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Benefits Guide: Basics

Retirement and Pension Plan Administration, Application of ERISA Fiduciary Duties: Who is a Fiduciary?

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Retirement and Pension Plan Administration

Application of ERISA Fiduciary Duties: Who is a Fiduciary?

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(10) **Introduction —**

ERISA Section 404 sets forth ERISA's general fiduciary duty provisions. Knowing when these stringent duties apply is critical. The fiduciary duties established under ERISA are routinely acknowledged as the “highest known to the law” and the consequences of noncompliance can be significant: ERISA § 409 imposes personal liability on fiduciaries, to make good on retirement plan losses resulting from their actions or inactions, in fulfilling their duties under ERISA § 404.

There are generally three ways a person or entity assumes fiduciary status pursuant to ERISA:

- through the plan instrument setting a named fiduciary; [1]
- through fiduciary appointment pursuant to a procedure specified in the plan instrument; [2] or
- through actions demonstrating the requisite authority, control, or discretion as a "functional fiduciary" under the provisions of ERISA § 3(21). [3]

[1] ERISA § 402(a)(1); ERISA § 402(a)(2); 29 U.S.C. § 1102(a)(1).

[2] ERISA § 402(a)(2); 29 U.S.C. § 1102(a)(iii).

[3] ERISA § 3(21)(A); 29 U.S.C. § 1002(21)(A).

The Supreme Court has simplified the application of ERISA fiduciary status as follows: "ERISA defines fiduciary status as not only the persons named as fiduciaries by a benefit plan, but also to anyone else who exercises discretionary control or authority over the plan's management, administration, or assets." [4] Therefore, the determination of fiduciary status often turns on the degree of discretion, control, or authority possessed or exercised by individuals or entities associated with an ERISA-governed retirement plan.

[4] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993).

Practice Tip: The analyses employed by courts to determine who functions as an ERISA fiduciary are contextual and determined on a case by case basis. Where there might be a question of whether ERISA's fiduciary duties apply, courts apply fiduciary status liberally and consistent with ERISA's policies and objectives. [5]

[5] *Johnson v. Couturier*, 572 F.3d 1067, 1076 (9th Cir. 2009).

Additional Resources: Portfolio 365: ERISA—Fiduciary Responsibility and Prohibited Transactions; TPS ¶5530.02.C. Fiduciary and Plan Assets Defined; Benefits Guide: *Fiduciary Standards: What Is a Plan Asset?*

(20) **Named Fiduciaries**

(10) **In General** —

ERISA § 402(a)(1) mandates that every employee benefit plan be established and maintained pursuant to a written instrument. And, a retirement plan written plan document, pursuant to ERISA § 402(a)(1), must include one or more “named fiduciaries" who control and manage the plan's operation and administration. In drafting ERISA, Congress included this requirement “so that responsibility for managing and operating the Plan—and liability for mismanagement—are focused with a degree of certainty.”[6]

[6] *Birmingham v. Sogen-Swiss Int'l Corp. Retirement Plan*, 718 F.2d 515, 522 (2d Cir. 1983).

ERISA refers to “named fiduciary” and “named fiduciaries” in five separate sections to further guide an understanding of the roles, powers, and responsibilities of named fiduciaries.[7] Under ERISA § 402(a)(2), for example the term “named fiduciary” means “a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.” The named fiduciary may either be identified by name in the plan or identified by a procedure set forth in the plan document. In practice the named fiduciary is typically an administrative committee established by the plan sponsor.

[7] See 29 U.S.C. § 1002(18), 29 U.S.C. § 1102, 29 U.S.C. § 1103(a), 29 U.S.C. § 1105(c), 29 U.S.C. § 1133(2).

ERISA grants such named fiduciaries broad authority to “control and manage the operation and administration of the plan.”[8] ERISA, however, expressly permits named fiduciaries to designate persons or entities other than themselves to carry out their fiduciary responsibilities under the plan.[9]

[8] 29 U.S.C. § 1102(a)(1).

[9] 29 U.S.C. § 1105(c)(1)(B).

(20) **A Named Fiduciary's Delegation of Fiduciary Authority** —

The Supreme Court has, in several of its decisions construing the limits of ERISA fiduciary status, likened ERISA's fiduciary responsibilities to the common law of trusts.[10] In *Tibble v. Edison*, specifically, the Court stated “in determining the contours of an ERISA fiduciary's duty, courts often ***must look*** to the law of trusts.”[11]

[10] See e.g. *Varity Corp. v. Howe*, 516 U.S. 489, 505, 116 S. Ct. 1065, 1074, 134 L. Ed. 2d 130 (1996).

[11] *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 1828, 191 L. Ed. 2d 795 (2015) (emphasis added).

Following the Supreme Court's mandate, long accepted trust common law holds that while a fiduciary may not delegate the entire administration of his or her trust absent specific authorizing language in the trust instrument, a fiduciary may delegate the performance of certain tasks “which it is unreasonable to require him personally to perform.”[12]

[12] See Restatement (Second) of Trusts § 171 cmt. d (1959).

It makes sense, therefore, that ERISA allows for the delegation of fiduciary responsibilities that a named fiduciary might not have the necessary expertise to perform. A retirement plan, to further this objective, may provide procedures allowing named fiduciaries to designate other persons to carry out fiduciary responsibilities and a named fiduciary may delegate other persons to serve.

But there are some caveats. ERISA § 405(c)(1) does not allow named fiduciaries to delegate "trustee responsibilities." Section 405 clarifies "trustee responsibilities" to mean "any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager." However, pursuant to ERISA § 403(a)(2) and ERISA § 402(c)(3), authority or discretion to manage or control plan assets, may be delegated to persons who are investment managers as defined in ERISA § 3(38).[13] Trustee responsibilities therefore may be performed either by the named fiduciaries or investment manager.

[13] 29 C.F.R. § 2509.75-8, FR–15.

Practice Tip: Fiduciary powers can only be delegated if the plan instrument expressly provides procedures for such an allocation or designation. This is an important principle because if the plan document does not speak to, or allow for fiduciary delegation, any allocation or delegation of fiduciary powers "will be ineffective to relieve a named fiduciary from responsibility or liability for the performance of fiduciary responsibilities allocated to other named fiduciaries."[14] A number of courts have confirmed this to be the case–that although the delegation of fiduciary responsibilities is permissible under ERISA–the authority of named fiduciaries to designate fiduciary responsibilities must be expressly provided for in the ERISA plan documents.[15]

[14] 29 C.F.R. § 2509.75-8, FR–13.

