NATIXIS INVESTMENT MANAGERS

NATIXIS RETIREMENT STRATEGIES

Plan Sponsor's Guide to Fiduciary Responsibility

This plan sponsor's guide covers key areas of fiduciary education:

- Importance of fiduciary status
- When fiduciary status applies
- Obligations of a fiduciary
- How to avoid prohibited transactions
- Action steps for running a compliant retirement program

Understanding the fiduciary status under ERISA

Improving workers' health and retirement security is a top priority for the US Department of Labor (DOL). To help achieve this mission, it continually strives to educate employers and service providers about their fiduciary responsibilities under the Employee Retirement Income Security Act (ERISA).[1] Fiduciaries are expected to understand their full obligations under ERISA – in an effort to increase financial security for workers. In fact, when fiduciaries don't understand their obligations, or when they recognize they don't have the expertise to perform their duties, they are expected to hire service providers to assist.[2]

What is ERISA?

The Employee Retirement Income Security Act of 1974 (ERISA) is a US federal law that sets standards for retirement and health plans in private industry to provide protection for individuals in these plans. ERISA's key functions are as follows:

- Requires plans to provide participants with information about plan features and funding
- Sets minimum standards for participation, vesting, benefit accrual and funding
- Provides fiduciary responsibilities for those who manage and control plan assets
- Requires plans to establish a grievance and appeals process for participants to get benefits from their plans
- Gives participants the right to sue for benefits and breaches of fiduciary duty
- Guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation – if a defined benefit plan is terminated

In general, ERISA does not cover plans connected with governmental entities, churches, or plans that are maintained solely to comply with applicable workers' compensation, unemployment, or disability laws.

1 See Fiduciary Education Campaign - Getting It Right - Know Your Fiduciary Responsibilities, available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/fiduciary-responsibilities/fiduciary-education-campaign.

2 DOL, Meeting Your Fiduciary Responsibilities, available at: https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf.

ERISA fiduciary status matters

Why it is important to understand fiduciary status under ERISA? Here are three critical implications.

1. Certain duties come with fiduciary status, including the requirement to **always put the interests of the plan's participants first**. ERISA Section 404 identifies the list of duties that ERISA fiduciaries must follow.
2. Under ERISA Section 406, **there are certain actions that fiduciaries are not allowed to take**, known as prohibited transactions. For example, fiduciaries are not allowed to take a loan from the plan or lease property from or on behalf of the plan. In general, conflicts of interest with the plan or taking money from the plan are prohibited transactions and are not allowed. It is important to know if you are a fiduciary because fiduciaries cannot engage in these types of violative actions.
3. Probably the most important reason to understand ERISA fiduciary status is the **personal liability that arises from errors associated with the plan**. This should not be a reason to avoid fiduciary status, but it is certainly a reason to understand when you are acting as a fiduciary. Since ERISA fiduciary status is so important, ERISA imposes an obligation that fiduciaries who do not meet their responsibilities may be personally liable. They may be required to restore any losses to the plan or to restore any profits gained through improper use of plan assets – which come from an individual's own retirement account. However, there are ways fiduciaries can limit their exposure, as we will explore next.

Tip: Ask your financial professional: *Are you serving me as an ERISA fiduciary?*

If so, make sure you have the financial professional's fee disclosure that identifies services, fees, and fiduciary status. Review the disclosure to make sure that the fees are reasonable for the services provided.

Typically, plan sponsors are not going to be concerned with becoming a fiduciary by giving investment advice. While it is a best practice that plan sponsors do not cross the line of directing participants as to how to invest their assets, the DOL has said that the ordinary communications of a human resources employee, who is not an investment professional, with plan participants is not covered as investment advice. Retirement Security Rule: Definition of an Investment Advice Fiduciary, available here: https://www.federalregister.gov/documents/2024/04/25/2024-08065/retirement-security-rule-definition-of-an-investment-advice-fiduciary.

Becoming a fiduciary under ERISA

Given the responsibility that comes with ERISA fiduciary status, it is critical to understand how you may become a fiduciary without even realizing it. ERISA fiduciary status is not based on your job title. Rather, it is based on the functions being performed. In fact, sometimes an individual may be acting as a fiduciary one minute, but not acting as a fiduciary the next minute.

Example 1 The Chief financial officer (CFO) of the company may make decisions on behalf of the organization, such as deciding to offer a matching contribution. This decision is made in the best interest of the company and is based on the company's ability to afford the contribution. The CFO reports this decision back to those individuals responsible for the retirement plan who will then make the amendment to the plan document and implement the match via payroll.

Example 2 The same CFO is also on the retirement plan committee. During the committee meeting, the CFO participates, makes decisions about whether to retain the target date funds on the investment menu, and reviews the report about the fees paid to the plan's recordkeeper. In this context, the CFO is acting as a fiduciary.

Three ways to become a fiduciary under ERISA Section 3(21)

Definition	Typical role	Example
Exercises any discretionary authority or control over management of the plan and/or the plan assets	Plan sponsor	CFO selects target date funds for investment menu
Provides investment advice for a fee	Financial services professional (e.g., advisor)	Financial advisor recommends the target date funds the CFO approves or rejects[3]
Has any discretionary authority or responsibility in the administration of the plan	Plan sponsor	CFO signs Form 5500

Remember, **fiduciary status is based on the function performed and not the title of the person or position**. We have covered just a few examples. Working with your knowledgeable plan advisor or consultant, you can discuss other examples and how it applies to your plan.

