Best Practices For: Reducing Employer Liability With in Corporate 401(k) Plans

Offering a 401(k) is a great benefit for a business and its employees, but more often than not, business owners and administrators are unaware of at least some of the duties they're required to manage and the fiduciary role they take on. Moreover, employers are often unclear if any of their 401(k) providers share in the duties and risk.

Who typically IS

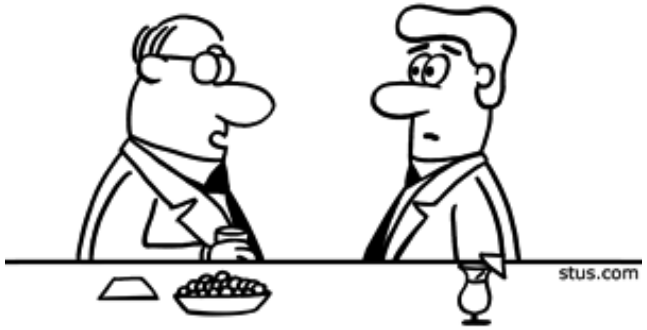
These can be the same person or many at your company:

- ✓ Business owner(s)
- ✓ Employees that manage the plan for your company
- ✓ Named trustee at your company
- ✓ Named investment fiduciary at your company

Who typically IS NOT

The plan service providers are <u>generally</u> not responsible:

- ✓ Broker reps, and financial consultants
- ✓ Record keepers and custodians
- ✓ Attorneys
- ✓ Accountants



This "fiduciary" thingy really complicates pillaging a corporation.

Best Practices – Identify All Fiduciaries

Fiduciaries include all of the following individuals:

- ✓ The trustee
- ✓ The investment manager - ERISA 3(38) Investment Manager
- ✓ All individuals exercising discretion in the administration of the plan – ERISA 3(16) Plan Administrator
- ✓ Those who have been appointed as a fiduciary
- ✓ Those who “function” with discretion without knowledge – defacto fiduciary!!

Best Practices - What are fiduciary responsibilities?

Fiduciaries have important responsibilities and are subject to high standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. Their “basic” responsibilities include:

- ✓ Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them
- ✓ Carrying out their duties prudently
- ✓ Avoiding prohibited transactions
- ✓ Following the plan documents
- ✓ Diversifying plan investments
- ✓ Paying only reasonable plan expenses.

Best Practices – Timely Salary Deferral Contributions and Loan Payments

If a 401(k) plan allows for loans, then the employer must deposit the loan payment contributions in a timely manner. The same rule applies to salary deferral contributions. The law requires that participant contributions be deposited in the plan as soon as it is reasonably possible to segregate them from the company's assets no later than the 7th business day following withholding by the employer will be considered contributed in compliance with the law.

Best Practices – Documents and Notices

- Review plan documents: Review the plan document and summary plan description to ensure that the terms are consistent with plan operations, and that the terms of the plan document and summary plan description are consistent with one another.
- Ensure all appropriate notices are provided to participants by the required deadlines (i.e., safe harbor, automatic contributions, QDIA, SAR, etc.)
- ERISA Fidelity Bond: This bond covers employee fraud and dishonesty. Ensure the bond meets the Department of Labor guidelines – The bond must be at least 10% of plan assets up to $500,000.
- Fiduciary Liability Insurance – Fiduciaries are personally liable for all breaches and errors they make. Directors' and officers' coverage and employment practices liability policies do not cover fiduciary errors!

Best Practices – Hiring A Service Provider

Hiring a service provider in and of itself is a fiduciary function. When considering prospective service providers, provide each of them with complete and identical information about the plan and what services you are looking for so that you can make a meaningful comparison.

For a service contract or arrangement to be reasonable, service providers must provide certain information to you about the services they will provide to your plan and all of the compensation they will receive. This information will assist you in understanding the services, assessing the reasonableness of the compensation (direct and indirect), and determining any conflicts of interest that may impact the service provider's performance.

Best Practices – Reasonable Fees

Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments. When the fees for services are paid out of plan assets, fiduciaries will want to understand the fees and expenses charged and the services provided. While the law does not specify a permissible level of fees, it does require that fees charged to a plan be "reasonable." After careful evaluation during the initial selection, the plan's fees and expenses should be monitored to determine whether they continue to be reasonable by benchmarking plan costs against fellow employers in comparable peer groups.

Best Practices - Investment Advice And Education

More and more employers are offering participants help so they can make informed investment decisions. Employers may decide to hire an ERISA 3(38) investment manager who offers specific investment advice to participants. These advisers are fiduciaries and have a responsibility to the plan participants.

On the other hand, an employer may hire a plan adviser to provide general financial and investment education, interactive investment materials, and information based on asset allocation models. As long as the material is general in nature, providers of investment education are not fiduciaries.

The decision to select an ERISA 3(38) Investment Manager or a plan adviser offering investment education is a fiduciary action and must be carried out in the same manner as hiring any plan service provider.

Best Practices – Investment Policy Statement

An Investment Policy Statement is written by the ERISA 3(38) Investment Manager and is intended to assist a fiduciary in making investment-related decisions prudently. The IPS also outlines the underlying philosophies and processes for the selection, monitoring, and evaluation of the investment options utilized by the plan. It should include various elements, including but not limited to:

- The objectives for structuring a retirement investment program suitable to the long-term needs and risk tolerances of each plan participant.
- The roles of those responsible for the investment of the plan's assets.
- Appropriate diversification within investment vehicles.
- The criteria and procedures for selecting investment options.
- Ways to address investment options that fail to satisfy objectives.
- Objectives for prudently monitoring and evaluating investment procedures, measurement standards and monitoring procedures.

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