[15] See e.g. *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1284 (9th Cir. 1990); *Rubio v. Chock Full O'Nuts Corp.*, 254 F. Supp. 2d 413, 422 (S.D.N.Y. 2003).

Upon delegation of fiduciary duties, the fiduciary is generally not liable for the acts or omissions of the person carrying out the fiduciary responsibility.[16] But keep in mind that according to ERISA § 405 a fiduciary is still liable, as a co-fiduciary to the extent it participates knowingly in a fiduciary breach, or fails to act reasonably in discharging its own responsibilities and thereby enables the other fiduciary to commit a breach.[17] Also, a fiduciary who appoints trustees or other fiduciaries possesses a duty to monitor at "reasonable intervals the performance of trustees and other fiduciaries… in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan."[18]

[16] ERISA § 405(c)(2); *Arizona State Carpenters Pension Tr. Fund v. Citibank (Arizona)*, 125 F.3d 715, 719 (9th Cir. 1997) ("if an ERISA plan expressly provides for a procedure allocating fiduciary responsibilities to persons other than named fiduciaries under the plan, the named fiduciary is not liable for an act or omission of such person in carrying out such responsibility").

[17] *Presley v. Blue Cross-Blue Shield of Alabama*, 744 F. Supp. 1051, 1058 (N.D. Ala. 1990) 29 U.S.C. § 1105(a), 29 U.S.C. § 1105(c).

[18] 29 C.F.R. § 2509.75-8.

Practice Tip: The delegation language in the plan document should be specific and if it is unartfully worded it can have severe consequences in determining who is a fiduciary. Take for example, the facts of an ERISA breach of fiduciary case against WorldCom. There, the Plan document stated that "If WorldCom, Inc. (the named fiduciary) does not appoint individuals to carry out the duties of the Administrator or Investment Fiduciary ... then *any officer* of WorldCom, Inc. shall have the authority to carry out, on behalf of WorldCom, Inc., the duties of the Administrator and the Investment Fiduciary."[19] Because of the wording of the plan document, Plaintiffs in that case argued that ***any World Com officer was a fiduciary*** of the plan.

[19] *In re WorldCom, Inc.* , 263 F. Supp. 2d 745, 754 (S.D.N.Y. 2003)(emphasis added).

See SmartCode® for the latest cases on plan fiduciary by functions.

(30) **Named Fiduciary Delegation of Fiduciary Powers To Plan Investment Managers** —

ERISA § 402(c)(3) authorizes a plan's named fiduciary, to appoint an "investment manager" to manage assets of an ERISA governed plan.

ERISA § 3(38) specifically defines the term "investment manager" as any fiduciary—

(A) who has the power to manage, acquire, or dispose of any assets of a plan;

(B) who is (i) registered as an investment advisor under the Investment Advisors Act of 1940; (ii) is registered as an investment adviser under the laws of the state in which it maintains its principal office and place of business; (iii) is a bank as defined in the Investment Advisors Act; or (iv) insurance company qualified to perform services…under the laws of more than one state; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.[20]

[20] 29 U.S.C. § 1002(38).

Appointment of an investment manager is often attractive for the named fiduciary because of the safe harbor codified in ERISA § 405(d)(1). ERISA § 405(d)(1) provides that if an investment manager or managers have been appointed under § 402(c)(3) of this title, then, notwithstanding any co-fiduciary liability, the named fiduciary will not be liable for the acts or omissions of the manager. This safe harbor was codified into law to allow named fiduciaries to delegate fiduciary investment powers to a professional advisor who has the necessary expertise and wisdom to prudently and loyally manage the plan's investments.[21]

[21] *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1219 (2d Cir. 1987).

The language of the agreements and the authority possessed by the investment manager will control to whether fiduciary duties have actually been delegated or not.

Example: In a case involving the alleged delegation of investment management authority, the U.S. Court of Appeals for the Ninth Circuit emphasized that because a custodial agreement with Citibank did not expressly or in practice constitute a delegation of fiduciary authority, Citibank had not been delegated fiduciary authority as an investment manager. [22]

[22] *Arizona State Carpenters Pension Tr. Fund v. Citibank (Arizona)*, 125 F.3d 715, 721 (9th Cir. 1997).

To be clear, § 3(38) of ERISA does not, by its terms, create a path to fiduciary status independent of the functional definitions set forth in § 3(21)(A). Rather, to come within the scope of § 3(38)'s definition of investment manager, the investment manager must be a fiduciary and meet the criteria of § 3(21)(A). [23]

[23] *Severstal Wheeling, Inc. v. WPN Corp.*, No. 10 CIV. 954 LTS GWG, 58 EBC 1365 (S.D.N.Y. 2014).

Practice Tip: In appointing an investment fiduciary, named fiduciaries still retain a duty to monitor their performance. A fiduciary's obligation to act is triggered when it has notice of the appointee's misconduct or has information available to it from which the misconduct would be apparent to them. [24]

[24] *Scalia v. WPN Corp.*, 417 F. Supp. 3d 658, 671 (W.D. Pa. 2019); *Sec'y of Labor v. Doyle* , 657 F. App'x 117, 127-28 (3d Cir. 2016).

(30) **Plan Trustees Under ERISA** —

ERISA § 403(a) generally requires that the assets of an employee benefit plan, including an employee stock ownership plan, be held in trust by one or more trustees. [25] There are exceptions to this rule, set forth in 29 C.F.R. § 2550.403b-1. But for the majority of retirement plans the trust requirement applies.

[25] ERISA § 403(a).

Pursuant to ERISA, the trustee (or trustees) must either be named in the plan document or trust agreement or appointed by the named fiduciary through a procedure set forth in the governing plan documents. The trustee can be an individual for example, the owner or chief officers of the plan sponsor, or alternatively, an entity like a bank or trust company. In the case of an individual trustee, the plan assets will still be held in trust with an institutional custodian.

