



In everyone's best interest

EMPLOYEE BENEFIT CONSULTANTS | RETIREMENT PLAN ADMINISTRATORS | REGISTERED INVESTMENT ADVISORS

EMPLOYEE RETIREMENT PLANS

Current Developments in Plan Administration and Participant Investment Choices

Fiduciary Liability

Questions of whether or not to have a qualified retirement plan or whether to amend or even terminate your plan are all business decisions. Such questions are answered by asking, "What is in the best interest of our business?"

The operation of your plan is a different game. Once the plan is running, all decisions are fiduciary decisions. This means that the only real question is "What is in the best interest of plan participants?"

Liability is a familiar concept to the business sector. As soon as you advertise or sell a product or service, or as soon as you hire an employee you assume a potential liability. If your words, products, or personnel harm another, inadvertently or by design, you are liable for the damage caused to others. "Harm" is given a broad semantic range, going beyond physical and financial harm.

Those persons or entities that are plan fiduciaries are in a position of trust with respect to the participants and beneficiaries in the plan. The fiduciaries responsibilities include:

- Acting solely in the interest of the participants and their beneficiaries;
- Acting for the exclusive purpose of providing benefits to workers participating in the plan and their beneficiaries, and defraying reasonable expenses of the plan;

- Carrying out duties with the care, skill, prudence, and diligence of a prudent person familiar with such matters;
- Following the plan documents; and
- Diversifying plan investments.

The above bulleted items are a quote from the IRS instructions to plan sponsors. Standards such as "reasonable", "prudent" and "diversified" are not absolutes but do require a level of familiarity or knowledge that is not available in-house to most employers.

Consequently, most employers hire service providers for a major part of the administrative, educational and investment services. The IRS advises, "Even if you do hire a financial institution or retirement plan professional to manage the plan, you retain some fiduciary responsibility for the decision to select and keep that person or entity as the plan's service provider."

Documentation is an effective tool in limiting liability. The document prepared after each plan anniversary should state that (a) the performance of the service provider has been reviewed, (b) the reports provided have been read, (c) fees charged have been checked for accuracy, and (d) participant complaints have been documented and followed up.

The requirement that fiduciaries invest funds in a diversified portfolio applies to plans where the sponsor invests the assets for the benefit of the participants. Where participants may direct the investment of their

assets, following the rules of ERISA 404(c) can reduce liability. These rules are:

- Three or more choices, representing different asset classes must be offered;
- The costs associated with the investment choices must be disclosed;
- The investment manager must be identified; and
- Participant education must include the risk / return characteristics of the choice.

Again, liability can be reduced by documented periodic reviews of the investment choices, including performance measurement parameters. We recommend that each plan sponsor establish an investment committee and establish scheduled meetings with the plan's financial advisor.

Choosing a Registered Investment Advisor can significantly reduce liability for investment decisions, and for investment advice given to participants. His responsibility is to assist in the selection of investment choices, and to provide investment advice to plan participants.

There are key differences between employing a stockbroker vs. a registered investment advisor. A registered representative (stockbroker) is:

- Primarily in the business of buying and selling securities;

- Typically an employee/contractor of a brokerage firm;
- Charges commissions on products;
- Typically held to suitability standards, not fiduciary standards; and
- Regulated primarily by the NASDA but also the SEC and states.

A registered investment advisor is:

- In the business of giving advice;
- Independent - RIA firm not typically owned by another;
- A fiduciary - legally required to put client's interest first;
- Typically fee based compensation for advice; and
- Regulated by the SEC where assets under control exceed \$35,000,000 and by state supervision of smaller firms. *BENEFITWORKS* is regulated by the SEC.)

Fiduciary liability is never eliminated, other than following plan termination, but can be effectively managed. Such management includes documentation of procedures and reviews, formalized participant educational programs, and the use of qualified consulting, administration and investment advisory services through firms capable of legally assuming fiduciary responsibility. To discuss any part of this Bulletin please call *BENEFITWORKS* at (717) 273-8441.

