disclosure Requirements

- Plan Contributions and Distributions
- Nondiscrimination Testing v. Safe Harbor Designs
- Selected Notices and Disclosures for Defined Contribution Plans
- Form 5500 and Other Required Reports
- Solving Administrative Errors

Plan Contributions

- As soon as amounts may be segregated from general assets, but no later than 15 business days of the following month
- This is **NOT** a safe harbor, if contributions can be segregated sooner, they must be
- Small plan safe harbor: for plans with fewer than 100 participants on the first day of the year, elective deferrals may be made within seven business days of a pay date even if the deposits could have been made earlier.

Plan Distributions

- Age 59 & ½
- Hardship
- Loans
- Termination of employment (by death, disability, retirement or other severance from employment)
- Special circumstances (e.g. COVID-19 or natural disaster distributions)

Non-Discrimination Tests

Minimum Coverage

- At least 70% of non-highly compensated employees must "benefit" from the plan
- Highly Compensated Employee (HCE)
  - Owned more than 5% of the interest in the business at any time during the year or the preceding year, regardless of how much compensation that person earned or received, or
  - For the preceding year, received compensation of more than$125,000 ($130,000 for 2020), and, if the employer elects, was in the top 20% of employees ranked by compensation

Actual Deferral Percentage (ADP)

- Average salary deferrals of HCEs may not exceed the ADP for the non-highly compensated employee (NHCE) group by 1.25 percent or the lesser of 2 percentage points and two times the NHCE ADP

Actual Contribution Percentage (ACP)

- Same as the ADP test, except it looks at matching and after tax contributions

Top-Heavy

- A plan is top-heavy if more than 60 percent of plan benefits are in the accounts of key employees. A key employee is anyone who during the year was:
  - An officer with annual compensation exceeding $185,000 for 2020 (adjusted),
  - More than a five percent owner, or
  - More than a one percent owner with annual compensation exceeding $150,000 (not subject to cost-of-living adjustments).

Safe Harbor Plans

- Basic match

  A 100% match on elective deferrals up to 3% of compensation and a 50% match on the next 2% of compensation.

- Enhanced match

  A matching contribution at least equal to the basic match, for example a 100% match on deferrals up to 4% of compensation.

- Nonelective contribution

  A contribution for all eligible employees regardless of whether an employee makes an elective deferral that equals at least 3% of compensation.

- Vesting

  Safe harbor contributions must always be 100% vested.

Selected Notices and Disclosures for Defined Contribution Plans

(see DOL Notice and Disclosure Guide and IRS Reporting and Disclosure Requirements)

Name	Description	Timing
Summary Plan Descriptions (SPD)	Primary document to inform participants and beneficiaries about the plan. Must be written for average participant and be sufficiently comprehensive to apprise participants and beneficiaries of their benefits, rights, and obligations under the plan.	Automatically to participants within 90 days of becoming covered by the plan. Updated SPD must be furnished every 5 years if changes made to SPD information or plan is amended. Otherwise must be furnished every 10 years.
Summary of Material Modification (SMM)	Describes material modifications to the plan and any changes to information required to be in the SPD.	Must be provided within 210 days after the end of the plan year in which the change is adopted.
Summary Annual Report	Summary of the Form 5500.	Within 9 months of the end of the plan year or within 2 months of Form 5500 due date.
Pension Benefit Statement	Total benefits and total nonforfeitable benefits or the earliest date benefits become nonforfeitable. Individual account plan must provide: • The value of each investment and any limitation or restriction on directing investments; • An explanation of the importance of a well-balanced and diversified portfolio; and • A notice directing the participant or beneficiary to the Internet Website of the Department of Labor for sources of information on individual investing and diversification.	Once each quarter for participant directed plans; at least once a year for all other defined contribution plans.

Selected Notices and Disclosures for Defined Contribution Plans

(see DOL Notice and Disclosure Guide and IRS Reporting and Disclosure Requirements)

Name	Description	Timing
Section 404(c) Disclosures	Investment-related information for participant directed accounts.	Before a participant may invest, and upon request.
Blackout Notices	Notification of any period of more than 3 consecutive business days when there is a temporary suspension, limitation or restriction on investment of a self-directed individual account plan or for taking a loan or distribution.	Generally, at least 30 days but not more than 60 days before the blackout.
Qualified Default Investment Alterative Notice	Advance notice to participants describing the circumstances under which contributions or other assets will be invested on their behalf in a qualified default investment alternative, the investment objectives of the qualified default investment alternative, and the right of participants and beneficiaries to direct investments out of the qualified default investment alternative.	An initial notice at least 30 days before eligibility date or at least 30 days before the first investment in the QDIA or on or before eligibility date if the participant may withdraw the amounts within the first 90 days.