Neither a trustee nor a custodian of an ERISA retirement plan maintains beneficial ownership of the assets of the plan. Rather, under ERISA, the plan participants are the beneficial owners of the plan because a retirement trust a legal entity that is separate from the employer, the trustee and any custodian.

ERISA § 403(a) provides that "upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan." Accordingly, trustees that are named in the plan documents or appointed by the named fiduciary are virtually always fiduciaries under ERISA. [26]

[26] DOL FAB 2008-01 (Feb. 1, 2008).

Practice Tip: There is no authority stating that, pursuant to ERISA trustee responsibility cannot be divided among multiple trustees. In fact, the DOL has instructed that "although trust documents cannot excuse trustees from their duties under ERISA, ERISA clearly gives named fiduciaries the authority to appoint multiple trustees and to allocate trustee responsibilities among those trustees (including directed trustees)." [27]

[27] DOL FAB 2008-01 (Feb. 1, 2008).

The written trust instrument must assign authority over a plan's assets subject to the trust requirement, including a plan's legal claim for delinquent contributions, to:

- a plan trustee with discretionary authority over the assets;
- a directed trustee subject to the proper and lawful directions of a named fiduciary; or
- an investment manager (ERISA § 403(a). [28]

[28] DOL FAB 2008-01 (Feb. 1, 2008).

(10) **Appointment of a Directed Trustee** —

ERISA § 403(a)(1) states that a plan may expressly provide "that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to" ERISA. A trustee that is subject to the direction of a named fiduciary is commonly referred to as a "directed" trustee.

The appointment of a directed trustee to conduct custodial tasks and follow the directions of a named fiduciary is very common in ERISA governed retirement plans. Although not actually defined in ERISA, the term "directed trustee" is widely used to describe a plan trustee where, "the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee." [29]

[29] *DiFelice v. U.S. Airways, Inc.,* 397 F. Supp. 2d 735, 744 (E.D. Va. 2005).

Because of the custodial nature of their responsibilities, there are typically limits to the scope of a directed trustee's fiduciary liability. DOL FAB No. 2004-03 is a helpful resource. It instructs that while directed trustees are fiduciaries, and as such, are subject to ERISA's fiduciary rules, the scope of their duties is "significantly narrower than the duties generally ascribed to a discretionary trustee under common law trust principles." [30] Accordingly, directed trustees generally are not liable for following the instructions of the named fiduciaries so long as the instructions are "made in accordance to the plan" and not "contrary to ERISA." [31]

[30] DOL FAB 2004-03 (Dec. 17, 2004).

[31] *Chesemore v. All. Holdings, Inc.* , 770 F. Supp. 2d 950, 969 (W.D. Wis. 2011).

In other words, the fiduciary capacity of directed trustees is to follow the directions of named fiduciaries, ensure the instructions given to them are proper pursuant to ERISA, do not violate the terms of the plan, and do not violate ERISA. [32] For example, when a directed trustee knows or should know that a direction from a named fiduciary is not made in accordance with the terms of the plan or is contrary to ERISA, the directed trustee may not, consistent with its fiduciary responsibilities, follow the direction. [33]

[32] *Chesemore v. All. Holdings, Inc.* , 770 F. Supp. 2d 950, 969 (W.D. Wis. 2011).

[33] DOL FAB 2004-03 (Dec. 17, 2004).

> ***Practice Tip:*** The DOL has advised that, to meet these fiduciary duties, directed trustees necessarily have a duty to request and review all the documents and instruments governing the plan that are relevant to its duties as directed trustee. In fact, the DOL has expressly stated that "if a directed trustee either fails to request such documents or fails to review the documents furnished in response to its request and, as a result of such failure, follows a direction contrary to the terms of the plan, the directed trustee may be liable for following such direction because the directed trustee had a duty to request and review pertinent plan documents." [34]

[34] DOL FAB 2004-03 (Dec. 17, 2004).

Example: According to the DOL, if a directed trustee purchases of a particular stock at the direction of the plan's named fiduciary is contrary to the plan's investment policy, the directed trustee may be liable for a breach of its fiduciary duty to follow only proper direction. [35]

[35] DOL FAB 2004-03 (Dec. 17, 2004).

Directed trustees have a duty to ensure they do not take action they know or should know are prohibited transactions under ERISA § 406. But while a directed trustee's duty to act arises from its knowledge in that a directed trustee may not follow a direction that the trustee "knows or should know" is contrary to ERISA, a directed trustee does not share the named fiduciary's duty, or the investment manager's duty, to investigate the wisdom of plan investment choices or any obligation to render advice regarding those choices. [36] Put another way, directed trustees generally do not have an independent obligation to determine the prudence of every transaction. [37]

[36] *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423, 449 (S.D.N.Y. 2005).

[37] DOL FAB 2004-03 (Dec. 17, 2004); *DiFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 735, 748 (E.D. Va. 2005) ("Properly read, § 403(a) includes no such implicit duty of prudence. To conclude otherwise would

effectively eviscerate § 403(a) by eliminating any distinction between the duty of a directed trustee under § 403(a) and the duty of the ERISA named fiduciary with investment authority, who has the duty of ordinary care and prudence prescribed by § 404(a)").

One court set forth this premise effectively in framing the practical design of this limitation: "If 403(a) were read to impose a duty of ordinary care on directed trustees to consider the financial merits of a named fiduciary's directions concerning plan investment options and follow only prudent directions, it takes little imagination to see the disputes and litigation such an arrangement would spawn. Congress plainly did not intend such a result." [38]

[38] *Chesemore v. All. Holdings, Inc.*, 397 F. Supp. 2d 735, 748 (E.D. Va. 2005).

Pieces of ERISA legislative history support this interpretation. The 1973 House and Senate Conference Report, for example, noted that "the trustee who is directed by an investment committee is to follow that committee's directions unless it is clear on their face that the actions to be taken under those directions would be prohibited by the fiduciary responsibility rules of the bill or would be contrary to the terms of the plan or trust." [39]

[39] H.R. CONF. REP. No. 93-1280 (1973), reprinted in 1974 U.S.C.C.A.N.5038, 5079.

