ROLE AND RESPONSIBILITIES OF FIDUCIARIES

Who is a fiduciary?

Under ERISA and most state pension laws, a person is a fiduciary when that person:

- Exercises any discretionary authority or control regarding management of or the investment of plan assets; or
- Renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of the plan, or has any authority or responsibility to do so; or
- Has any discretionary authority or discretionary responsibility in the administration of the plan.

Fiduciary status is based on the functions performed for the plan, not just a person’s title.

Attorneys, accountants, and actuaries generally are not fiduciaries. Labor unions representing participants are not fiduciaries. The key to determining fiduciary status is whether an individual or company is exercising discretion or control over the plan or its assets.

What is the significance of being a fiduciary?

Fiduciaries have critical responsibilities in protecting the plan and its participants and are subject to the highest standard of care known under the law.

- A fiduciary must discharge his/her duties solely in the interest of the participants and beneficiaries.
  - Courts have interpreted this to mean that fiduciaries must act “with an eye single to the interests of the participants and beneficiaries” and with complete and undivided loyalty to the beneficiaries.
  - Trustees "must overcome any loyalty to the interest of the party that appointed" them when functioning in their capacity as plan fiduciaries.
  - A fiduciary must discharge his/her duties for the exclusive purpose of:
    - providing benefits to participants and their beneficiaries; and
    - defraying reasonable expenses of administering the fund.
    - Exception: Fiduciaries will not be held to have breached either the “solely in the interest” or the “exclusive benefit” requirements when they take action that is prudent and intended to primarily benefit the plan but the
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action also benefits the sponsor or trustees of the plan or a larger public purpose.

Co-Fiduciary Liability

A fiduciary may be held responsible for breaches or mistakes committed by another fiduciary, if:

• The fiduciary knowingly participates in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, when such act or omission is a breach;
• By failure to comply with fiduciary duties, the fiduciary enables the other fiduciary to commit a breach; or
• The fiduciary has knowledge of a breach by such other fiduciary, unless she makes reasonable efforts under the circumstances to remedy the breach.

Prohibited and Permissible Transactions:

Certain transactions are prohibited under the law to prevent dealings with parties who may be in a position to exercise improper influence over the plan. Fiduciaries are also prohibited from engaging in self-dealing and must avoid conflicts of interest that could harm the plan.

• Prohibited Transactions:
  • A fiduciary may not:
    ▪ deal with the assets of the pension fund in one's own interest or for one’s account;
    ▪ act in any transaction in a fiduciary or personal capacity on behalf of a party who represents or has interests adverse to the fund;
    ▪ receive any compensation or anything of value for one’s own personal account from any party dealing with or who is involved with the assets of the fund.
  • A Trustee, fund employee, or consultant may not knowingly cause or advise the fund to engage in an investment transaction with an investment manager when the Trustee, fund employee, consultant (or their spouse) has:
    ▪ Any direct interest in the income, gains, or profits of the investment manager through which the investment transaction is made; or
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- A relationship with that investment manager that would result in a pecuniary benefit to the Trustee, fund employee, or consultant as a result of the investment transaction.

- **Permissible Transactions.** A fiduciary is not prohibited from the following:
  
  - Receiving benefits which one would normally be entitled to as a participant or beneficiary of the fund.
  
  - Reimbursement of expenses “properly and actually” incurred while performing duties related to the fund.
  
  - Serving as a trustee in addition to being an officer, employee, agent or other representative of a party in interest.

Who is prohibited from doing business with the plan?

Prohibited parties (called parties in interest) include the employer, the union, plan fiduciaries, service providers, and owners, officers, and relatives of parties in interest.

Some of the prohibited transactions under ERISA and state pension laws:

- A sale, exchange, or lease between the plan and party in interest;
- Lending money or other extension of credit between the plan and party in interest;
- Furnishing goods, services, or facilities between the plan and party in interest.

A fiduciary who fails to follow these duties may be held personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets. Plan fiduciaries that willfully violate their responsibilities can also be subject to criminal penalties and to civil actions by participants.

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Disclaimer: Nothing in this document shall be considered or construed as legal advice and trustees are encouraged to seek legal advice from plan counsel.