

Fiduciary Liability Insurance



Why is it necessary to carry fiduciary liability insurance? As a fiduciary, your personal assets are at stake!

- Fiduciary Liability Insurance is not required by ERISA. However, it is strongly recommended for those individuals with fiduciary responsibilities, because their personal assets are at stake.
- Under the Employee Retirement Income Security Act of 1974 (ERISA), fiduciaries may be held personally liable for breach of their responsibilities in the administration or handling of employee benefit plans. Plan fiduciaries must abide by the "Prudent Man Standard of Care", whereby decisions made with regard to an employee benefit plan must be made solely in the interest of the participants and beneficiaries of those plans.
- ERISA applies to any plan, fund or program established or maintained by an employer or employee organization to provide pension or welfare benefits to its participants/beneficiaries.

◆ Examples of pension plans are:

- Defined benefit pension plans (those plans that state the exact benefit to be received by a participant/beneficiary upon retirement);
- Defined contribution pension plans (those plans in which benefits are based solely on the amount contributed to the account)

◆ Examples of welfare plans are:

- Medical, dental, life, disability, flexible spending, accidental death

Who is a fiduciary?

A fiduciary is a person to whom property is entrusted for the benefit of another. According to ERISA, you are a fiduciary of an employee benefit plan if you:

- Are named in the plan document or are identified as a fiduciary by the sponsor of the plan.
- Exercise any discretionary authority or discretionary control with respect to the management, administration or disposition of plan assets.
- Provide investment advice for a fee or other compensation.

COMMON MISCONCEPTIONS:

1. *I can't afford this coverage.*

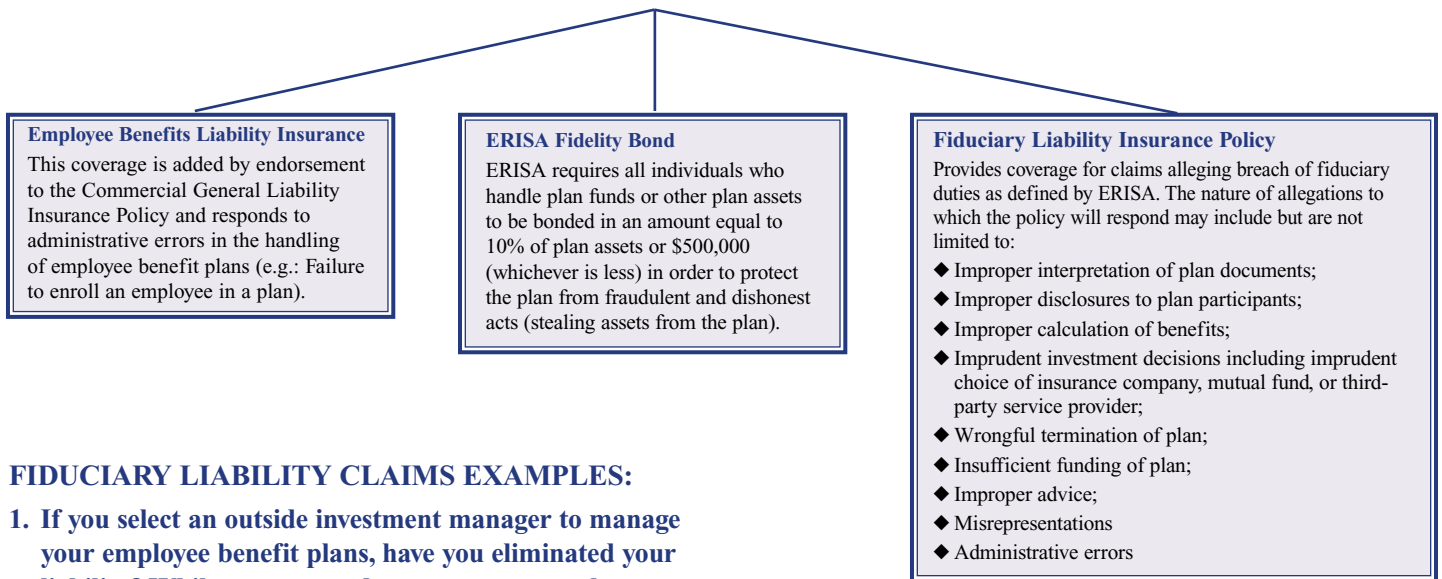
It is less expensive to purchase a fiduciary liability insurance policy than it is to retain a competent ERISA defense attorney. Premiums are very reasonable.

2. *I have a fidelity bond to cover my fiduciary exposure.*

Many fiduciaries believe their ERISA fidelity bond protects their personal assets – it doesn't!

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Insurance and bonding coverage related to employee benefit plans and their fiduciaries fall into three areas that are commonly confused. If you purchase only one or two of these coverages, you could be exposed to significant gaps in your insurance program, and thus some of your personal assets may be at risk.



FIDUCIARY LIABILITY CLAIMS EXAMPLES:

1. If you select an outside investment manager to manage your employee benefit plans, have you eliminated your liability? While you may reduce your exposure by delegating fiduciary duties to outside experts, liability does still remain as the following example illustrates:

A small company established a 401k plan for its employees. The company named itself as the plan's fiduciary and the company president served as the plan trustee. The plan hired an outside money management firm to manage its plan assets. The investment firm provided the plan with regular, but limited performance data. When the company hired a new controller, he became concerned over the lack of investment data and informed the company president, who did not take immediate action. When the president finally did make an attempt to withdraw the funds from the investment firm, it was too late. The investment firm was bankrupt. The court held that the company and the company president violated their fiduciary obligations by selecting an unfit money manager and not exercising reasonable diligence in monitoring the money manager's performance. The court ordered that both the company and the president, personally, pay the plan more than \$635,000.

2. Changes in ERISA and tax laws can be difficult to monitor. Are you exposed to liability for failure to track and implement those changes?

A financial services firm maintained a defined benefit plan. The trustee of that plan failed to amend the plan in a timely fashion to comply with tax law changes. As a result, the Internal Revenue Service disqualified the plan. Subsequently, the trustees entered the IRS Closing Agreement Program and paid the IRS \$142,000 to have the plan's "qualified" status restored. New trustees were

appointed, and they sued the old trustees for breach of fiduciary duty for failure to maintain the tax "qualified" status of the plan. The old trustees consented to a judgment of \$294,000.

3. Errors in the administration of an employee benefit plan can easily happen. Are you exposed to liability for these errors despite your best intentions?

A small manufacturing company that offered welfare plans for long-term disability and life insurance failed to notify the life insurance company that premium payments would be suspended for one of their employees who was out on long-term disability. As a result, the life insurance coverage for this individual was terminated. When the employee died and the life insurance company denied payment due to the fact that premium payments had not been made, the estate of the deceased employee sued the fiduciaries of the plan. The fiduciaries were ordered to pay \$52,000.

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