Example: While the general rule is that directed trustees do not have an independent duty to investigate the prudence of plan investments, directed trustees would be compelled to act if they hold material non-public information about the prudence of an investment. For example, if a directed trustee performs an internal analysis in which it concludes that the company's current financial statements are materially inaccurate, the directed trustee would have an obligation to disclose this analysis to the named fiduciary before making a determination whether to follow a direction to purchase the company's security. [40]

[40] *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423, 449 (S.D.N.Y. 2005).

Plan documents should clearly delineate responsibility among trustees and directed trustees and these documents should be adhered to in practice. Where the trust agreement and plan documents are unclear with respect to allocation of trustee responsibilities, the DOL has advised that the plan documents "should generally be interpreted in a manner that corresponds to the statutory scheme, rather than in a manner that relieves all of the trustees and investment managers from responsibility" which could lead to some unforeseen consequences. [41] This is especially the case because the DOL also cautions that "reliance on plan, trust and other governing documents to define the responsibilities of plan fiduciaries, however, may not be completely determinative if the provisions in the documents are inconsistent with the actions of the parties." [42]

[41] DOL FAB 2008-01 (Feb. 1, 2008).

[42] DOL FAB 2008-01 (Feb. 1, 2008).

Example: If a nominally directed trustee routinely assumes discretionary responsibility in practice, a directed trustee cannot seek to limit its allocation of fiduciary powers and associated responsibility. [43] Similarly, a trustee cannot alter its status as fiduciary through a contractual provision that defines its trustee duties as non-fiduciary in nature.

[43] DOL FAB 2008-01 (Feb. 1, 2008).

Where plan assets are held in more than one trust, trustees are liable only for the assets in their own trusts. However, where two or more trustees govern one trust, pursuant to the co-fiduciary rules of ERISA § 405 trustees share co-trustee responsibility and each trustee must use reasonable care to prevent the other trustees from breaching their duties.

Generally, multiemployer plans, commonly referred to as Taft Hartley Plans, have an equal number of employer and employee organization (union) trustees who manage the plan. Pursuant to ERISA § 3(16)(B), the plan sponsor of a multiemployer plan is the joint board of trustees that establishes or maintains the plan.[44] Because of their prescribed role, the board of trustees is typically the named fiduciary of multiemployer plans with accompanying powers and duties typically concerning the plan's structure, administration and operations.

[44] 29 U.S.C. § 1002(16)(B).

Practice Tip: Plan documents, including the trust agreement, should be written to envision what might occur in practice. For example, to the extent the nature and scope of the trustees' responsibilities are specifically limited in the plan documents or trust agreement, the responsibility falls on the named fiduciary to assume typical trustee and directed trustee responsibilities, including the collection of plan contributions in the multiemployer plan context.

(40) **Plan Fiduciary by Function** —

An important concept to discern the limits of ERISA fiduciary responsibility is that ERISA “defines ‘fiduciary’ not in terms of formal trusteeship, but in functional terms of control and authority over the plan.”[45] This concept is codified in ERISA § 3(21)(A) which provides that a person is a fiduciary “to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation ..., or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.”

[45] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993).

Accordingly, in addition to the named fiduciary, a person who performs certain management functions is treated as a plan fiduciary, even if not officially appointed or named as such. These functions include:

- exercising any discretionary authority or control in managing the plan or in acquiring or selling plan assets;
- rendering investment advice for a fee or other compensation, direct or indirect, as to any money or other plan property; and
- acting with discretionary authority or responsibility in plan administration.

Interpretation of the limits of these three buckets of fiduciary responsibility has historically been a hotly litigated issue. First, courts have latched onto the language in this provision of ERISA which states "to the extent" to find that a person or entity might function as an ERISA fiduciary for certain actions but not for others.[46] The U.S. Court of Appeals for the First Circuit has specifically instructed that "fiduciary status is not an all or nothing proposition; the statutory language indicates that a person is a plan fiduciary only 'to the extent' that he possesses or exercises the requisite discretion and control."[47] Accordingly, a party not identified as a plan fiduciary in the plan documents can become one if, but only to the extent that, it undertakes discretionary tasks related to the plan's management or administration.[48]

[46] *Baker v. Kingsley*, 387 F.3d 649, 660 (7th Cir. 2004).

[47] *Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 18 (1st Cir. 1998).

[48] *Livick v. The Gillette Co.*, 524 F.3d 24, 29 (1st Cir. 2008) (emphasis added).

See SmartCode® for the latest cases on plan fiduciary by functions.

For more, see Portfolio 365.III.D.: Fiduciary Status Under ERISA, Scope of Fiduciary Activity.

(10) **Plan Fiduciary By Function- The Employer** —

The concept of attaining fiduciary status through function frequently arises in the context of employers who sponsor an ERISA-governed retirement plan. While a plan sponsor may be a fiduciary, by, for example, being designated as the plan administrator or the named fiduciary, a plan sponsor is not "automatically" a fiduciary.[49] The question is often, when is the employer acting in its corporate capacity or in the capacity as a plan administrator. The Supreme Court has offered guidance over several years of litigation and has instructed that employer's decisions about the content of an ERISA plan are not themselves fiduciary acts.[50]

[49] *In re Northrop Grumman Corp. ERISA Litig.*, No. CV0606213MMMJCX, *2010 WL 11469724*, at *19 (C.D. Cal. Aug. 12, 2010).

[50] *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996).

To this effect, the Supreme Court stated in *Curtiss–Wright Corp. v. Schoonejongen* that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[51] This means that these actions, amending, adopting, or terminating acts, are typically plan settlor actions as opposed to fiduciary actions.

[51] 514 U.S. 73, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995).

Example: Courts conclude that fiduciary acts by employers include actions that involve the management and administration of the plan, the management and disposition of plan assets, the dispensation of investment advice, and making benefits determinations, but fiduciary acts do not encompass actions that involve the termination of an employer-employee relationship.[52]

[52] See *Brooks v. Pactiv Corp.*, 729 F.3d 758, 766 (7th Cir. 2013) (emphasizing fiduciary status does not extend to decisions to terminate employees because the decision does not involve the disposition of plan assets and/or management and administration of the plan).

The limits to when plan sponsors act as a "settlor" of the plan versus a fiduciary of a plan has spawned a litany of case law over many years. In response, courts have developed the "two hat" doctrine to address situations where the employer or corporate officers are fiduciaries of an ERISA plan. The doctrine states that ERISA liability can only arise from actions or omissions taken in connection with the plan, and not settlor or corporate actions, like amending or terminating the plan, or hiring and firing an employee.

