



Fiduciary Best Practices for California Plans

Who Wants to be a Fiduciary?

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Overview – Who ARE THE PLAYERS

Plan Sponsor

Recordkeeper

Investment Consultant

Legal Counsel

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AGENDA

Overview –

- ERISA
- Fiduciary Fundamentals
 - Who is a Fiduciary?
 - Fiduciary Standards?

Best Practices and Managing Risk

“Who Wants to be a Fiduciary”


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Overview – WHY ERISA



There are references in this program to “ERISA”—the Employee Retirement Income Security Act of 1974, the law governing private sector retirement plan fiduciaries



The ERISA fiduciary rules do not apply to public sector retirement plan fiduciaries



Fiduciaries of public sector/governmental plans may find applicable rules in the California Constitution, various California statutes, the common law, and various plan documents

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Overview – WHY ERISA

- California Constitutional and statutory provisions were based, like ERISA, on the common trust law applicable to fiduciaries
- This resulted in California's rules for governmental plan fiduciaries being virtually identical to the ERISA fiduciary provisions
- Courts may look to ERISA for guidance on public sector fiduciary issues where there is no available State law guidance
- Compliance with ERISA is considered a best practice in many areas (and sometimes incorporated into the California statutes-e.g. GC 53213.5(b) incorporating ERISA 404(c) requirements by reference)
- Fiduciary litigation that begins in the private sector often carries over to public sector plans

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Overview – Who is a Fiduciary

- Under ERISA, a fiduciary is anyone who:
 - Exercises any discretionary authority or discretionary control respecting the management of the plan;
 - Exercises authority or control respecting management or disposition of plan assets;
 - Has any discretionary authority or discretionary responsibility in the administration of the plan; or
 - Renders investment advice for a fee (ERISA § 3(21))
 - Contrast 3(21) fiduciary with 3(38) fiduciary: 3(21) fiduciary provides advice and plan fiduciary makes final decision; 3(38) fiduciary directly control investment of plan assets
- “Functional” test – title or position is not dispositive

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Overview
Who
else is a
Fiduciary


- Under general common law of trusts, a fiduciary:
 - Must use reasonable care to prevent a co-fiduciary’s breach
 - Breaches their duty by permitting a co-fiduciary’s breach
 - If a co-fiduciary breach is discovered, must take reasonable steps to compel the co-fiduciary to cure the breach (Rest.3d Trusts, § 81)
- Similar provisions apply under ERISA §405(a)

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Overview – Who is not a Fiduciary



Recordkeepers and third-party administrators are not fiduciaries



However, recordkeepers and third-party administrators

- Support the fiduciary process
- Issue spot
- Document the fiduciary process

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Overview Where are the Fiduciary Standards

California Constitution Article XVI,
§17 = Plan fiduciaries have “plenary
authority and fiduciary responsibility
for investment of moneys and
administration” of Plan, subject to:

Three specific responsibilities and
Three specific duties or standards

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Overview – What are the Fiduciary Standards

Three specific responsibilities:

1. Exercise sole and exclusive fiduciary responsibility over Plan assets
2. Exercise sole and exclusive responsibility to administer the Plan in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries
3. Hold Plan assets for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan



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Overview – What are the Fiduciary Standards

Three specific duties:

1. The duty of prudence,
 2. The duty of loyalty (exclusive purpose rule), and
 3. The duty to diversify investments to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so
- ERISA adds the duty to discharge responsibilities in accordance with written plan document (ERISA § 404(a))
 - Compliance with written Plan document also is a tax-qualification requirement under Code section 401(a)

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Overview – When do Fiduciary Standards Apply

The fiduciary standards apply to fiduciary functions, including:

- Selecting and monitoring investments and service providers
- Interpreting Plan provisions
- Deciding benefit claims or appeals
- Delegation of fiduciary responsibilities
- Plan administration functions that involve:
 - Discretionary authority or control over Plan management
 - Any authority or control over management or disposition of Plan assets

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Overview – When do Fiduciary Standards **Not** Apply

- The fiduciary standards do **not** apply to “ministerial” functions = functions that do not involve *discretionary* authority to administer the Plan or manage Plan assets
- If performed without discretion, these can include:
 - Collecting & allocating contributions
 - Applying eligibility rules
 - Preparing participant communications
- Fiduciaries may rely on information provided by persons who perform ministerial functions if prudently selected and monitored

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Best Practices - Managing Risk

- Provide fiduciary training to fiduciaries and employees
 - Retain documentation of training, including any education and training policies
- Ensure plans are operated in accordance with Plan documents
- Avoid conflicts of interest
- Consult with experts and rely on their advice
- Monitor service providers
 - Document service provider selection and ongoing review
- Consider fiduciary liability insurance

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