



# State of Wisconsin Fiduciary Responsibility

*Marilyn R. Collister, Senior Director,  
Legislative and Regulatory Affairs*



# Agenda

- » Fiduciary capacity
- » Identifying plan fiduciaries
- » Plan fiduciary responsibilities
- » Fiduciary best practices
  - Prudent plan administration
  - Prudent investment policies and process
  - Monitoring all aspects of the plan
- » Employee communication/education
- » Limiting fiduciary liability
- » Documentation



# Fiduciary responsibility under applicable law

- » Fiduciaries held to the highest standard of conduct imposed by law.
- » SBJPA imposed exclusive benefit rule and prudence requirements on 457(b) plans.
- » State law imposes fiduciary duty through the Uniform Trust Act and Uniform Prudent Investor Act.
- » Failure to meet fiduciary obligations can result in severe penalties, including personal liability.
- » Participants continue to sue plan sponsors for alleged breaches of fiduciary duty.

## What is fiduciary capacity

- » This question gets right at the heart of what constitutes fiduciary capacity and when it attaches to an individual.
- » A person acts in a fiduciary capacity when he or she handles money or property for the benefit of another – here, the plan sponsor handles money for the benefit of plan participants.
- » It is precisely because plan assets do not belong to the employer, but rather are held in trust for plan participants, that the plan sponsor has fiduciary responsibility.
- » Fiduciary responsibility arises every time the plan sponsor, or certain designated employees, are making decisions that impact the plan and plan assets.

## Identify all parties who work on plan.

- » List all employees who work on the plan in any capacity.
  
- » List all third parties that assist with the plan, including:
  - Trustee
  - Recordkeeper
  - Consultant or investment adviser,
  - Attorney
  - Other
  
- » Determine which individuals or entities are fiduciaries.

# So who is a plan fiduciary?

- » Fiduciary status is based on functions performed, not a person's title.
  
- » Anyone who takes discretionary action to manage and administer the plan or exercise control over plan assets.
  
- » A plan's fiduciaries may include the:
  - Trustee,
  - Plan administrator (you the employer),
  - Investment advisors,
  - Members of the plan's administrative committee, and
  - Members of the plan's investment committee.



# When is the plan sponsor a fiduciary?

- » You are acting in your role as the employer, *not a plan fiduciary*, when:
  - Deciding to offer a retirement plan to employees.
  - Establishing the retirement plan.
  - Designing the plan's benefits and features.
  - Amending the plan to add or remove optional provisions, such as loans.
  - Terminating the plan.
- » You are a plan fiduciary, *not acting as the employer*, when:
  - Implementing the plan decisions made by the employer.
  - Establishing policies and procedures for the plan.
  - Administering and operating the plan.
  - Keeping the plan document updated for all required changes in law.
  - Selecting and monitoring plan's investment options.
  - Selecting and monitoring service providers, consultants and others to assist with the plan.

# When are staff members fiduciaries?

- » Your staff members are not fiduciaries when they:
  - Perform ministerial activities such as processing forms.
  - Act at the direction of participants or plan fiduciaries.
  - Prepare employee communications or answer questions about the plan provisions.
  - Calculate the amount available for a loan or distribution.
  - Perform any other activity not involving the exercise of discretion or authority over the plan or its assets.
- » Your staff members are fiduciaries when they:
  - Exercise discretion when processing QDROs or other forms.
  - Interpret plan provisions.
  - Perform any other activity involving the exercise of discretion or authority over the plan or its assets.



# Are third parties plan fiduciaries?

- » Third parties are typically not fiduciaries.
- » Non-fiduciary experts provide information or act on instructions from plan sponsor or participants and include:
  - Accountants,
  - Actuaries,
  - Attorneys,
  - Auditors,
  - Investment consultants, and
  - Recordkeepers and other service providers.
- » Investment advisers will be fiduciaries if they provide investment advice for a fee or make decisions on behalf of the plan.

