



# NAGDCA NOTES

## Fiduciary Responsibility of Plan Administrators: What is it and how does it affect you?

### Who is a Plan Fiduciary?

While governmental plans, both defined benefit and defined contribution plans are not subject to the provisions of the Employee Retirement Income Security Act ("ERISA"), the provisions of ERISA are grounded in well-established trust principles<sup>i</sup> and are instructive in guiding most, if not all, governmental plans.<sup>ii</sup> A plan administrator must review plan and trust documents, his/her own State laws and regulations regarding defined contribution plans, if any, and State trust law.

A plan fiduciary is obligated to administer the plan for the exclusive benefit of its participants and beneficiaries.<sup>iii</sup> Moreover, the fiduciary must perform his or her duties in a prudent manner, i.e., using the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with such matters would use in the conduct of an enterprise of similar character and aims.<sup>iv</sup> Thus, an objective standard, sometimes referred to as the prudent expert rule, is applied to actions taken by a fiduciary. The determination of who is a plan fiduciary is significant because a fiduciary has personal liability for a violation of his/her fiduciary duty.<sup>v</sup>

Generally, the members of a defined contribution plan's governing board or committee ("plan board"), particularly when they are determining the plan's investment array, default investment, etc., are plan fiduciaries,<sup>vi</sup> while "plan sponsor" activities in establishing, amending and terminating a plan do not involve fiduciary duties. The issue of whether the staff who are involved in the day to day operation of the plan and/or who provide administrative support to the plan board are plan fiduciaries is less clear cut. Fiduciary status is determined based on the functions performed for the plan, not the individual's title.<sup>vii</sup> The administrative staff is acting as fiduciaries when they are exercising discretion or control over the plan or its assets.<sup>viii</sup> A plan administrator who performs purely ministerial functions is not a fiduciary.<sup>ix</sup>

In applying ERISA, the U.S. Department of Labor has long ruled that persons who do not have the authority to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative tasks for a plan within the framework of a plan's policies, interpretations, rules, practices and procedures, are not plan fiduciaries. These tasks include:

1. The application of rules to determine eligibility for participation or benefits.
2. Calculation of service for vesting benefits
3. Preparation of employee communications material,
4. Maintenance of participants' service and employment records,
5. Preparation of reports required by government agencies,
6. Determination of benefits,
7. Orientation of new participants,
8. Advising participants of their rights and options under the plan,
9. Collection of contributions and application of contributions as provided in the plan,
10. Preparation of reports concerning participants' benefits,
11. Processing of claims, and
12. Making recommendations to others for decisions with respect to plan administration.<sup>x</sup>

(859) 514-9161 • Fax: (859) 514-9166 • [www.nagdca.org](http://www.nagdca.org)

## **What is the Significance of Being a Fiduciary?**

Fiduciaries have great responsibilities because they are acting on behalf of their plan participants and their beneficiaries. According to the Department of Labor<sup>xi</sup>, the responsibilities include:

1. Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
2. Carrying out their duties prudently;
3. Following the plan documents (unless inconsistent with ERISA);
4. Diversifying plan investments; and
5. Paying only reasonable plan expenses.

## **What Kinds of Activities Involved Fiduciary Duties?**

The following are among the various issues which are resolved by the administrative staff and which can involve fiduciary duties.

Plan Expenses - In many governmental defined contribution plans, particularly if they are supplemental to a defined benefit plan, the plan sponsor requires that the plans be operated at no cost to the plan sponsor. Thus, the expenses of the plan's administrative staff are charged to the plan. To the extent that an administrator determines the appropriate allocation of the costs for in-house staff and other plan expenses, the administrator would be acting as a fiduciary. 29 CFR 2509.75-8 (D-3)

Hardship and Unforeseen Emergency Withdrawals - In those 401(k) plans which permit hardship withdrawals and 457(b) plans which permit unforeseeable emergency withdrawals, the final decision to approve participant applications for such withdrawals, particularly when applying a facts and circumstances analysis and not safe harbor rules, can be a fiduciary function. In those plans where a staff member makes that decision, he/she would be acting as a fiduciary.

