

# Trustee Insights

## FIDUCIARY DUTIES



## Fiduciary Responsibilities of Hospital Trustees

### Key areas of financial oversight to consider

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Increasingly, hospitals and health systems, along with the individuals serving on their committees and governing boards, are seeing the need for prudent oversight of their organizations' 403(b) and 401(k) plans. Due to a rising number of lawsuits, trustees need to ensure that their organizations are taking

proactive steps to protect their organizations and themselves.

Corporate governance events in the financial services industry over the last few years have caused retirement plan sponsors in all fields, including health care, to pay more attention to transparency or full disclosure and explanation of fees charged by plan service providers.

The problem is that the costs are all too often "hidden" within the expense of the investment fees. Instituting prudent procedures in the ongoing operation of retirement programs is paramount in managing the risks associated with retirement programs: investment risk, expense risk (both investment and plan), fiduciary risk and organization reputation risk.

### Expense Risk: Beware the Hidden Fees

Plaintiff class action lawyers have brought more than 14 major lawsuits accusing Fortune 100 companies and members of their boards of directors and senior officers of violating the Employee Retirement Income Security Act (ERISA) of 1974, by allowing their employees to be overcharged by vendors of their 401(k) — and similar plans — for administration services and investment management.

Plaintiff lawyers have since moved on to bring similar lawsuits involving smaller 401(k) and 403(b) plans — plans as small as \$50 million in assets. In 2020 alone, more than 90 such lawsuits were brought, and the number is likely to continue to increase.

The primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses.

## Are Your Fees ‘Reasonable’?

When the fees for services are paid out of plan assets, fiduciaries will want to understand the fees and expenses charged, and the services provided. While the law does not specify a permissible level of fees, it does require that fees charged to a plan be “reasonable.”

After careful evaluation during the initial selection, the plan’s fees and expenses should be monitored to determine whether they continue to be reasonable. An examination of whether fees paid to service providers and other expenses of the plan are “reasonable” is a critical ERISA fiduciary requirement. Not only is there potential fiduciary liability for failure to examine this issue, but the ERISA 404(c) safe harbor section — which may insulate a trustee from ERISA fiduciary liability — may be negated by failure to identify and disclose all plan fees and expenses to plan participants.

Finally, it is our experience that such a review may “recapture” significant assets for the benefit of both the employer and plan participants.

## Fiduciary Checklist for Trustees: 403(b) and 401(k) Plans

ERISA requires oversight of retirement plans. Here are a few questions to assess how your board is managing plan risks as well as investment, expense and fiduciary risks:

- Do we have the right governance oversight structure in place for our employees’ retirement plan?
- Are we taking the necessary steps to reduce our fiduciary responsibility?
- Do we know the “hard dollar” fees our vendors have taken from participants’ retirement accounts? How do we know that they are reasonable?
- How are the investments in the retirement plan(s) selected?
- Are we prudently monitoring and evaluating these investments on an ongoing basis?
- Do we have an ongoing process in place that is documented?
- Do we have internal expertise, or should we engage the services of an outside specialist?

## The Risk of Personal Liability

With fiduciary responsibility comes potential liability. Fiduciaries that do not follow the principles of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets. Courts may take

whatever action is appropriate against fiduciaries that breach their duties under ERISA, including their removal.

A fiduciary should be aware of others who serve as fiduciaries to the same plan, since all fiduciaries have potential liability for the actions of their co-fiduciaries.

## Process, Process, Process

The duty to act prudently is one of a fiduciary’s central responsibilities under ERISA. Prudence focuses on the process for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions.

It is important to document the in-depth process of due diligence on recordkeeping services and their fees compared to others — not casual benchmarking — and document reasons for changing or

## TRUSTEE TAKEAWAYS

- Are you aware of your fiduciary status with your organization’s 403(b) or 401(k) plans and what the stipulated responsibilities are?
- Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore losses to the plan.
- Prudence focuses on the process for making fiduciary decisions: Are you knowledgeable about your organization’s process?
- When was the last time an in-depth service and fee analysis was performed on the record keeper, custodian, actuarial and investment advisors? Every four to five years is a best practice.

maintaining providers. Repeating this process every four to five years is prudent behavior.

### **Be Mindful of the Many Fiduciary Risks**

In this litigious and heavily regulated environment, underscored by increased congressional interest in fees charged to plans, it is clear that plan service providers with

complex payment structures, such as revenue sharing arrangements, must be mindful that their acts could cause fiduciary issues and concerns to plan sponsors.

Assuring the “reasonableness of fees” in a retirement plan is a fiduciary duty; however, it is not easily ascertained. Retirement consultants and attorneys that are fiduciary advisors and specialize in this are your plan’s best ally.

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