# Importance of knowing who is a fiduciary

- » Fiduciaries are held to the highest standard of conduct under the law and can be personally liable for a breach.
- » Executives or employees who don't know they are fiduciaries may inadvertently breach their fiduciary duty.
- » Knowing you are a plan fiduciary will keep you and your plan out of "trouble."
- » Maintaining your participants' trust is extremely important.
- » A sound fiduciary governance process:
  - Protects participants, and
  - Effectively shields the employer, Board or Committee members and other fiduciaries from liability.

# Hold regularly scheduled meetings

- » Hold committee meetings regularly to discuss and make decisions for the plan.
- » Include all plan fiduciaries and any staff or third parties needing to provide information to the committee.
- » Key things to document in meeting minutes include:
  - Identity of all persons in attendance.
  - Prominently highlight the prudent process followed at the meeting.
  - Focus on decisions reached at the meeting.
  - Incorporate reports from third-party advisers by reference and maintain as part of the minutes.
  - Emphasize advice provided by third-party advisers and legal counsel.
- » Draft the minutes timely and ask all attendees to approve them.

# Fiduciary standards of conduct

- » Governmental plans are governed by state law.
- » In addition to complying with state Uniform Trust Act and the Uniform Prudent Investor Act, most governmental plans use Employee Retirement Income Security Act of 1974 (ERISA) rules as a guide.
- » Never found a state law that conflicts with ERISA.
- » Basic fiduciary principles:
  - Duty of loyalty,
  - Duty of prudence,
  - Duty to diversify plan assets,
  - Duty to monitor funds and providers and make changes when warranted, and
  - Duty to follow terms of plan documents.

# Duty of loyalty

- » The duty of loyalty is the exclusive benefit rule:
  - Act solely in the best interests of the plan participants,
  - Act for exclusive purpose of providing plan benefits, and
  - Ensure plan fees and expenses are “reasonable.”
- » Fiduciaries cannot put employer interests before those of the plan and participants.
- » Avoid conflicts of interest.
- » Example.

## Duty of prudence

- » The duty of prudence focuses on the process followed when making fiduciary decisions.
- » Prudence is one of most important duties because it comes into play in every activity undertaken by the fiduciaries.
- » Prudence is more than just an obligation to be competent and careful in your conduct.
- » Prudence requires fiduciaries to act with the care, prudence, skill and diligence a knowledgeable person administering a retirement plan would use.
- » Prudence required the use of good judgment and sound processes when handling the affairs of the plan.

## A prudent process

- » Prudence a careful, diligent, thorough decision-making process.
- » Gathering, examining and giving appropriate consideration to relevant information.
- » Implementing the decision.
- » Periodically monitoring performance to ensure the decisions continue to be right for the plan,
- » Retaining third parties to assist you, if necessary, and
- » Keeping good records of your deliberations and decisions.

# How to best comply with fiduciary duties when selecting third parties

- » Develop a prudent formal process for selecting third parties.
- » Use objective criteria in the selection process:
  - Financial condition,
  - Experience,
  - Quality of the services,
  - Any recent litigation or enforcement action, and
  - The proposed fee structure.
- » Determine that:
  - Fees paid with plan assets to a third party are reasonable
  - Third party has no conflicts of interest that could influence his or her recommendations to your plan.
- » Document your review process and the basis for your hiring and firing decisions.





# Monitoring service providers

- » Service providers include trustees, attorneys, consultants, advisers, recordkeepers, etc.
- » Establish a process for reviewing each provider's performance with respect to services set out in the contract.
- » Make service provider changes when necessary to promote the best outcomes for participants.
- » Keep adequate records of all plan decisions and document the evaluation and decision-making process used in monitoring service providers and the basis for your decision to retain them or make a change.

# Prudent investment policies

- » State law requires, and courts have agreed, that fiduciaries must adopt prudent investment policies for selecting and monitoring plan investments.
- » A prudent investment policy involves developing and following a written Investment Policy Statement (IPS) for the plan.
- » An IPS is a written governing plan document outlining the process for making prudent investment-related decisions.
- » Courts have also said that fiduciaries must use reasonable diligence in disposing of funds which are improper to keep.
- » Your IPS will detail how and when to dispose of funds.

