Protecting Retirement Plan Fiduciaries (Including Your Boss) from Liability

August 7, 2012

Michael S. Melbinger
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
312-558-7588
mmelbinger@winston.com

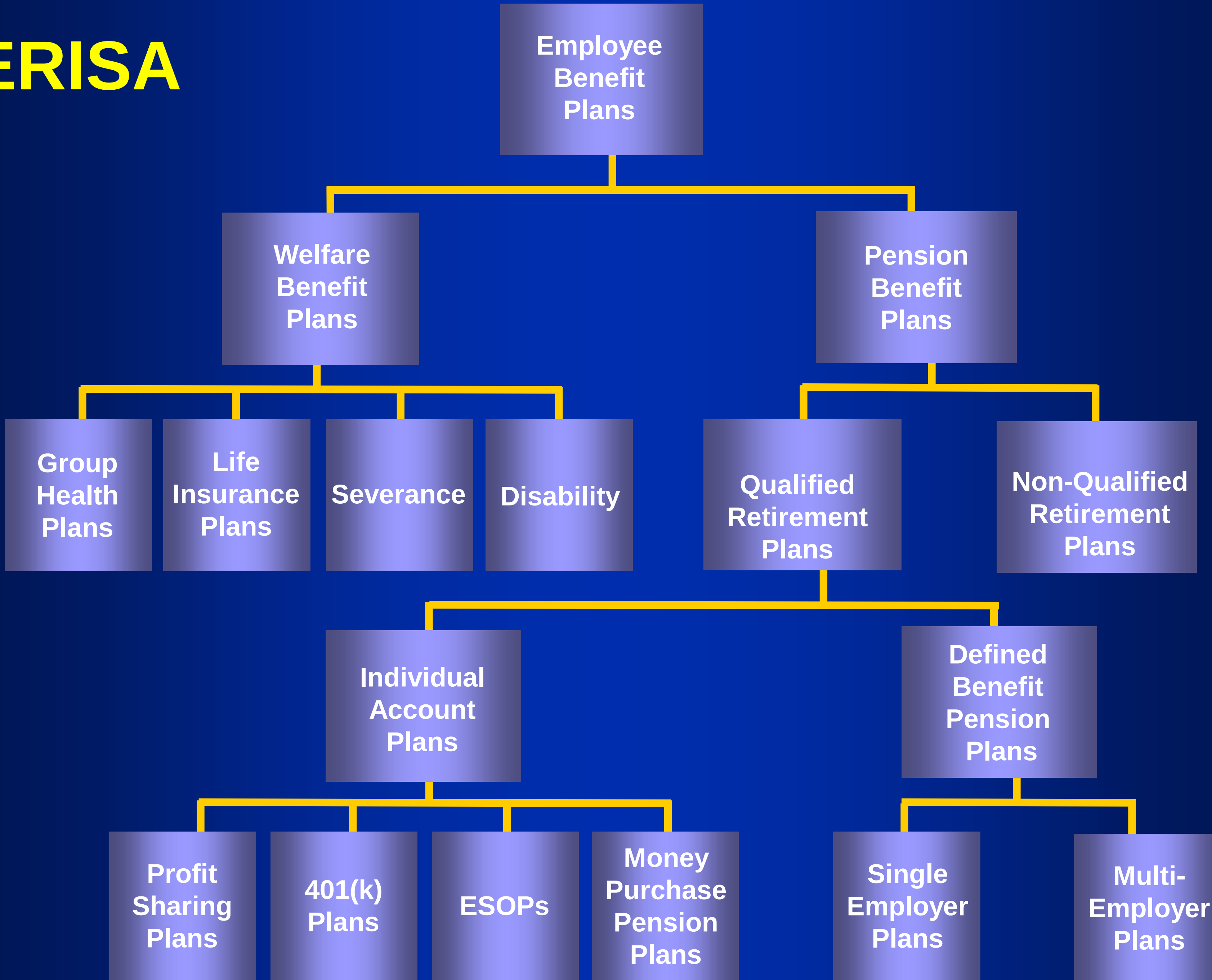
IHR INSTITUTE FOR HUMAN RESOURCES

HR.com

Why Now? What has changed?

- Department of Labor refocuses with audits
- Stock market gyrations
- Changes in the law increase fiduciaries' risks
- U.S. Supreme Court cases
- Other Adverse court cases and new theories of liability
- Investment Fee and Company Stock Drop Litigation
- Fiduciary liability insurers require training

ERISA


Employee Benefit Plans
Welfare Benefit Plans
Pension Benefit Plans
Group Health Plans
Life Insurance Plans
Severance
Disability
Qualified Retirement Plans
Non-Qualified Retirement Plans
Individual Account Plans
Defined Benefit Pension Plans
Profit Sharing Plans
401(k) Plans
ESOPs
Money Purchase Pension Plans
Single Employer Plans
Multi-Employer Plans

Who is a Fiduciary?