The scope of settlor versus fiduciary actions can often be a close call. The Supreme Court's decision in *Varity Corp. v. Howe* is often a starting point for the settlor versus fiduciary analysis. There, the Supreme Court concluded that an employer making intentional representations about the future of plan benefits was a plan fiduciary because the employer's representations about future plan benefits were an act of plan administration. [53]

[53] *Varity Corp. v. Howe*, 516 U.S. 489, 505, 116 S. Ct. 1065, 1074, 134 L. Ed. 2d 130 (1996) (making intentional representations about the future of plan benefits in that context is an act of plan administration).

The decisions often hinge upon whether the employer's decision making touches plan administration that affects benefits of participants or corporate decisions that would routinely be made in the ordinary course of business. In an interesting case, *Coulter v. Morgan Stanley & Co.* , the U.S. Court of Appeals for the Second Circuit wrestled with whether a determination of how to fund a retirement plan is a settlor function rather than a fiduciary one. In that case, the participants argued that the employer and related entities were de facto fiduciaries because they provided the company's chief executive with the "authority and means" to fund the plan with company stock. The Second Circuit, however, affirmed the lower court's dismissal of the participants' claims, concluding that the defendants' exercise of discretion to fund the plan with company stock wasn't fiduciary conduct under ERISA, because it didn't involve plan management or administration. [54]

[54] 753 F.3d 361, 2014 BL 148224, 58 EBC 1497 (2d Cir. 2014).

To distill some of the decisions relating to settlor versus fiduciary functions, courts have found the following acts not to be encompassed by ERISA's functional fiduciary rules set forth in § (21):

• signing or preparing a SEC filing; [55]

• the decision to hire or fire an employee; [56]

• an employer's failure to pay more money into the plan; [57]

• negotiating or changing plan rates when the rates are generally applicable to a broad range of health-care consumers and not specifically dealing with the individual plan; [58]

• allocating funds to the benefit plan or elsewhere in the company; [59]

• failures to make plan contributions; [60] and

• the decision to spin off a pension plan as part of a corporate restructuring initiative. [61]

Practice Tip : Plan fiduciaries should exercise caution when incorporating financial information filed with the SEC into plan documents. While signing or preparing a SEC filing might not be a fiduciary act, when SEC filings are incorporated into plan documents, some courts find that it is a fiduciary act, and thus, the fiduciary rules extend to ensure the financial information incorporated into plan documents is complete and accurate. [62]

[55] *Gearren v. The McGraw-Hill Cos., Inc.*, 660 F.3d 605, 610–11 (2d Cir. 2011).

[56] *Brooks v. Pactiv Corp.*, 729 F.3d 758, 766 (7th Cir. 2013).

[57] *Loomis v. Exelon Corp.*, 658 F.3d 667, 671 (7th Cir. 2011).

[58] *Deluca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743, 746–47 (6th Cir. 2010).

[59] *Holdeman v. Devine*, 474 F.3d 770, 780 (10th Cir. 2007).

[60] *Glazing Health & Welfare Fund v. Lamek*, 896 F.3d 908, 910 (9th Cir. 2018).

[61] *Thondukolam v. Corteva, Inc.*, No. 19-CV-03857-YGR, *2020 WL 1984303*, at *2 (N.D. Cal. Apr. 27, 2020).

[62] *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 422 (6th Cir. 2012), rev'd on other grounds 573 U.S. 409, 134 S. Ct. 2459, 189 L. Ed. 2d 457 (2014); *Harris v. Amgen, Inc.*, 788 F.3d 916, 942 (9th Cir. 2015), rev'd, on other grounds 136 S. Ct. 758, 193 L. Ed. 2d 696 (2016); *In re Dynegy, Inc. ERISA Lit.*, 309 F.Supp.2d 861, 869 (S.D.Tex. 2004).

In instances where officers of the plan sponsor's serve on a fiduciary committee to administer an ERISA plan, but the plan sponsor shares no other nexus with plan administration, management or control, fiduciary liability will not be imputed to the plan sponsor. [63]

[63] *In re Northrop Grumman Corp. ERISA Litig.*, No. CV0606213MMMJCX, *2010 WL 11469724*, at *20 (C.D. Cal. Aug. 12, 2010).

Example: In the case, *In re Northrop Grumman Corp. ERISA Litigation* , plaintiffs sought to name the plan sponsor, Northrop Grumman, in their complaint, because, according to them, the Northrop employees on the plan's administrative committee, controlled the “purse strings” of the plan's expenditures. The U.S. District Court for the Central District of California rejected this argument because the proposed complaint alleged not that Northrop, as plan sponsor, controlled the purse strings, but that Northrup's employees did, and that there was no other nexus with Northrop beyond the mere employment of the committee members. [64]

[64] *In re Northrop Grumman Corp. ERISA Litig.*, No. CV0606213MMMJCX, *2010 WL 11469724*, at *20 (C.D. Cal. Aug. 12, 2010).

(20) **Plan Fiduciary By Function – The Plan Sponsor Board of Directors** —

The fiduciary status of the board of directors of plan sponsors is an issue that often comes up in the context of ERISA litigation. The DOL has expressly thrown its hat in the ring to state that “members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in [29 U.S.C. § 1002(21)(A).]" [65] This means that, according to the DOL, a plan sponsor's board of directors acts as a fiduciary to the extent they possess the responsibilities, powers, and discretion enumerated in ERISA § 3(21).

[65] 29 C.F.R. § 2509.75-8 (D-4).

Most typically, a fact set involving the fiduciary roles of a plan sponsor's board of director is the duty to monitor a named fiduciary because many plans operate through the procedure that the board of directors have the power to appoint and remove the plan's named fiduciary, such as the members of an administrative committee of a plan.

In such cases, where the board members are only responsible for appointing the named fiduciary, the DOL has specifically advised that members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan but their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in § 405(a) of ERISA). [66]

[66] 29 C.F.R. § 2509.75-8 (D-4).

