

Fiduciary liability

How insurance can protect against benefit plan mismanagement

INTERVIEWED BY ROGER VOZAR

Companies can be held liable if they breach their fiduciary duties in managing employee benefit programs such as pensions, profit sharing, health care and 401(k) plans.

This risk remains even if you hire a third party to manage your plans.

“A lot of companies have hired these outside consultants to manage 401(k) and other pension plans in an attempt to mitigate exposure. In reality, they still have liability because they chose the consultant,” says Peter Bern, CEO of Levery Insurance Group.

Smart Business spoke with Bern about what fiduciary liability insurance covers and how it fits with other business insurance policies.

Who is considered a fiduciary?

A fiduciary is the individual responsible for controlling the management of employee benefit plans, investment of funds, and controlling or disposing of plan assets. That includes consulting firms, attorneys, accountants and other entities that service pension plans.


A fiduciary is required to:

- Act solely in the interest of plan participants and their beneficiaries with the exclusive purpose of providing benefits to them.
- Carry out their duties prudently.
- Follow plan documents.
- Diversify plan investments.
- Ensure plan expenses are reasonable.

The Department of Labor (DOL) was concerned about plan expenses in the 2012 issuance of a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA). Workers lost significant amounts of retirement savings after the 2008 financial crisis,

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and the DOL sought to make fiduciaries more accountable for controlling fees and selecting appropriate investment options.

Companies can limit liability by giving plan participants control over investments in their accounts. However, they must be given a broad range of investment options and sufficient information to make informed decisions.

What is the company's responsibility in hiring a third party to manage plans?

It's important to have a documented process by which you rate and select a third-party service provider. Survey a number of potential providers, asking the same information and providing the same requirements. That will enable a meaningful comparison and give a sound basis for reaching your decision.

Whether you're selecting the investments yourself or utilizing a third party, it's important to provide employees with a sufficient number of options.

Does an ERISA bond protect you from liability?

An ERISA bond or employee dishonesty policy with ERISA compliance only protects you from theft, not from mismanagement of funds, programs, pensions or health plans — all of the major exposures that exist.

Business owners also might think they're protected under directors and officers (D&O) insurance, but there are certain exclusions in those policies concerning fiduciary liability. D&O, employment practices and fiduciary liability insurance are often secured as an insurance package because if someone perceives that the business didn't perform as well as it should and was mismanaged, you could potentially seek damages on the D&O and/or fiduciary line of coverage.

Of these aforementioned product lines, fiduciary liability insurance is the least expensive, and most cost-effective. Another line of coverage that should be secured in your insurance portfolio is employee benefit liability, which specifically protects benefits managers from mistakes and omissions made in the administration of various employee programs. These typically involve minor issues about proper filing and enrollment, but do not provide coverage against any problems related to investing.

In summary, some of the responsibilities of a fiduciary are vague — what does monitoring investments mean? Also, sudden swings in a turbulent stock market can bring risks to even the best of fiduciaries. Fiduciary liability insurance can help defend the reputation of the company and its management team. ●