- The term "fiduciary" is broadly defined to include any person who:
  - Exercises discretionary authority or control over administration or management of the plan or plan assets
  - Renders investment advice for a fee
- Some positions are always fiduciary (at least to some extent)—named fiduciaries, trustees, plan administrators, investment managers (as defined in ERISA).
- **A person can be a fiduciary even if their contract or the Plan documents say he/she is not.**
- **A person can be a fiduciary based on their actual actions - fiduciary status is determined by function, not title.**

A person without direct discretionary authority over the plan still can be a fiduciary

- Persons with authority to select, appoint , supervise or monitor, and remove plan fiduciaries are themselves fiduciaries.
  - Examples include the board of directors and/or compensation committee of the board.
- Persons who provide nondiscretionary investment advice (intended to serve as the primary basis for an investment decision) are also plan fiduciaries.
  - Examples include investment consultants and advisors who provide advice directly to plan participants.

Fiduciary functions are distinguished from non-fiduciary "settlor" functions

- Settlor functions generally include the adoption, amendment and termination of the plan.

- Settlor Functions include Plan design decisions, such as what types and amounts of contributions the Company will make for its employees.

- *Note that even when the decision may be a settlor function, the carrying out of that decision may turn into a fiduciary function*

Settlor or Fiduciary?

- Examples of Fiduciary Functions:
  – Choosing investments or investment managers for the Plan
  – Deciding benefit claims filed under the Plan

- Fiduciary functions must be carried out in compliance with ERISA fiduciary duties and <u>not</u> for the primary benefit of the Company.

- Settlor functions, in contrast, can be carried out in the best interests of the Company.

Can a Corporate Officer or Employee Wear Two Hats (settlor and fiduciary)?

- Yes. The U.S. Supreme Court expressly blessed this in *Lockheed v. Spink*.
- However, need to be clear on when the individual/committee is acting in which capacity - settlor versus fiduciary

What's at Stake

- The U.S. federal courts have held repeatedly and uniformly that ERISA fiduciary responsibility is the **"highest duty known to the law"**

- If a fiduciary fails to meet ERISA's standard of conduct, the fiduciary is ***personally liable*** for any losses resulting from the breach of fiduciary duty

- ERISA allows the U.S. Department of Labor (DOL), the plan administrator, and participants or their beneficiaries to bring an action against the fiduciary

What's at Stake

- Civil and criminal penalties also may apply.
- ERISA allows the DOL to cause a fiduciary to forfeit his or her plan account balances (more on this later).

- **Therefore, *the Committee members assume significant potential liability as fiduciaries of the Plan*.**

What's at Stake

- However, the courts also have held repeatedly and uniformly that discharging ERISA fiduciary responsibility is all about following procedures
- The court and practitioners call this "procedural prudence"

- ERISA does not require that a fiduciary be correct in every investment and administrative decision it makes; only that it carefully follow all appropriate procedures in reaching that decision

ERISA's Fiduciary Duties

A fiduciary must act:

1. Solely in the interest of participants (Duty of Loyalty)
2. With the care, skill, prudence and diligence of a prudent person, expert in such matters (Duty of Prudence)
3. By diversifying investments so as to avoid the risk of large losses (Duty of Diversification)
4. In accordance with the terms of the Plan documents (Duty to Follow the Plan)

ERISA imposes personal liability on fiduciaries

1. Duty of Loyalty

- The Duty of Loyalty requires a fiduciary to:
  - Act solely in the interest of plan participants and beneficiaries, and
  - For the exclusive purpose of providing benefits to plan participants and beneficiaries.
- Some courts refer to this as requiring an “eye single” (or a single focus) on interests of plan participants and beneficiaries.
- ERISA allows that a fiduciary's decision *may* benefit the Company *incidentally.* However, the primary purpose of every fiduciary action/transaction must be to benefit plan participants and beneficiaries.

2. Duty of Prudence

- The Duty of Prudence requires an ERISA fiduciary to act 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 matter would use in an enterprise of like character and with like aims.

- Has evolved into a "prudent expert" standard.
- A fiduciary is not required to be an expert in all (or in any) aspects of managing the plan, but must seek the advice or retain the services of those who are.

- Good faith is not sufficient: *"A pure heart and an empty head is not enough."* - Donovan v. Bierwirth

Duty of Prudence

- The courts also have held repeatedly and uniformly that discharging the duty of prudence is all about following procedures.
- Courts and practitioners call this "procedural prudence."
- ERISA does not require that a fiduciary be correct in every investment and administrative decision it makes; only that it carefully follow appropriate procedures in reaching that decision.

ERISA does not make fiduciaries guarantors of investment performance

Duty of Prudence

- If fiduciaries' meeting minutes reflect a deliberate consideration of an investment, a future allegation that the investment was imprudent will fail, without regard to the performance of the investment

- *See Unisys*

Prudence and Diligence:
The J. Geils Band Case

- Trustees/band members turned over plan assets to a broker with Shearson Lehman Brothers in 1985
- Broker lost money, but generated colossal commissions, for 5 years. Broker provided monthly statements
- Trustees sued in 1993
- Too Late
- The statute of limitations had run

Diligence: See no evil, hear no evil, speak no evil -- and you breached your fiduciary duty!

