



Frank A. Busalacchi

## Your Practice

# Be aware of fiduciary responsibilities with retirement plans

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If you sponsor or manage investments for your practice's retirement plan, you may be a fiduciary. How you perform your fiduciary responsibilities and the decisions you make can determine the standard of living you and your employees will have at retirement.

The laws that govern fiduciaries are complex. Staying in compliance and protecting yourself requires a thorough understanding of applicable laws. The intent of this article is to raise awareness of some of a fiduciary's responsibilities. If you serve as a fiduciary or are considering doing so, you should consult with an attorney or retirement plan professional for specific advice.

### Who is a Fiduciary?

Fiduciaries are responsible primarily for managing the retirement plan and the investments in the plan. A fiduciary can be anyone who

- is named as the plan sponsor, trustee, or plan administrator.
- has discretionary control over the management of the plan's assets or the plan itself.

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- provides investment advice to the plan for a fee or other compensation.
- has discretionary authority or responsibility for plan administration.

### The "Prudent Man" Rule

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect employees' retirement accounts. By complying with ERISA and all the subsequent retirement plan tax law amendments, fiduciaries can pass the "prudent man" rule test. The prudent man rule states that a fiduciary must perform his or her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use..."

Fiduciaries are measured by the standard of a knowledgeable investor. However, a good faith effort without the investment knowledge is not good enough. Fiduciary management is a process to procedurally document all aspects of a retirement plan's activities so that a paper trail is created as proof of fiduciary duties being exercised, thus complying prudently.

By following ERISA's guidelines, you are protecting not only yourself but also your employees. Many plan trustees consult

regularly with expert advisors. The courts have held that such consultations are evidence of prudent behavior. Any fiduciary who breaches his or her obligations under ERISA can be held personally liable for the losses caused by his or her actions.

### What are Your Basic Duties?

Fiduciaries must:

1. Follow a written investment policy statement.
2. Diversify the plans assets, unless it is clearly not prudent to do so.
3. Invest according to the ERISA "prudent man" rule.
4. Make sure plan investment expenses are reasonable.
5. Monitor and review the performance of the plan.
6. Avoid making any investments that result in directly or indirectly prohibited transactions.

Finally, remember to document, document, document. All decision making, processes, education meetings, investment review, and employee communications should be included in your fiduciary management binder.

### Other Ways to Reduce your Liability

ERISA provides protection for fiduciaries under Section 404(c) regulations. Section 404(c) protection is only available to plans that allow

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employees to direct the investments in their accounts. ERISA allows plan participants to take control of their investment direction. By doing so, a fiduciary transfers the legal responsibility to the employee as long as the detailed requirements of the regulations are satisfied. Complying with 404(c) is optional.

For the fiduciary relief to occur, all of the requirements of 404(c) must be met and documented. If not, liability remains. To qualify under 404(c), the plan must

- Offer a broad range of diversified investments. The 404(c) guidelines will be met if participants can choose from at least 3 “core,”

diversified (low-, mid- and high-risk) investments that offer significantly different risk and return characteristics.

- Allow participants to transfer among investment choices. Participants must be able to transfer between investments at least quarterly. The more aggressive the investment, the greater need for more frequent transfers. Most daily valuation plans easily satisfy this requirement.
- Provide adequate information about participants’ investment options. The fiduciary must provide a written explanation that the plan intends to comply

with 404(c), including a description of the plan’s investment options, the most recent plan prospectus, and procedures for investing.

For more information on fiduciary responsibilities under ERISA, consult the US Department of Labor Employee Benefits Security Administration’s Web site, [www.dol.gov/ebsa](http://www.dol.gov/ebsa). The web site’s publications section features an article titled, “Meeting Your Fiduciary Responsibilities.”

*This article is not legal advice and should not be used as a substitute for the advice of an attorney.*

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