# Investment Policy Statement

- » IPS should define the duties and responsibilities of all parties involved in the investment process.
- » Should establish regular meeting schedule for evaluating the current investment menu and initiating changes when necessary.
- » IPS defines your criteria and processes for investment decisions and should set out the:
  - Methodology and criteria for selecting a broad, diversified array of investments with different levels of risk and returns.
  - Goals, objectives and performance standards the funds are expected to meet to be retained in the investment menu.
  - Guidelines for monitoring and evaluating funds, and timing for terminating and replacing any nonperforming funds.

## Plan Administration – As important as investment selection!

- » Plan document must comply with all Internal Revenue Code.
- » Plan document must describe each feature you are offering participants – it is your contract with the participants.
- » Read the plan document thoroughly and often and be sure you understand each and every provision.
- » The plan document is your manual for administering the plan.
  - Compare plan policies, procedures and forms to the terms of the document.
  - Revise any procedures that do not exactly match the document.
- » Failure to operate the plan in compliance with governing documents is a top IRS audit “catch-all” and can cause the plan to become ineligible.

## Plan Administration – Pay attention to top audit issues

- » Trust requirement – know your trustee and maintain signed trust documents.
- » FICA tax – paid when deferral is made – not deferred to time of distribution.
- » Timely delivery of deferrals into trust – as soon as practicable – IRS rule of thumb.
- » Timing of deferrals – first day of month rule.
- » Limit deferrals to the 457(e)(15) annual limit, plus age 50 or special catch-up, if applicable.
- » Distribute excess deferrals plus earnings as soon as practicable after discovery.

## Plan Administration – Pay attention to top audit issues

- » Special catch-up contributions:
  - Must have underutilized amounts in employer's plan.
  - Must establish a normal retirement age that meets the definition in the plan document and that is four years past the first special catch-up contribution year.
  - Cannot use special catch-up and age 50 catch-up in the same year – can use whichever is greater.
  
- » Distributions restricted until:
  - Severance from employment,
  - Attainment of age 70 ½,
  - Unforeseeable Emergency, or
  - De minimis amount, if allowed by the plan document.

## Plan Administration – Pay attention to top audit issues

- » Unforeseeable Emergencies:
  - Know the criteria in your plan document and ensure compliance with the final regulations.
  - Acquire, review and maintain copies of the paperwork used to approve the emergency withdrawal.
  
- » Required minimum distributions.
  
- » Loans – coordinate all plan loans and put default procedures in place.
  
- » Auto cash-outs of small balances – if required, must be done timely and consistently with plan document.
  
- » Beneficiary designations and spousal consent – IRS Rev. Rul. 2013-17 now requires plan to treat same-gender spouses exactly as other spouses.

# Fiduciary File Cabinet

- » Maintain a fiduciary file cabinet to document systematic processes and evidence that good processes were followed.
- » Critical components of a fiduciary file cabinet:
  - Identify parties in plan operation and management,
  - Identify what they are responsible for and whether they are a fiduciary,
  - If you use a plan committee, identify who is on the committee, when it meets, what processes it is responsible for and how it implements these processes.
  - Have a definitive agreement to establish roles and liability for third parties heavily involved in plan administration.



# Fiduciary File Cabinet

- » A complete set of all current signed plan documents:
  - Plan documents and any summary plan materials,
  - Trust agreement,
  - Plan forms, rules and procedures,
  - Service agreements,
  - Third party contracts,
  - Investment contracts,
  - Investment Policy Statement, and
  - All amendments to those documents.



## Why due diligence matters

- » Responsibilities of sponsors of retirement plans are many and not to be taken lightly.
- » The IRS is auditing governmental plans.
- » Participants have heightened awareness of the importance of their retirement needs and plan investments and fees.
- » The number of lawsuits against ERISA plan sponsors is increasing.
- » In addition to prudent processes, communicating with and educating participants is a large part of fulfilling your fiduciary responsibilities and limiting liability.
- » ERISA 404(c) is extremely important.

