

RETIREMENT Report

FEBRUARY 2016 News and updates for plan sponsors and fiduciaries of defined contribution plans

FIDUCIARY LIABILITY INSURANCE

Plan sponsors are often concerned with the prudence and process of obtaining insurance covering ERISA retirement plan fiduciaries. While fiduciary insurance is an important aspect in mitigating the financial impact of fiduciary litigation, there are a number of additional, important activities that are prudent for fiduciaries to embrace.

ERISA fiduciaries are well advised to follow a comprehensive strategy to optimize fiduciary risk mitigation. Other important risk mitigation steps include identifying who the plan's named fiduciary is, delegating fiduciary responsibilities to co-fiduciaries (e.g., steering committee) as appropriate and allowable, implementing a sound fiduciary structure (via committee charter with ancillary paperwork), consistently practicing procedural prudence as defined by ERISA for all fiduciary-level plan decision making, hiring experts as needed to fulfill ERISA's prudent expert requirement, documenting all fiduciary decision-making processes and results, and auditing administrative procedures periodically to ensure compliance with ERISA and the plan document (this is a source of many unintentional fiduciary breaches). Ask your plan consultant to provide a more complete explanation of this important topic.

Returning to the specific topic of fiduciary insurance, please note that typically, most corporate-level liability insurance policies (directors and officers liability insurance (D&O), employee benefit liability coverage) do not address ERISA fiduciary breaches. If ERISA-specific language is not included in a liability policy, ERISA breaches are most likely not covered. Comprehensive fiduciary insurance is relatively affordable and typically does cover all plan fiduciaries. ERISA fiduciary coverage

can be obtained as an addendum to an existing liability policy, or as a separate policy, depending upon the issuer. Not all fiduciary liability policies are created equal, and some issuers are more astute about this coverage than others. It is prudent to confirm that the issuer you are considering to provide coverage has experience and expertise in providing ERISA fiduciary coverage. A few areas to focus on, other than what would normally be considered in reviewing any insurance policy, are:

- Does the policy specifically cover ERISA fiduciary breaches?
- Does it cover the appropriate individuals?
- Does the policy contain carve-out language that eviscerates the effectiveness of the policy?

Do review all language contained in the contract, especially in areas of coverage exclusions and limitations, provisions for legal representation in event of a claim, and specific and aggregate dollar limits of coverage.

Another important area of concern in terms of policy language is the application for coverage. As with most insurance contracts, the signed application for coverage is considered part of the contract. We have noticed many applications that ask the fiduciaries to affirm that there has never been a fiduciary breach associated with the plan. In our opinion, this is an affirmation that is not practicable to assert, as many unintentional fiduciary breaches (by far the most frequent category of breaches) may not be identified upon occurrence or until years after

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its occurrence. The affirmation can and may be used to nullify the insurance protection at time of a claim. It would be prudent to have the issuer insert, “to the best of my knowledge” language to this question. We believe that this is typically not an intentional attempt by the issuer to avoid a claim, but is often due to the issuer’s naivety concerning ERISA law.

To summarize, here are some steps you might follow in evaluating ERISA fiduciary insurance:

1. Check any existing corporate liability policies to determine if they cover ERISA fiduciaries (it may be more efficient to ask your broker to show you where in a policy it identifies that ERISA fiduciaries are covered).
2. If the policy does not cover ERISA fiduciaries, ask your broker to provide you with a quote for ERISA fiduciary insurance from a company that has expertise and experience in this area.
3. Keep in mind the specific provision areas of focus identified above (paragraphs four and five).
4. The amount of coverage is a judgement call. To our knowledge, there has not been an award that has approached 10 percent of plan assets, but it is theoretically conceivable that one could. Most successful litigation to date (other than those involving company stock

litigation) is based on unreasonableness of fees, and fees are a relatively small percentage of total plan assets. Lawsuits can, and often do, contemplate a prolonged period of time based on when a breach originated and when it is corrected.

5. Designating a beneficiary will depend on whether there is a committee charter in place, which we highly recommend for most plans. If there is a formally executed committee charter delegating fiduciary responsibility from a plan’s named fiduciary (e.g., the company) to a committee, and the committee members are indemnified by the company, the beneficiary is most commonly the company. If committee members have not been indemnified, then the committee members themselves (along with any other fiduciary members) should be named as beneficiaries as they would be held personally liable for fiduciary breaches in areas they are responsible for.

Please speak with your plan consultant if you have questions or would like more information on this important fiduciary topic.