QDROs - Processing and administering Qualified Domestic Relations Orders (QDROs) may also involve the exercise of discretion. For example, if a plan administrator makes the final decision that a domestic relations order is acceptable to the plan, that determination would be a fiduciary decision.

Loans - In most cases, approval of plan loans would be ministerial and not involve discretion. Where, however, a loan applicant must satisfy a qualifying requirement to be eligible for certain loans, e.g., a loan to purchase a primary residence, approval of such a loan by administrative staff would also involve the exercise of discretion or judgment and would thus be subject to fiduciary duty.

Duty to Comply with Plan Terms - ERISA requires that a plan be operated in accordance with the documents and instruments governing the plan, unless the plan terms are contrary to applicable law. Thus, a plan fiduciary is under a double duty: he/she must both know and act in accordance with plan terms. This duty requires that plan administration be monitored to insure that the plan is being operated in accordance with plan documents. In many plans, administrative staff is responsible to monitor plan administration.

One area where this can be problematic is a plan's investment policy. If a plan has adopted a formal investment policy, and plan staff monitors that investment decisions are in compliance with that policy, this duty would be a fiduciary one.

### **ADDITIONAL RESOURCES:**

- [http://www.nagdca.org/content.cfm/id/fiduciary\\_check\\_list](http://www.nagdca.org/content.cfm/id/fiduciary_check_list)
- [https://www.principal.com/allweb/docs/ris/marketing\\_materials/pq/pq\\_5813.pdf](https://www.principal.com/allweb/docs/ris/marketing_materials/pq/pq_5813.pdf)
- [http://www.bridgebay.com/BBFIArticles/RetirementArticles/On\\_Being\\_a\\_Fiduciary.pdf](http://www.bridgebay.com/BBFIArticles/RetirementArticles/On_Being_a_Fiduciary.pdf)

*Neither NAGDCA, nor its employees or agents, nor members of its Executive Board, provide tax, financial, accounting or legal advice. This memorandum should not be construed as tax, financial, accounting or legal advice; it is provided solely for informational purposes. NAGDCA members, both government and industry, are urged to consult with their own attorneys and/or tax advisors about the issues addressed herein.*

**SOURCES:**

- <sup>i</sup> 29 USCS 1104(a); *Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997); *Bixler v. Central Pennsylvania Teamsters*, 12 F.3d 1292, 1299 (3d cir. 1993).
- <sup>ii</sup> Some governmental plans incorporate ERISA standards in their plan documents, trust agreements and third party provider contracts.
- <sup>iii</sup> See, 29 USC §1104(a)(1)(A)(i); also, the Internal Revenue Code (§401(a)(2)), includes the exclusive benefit rule to satisfy a plan's tax qualification.
- <sup>iv</sup> 29 USC §1104(a)(1)(B).
- <sup>v</sup> 29 USCS §1105 and 29 USCS §1009(a); *Authier v. Ginsberg*, 757 F.2d 796 (6<sup>th</sup> Cir. 1985).
- <sup>vi</sup> 29 USCS §1002 (21)(A).
- <sup>vii</sup> 29 CFR 2509.75-8 (D-4); *Riley v. Murdock*, 890 F. Supp 444 (1995, ED NC).
- <sup>viii</sup> 29 USCS §1002 (21)(A).
- <sup>ix</sup> 29 CFR 2509.75-8 (D-2); *Livick v. The Gillette Company*, 524 F.3d 24 (1<sup>st</sup> cir. 2008).
- <sup>x</sup> 29 CFR 2509.75-8 (D-2).
- <sup>xi</sup> [www.nextfinancial.com/html/DOLfiduciaryresponsibility.pdf](http://www.nextfinancial.com/html/DOLfiduciaryresponsibility.pdf)

Edward F. Zagajeski, Special Counsel – Pensions Metropolitan Transportation Authority (New York)  
with assistance by Maria LaVaglia, a paralegal assistant at the Metropolitan Transit Authority