# Communicate with and educate participants

- » Develop easy to understand communications to inform employees about key plan features and how participating in the plan would benefit them.
- » Provide materials and seminars to educate participants about investing and how to manage their account balances.
- » Utilize a robust website with retirement income and other calculators to allow participants to make informed choices about contribution levels, investments, etc.
- » ERISA 404(c) allows plan fiduciaries to avoid liability for individual participant investment decisions – a big deal!
- » 404(c) is designed to allow participants:
  - An “opportunity to exercise control” and
  - An opportunity to select from a broad range of investment options.

## Limiting fiduciary liability by complying with 404(c)

- » Broad range of investment options:
  - At least three options with different risk and return characteristics:
  - Designed to provide participants with a reasonable opportunity to materially affect the potential return and degree of risk in their accounts.
  
- » Once a range of investment options is in place, 404(c) is essentially a communications statute:
  
- » Participant information to assist them to become informed investors:
  - Their right to direct their own investments in the plan,
  - How to make and change investment decisions,
  - The funds and fund managers available under the plan,
  - Investment related fees,
  - Any restrictions on investment transfers, and
  - The name of who to contact for more information.

## Limiting fiduciary liability by complying with 404(c)

- » Communication materials prepared by you/Great-West are helpful in complying with the automatic disclosure requirements.
- » These materials include, among a number of others:
  - » Investment Options at a Glance
  - » Fund Data Sheets
  - » Plan Features and Highlights
  - » Quarterly Newsletters enclosed with the participant statements
  - » Brochures, articles and video on the website
  - » Special mailings, and
  - » Seminars to assist with employee education.

# Participant Allegations Against Plan Fiduciaries

- » Recent lawsuits brought by plan participants against plan sponsors are very instructional.
  
- » At issue in the lawsuits are whether:
  - Plan fiduciaries acted prudently in selecting and monitoring plan investments and compensation arrangements, and
  - Fees were reasonable or excessive, and were properly disclosed.
  
- » Only a few cases have been decided on the merits, some have been settled by mutual agreement of the parties and some have been dismissed.
  
- » Court decisions are based more on the process the fiduciaries used rather than the particular result obtained.

# Participant Allegations Against Plan Sponsor - Example

- » Plan participants sued the plan sponsor for breach of fiduciary duties to the plan when it:
  - Failed to monitor recordkeeping costs and negotiate lower fees to offset revenue sharing amounts paid to the recordkeeper;
  - Removed an investment fund and replaced it with other funds in violation of Investment Policy Statement (IPS);
  - Selected more expensive share classes when less expensive share classes were available;
  - Allowed plan to pay recordkeeper an amount that exceeded market cost of services (and used the excess to subsidize corporate services);

# Court Findings

- » Plan sponsor's actions were a blatant conflict of interest :
  - Allowing excessive fees to be paid by plan participants to benefit the employer rather than the plan,
  - Failure to follow the IPS, and
  - Altogether failing to monitor the recordkeeper.
  
- » Violated fiduciary's responsibility of prudence.
  
- » Court fined plan sponsor \$millions for:
  - Not following prudent processes,
  - Not following the governing plan documents,
  - Not acting when told plan was paying excessive fees, and
  - Inappropriate selection and de-selection of funds.



## Limiting fiduciary liability

- » On the other hand, courts have found in favor of fiduciaries who followed prudent processes and complied with their plan documents.
- » Courts have ruled that following prudent processes is the key!

# Summary

- » Remember, the ultimate responsibility for the plan and its operations cannot be outsourced or relinquished.
- » The key is acting sensibly when making decisions on behalf of the plan.
- » Act solely in the best interests of participants which means monitoring fees to ensure the plan fees are reasonable.
- » Identify your plan fiduciaries and provide education and training.
- » Follow governing documents with respect to selecting and monitoring investment options.
- » Follow ERISA 404(c).
- » Ensure your policies and procedures and plan operation are in compliance with plan documents.
- » Keep records of fiduciary meetings to support decision-making.

# Thank you!

## Questions?

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