

Who or What is a Fiduciary?

A fiduciary is the party responsible for executing ERISA retirement plan duties. It can be a person, company, committee, etc.

Fiduciary status is created by

- Having authority
 - Named fiduciaries –Section 402(a)
 - Trustee –Section 403(a)
 - Administrator—Section 3 (16)
 - Investment Manager— Section 3 (38)
- Exercising authority
 - even if not appointed, Section 3 (21)

You are a fiduciary to the plan if you:

- exercise authority— *even if you never were granted that authority*
- have authority over the plan-*even if you never exercise that authority*

"...fiduciary status is based on the functions performed for the plan, not just a person's title."

Department of Labor's publication
Meeting Your Fiduciary Responsibilities

Consider: Your opinion that you are not a fiduciary is just your opinion. The plaintiff attorney may have a different opinion. Do you exercise authority over plan decisions?

Documents created on this site provide proof of proper exercise of fiduciary oversight.

3(21) Fiduciary—Authority

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle A--General Provisions
3 Definitions

(21)

(A) Except as otherwise provided in subparagraph (B), **a person is a fiduciary** with respect to a plan 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, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he **has any discretionary authority** or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c) (1) (B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [[15 U.S.C. 80a-1 et seq.](#)], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment

company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

3 (38) Fiduciaries—Investment Manager

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle A --General Provisions
3 Definitions

For purposes of this subchapter:

(38) The term “**investment manager**” means any fiduciary (other than a trustee or named fiduciary, as defined in section 1102 (a)(2) of this title)—

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

(B) who

(i) is registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.];

(ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act [15 U.S.C. 80b–3a (a)], is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary’s registration under the laws of such State, also filed a copy of such form with the Secretary;

(iii) is a bank, as defined in that Act; or

(iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

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

Named Fiduciaries

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle B--Regulatory Provisions
part 4--fiduciary responsibility ERISA
Sec. 1102 Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more **named fiduciaries** who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, 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.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105 (c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide—

(1) that **any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator)**;

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105 (c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Administrator Fiduciaries

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle A --General Provisions
3 Definitions

(16)

(A) The term “**administrator**” means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

Trustee Fiduciaries

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle B--Regulatory Provisions
part 4--fiduciary responsibility ERISA
Sec. 1103 Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. **Such trustee or trustees shall be either named in the trust instrument** or in the plan instrument described in section 1102 (a) of this title or appointed by a person who is a named fiduciary, and 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, except to the extent that—

(1) the plan expressly provides 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 this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102 (c) (3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(A) some or all of the participants of which are employees described in section 401 (c) (1) of title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401 (f) or 408 (h) of title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403 (b) of title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403 (b)(7) of title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or

under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 (as in effect on July 6, 2012), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)

(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401 (a) of title 26 or the trust which is part of such plan is exempt from taxation under section 501 (a) of title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403 (a) of title 26, and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.