Selected Notices and Disclosures for Defined Contribution Plans

(see DOL Notice and Disclosure Guide and IRS Reporting and Disclosure Requirements)

Name	Description	Timing
Automatic Contribution Arrangements (QACA and EACA)Notice	Notice informing participants of rights and obligations under the arrangement, such as: • The default percentage rate and how to elect a different amount; • The type and amount of the employer contributions; • The right to not participate and how to opt out; • How to make an investment election, if permitted by the plan; and • If there are two or more investment options for the QACA, how automatic enrollment contributions will be invested if no employee election.	30 to 90 days before the beginning of each plan year and for new participants reasonably in advance of date to decline participation, but not more than 90 days in advance.
Participant Plan and Investment Fee Disclosures	Information about the administrative and investment costs for participation in 401(k)-type plans, including general information about the mechanics and structure of the plan, such as how to give investment directions, and information about the plan's administrative costs, and individual charges that may be assessed to participants. The notice also must include an investment option comparative chart, including investment fees and expenses, performance and benchmark data, an active Website address with supplemental investment information, and a glossary of terms.	General information and chart must be provided at least annually. Participants must receive a statement of the dollar amount of administrative and individual fees that were charged to their accounts quarterly.

Selected Notices and Disclosures for Defined Contribution Plans

(see DOL Notice and Disclosure Guide and IRS Reporting and Disclosure Requirements)

Name	Description	Timing
Rollover Notice	Notice describing the option to rollover a distribution.	No less than 30 and no more than 180 days before the distribution is made.
401(k) Safe Harbor Notice	Explanation of the employee's rights and obligations under the plan, including: • The safe harbor matching or nonelective contributions formula; • Any other contributions under the plan; • The plan to which the safe harbor contributions are made, if more than one plan; • The type and amount of compensation that may be deferred under the plan; • How to make salary deferral elections; • The periods available under the plan for making salary deferral elections; • Withdrawal and vesting provisions for plan contributions; and • How to easily obtain additional information about the plan (including a copy of the SPD)	Annually, 30 to 90 days before the beginning of each plan year. For new participants, generally no earlier than 90 days before the employee becomes eligible and no later than the eligibility date. For plan years after 2019, not required for a nonelective contribution safe harbor.

Form 5500 and Other Required Reports

Name	Description	To Whom/When
Form 5500	Annual plan report of plan finances and operations.	DOL (IRS/PBGC); 7 months after end of plan year; may extend by 2.5 months using Form 5558.
Form 8955-SSA	Reports terminated participants with deferred vested benefits in the plan.	IRS; 7 months after end of the plan year; may extend by 2.5 months using Form 5558.
Form 1099-R	Report distributions from a retirement plan.	IRS/Participants/Beneficiaries; To payee: by January 31 To IRS: by February 28 (paper) or March 31 (electronic)

Solving Administrative Errors

- Employee Plans Compliance Resolution System (EPCRS)

  Program for plan sponsors to fix plan failures and avoid plan disqualification through:

  - Self-Correction Program: correct certain plan failures without contacting the IRS or paying any fee.
  - Voluntary Correction Program: any time before audit, pay a fee and receive IRS approval for correction of plan failures.
  - Audit Closing Agreement Program: pay a sanction and correct a plan failure while the plan is under audit.

- Voluntary Fiduciary Correction Program

  DOL program to encourage employers voluntarily to comply with ERISA by self-correcting certain violations of the law. More details and a list of covered transactions are here.

- Delinquent Filer Voluntary Compliance Program

  DOL program to encourage voluntary compliance with ERISA's annual reporting requirements (Form 5500) and avoid higher civil penalty assessments.

Key Questions to Ask

- **How will various fiduciary liabilities be assigned or delegated?**
- **Who will monitor the other fiduciaries and what is the process?**
- **What are the compliance issues and how will they be performed and by whom?**

What You Learned

- Who is a fiduciary
- What are fiduciary responsibilities
- How to make informed decisions about fiduciary duties
- What are key areas of compliance

Thank You

Chantel Sheaks
(202) 463-5458
CSheaks@USChamber.com
U.S. Chamber of Commerce

Resources

- U.S. Chamber Association Retirement Plan Resources Page

- SPARK APRS Program Page