3 Typically, plan sponsors are not going to be concerned with becoming a fiduciary by giving investment advice. While it is a best practice that plan sponsors do not cross the line of directing participants as to how to invest their assets, the DOL has said that the ordinary communications of a human resources employee, who is not an investment professional, with plan participants is not covered as investment advice. Retirement Security Rule : Definition of an Investment Advice Fiduciary, available here https://www.federalregister.gov/documents/2024/04/25/2024-08065/retirement-security-rule-definition-of-an-investment-advice-fiduciary.

Fiduciary obligations under ERISA

Wherever you are on your learning journey of how to run a compliant retirement plan, there is a lot of ground to cover. In fact, retirement plan duties extend well beyond investments. Starting with the basics, under ERISA Section 404, these duties are required for all fiduciaries:

- **Acting solely in the interest of plan participants and their beneficiaries, and with the exclusive purpose of providing benefits to them**
- **Carrying out duties prudently**
- **Following the plan documents (unless they're inconsistent with ERISA)**
- **Diversifying plan investments**
- **Paying only reasonable plan expenses**

Guidance sources

Over time, you will want to tap other sources of guidance available from the DOL and the Internal Revenue Service (IRS). Plan fiduciaries should also consider that guidance may come from any of these additional sources:

Legislation	Laws made by Congress. Examples include ERISA, as well as the SECURE Act of 2019 and SECURE 2.0, which included several provisions impacting retirement plans, some optional and some mandatory.
Regulation	A regulation is a set of requirements issued by a federal government agency to implement laws passed by Congress. Here, the DOL makes the regulations that apply to ERISA (which is the applicable federal law). Examples of regulations include the Retirement Security Rule and the Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.[4]
Subregulatory Guidance	Regulatory agencies such as the DOL can also issue policy statements and interpretive rules to help clarify complex regulatory rules and statutory or technical issues. Examples of subregulatory guidance includes insight from the DOL's Field Assistance Bulletins.
Additional information and guidance	When the DOL wants to issue a statement but is not ready to make it technical formal guidance, the DOL will issue other forms of information, such as their Target Date Fund Tips from 2013.[5]

Stay up to date on modifications

While there is not a single list for all the guidance that comes from the DOL, it is important to partner with a knowledgeable advisor or consultant who can assist you in monitoring the continual guidance that arises over time. Guidance and updates should be incorporated into an ongoing fiduciary compliance program for the plan. Depending on how you list all the "duties" related to the retirement plan, there are arguably 50+ obligations a plan sponsor has, and that list is continually growing as retirement plans and technology evolve.

4 DOL Fact Sheet, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.

5 DOL, Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries, February 2013.

Prohibited transactions: What they are and how to avoid them

It is imperative for retirement plan fiduciaries to know what they are NOT allowed to do. You'll find these prohibited transactions spelled out under ERISA Section 406. Also, the Internal Revenue Code (the Code) closely aligns with ERISA as it relates to prohibited transactions. Under Section 4975 of the Code, there are coordinating prohibited transactions. More importantly, there is an enforcement mechanism for prohibited transactions. This means that if an ERISA fiduciary engages in a prohibited transaction, an excise tax (or penalty) will apply unless there is an associated prohibited transaction exemption (PTE). So, what's prohibited, and what are the exemptions?

A few prohibited transactions (nonexhaustive list)

- A fiduciary's act by which he or she deals with plan income or assets in his or her own interest or benefit
- Taking a loan from the plan or participants
- A fiduciary paying him-herself from the plan

There are some instances where prohibited transactions are allowed – that's where there is an exemption (or PTE). The most common example may be the PTE under Section 408(b)(2). Ordinarily, the use of plan assets to pay a provider's fee – such as paying the recordkeeper or advisor – would constitute a prohibited transaction. However, the disclosure rules under Section 408(b)(2) are the PTE that allow for payment of service providers from plan assets as long as all the requirements of the PTE are met, which includes receiving the disclosure and reviewing it to ensure that services, fees, and fiduciary status are disclosed and that the fees are reasonable.

Action steps

Being a fiduciary to a retirement plan is a big commitment. It's a job that should not be taken lightly. However, it is not something to be afraid of, particularly if you work with the right team of partners – including a knowledgeable retirement plan advisor or consultant. Here are five steps to help you maintain a compliant retirement program:

1. **Identify the fiduciaries** to the retirement plan, including internal and external stakeholders.
2. **Define roles and responsibilities** among fiduciaries, and confirm the plan is supported by the right team of experts. Where there is a lack of expertise, hire additional support.
3. **Develop a fiduciary calendar** to ensure that fiduciary obligations are met on an ongoing basis.
4. **Leverage the companion resource** to this plan sponsor's guide, and conduct fiduciary training periodically.
5. **Monitor for ongoing updates** to legislation, regulation, and additional guidance, as it changes your ongoing fiduciary obligations.

Get started

When you are ready to put a fiduciary compliance program into place, remember that you are not alone.

1. Work with your plan advisor or consultant to start implementing the action steps.
2. Tap into the easy-to-follow companion presentation for this plan sponsor's fiduciary guide to hold training sessions.
3. Ask your retirement plan advisor or consultant about it today.

To learn more, contact your Natixis Retirement Specialist.

Call: 800-862-4863

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