Barker v. American Mobile Power

- Officer of a privately-held company also served as a Plan trustee.
- Became "suspicious" of company owners' operation of the Plan, but never protested.
- Company went bankrupt, Plan was empty and participants sued officer.

Prudence and Diligence

It is possible to be liable for the acts of a co-fiduciary, if:

- The fiduciary knowingly participates in the other fiduciary's breach or knowingly conceals the breach
- The fiduciary, by failing to satisfy its fiduciary responsibilities, enables the other fiduciary's breach (for example, failing to monitor, etc.)
- The fiduciary has knowledge of the other fiduciary's breach and does not make reasonable efforts to remedy the breach

3. Duty of Diversification

- The Duty of Diversification requires a fiduciary to diversify a plan's investments to minimize the risk of large losses unless, under the circumstances, it is clearly prudent not to do so

- Plan fiduciaries are generally responsible for diversification of the plan's investment portfolio

- Individual investment managers are responsible for diversification within their specific mandate

4. Duty to Administer the Plan in Accordance with its Terms

- ERISA Section 404(a)(1)(D) requires a fiduciary to exercise its duties in accordance with the documents and instruments governing the plan

- These documents include the plan document, the trust agreement, SPD, the investment policy statement or funding policy for the plan and any relevant investment manager's agreement

Duty to Administer the Plan in Accordance with its Terms

- Even if an act or investment otherwise satisfied the standards of ERISA, it could constitute a fiduciary breach if it is *inconsistent with the terms of the Plan* documents (even if neither ERISA nor the Code require that the particular term to be in the Plan, Trust or other document)

- For instance, a federal court found a fiduciary breach where a plan fiduciary invested in equity securities in amounts that exceeded limitations *prescribed by the plan guidelines*

What's Else is Required of a Fiduciary?

- Avoid non-exempt "prohibited transactions." A fiduciary may not:
  - Cause the plan to engage in transactions with a "party in interest" unless an exemption applies.
    - "Party in interest" definition very broad
  - Deal with the plan's assets in the fiduciary's own interest.
  - Act on both sides of a transaction involving the plan.
  - Receive consideration for the fiduciary's personal account from any party dealing with the plan in connection with plan transactions (no kickbacks).
- Custody assets within the jurisdiction of the U.S. District Courts
- Maintain an ERISA bond

Beware of "New" Fiduciary Duties

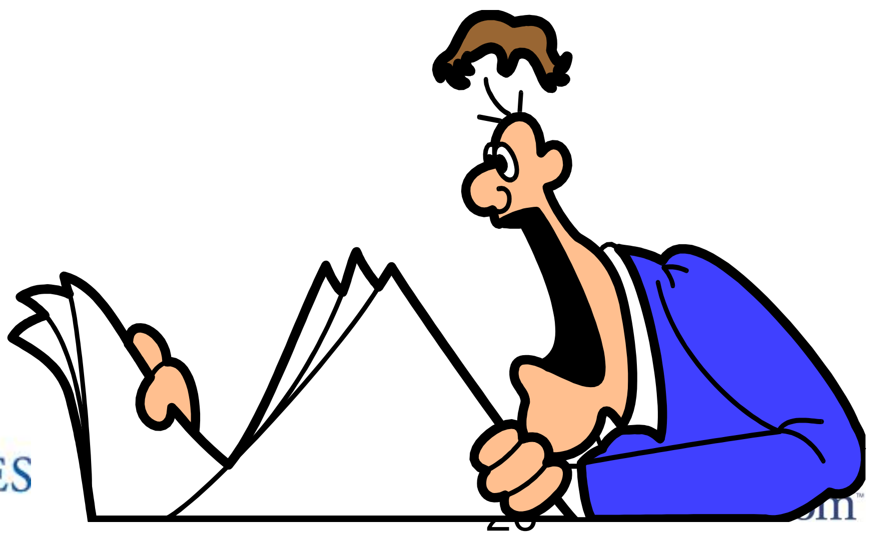
- *Duty to disclose*. Cases have found a fiduciary breach where the plan sponsor neglected to tell employees taking early retirement that it was about to implement an open window incentive
- *Duty to communicate (accurately*). Some courts seeking to compensate participants for employer mistakes in communicating the amount of the participants' benefit have found the mistake a breach of fiduciary duty
- *Duty to hold assets*. In *Atwater v. Nortel Networks*, court found that fiduciaries breached their duty by paying a lump sum to surviving spouse of participant (where spouse had murdered the participant).
- *Duty to "read and understand."* In *Gregg v. Transportation Workers of America*, ERISA requires "that a fiduciary read the policy he signs and have a basic understanding of its most important provisions."
- *Stickle v. SCI Western Market Support Center*, (D. Ariz. 9/30/08). Employees can proceed with their claims that the Company breached its ERISA fiduciary duties by not properly crediting them for their overtime work.