Like a plan sponsor in general, a plan sponsor's board of directors, majority shareholder, officers and/or other employees may be considered a fiduciary in an individual capacity under ERISA based upon the degree of authority, discretion and control they possess, pursuant to § ERISA § 3(21).

> ***Practice Tip:*** The fiduciary status of the board of directors on the whole, will not change based upon the individual powers held by individual members. In *Martin v. Schwab*, for example, the U.S. District Court for the Western District of Missouri rejected the argument that individually, board members did not have discretionary authority to appoint members to the plan's Administrative Committee and found the board of directors as an entity was a fiduciary of the plan based upon the powers they possessed as a unit pursuant to the plan document. [67]

[67] *Martin v. Schwab*, No. CIV.A.91-5059-CVSW-1, 1992 BL 452, 15 EBC 2135 (W.D. Mo. 1992).

In the special case of employee stock ownership plan transactions, the board of directors of the plan sponsor might look to retain third parties to direct functional fiduciary tasks associated with transactions if it does not wish to act as a functional fiduciary for such transactions. Several cases have illustrated board members can be functional fiduciaries where they exercise discretionary control over employee stock ownership plan dealings involving plan assets. [68] For more, see *ERISA Fiduciary Rule Application to ESOPs*.

[68] *In re Electronic Data Systems Corp. "ERISA" Litigation*, 305 F. Supp. 2d 658 (E.D. Tex. 2004) (Beneficiaries under corporation's retirement plan, which was subject to ERISA, stated claim that corporation, its board of directors, and chief executive officer (CEO), and administrators of employees' investment retirement accounts (IRAs) were all "fiduciaries" under plan, through allegations that all took part in decision to have plan invest in corporation's stock); *Acosta v. Saakvitne*, 355 F. Supp. 3d 908, 922 (D. Haw. 2019).

(30) **Plan Fiduciary By Function - Service Providers Setting Interest Rates and Fees** —

Service providers are regularly retained to provide essential services to ERISA plans. A determination of a service provider's fiduciary status will hinge upon their service contracts with the plan relating to their scope of services. When a service provider ventures into a discretionary area—for example, a lawyer gives investment advice to the plan and not just legal advice—that provider then becomes a fiduciary.

The U.S. Court of Appeals for the Tenth Circuit in *Teets v. Great-West Life & Annuity Ins. Co.*, attempted to establish a bright line test to ascertain when service providers fit within the functional fiduciary framework of ERISA § 3(21).

The Tenth Circuit set the test as to establish a service provider's fiduciary status, as follows: an ERISA plaintiff must show the service provider (1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision. [69] The Teets court emphasized that "fiduciary status turns on whether the service provider can force plans or participants to accept its choices about plan management or assets." [70]

[69] Thus, to establish a service provider's fiduciary status, an ERISA plaintiff must show the service provider (1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision. *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir.), cert. denied, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019).

[70] *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1213 (10th Cir.), cert. denied, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019).

In applying this test, the Court found that Great-West Life Annuity and Insurance Company was not a fiduciary in setting predetermined interest rates for an investment in plaintiff's retirement plan mainly because it did not have "unilateral and unimpeded discretion" over the setting of the rate. [71]

[71] *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1221 (10th Cir.), cert. denied, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019).

But based on very similar facts, the U.S. Court of Appeals for the Eighth Circuit came to the opposite conclusion in applying the *Teets* test to a service provider that also set the interest rate for certain plan investments. The Eighth Circuit specifically found that Principal Life Insurance was a fiduciary because (1) in setting the crediting rate it exercised discretionary authority in deciding the rate itself (the rate itself was not a specific term of the contract) and (2) the plan sponsor did not have the "unimpeded" ability to reject the rate. [72]

[72] *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1075 (8th Cir. 2020).

> ***Practice Tip:*** The *Teets* and *Rozo* decisions are just the most recent attempts to crystalize and streamline complicated and factually specific analyses to discern if a plan service provider acts with the requisite discretion and control called for in ERISA § 3(21). As is demonstrated in the difference in outcome with *Teets* and *Rozo* the same test can be applied but a court can reach divergent results based upon slight nuances in facts.

The same outcome is true for cases involving other discrete services provided to retirement plans like a service provider's retention of discretion to set its compensation. While a service provider is plainly not involved in plan management when negotiating its prospective fees, after a service provider has entered into an agreement with an ERISA-governed plan, the agreement may give the service provider control over factors that determine the actual amount of its compensation from the plan itself. In certain situations where service provider compensation is derived from plan assets, the service provider may become an ERISA fiduciary with respect to that compensation. [73]

[73] *Glass Dimensions, Inc., ex rel. Glass Dimensions, Inc., Profit Sharing Plan & Trust v. State Street Bank & Trust Co.*, 931 F. Supp. 2d 296, 304 (D. Mass. 2013) (Tauro, J.) (finding that bank that offered and managed funds was a fiduciary with respect "to its compensation because its contract with the ERISA plan allowed it to charge a lending fee "anywhere from 0% to 50%," which constituted "significant discretionary authority" to determine the amount of its compensation" from the ERISA plan).

Most recently, the U.S. District Court for the District of Massachusetts, following in the footsteps of the *Teets* court, found that Fidelity was not a fiduciary in setting its "infrastructure fee" compensation because plaintiffs did not plausibly allege that Defendants "unilaterally control" the terms of the compensation they received. [74] Because it could not unilaterally control the terms of the compensation, the court found it was not a fiduciary in this respect.

[74] *In re Fid. Erisa Fee Litig.*, No. CV 19-10335-LTS, **2020 BL 54722** (D. Mass. 2020) found that Fidelity was not a fiduciary in selecting the funds available on the plan's investment platform because according to the Court "having control over the broad menu of investment options from which plan sponsors may choose their plan's investment options does not transform a platform provider into a functional fiduciary."

Practice Tip: Recent decisions on the fiduciary status of service providers have turned on the particular court's perception of "unilateral" or "total control." Different outcomes may be reached based upon the specific court's thoughts on what degree of control is necessary to confer fiduciary status, but an important consideration is whether the plan sponsor has the ability to reject, overrule, or modify decisions made by the service provider through direct action or indirect action such as waiting periods.