FINANCIAL WELLNESS INSIGHTS: TOP FINANCIAL GOALS AMONG AMERICAN EMPLOYEES



The majority of employees are concerned with retirement planning. Saving for retirement is the most commonly cited financial goal among employees, coming ahead of many short-term goals, including eliminating debt and creating an emergency fund.¹

In an analysis of data collected from 1,081 employees earlier this year, Retiremap found that saving for retirement is a goal for the majority, 56 percent, of employees surveyed. The second most popular financial goal, eliminate debt, was chosen by 40 percent of employees.

Employees were asked to choose up to five financial goals from a list of 20, which included a holistic range of family care needs,

long-term investment targets and personal aspirations.

Goal #1: Save for Retirement

Saving for retirement is the top goal for employees across all income levels. The relative importance of retirement vis-à-vis other goals varied with income. There is a 7 percentage point difference between saving for retirement and the second most common goal among employees with annual income levels of \$0–\$49,999. Among those with \$125,000 or higher in annual income, there is a 39 percentage point difference.

Goal #2: Eliminate Debt

Forty percent of all employees said that one of their financial goals is to eliminate debt. It is the second most commonly cited goal for employees with less than \$125,000 or higher in annual income, eliminating debt was the third most common goal, with 27 percent.

Goal #3: Buy a Home

Thirty-four percent of all employees wanted to be homeowners. Buying a home was more common as a financial goal among those with lower annual incomes, rounding out the top three for employees who made less than \$75,000.

Goal #4: Invest Better

Across all employees, investing better was the fourth most commonly cited goal with 30 percent. The desire to invest better correlated with income. It was only in the top three for those with more than \$75,000. Investing better was the second most commonly cited goal for those who made \$125,000 or higher annually, with 39 percent.

Goal #5: Create an Emergency Fund

Creating an emergency fund was a close fifth, with 29 percent of all employees choosing it as a financial goal. Interestingly, creating an emergency fund varied only slightly between different income ranges, with only a 5 percentage point difference between those who made less than \$50,000 and those who made \$125,000 or higher.

When probed about financial goals, most employees are aware of the importance of retirement planning. Even with the prevalence of competing goals that have more immediate implications, such as creating an emergency fund and paying off debt, Americans still want to save for retirement. To do so, they need more tools and guidance around how to invest better and make smarter long-term decisions.

¹Based on Retiremap implementation data from 2015.

This is an excerpt of Retiremap's, Financial Wellness Insights, Top Financial Goals Among American Employees, November 2015. Slight modifications were made for compatibility purposes.

LOCATING MISSING PARTICIPANTS

At one time or another all plan sponsors will likely be in the position of having to locate missing participants. This may be related to delivery of regulatory required communications, distribution of assets, or communication of fund changes to active and/or terminated participants. If the delivery of necessary communications is encumbered because a participant cannot be located, there exists a fiduciary requirement to perform a “reasonable search” for this “missing” participant. There are various search methods that would be considered as reasonable good faith efforts, including:

- Certified Mail (with a return receipt) to the last known address;
- Checking records of other benefit plans (i.e., employer provided health plan); and
- Using a commercial participant-locating service (such as www.unclaimedretirementbenefits.com) (historically the Department of Labor required use of either the IRS or SSA letter forwarding programs, but both of those programs have been discontinued within the past few years).

In the event that your plan allows cash-out distributions on terminated participants with account balances under \$1,000, or rollovers to an IRA for balances between \$1,000 and \$5,000, be sure to check the provisions described in the plan document. Typically a rollover to an IRA on behalf of these participants can be accomplished for participants deemed to be missing. For more information on this topic, please contact your plan consultant.

REVENUE SHARING DEFINED

There is much misunderstanding about what revenue sharing is and what it provides. As an overview, it reflects the acknowledgement by the fund company that a portion of its normal investment fee will no longer be incurred since a third party recordkeeper will be providing the services being shed. For example, if a fund originating from ABC Fund Company will be marketed and serviced by XYZ Retirement Recordkeeper then fees built into the ABC fund expense for marketing and servicing would be “shared” with XYZ Retirement Recordkeeper. Any amount above what the investment manager is paid is considered revenue sharing and is retained by the recordkeeper.

COMMUNICATION CORNER: **How Long Will Your Money Last?**

This month's employee memo helps participants understand the difference between what they can save for retirement versus what is needed to retire.

As a reminder, we post each monthly participant memo online via the Fiduciary Briefcase (fiduciarybriefcase.com).

Call 405-608-8660 or email Brad or Matt if you have questions or need assistance.
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