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SPECIAL REPORT

THE PERSONAL LIABILITY OF A FIDUCIARY UNDER ERISA FOR EMPLOYEE BENEFITS

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The Importance of Fiduciary Liability Insurance

- Fiduciary liability insurance will defend and pay, where required, for settlement and judgments arising out of **employee benefit plans** that are governed by the Federal ERISA statute.

- The ERISA statute relates to **employee benefit plans** including, but not limited to:

    - Health Insurance
    - Group Life
    - Group Disability
    - Pension Plans
    - 401(K) Plans

- It is important to understand this Federal statute in the following areas:

    - Standard of Care
    - Personal Liability
    - Who Is a Fiduciary Under ERISA?

Standard of Care

§1104. Fiduciary Duties

A. Prudent Man Standard of Care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan **solely in the interest of the participants and beneficiaries and** –

(a) for the **exclusive purpose** of:

(i) **providing benefits to participants** and their beneficiaries; and

(ii) **defraying reasonable expenses** of administering the plan;

(b) with the **care, skill, prudence, and diligence** under the circumstances then prevailing that a **prudent man** 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:

(c) by **diversifying the investments of the plan so as to minimize the risk of large losses**, unless under the circumstances it is clearly prudent not to do so; and

(d) **in accordance with the documents and instruments governing the plan** insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(c) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(b) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

Personal Liability

§1109. Liability for Breach of Fiduciary Duty

A. **Any person who is a fiduciary** with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter **shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary**, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

B. No fiduciary shall be liable with respect to a breach of fiduciary duty under this chapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.
(Pub. L. 93-406, title I, § 409, Sept. 2, 1974, 88 Sat. 886)

§1105. Liability for Breach of Co-Fiduciary

A. Circumstances Giving Rise to Liability
In addition to any liability which he may have under any other provisions of this part, a **fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary** with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
(2) if, by his failure to comply with section 1104(A)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Who Is a Fiduciary Under ERISA?

§3(21)(A). When a Person Is a Fiduciary

A. According to ERISA **a person is a fiduciary** with respect to a plan to the extent:
   (1) **he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets;**
   (2) **he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or**
   (3) **he has any discretionary authority or discretionary responsibility in the administration of such plan**. This includes any person designated under Section 1105(c)(1)(B) of this title.

Plan **fiduciaries** may include, for example, **plan trustees, plan administrators, members of a plan's investment committee or a service provider**.

§3(16)(A). Named Fiduciaries

A. Plan Administrator
   (1) The **plan administrator** is the person specifically designated in the plan document or, in most cases, **the plan sponsor.** The plan administrator oversees the operation of the plan. This should not be confused with a third-party administrator (TPA) who serves as a contract administrator.

B. Trustee
   (1) ERISA requires plan assets to be held in trust by one or more trustees. The trustee(s) must either be named in the written documents or be appointed by a named fiduciary. The discretionary trustee(s) have the exclusive authority to manage and control the assets of the plan and generally are the owners or executives of the plan sponsor. Directed, or nondiscretionary, trustees may be appointed to execute

upon instructions given by the discretionary trustee. Directed or nondiscretionary trustees are generally trust companies.

Delegating Fiduciary Responsibility

A. **Delegating responsibility to someone else is a fiduciary action, and the appointing fiduciary is obligated to prudently select and monitor the performance of their appointees**.

B. Many people are unaware the fiduciary responsibility (and thus liability) for managing and controlling plan assets can also be delegated. In fact, ERISA §3(38) identifies the role of investment manager. Although common sense would dictate that an investment manager is simply someone who manages investments, this role is specifically identified under ERISA and has certain requirements. An *investment manager* is any fiduciary (other than a trustee or named fiduciary) who:
   (1) has the power to manage, acquire or dispose of any plan asset;
   (2) is a registered investment advisor (RIA) under the Investment Advisers Act of 1940, a bank or an insurance company;
   (3) has acknowledged in writing that he is a fiduciary with respect to the plan.

C. §402(c)(3). **A named fiduciary may appoint an investment manager(s) to manage any plan assets**. When this is done properly, the other fiduciaries are relieved of the responsibility for the manager's investment decisions as long as they have **prudently selected** the investment manager and **continue to monitor its performance**.

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