(40) **Plan Fiduciary By Function - Service Providers Third Party Administrators and Custodians** —

It is a generally accepted premise that a third party administrator (TPA), recordkeeper, or custodian who performs solely "ministerial" functions is not a fiduciary, unless the TPA or recordkeeper exercises the discretion or control over the plan called for in § 3(21).

To better assist practitioners, the DOL issued "questions and answers" regarding the distinction between persons performing "ministerial duties" and fiduciary duties.

The DOL has enumerated the following responsibilities as ministerial, and therefore, non-fiduciary in nature:

- Application of rules determining eligibility for participation or benefits;
- Calculation of services and compensation credits for benefits;
- Preparation of employee communications material;
- Maintenance of participants' service and employment records;
- Preparation of reports required by government agencies;
- Calculation of benefits;
- Orientation of new participants and advising participants of their rights and options under the plan;
- Collection of contributions and application of contributions as provided in the plan;
- Preparation of reports concerning participants' benefits;
- Processing of claims; and
- Making recommendations to others for decisions with respect to plan administration. [75]

[75] 29 C.F.R. § 2509.75-8 at D-2.

The DOL has advised that TPAs or recordkeepers who perform any of these functions (without more) do not act as ERISA fiduciaries because they do not have discretionary authority or discretionary control respecting management of the plan, do not exercise any authority or control respecting management or disposition of the assets of the plan, and do not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so. [76] Essentially, the DOL has instructed that the above tasks typically do not involve or necessitate the fiduciary control, discretion or authority called for in ERISA § 3(21).

[76] 29 C.F.R. § 2509.75-8 at D-2.

Practice Tip: The plan service provider's fiduciary status does not turn on the words of the plan's contract with the service provider, but the power and control exercised in practice. The Ninth Circuit has stated, “putting the magic words” in the contract, “purely ministerial” does not avoid fiduciary responsibility, if the characterization, purely ministerial duties is not correct reflection of what the provider does. The issue is not just how the duties are characterized, but what they are considering discretionary authority and control may exceed what could properly be characterized as “purely ministerial” activities in a contract. [77]

[77] *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1419 (9th Cir. 1997).

The DOL's above guidance is helpful, but the degree of control or discretion exercised is a case by case and contextual analysis. To discern in practice whether TPAs act with a level of fiduciary discretion, a distinction can be made based upon the wording of ERISA § 3(21)(A) which expressly differentiates between service providers who manage the ***plan in general*** and those who manage the ***plan assets.*** The latter might not contemplate fiduciary responsibilities but the former often does. The U.S. Court of Appeals for the Third Circuit has emphasized that "a significant difference between the two clauses is that discretion is specified as a prerequisite to fiduciary status for a person managing an ERISA plan, but the word 'discretionary' is conspicuously absent when the text refers to assets." [78] "This distinction is not accidental—it reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another." [79]

[78] *Bd. of Trustees of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272–73 (3d Cir. 2001).

[79] *Bd. of Trustees of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272–73 (3d Cir. 2001) quoting *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir.1994). See Daniel Candee Knickerbocker, Jr., Fiduciary Responsibility Under ERISA, § 2.05 (2000).

Thus, a line is typically drawn between a third party administrator who exercises custody of plan assets versus control over how the plan assets should be disposed. As the Ninth Circuit put it, "The words of the ERISA statute, and its purpose of assuring that people who have practical control over an ERISA plan's money have fiduciary responsibility to the plan's beneficiaries, require that a person with the authority to direct payment of a plan's money be deemed a fiduciary." [80]

[80] IT Corp., 107 F.3d at 1421.

Courts exercise a contextual analysis to discern where the fiduciary status of third party administrators and sometimes custodians, arise "'only to the extent' a person acts in an administrative, managerial, or advisory capacity to an employee benefits plan." [81]

[81] *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 290–91 (3d Cir. 2014) (quoting Pegram v. Herdrich, 530 U.S. 211, 222 (2000).

The mere safeguarding of plan assets typically does not render an individual a fiduciary under ERISA but exercising control over how the funds should be distributed could result in an opposite finding. [82]

[82] *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 347 (3d Cir. 2004) (finding that the defendants were not fiduciaries for purposes of ERISA where they had no right or discretion to dispose of the assets, but merely held the plan funds in an escrow account); Wettlin, 273 F.3d at 275 ("ERISA does not consider as a fiduciary an entity such as a bank when it does no more than receive deposits from a benefit fund on which the fund can draw checks."); But see *IT Corp.*, 107 F.3d at 1421 (Because the power to draft checks on the plan account constituted control over plan assets, General American qualified as an ERISA fiduciary).

Example: Extending this distinction, the Second and Tenth Circuits have a held that parties who possess and use their power to write checks on a plan account exercise control over plan assets. [83]

[83] See *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997); *David P. Coldesina, D.D.S. v. Estate of Simper*, 407 F.3d 1126, 1134 (10th Cir. 2005).

With this backdrop, in two important decisions both the Sixth Circuit and Ninth Circuit have found third party administrators acted with the requisite discretion as fiduciaries even though their contracts with the plan listed their responsibilities as ministerial. In *Briscoe v. Preferred Health Plan, Inc.*, 444 F.3d at 484 (6th Cir. 2006) the third-party administrator of a company's healthcare plan canceled its contract and wrote a check remitting the balance of the funds in the plan's account to the company but retained for itself an administrative fee of several thousand dollars. [84] The court held that the unilateral disposition of funds held in an account over which it exerted control made the TPA a fiduciary to the extent that it exercised such control beyond the period it was under contract with the plan. [85] Also, the Ninth Circuit in *IT Corp. v. Gen. Am. Life Ins. Co.*, concluded that the plan's contractual arrangement with its third party administrator that defined its responsibilities as “purely ministerial” was immaterial considering the plan administrator had possessed discretion to control the money in the plan's bank account. [86]

[84] *Briscoe v. Preferred Health Plan, Inc.*, 444 F.3d at 484, 490 (6th Cir. 2006).

[85] *Briscoe v. Preferred Health Plan, Inc.*, 444 F.3d at 484, 490 (6th Cir. 2006).

[86] *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997).