Protecting Fiduciaries - What's At Stake?

- ERISA imposes personal liability on fiduciaries
  - "Personal" really means "personal"—your house, your assets.
- ERISA authorizes lawsuits by participants or the DOL
- Don't forget the Internal Revenue Service

Fiduciaries' Liability – It Gets Worse!

- The Taxpayer Relief Act of 1997 added a new subsection (C) to Code Section 401(a)(13)
- Provides for the **forfeiture of a participant's account balance** or benefit by the amount the participant is required or ordered to pay to the Plan in connection with a lawsuit relating to a breach of fiduciary duty . . . including pursuant to a settlement agreement



Forfeiture of Fiduciary's Account

- The law applies to any fiduciary breach, whether or not criminal
- Any administrative or investment decision by a fiduciary that is successfully challenged by participants or the DOL could result in a potential forfeiture
- Do <u>not</u> include this provision in your Plan or Trust

Remember: a fiduciary is judged by function and actions, not just title

- A person can be a fiduciary based on their scope of responsibilities.
- A person can be a fiduciary based on their actual actions.
- A person can be a fiduciary even if their contract says they are not.
- Individuals are fiduciaries, in addition to companies, committees, trustees, etc.

A Trap for the Innocent Fiduciary

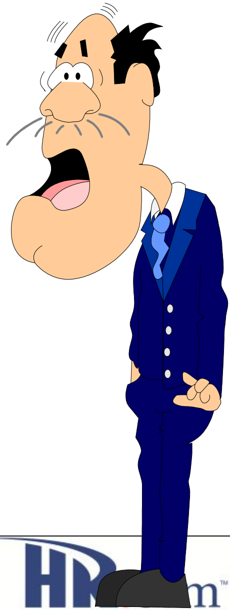
- An individual who is not a named fiduciary can nonetheless become one through actions that seem like ordinary administrative functions
- These “unknown” fiduciaries may not be protected by indemnification provisions, fiduciary insurance and the other protective mechanisms we create

<u>Tabasko v. Direct Communications Group</u>: *Facts*

- Human resources professional fielded questions from participant claiming benefits - advising him that he was not entitled to coverage

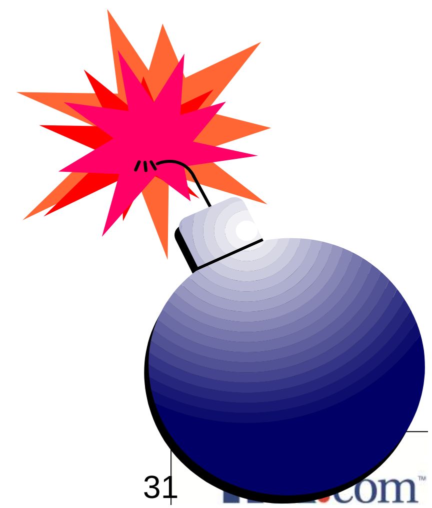
- Participant sued the company for coverage, and sued the HR person for breach of fiduciary duty

- The Court Ruled that by handling claims, the HR person held himself out to the participant as a plan fiduciary and, thus, could be liable as one



Tabasko v. Direct Communications Group
What Does This Mean to You?

- Be careful not to hold yourself out as a plan fiduciary to participants
- Advise participants of ERISA's claims procedures and urge them to follow them
- When writing letters or communicating with employees, indicate that you are acting on behalf of the Company
- ERISA imposes personal liability on plan fiduciaries.



