

Benefit plans may include employer liability losses

By Kenneth Golsan

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Back in 1974 Congress enacted the ‘ERISA’ law that clarifies the duties and liabilities of fiduciaries of employee benefit plans. ERISA stands for the Employee Retirement Income Security Act. In today’s litigious society, more and more lawsuits are being brought against plan fiduciaries for failure to comply with ERISA’s provisions. These lawsuits subject an employee benefit plan’s fiduciaries to the expense of unwanted legal proceedings, which often result in personal liability and loss of a business owner’s personal assets.

Many employers do not realize their responsibility to comply with ERISA’s requirement to secure a Fidelity Bond equal to 10% of a 401K assets in order to protect the plan’s participants or beneficiaries.

The purpose of this article is to explain some of ERISA’s provisions regarding the duties, responsibilities and liabilities of employee benefit plan fiduciaries and provide some effective solutions.

What types of employee benefit plans are governed by ERISA?

ERISA was enacted in response to a perceived abuse - namely that companies who sponsored employee benefit plans for their employees were not keeping their promise to provide the plan’s benefits. Congress has defined the term “employee benefit plan” broadly in order to subject as many plans as possible to ERISA’s provisions.

In general, the laws of ERISA apply to any plan, fund or program that has been established or maintained by an employer or employee-organization for the purpose of providing benefits to participants and beneficiaries of the plan. ERISA applies to any fund, plan or program that provides retirement income to employees or provides medical or life insurance or similar benefits.

Who is a plan fiduciary?

As a general rule, you are a fiduciary of an employee benefit plan if any one of the following applies to you: (a) You (or the position you hold) are specifically identified in the written documents of a plan as a named fiduciary; or (b) You manage the plan or its assets, or (c) You have discretionary responsibility for the plan’s administration.

Typically, the fiduciaries of a plan are its sponsoring employer (or employers), the plan trustees, the administrator, all members of the administrative committee, the investment manager, and anyone

else who also has discretion or control over the plan or the management or investment of its assets. One sure thing, Congress defines a “fiduciary” as broadly as possible.

As a fiduciary, you must operate the plan in accordance with ERISA’S various laws as well as regulations promulgated by the IRS and the U.S. Department of Labor. These laws, of course, are designed to protect the interests of the participants and beneficiaries of the plan.

The key fiduciary standards can be summarized as follows: (a) All transactions must be made for the exclusive purpose of providing benefits to participants while avoiding unnecessary costs; (b) You are required to exercise prudence under the “prudent man rule”; (c) You must make sure investments are sufficiently diversified and (d) You must act in manner consistent with legal documents of plan.

Some of the mistakes which have placed fiduciaries in legal trouble are:

1. Failing to disclose required information or making misleading representations to participants beneficiaries.
2. Failing to meet statutory funding requirements to a pension plan.
3. Failing to recognize conflict of interests when making decisions.
4. Failing to monitor the work done for the plan by service providers (third party administrators, plan managers).
5. Making imprudent investment decisions.
6. Failing to meet regulatory and filing requirements.

The majority of these claims are brought by current or former participants or their beneficiaries. Many business owners have been found in violation of ERISA standards and have become personally liable for resulting losses. In certain circumstances, you can also be held liable for the breach of duty by one of your co-fiduciaries (plan managers, etc.). Some claims have even proceeded as class-action suits.

Other fiduciaries and the secretary of Labor may also commence litigation alleging a breach of fiduciary duty. The potential for personal liability is especially large if you are both a plan fiduciary and an executive or owner of the sponsoring company.

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You can be held personally liable for any resulting losses to your plan.

Possible solutions to cover your risks.

Although Congress has enacted ERISA provisions to void a plan's document relieving a fiduciary from any liability or responsibility, you are not prohibited from purchasing insurance to cover any liability exposure for negligence. One risk-transfer tool is not only allowed, but mandatory.

To protect participants and beneficiaries from dishonest fiduciaries who handle plan assets, ERISA requires every plan to bond any fiduciary and all other persons who handle plan assets. One does this by purchasing an ERISA Fidelity Bond with the plan as the Named Insured. Coverage required in the amount of 10% of funds under management. Another important insurance tool is an endorsement to your Garage or General Liability policy called "Employee Benefit Liability".

This provides coverage for damage's the business may become legally liable for due to any negligent act, error or omission in the management of employee benefits. "Management" is generally defined as counseling and interpreting benefits, handling records, enrollment, termination or cancellation of employees. One big area that has seen much claim activity is an employer's failure or proposed failure to comply with COBRA (providing health insurance to a terminated employee).

Depending on the asset size of one's 401K, for example, a \$25,000 ERISA Fiduciary Bond costs about \$300. The Employee Benefit Liability coverage is rated on number of employees. Coverage for a 20 employee size firm with an each incident limit of \$1 million goes for about \$120. Consult a professional insurance agent.

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