Practice Tip: The lines can sometimes be slight between fiduciary and non-fiduciary conduct, which makes it essential the named fiduciary and plan trustees do not delegate powers they wish to remain in their hands. In a case in the U.S. District Court for the Eastern District of Pennsylvania involving allegations by the plan and a participant that the third party administrator and custodian breached their alleged “fiduciary” duty by permitting the distribution of plan assets to “cyber criminals,” the court found the third party administrator and custodian were fiduciaries. While courts have construed the scope of traditional plan custodian work to be non-fiduciary in nature, the Court found plaintiffs there stated a plausible fiduciary because they alleged the custodian had control of the Plan accounts so as to distribute the Plan funds, and was provided with the authority to “[t]ake all other acts necessary for the proper administration of the Account.” [87]

[87] *Leventhal v. MandMarblestone Grp. LLC*, 2019 BL 158856, 2019 EBC 158856 (E.D. Pa. May 2, 2019).

(50) **Plan Fiduciary By Function - Service Providers: Actuaries, Accountants, and Attorneys** —

Unlike other service providers, routinely find that actuaries, accountants, and attorneys are typically perform non-fiduciary tasks. [88] In fact, in drafting ERISA, Congress carved out a specific role for actuaries of ERISA plans to prepare annual reports required to be filed with the Internal Revenue Service. [89] A similar role requires plan administrators to engage accountants to examine information to be included in plan annual reports. [90]

[88] *Gerosa v. Savasta & Co.*, 329 F.3d 317, 324 (2d Cir. 2003) (collecting cases).

[89] See 29 U.S.C. § 1023(d) (requiring complete actuarial statement as part of annual report).

[90] *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 533 (7th Cir. 1991) (collecting cases).

Perhaps because of these specific and delineated roles set out in the drafting of ERISA, courts do not usually find actuaries, accountants, and attorneys are fiduciaries because advising or providing a service for the trustee or named fiduciary to exercise discretion or control under the terms of the plan is not a fiduciary act.

In *Pappas v. Buck Consultants, Inc.* for example, the U.S. Court of Appeals for the Seventh Circuit responded to the argument made by a plaintiff that an early version of ERISA contemplated actuaries would be fiduciaries under the prospective law which relied on a statement by Representative Perkins, Chairman of the House Committee on Education and Labor where he stated that: "the assumptions utilized in determining plan liabilities and assets and the choice of appropriate valuation and fundings [sic] methodology are crucial to adequate funding of a plan. The actuaries performing these plan services will fall within the definition of fiduciary and will be held to the duties imposed on such individuals, including personal liability for any breach of such duties."[91]

[91] 923 F.2d 531, 533 (7th Cir. 1991).

The Seventh Circuit, in dismissing this piece of legislative history, focused upon a later statement by the House-Senate joint committee that contemplated a more fact-intensive inquiry that looks to whether the professional transcended her "ordinary functions."[92] The Court also focused on the DOL's 1990 interpretative guidance which in answer to the question of whether "an attorney, accountant, actuary or consultant who renders legal, accounting, actuarial or consulting services to an employee benefit plan ... [becomes] a fiduciary to the plan solely by virtue of rendering of such services," the regulations respond that these consultants, when "performing their usual professional functions will ordinarily not be considered fiduciaries."[93] In relying on these two pieces of regulatory history, the Seventh Circuit rejected the premise that professionals hired by the plan become fiduciaries when they perform professional functions in a tortious manner.

[92] 923 F.2d 531, 533 (7th Cir. 1991).

[93] 29 C.F.R. § 2509.75–5 (1990).

Most courts follow the DOL's guidance, but again, these are contextual case by case analyses and as a result, there are outliers. For example, one court found that when a professional retained by the plan "usurps" the independent discretion and effectively exercised authority and control over management and administration of the plan, the professional met the functional fiduciary definition. [94]

[94] Reich v. Lancaster, 55 F.3d 1034, 1048 (5th Cir. 1995).

> ***Practice Tip:*** Whether a professional behaves as a fiduciary might be an uncommon occurrence, but the Supreme Court has expressly recognized it might happen under the appropriate fact set. In *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S. Ct. 2063, 2071–72, 124 L. Ed. 2d 161 (1993), the Supreme Court emphasized that "Professional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary; must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties."

(50) **Proxy Voting by Plan Fiduciaries —**

The voting of common stock held by the plan is a fiduciary act of plan asset management subject to the fiduciary provisions of Title I of ERISA.

Fiduciaries must exercise the right to vote proxies for the benefit of plan participants. In voting proxies, fiduciaries can't subordinate the interest of plan participants and beneficiaries to unrelated objectives. As in other areas, the responsible fiduciary should investigate where the plan's interests lie, analyze the risks and rewards of alternative actions relative to those interests, and act accordingly.

In DOL Interpretive Bulletin 2016-01, the DOL noted, “The Department's longstanding position is that the fiduciary act of managing plan assets which are shares of corporate stock includes decisions on the voting of proxies and other exercises of shareholder rights.”[95] In Staff Legal Bulletin No. 20, the SEC confirmed, “As a fiduciary, an investment adviser owes each of its clients a duty of care and loyalty with respect to services undertaken on the client's behalf, including proxy voting.”[96]

[95] DOL Interpretive Bulletin 2016-01, 29 C.F.R. §2509.2016-01.

[96] Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firm, Staff Legal Bulletin No. 20 (June 20, 2014).

Employee benefit plan sponsors can exercise their shareholder rights with proxy voting as part of their fiduciary duty to manage plan assets.[97]

[97] DOL Interpretive Bulletin 2016-1, 29 C.F.R. § 2509.2016-01.

Sponsors should vote their proxies:

- as part of the process of managing the plan's investment in company stock unless a responsible plan fiduciary determined that the time and costs involved weren't in the plan's best interest;
- when sponsors determine there are problems with their portfolio company's management; and
- to clarify their position regarding environmental, social, and governance issues.[98]

[98] DOL Interpretive Bulletin 2016-1, 29 C.F.R. § 2509.2016-01.

Practice Tip: Plan fiduciaries should maintain a documented analysis of the cost of shareholder activity when proxy voting on environmental, social, or other collateral factors. Because proxy voting is not a license to increase expenses, sacrifice returns, or reduce plan benefit security, fiduciaries must ensure that they are maximizing the expected economic gain for plan participants and beneficiaries over an appropriate investment horizon.[99]

[99] DOL FAB 2018-01.