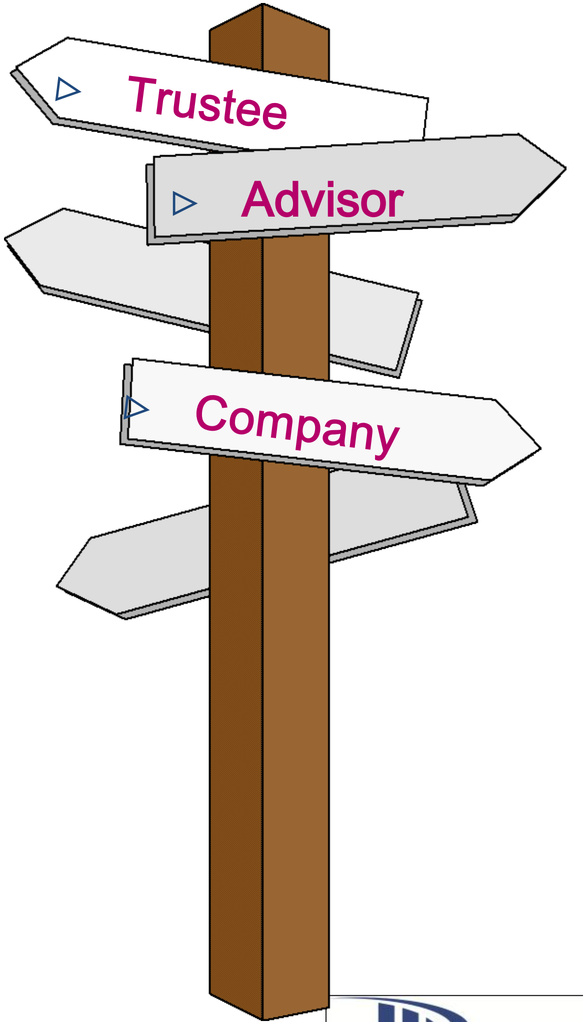
In re Calpine Corp. ERISA Litigation

- Court allows plaintiffs to include HR professional Marybeth Kramer-Johnson in their lawsuit against plan fiduciaries
- Not designated as a fiduciary (or plan administrator) in any document
- Signed the 401(k) plan's annual return Form 5500 for the year as the "Plan Administrator"

Protecting Plan Fiduciaries – While Complying with ERISA

Determine Who Bears the Fiduciary Responsibility under the Plan?

- Is it the Trustee?
- A Named Fiduciary?
- The Plan Administrator?
- An Investment Advisor?
- A Committee?
- The Company? Under ERISA, the plan sponsor initially bears 100% of the fiduciary responsibility.



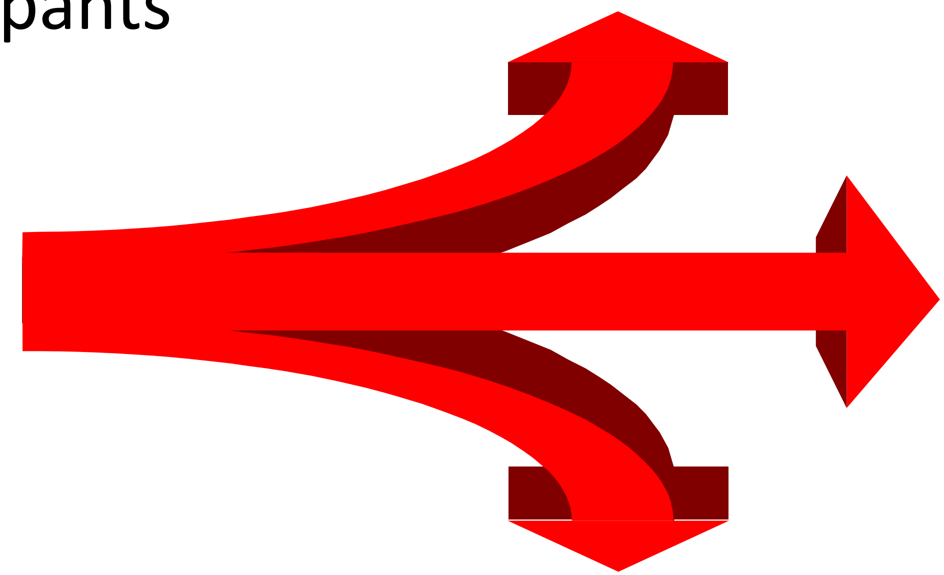
You Can Delegate Fiduciary Responsibility

- ERISA expressly contemplates delegation
  - To a Trustee: *"the trustee shall have exclusive authority and discretion to manage and control the assets of the plan,"*
  - To an Investment Manager (as defined in ERISA): *"a person who is a named fiduciary . . . May appoint an investment manager to manage any asset of a plan."*
- We strongly recommend it
- Concentrate the responsibility (and liability) in those who understand it and are prepared to comply (and are protected)

(It's always better to give than to receive.)

How Do You Delegate Fiduciary Responsibility?

- Delegate it internally, to a Committee
- Delegate it to an outsider
- Delegate it to Plan participants
- Do it right
  - Documentation
  - Indemnity
  - Fiduciary Insurance
  - Training



How to Protect the Plan's Fiduciaries

We recommend a five-step process for benefit plan sponsors to ensure that the appropriate fiduciaries:

- discharge their fiduciary duties and responsibilities, and
- are protected from liability.

