

## Trustees held personally liable for 401(k) issues—don't lose your home over your 401(k)

*ERISA requires a trustee to act “solely in the interest” of a plan’s participants and beneficiaries, and to discharge his duties “with the care, skill, prudence, and diligence...that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character...”<sup>i</sup> Failing to uphold these fiduciary standards can cause a trustee to be held personally liable for any losses to the plan caused by his breach.<sup>ii</sup>*

### Fiduciary Liability

Trustees are exposed to personal liability to make a plan whole for any losses due to a breach of their duties. Court decisions in the aftermath of the Supreme Court case of *Cigna Corp. v. Amara* have expanded liability to include monetary damages.<sup>iii</sup> Trustees may attempt to defray their liability by delegating some fiduciary duties to others. This does not relieve responsibility, however, they must now monitor those to whom the duties have been delegated. For example, an investment manager given discretion to manage plan investments may make imprudent decisions which cause a shortfall for beneficiaries. The beneficiaries are still likely to sue the plan’s trustees because the trustees selected the manager in the first place.<sup>iv</sup>

### Who is a fiduciary?

According to the Department of Labor the plan sponsor is a fiduciary along with anyone who meets any of the following criteria:<sup>v</sup>

- Anyone with discretionary control over administration of the retirement plan or the investments offered in the plan.
- Any person specifically named as a fiduciary in the plan documents.

- Anyone who renders investment advice to the plan or its participants for a fee or other compensation.
- Anyone having the authority to name someone else a fiduciary.

### What is ERISA?

ERISA is the acronym for the Employee Retirement Security Act of 1974. The goal of the Act is to protect participants in private-sector retirement plans. The Act also imposes specific duties on plan fiduciaries that must be satisfied.<sup>vi</sup>

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them
- Carrying out their duties prudently
- Following the plan documents, unless inconsistent with ERISA
- Diversifying plan investments
- Paying only reasonable plan expenses

### Enforcement

The Department of Labor’s job is to enforce ERISA. The Department has increased its audit staff and the number of annual plan investigations to more than 3000 annually.<sup>vii</sup> In fiscal year 2015, 67.2% ended in monetary results or other corrective action.<sup>viii</sup>



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## Limiting Liability

The Center for Fiduciary Studies™, a standards setting body that develops handbooks and education programs for fiduciaries, offers a series of questions to help identify areas for improvement:

1. What laws and governing documents apply to guide your decision-making processes?
2. How was the portfolio's current asset allocation determined?
3. Is there an investment policy statement? When was the last time it was updated?
4. What type of due diligence was performed on the available investment options?
5. Are you sure the fees and expenses paid to Investment Managers and other service providers are fair and reasonable?
6. What type of periodic monitoring is applied to the portfolio?
7. Is it clearly defined which service providers are serving in a fiduciary capacity versus which are not? How are conflicts of interest being resolved in the plan's favor?

If the answers to any of these questions identify potential gaps in fulfilling your duties, then it may be time for a more thorough review.

Offering a retirement plan to employees requires expertise in many areas. If expertise is missing, then a prudent fiduciary will hire a professional with the knowledge to carry out the necessary functions and put the pieces in place to maximize benefits to plan participants.

An independent advisor can help fiduciaries fulfill their duties and reduce their personal exposure to liability. Phillips & Company has deep experience controlling plan costs and meeting with participants one-on-one to make sure they are contributing enough of their income to achieve successful retirement outcomes.

If you are worried about being targeted by the Department of Labor's expanded enforcement program or have any doubt you've met your fiduciary responsibilities, call Phillips 401(k) Advisors and have us prepare a free review of your plan.

### Contact:

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<sup>i</sup> 29 U.S.C. § 1104(a)(1)(B)

<sup>ii</sup> 29 U.S.C. § 1109(a)

<sup>iii</sup> Benefits Law Group of Chicago. 2013. [http://www.benefitslawgroupofchicago.com/HTML/2013/expanded\\_liability\\_for\\_plan\\_fiduciaries.htm](http://www.benefitslawgroupofchicago.com/HTML/2013/expanded_liability_for_plan_fiduciaries.htm)

<sup>iv</sup> Fiduciary News. 2012. <http://www.fiduciarynews.com/2012/10/the-easiest-way-to-reduce-personal-fiduciary-liability-for-plan-sponsors-and-other-non-professional-trustees/>

<sup>v</sup> Employee Benefits Security Administration. [http://www.dol.gov/ebsa/faqs/faq\\_compliance\\_pension.html](http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html)

<sup>vi</sup> Employee Benefits Security Administration. 2012. <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html>

<sup>vii</sup> HRE Online. 2012. <http://www.hreonline.com/HRE/view/story.jhtml?id=533350669>

<sup>viii</sup> Employee Benefits Security Administration. 2015. <http://www.dol.gov/ebsa/newsroom/fsFYagencyresults.html>



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