Ask The Lawyer

Better Watch Your *ERISA-FIDUCIARY DUTIES*

By Marc Beckman
Marc S. Beckman is an associate with Scolaro, Shulman, Cohen, Fetter & Burstein, P.C. in Syracuse, NY, practicing in corporate and business groups with a special emphasis in representating health care professionals. You may contact Mr. Beckman at (315) 471-8111 or via e-mail at mbeckman@scolaro.com.

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA), the cornerstone of law about employee benefits, including employee welfare (health insurance) and pension benefit plans, like 401(k), and profit sharing. Many small businesses establish plans like these for their employees (and for the owners). In order to protect benefit plan participants and their beneficiaries, ERISA sets forth standards for the conduct, responsibilities and obligations for the fiduciaries and administrators of these plans – for small businesses, typically the owners. It's important for you to be familiar with these fiduciary obligations. Much of this article most directly applies to retirement plan funds.

ERISA provides that a person is a plan fiduciary if they:

- Exercise discretionary control over plan management or any authority over the management or disposition of its assets;
- Have the responsibility to render investment advice regarding plan assets (including contributions made by employees through elective deferrals) for a fee or compensation; or
- Have any authority or responsibility in plan administration.

ERISA defines a fiduciary extremely broadly. In addition, certain positions (plan trustees, administrators and other individuals named as fiduciaries) are considered to create fiduciary status. ERISA clearly defines the duties of fiduciaries, the main objective of which is to assume that plans are operated according to written guidelines and protect the availability of benefits under such plans.

Under ERISA, a fiduciary shall discharge their duties under four broad standards:

The Exclusive Benefit Rule - For the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable plan administration expenses.

The Prudent Person Standard - With a care, skill, prudence and diligence under the prevailing circumstances 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.

The Diversification Standard - 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. Overall plan management is the key.

The Compliance Standard - In accordance with the documents and instruments governing the plan insofar as they are consistent with the law.

The prudence of an investment decision will be judged based on the role of the investment in the overall plan portfolio. As such, in making investment decisions, a fiduciary should consider:

- The composition and diversification of the plan's portfolio;
- The liquidity and current return of the portfolio in relation to the anticipated cash flow requirements of the plan; and
- The projected return of the plan versus its funding objectives.

Allowing participants in the plan to "self-direct" isn't considered a safe harbor. The plan fiduciaries have a continuing obligation to oversee and administer the plan. Among other technical requirements set forth by ERISA, the fiduciaries operating within a self-directed plan must provide a broad range of investment options designed to ensure that participants have diversified investment options to minimize the risks of large losses; provide an opportunity for participants to exercise control over assets allocated to their accounts; and steer clear of providing "investment advice."

ERISA establishes liability for breaching fiduciary duty. Liability is joint and severable for all fiduciaries. Thus, any fiduciary may be found liable for <u>all</u> injuries arising from a breach regardless of the extent of that particular fiduciary's breach so long as they participated in the breach. Available remedies include making restitution to the plan for losses resulting from the breach; disgorging profits obtained by the fiduciary through the breach; and other appropriate equitable or remedial relief as determined by a court.

Furthermore, there are certain "prohibited transactions" set forth by ERISA, which would create "per se" breaches of fiduciary duty. These transactions revolve around those between a plan and a "party in interest" or transactions which permit the fiduciary to engage in self-dealing.

ERISA provides up to a 5% excise tax on the amount of any prohibited transaction. If the transaction isn't corrected within a permissible time frame, a second stage penalty of up to 100% of the transaction may be imposed.

Moreover, a willful violation of ERISA fiduciary duty

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Small-Biz Snapshot

Small-business owners were asked what phrase best describes the administrative difficulties they face in complying with their state's sales and use tax:

39.4% ... No real problems
24.8% ... A minor annoyance
23.4% ... A continuing hassle
7.4% ..... Occasional difficuties
4.2 % .... A serious business problem

Source: National Federation of Independent Business