How to Protect the Plan's Fiduciaries

1. Centralize and concentrate the fiduciary duties in the hands of a few qualified individuals
2. Establish policies and procedures to help ensure that fiduciaries adhere to their fiduciary duties
3. Train the internal fiduciaries to comply with the established procedures and their fiduciary duties, and
4. Protect internal fiduciaries with fiduciary liability insurance and indemnification
5. Narrow plan provisions that provide for broad fiduciary oversight or overlapping delegations of authority (and otherwise improve plan design)

1. Concentrating Fiduciary Duty

Centralize and concentrate the fiduciary duties applicable to all benefit plans in the hands of a few qualified individuals

– Naming "the Company" as named fiduciary fails to explicitly designate the actual persons who are responsible for discharging the plan's administrative and fiduciary duties (*Also leaves the Board of Directors liable*)
– Creating a Committee and expressly delegating the responsibility for administering the plan to it, makes it clear to all - especially to the Committee members - who is responsible for "getting the job done"

1. Concentrating Fiduciary Duty *(cont.)*

- The Company should design the composition of the Committee to include individuals with differing areas of knowledge and expertise
  - HR
  - Financial
  - Legal
- The result is a group of individuals who understand the fiduciary duties they must perform and are qualified to perform those duties by their experience

2. Establishing Policies and Procedures

- A structure that ensures the careful discharge of ERISA's fiduciary duties itself has several components, including:
  a) Proper organization,
  b) Good procedures, and
  c) Good documentation
- The determination as to whether the Committee fulfilled its fiduciary duties in choosing the plan's investments will focus on the **process** used in making the decisions

a) Proper Organization of the Committee

- Persons named in the plan or appointed by the Board, with a broad range of experience and expertise useful to the Plan
- Appoint the Committee as the "named fiduciary" of the Plan
- The Committee should adopt a charter

b) Committee's Policies and Procedures

- The Committee should hold at least four regular meetings per year
- Meetings should include full attendance
- Meetings usually include reports by outside experts (accounting, investing, legal, *etc*.)
- In advance of every meeting, the Committee Chair or Secretary should prepare and distribute to members an agenda of matters the Committee will address at meeting.

b) Good Procedures for the Committee

- The Committee should seek the advice and/or participation of experts when necessary.
- Seek expert advice in areas where the Committee is not expert, *e.g.,* derivatives or international equity investing

c) Good Documentation

- Secretary should keep detailed minutes of every meeting, including copies of all materials distributed, reviewed or evaluated during the meeting (*e.g.*, quarterly reports or other investment advisor communications)
- *George v. Kraft Foods Global, Inc.*, 641 F.3d 786 (2011). A tip for fiduciary committee meeting minute taking. Try to avoid gaps the give a willful court the opportunity to reach for the decision it wants. The opinion made much of the point that:

  "despite all of this discussion of investment and transactional drag, however, we can find nothing in the record that defendants ever made a decision on these matters--*i.e.*, that they actually determined whether the costs of making changes to the CSFs outweighed the benefit or vice versa."

c) Good Documentation

- *George v. Kraft*. Since the committee did not make the change, its decision on the matter is obvious to everyone on the planet, except, apparently, this court!
- The omission of seven words allowed this court to turn deliberations on the matter, reflected in detailed, contemporaneous meeting minutes [two best practices] into a conclusion that "no Plan fiduciary ever made a decision regarding the solutions to investment and transactional drag that were proposed between 2002 and 2004." (The fiduciaries' law firm could have done a much better job in argument and evidence on this point too.)
- Note that plaintiffs' counsel hadn't even alleged or argued this point!

c) Documentation and Procedures: Establish an Investment Policy

- ERISA §402(b) requires that every employee benefit plan provide a procedure for establishing and carrying out a ***funding policy and method*** consistent with the objectives of the plan

- Committee must establish written investment objectives and investment guidelines to develop an appropriate investment policy for the Plan.
- Once the investment objectives and guidelines are in place, they provide a structure for making investment decisions
- The Committee should update the investment policy periodically to ensure continued suitability for the Plan.

3. Education and Training

- Fiduciary training helps protect plan fiduciaries from liability by helping them understand and properly discharge their fiduciary duties.
- The DOL and providers of fiduciary insurance are asking: Do you provide training to your plan fiduciaries?
- Because ERISA emphasizes compliance with procedures, we want each member of the Committee to be able to say that:

    The Company had trained him or her in the functioning of the Plan, the requirements of ERISA, and the procedures established to ensure compliance with those requirements, and he or she understood those requirements and the duties of ERISA, and followed the established procedures

3. Education and Training

- Courts have viewed fiduciary training as a positive factor in recent litigation.
  - For example, in a recent settlement of ERISA class actions involving Ford Motor and RadioShack, the company/plan sponsor agreed to provide third-party fiduciary training for their fiduciary committee.
- "Witness Stand" test:
  - Have you received training to serve as a fiduciary?
  - Have you read your plan documents/investment policy/etc.?
- Another good reason to place all fiduciary responsibility (and liability) in one group

4. Protecting the Committee: Indemnification and Fiduciary Insurance

- Committee and its members should be indemnified by the Plan (and by Resolution), except for acts of “willful misconduct”
- Purchase fiduciary insurance to cover Committee
  - Separate from ERISA bonding requirement
  - Coordinate with D&O policy

Another good reason to place all fiduciary responsibility and liability in one group

5. Protecting the Fiduciaries

- The Company and the Committee should take care to:
  - Eliminate inconsistencies among plan documents
  - Narrow any provisions that provide for broad fiduciary oversight or overlapping delegations of authority
  - Ensure that all *SPDs and other communications* with Plan participants clarify the role of the Committee (and the individuals serving as Committee members)
  - Incorporate state-of-the-art drafting protection

5. Protecting the Fiduciaries

- Any correspondence to a Plan participant from an individual who is a Committee member (or acting at the direction of the Committee) relating to the participant's claim for benefits should explicitly state that the individual is acting in his or her capacity as a Committee member (or at the direction of the Committee).

5. Protecting the Fiduciaries

- One of the most significant components of protecting the fiduciaries through plan drafting involves acquiring and preserving the protection of ERISA Section 404(c)
- The ongoing monitoring, and communication to Plan participants, of investment fund performance by the Committee is critical to maintaining 404(c) protection
- This function should be included among the "procedures" followed by the Committee

ERISA Section 404(c)

- One way to delegate fiduciary responsibility is to give it to your participants.

  (Don’t worry - they never become liable.)

- ERISA Section 404(c) allows the plan sponsor to give participants the right to direct the investment of their accounts - and avoid the fiduciary responsibility for those investments.

ERISA Section 404(c) Protection

What is it?

- ERISA Sec. 404(c) provides that, if a participant in an individual account plan exercises control over the assets in his or her account, the Committee and other plan fiduciaries will be relieved from liability for any loss resulting from the participant's investments

- Plan sponsors are <u>not required</u> to comply with ERISA 404(c). Noncompliance means only that Plan fiduciaries remain liable for damages resulting from their own, or participants', investment choices

ERISA Section 404(c) Protection

How to Get It: Three Main Components

1. Offer participants the opportunity to direct the investment of their accounts among a broad range of investment alternatives;
2. Offer each participant the opportunity to give investment instructions to an identified plan fiduciary; and
3. Give each participant sufficient information to make informed decisions regarding investment options available under the Plan

… *PLUS 22 MORE!*

ERISA Section 404(c) Protection

How to Keep It:

- Monitor investment performance
- Supply investment information
  - Prospectuses
  - Notice of 404(c) status
  - Fees

ERISA Section 404(c) Protection

What is it Worth?

- The named fiduciary will no longer be responsible for investment gains or losses on participants' accounts
- *In re Unisys* upheld this protection

Give me an example . . . In re Unisys

- Suppose you made the worst possible investment . . . in a company that became insolvent. That's what the Unisys Plan fiduciaries did with Executive Life GICs
- But the courts found that the fiduciaries did not breach their duties under ERISA
  1. Gave participants the ability to switch out of the GIC fund
  2. Investigated Executive Life before purchase of GIC
  3. Retained an expert
  4. Monitored Executive Life's financial condition
  5. Kept participants apprised of same

Section 404(c) and QDIA

Qualified Default Investment Alternative (QDIA) rules also offer fiduciary protection

- Provide limited protection from fiduciary liability when amounts are invested without an investment instruction from the participant.
- Default investment must meet criteria to be a QDIA (*e.g.* target date funds – carefully selected).
- Ongoing notice requirements.
- Does <u>not</u> relieve fiduciary of liability for prudent selection and retention of QDIA.

QDIA

- Employee must receive **notice** before the start of each plan year:
  - Explaining his/her rights to direct investments and how investments will be made in the absence of direction, and
  - A reasonable period of time after such notice and before the beginning of the plan year to make such direction.

- Particularly relevant for 401(k) plans, like the GBC Plan, that provide for automatic enrollment

Other Fiduciary and Administration Issues

Oversight of Third Party Service Providers

- The Seventh Circuit's opinion in *George v. Kraft Foods Global, Inc.* calls into question common plan practice of relying on consultants to determine if service provider fees are reasonable
  - Possible that plan sponsors may need to conduct frequent RFPs with service providers to demonstrate prudence
  - Reliance on consultants may not be enough
  - Decision could increase litigation with respect to service provider fees
- DOL Emphasizes Duty to Monitor
  - DOL institutes suit against Clark Graphics for failure to monitor third party plan administrator

Investment and Administration Fees

- ERISA expressly permits a plan administrator to pay reasonable administrative expenses in connection with a Plan from the Plan's assets, without violating the exclusive benefit and fiduciary duty provisions of those sections.
- A "Hot Button" issue for the DOL and plaintiff lawyers
  - 401(k) fees are rising (which could adversely impact participants' accounts)
  - DOL wants to ensure that plan fiduciaries are providing all necessary fee information to participants

Investment and Administration Fees *(cont.)*

- Fiduciary Concerns:
  - Only appropriate fees are paid from plan assets
  - Proper communications relating to fee disclosure
  - Operate plan in best interest of participants (including avoiding excessive fees)
- Mutual Fund Fees. Plan fiduciaries must:
  - Make sure that fees and expenses are adequately disclosed to participants, and
  - Investigate and monitor the fees and expenses to confirm they are reasonable – <u>Lowest Available</u>

401(k) Plan Fee Cases

George v. Kraft Foods Global, Inc., 641 F.3d 786 (2011).

- Plaintiffs argued that prudent fiduciaries would have solicited competitive bids for recordkeeping services on a periodic basis—about once every three years—and that defendants' failure to solicit periodic bids after initially hiring Hewitt resulted in Hewitt receiving an excessive fee once its initial contract term expired.
- In support of this claim, plaintiffs offered questionable testimony of an "expert" who reviewed the process that defendants followed when they extended Hewitt's contract and opined that:
  – defendants acted imprudently by extending the contract without first soliciting bids from other recordkeepers.
  – a reasonable fee for the kind of recordkeeping services the Plan needed would have been between $20 and $27 per participant per year, rather than the $43 to $65 the Plan paid to Hewitt.

401(k) Plan Fee Cases

George v. Kraft Foods Global, Inc.

- Defendants argued that prudence did not require them to solicit bids before extending Hewitt's contract.
  - Defendants had engaged several independent consultants for advice as to the reasonableness of Hewitt's fee and argued that in doing so they satisfied their duty to ensure that Hewitt's fees were reasonable.
- The federal district court granted summary judgment to defendants, determining that
  - The expert's opinions were "of limited relevance" because his experience involved working with the retirement plans of mid-sized companies rather than the plans of large companies such as Kraft, and
  - The Plan fiduciaries were told by their consultants that Hewitt's fees were reasonable, and that the Plan prudently relied on the advice of these consultants.

401(k) Plan Fee Cases

George v. Kraft Foods Global, Inc.

- Seventh Circuit reversed, finding that
  - The expert's opinions were relevant and admissible, and
  - The fiduciaries were not necessarily prudent in relying on the advice of consultants in lieu of bids.
- Plan fiduciaries should consider putting out for bid every three years or so,
  - The plan's fee arrangement, and
  - The investment fund provider

  Regardless of whether the plan fiduciaries use an independent consultant or not

401(k) Plan Fee Cases

Tussey v. ABB Inc., W.D. Mo., 3/31/12). One of the few Section 401(k) plan fees cases that has reached a decision on the merits. Court found ruled ABB breached its fiduciary duties, by:

- failing to monitor recordkeeping costs;
- failing to negotiate rebates from the plans from either Fidelity or other investment companies that offered investments in ABB's Section 401(k) plans;
- selecting more expensive share classes for the Section 401(k) plans when less expensive share classes were available;
- removing the Vanguard Wellington Fund from the plans and replacing it with Fidelity's Freedom Funds; and
- *agreeing to pay Fidelity an amount that exceeded market costs for plan services in order to subsidize the corporate services Fidelity provided to ABB, such as ABB's payroll and recordkeeping for the company's health plan and defined benefit plan.*

Apparently, ABB had even been advised by an independent investment consultant that the fees were too high – and ignored that advice.

New Fee Disclosure Requirements

- Plan administrator must provide each participant and beneficiary an initial disclosure on or before the date of plan eligibility and annually thereafter
  - Disclose general information about plan investments, plan-wide administrative expenses, and individual expenses and must include a comparison chart detailing investment performance and expenses
  - Initial compliance deadline is May 31, 2012
- Plan administrator must also provide each participant and beneficiary with quarterly disclosures
  - Include total cost charged to participant's account for administrative services and other charges
  - Initial compliance deadline is August 14, 2012
- Service provider disclosure rules go into effect April 1, 2012

Q & A

Questions
and
Answers

Mike Melbinger is a partner in the law firm of Winston & Strawn LLP, and global head of the Firm's Executive Compensation and Employee Benefits Practice. Mike is also an Adjunct Professor of Law at both the University of Illinois College of Law and Northwestern University School of Law.

Mike is the author of the CCH treatise Executive Compensation, the American Bankers Association's Compliance Guide to Employee Benefit Trusts, and more than 70 articles on executive compensation and employee benefits topics. He is also on the editorial board of *myNQDC.com* and *Practical Tax Strategies*, and writes "Melbinger's Compensation Blog" for *CompensationStandards.com*, the oldest and most widely read on the topic.

He has testified before the Senate Banking Committee and is frequently quoted in *The New York Times*, *The Wall Street Journal*, *Business Week* and other national publications. He has appeared as a guest on the *Jim Lehrer News Hour*, the *Fox News Business Report* and other nationally broadcast television programs.

Mike is a fellow into the American College of Employee Benefits Counsel and in the American Bar Foundation. He was named to the *2011 BTI Client Service All-Stars*. Each year since 2007, he has been named a Leading Lawyer for Business by *Chambers & Partners*, one of The Best Lawyers in America, and one of the top 100 lawyers in Illinois by "*Illinois Super Lawyers*." He is a member of the ABA and NASPP.

Mike received a B.A. from the University of Notre Dame in 1980 and a J.D. from the University of Illinois College of Law in 1983. He serves on the Board of Visitors of the University of Illinois College of Law.