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Understanding Fiduciary Duty: A Refresher for Plan Trustees

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February 17, 2014

Topics we will cover:

- Introduction
- The 5-Points of Fiduciary Duty
- Ethical Decision Making
- Co-Fiduciary Liability
- The 2-Hatted Trustee

Introduction:

- Taft-Hartley benefit plans and the joint board
- What does fiduciary duty mean, practically?
 - Loyalty
 - Prudence

The 5 Points of Fiduciary Duty

- ERISA § 404(a)
 - Solely in the interest of participants and beneficiaries
 - Exclusive purpose of providing benefits and defraying costs
 - The Prudence standard
 - Diversification
 - In accord with the Plan Document

The 5 Points of Fiduciary Duty

- Solely in the interest of participants and beneficiaries
 - The CENTRAL duty of a plan trustee
 - Construed strictly
 - Duty of loyalty

The 5 Points of Fiduciary Duty

- Exclusive purpose of providing benefits and defraying costs
 - Subset of the “solely in the interest” duty of loyalty
 - Practical issues
 - Socially responsible investing
 - Economic development investing
 - Reasonable administrative costs
 - Is the amount reasonable?

The 5 Points of Fiduciary Duty

- The Prudence standard
 - Prudent person
 - Procedural prudence
 - What can you prove?
 - Acting in a like capacity and familiar with such matters
 - Expertise not a requirement
 - Must know enough to know what you don't know
 - Education!

The 5 Points of Fiduciary Duty

- Diversification
 - Reduce the risk of large losses
 - Investment policy statements
 - To rebalance or not to rebalance?
 - Unless clearly prudent under the circumstances not to do so
 - Shifts burden to fiduciary to show prudence

The 5 Points of Fiduciary Duty

- In accord with the Plan Document
 - Requirement to have a written plan instrument
 - Be careful what is incorporated by reference
 - Trust Document
 - SPDs
 - Collective Bargaining Agreements
 - Disconnect between document and administration
 - EXCEPT if the document violates ERISA

Ethical Decision Making

- Why serve as a trustee?
 - No pay
 - Tremendous time commitment
 - High legal/financial exposure
- Highest ethical standard
 - Taking care of others when they need it
- Tone
 - Who benefits?

Co-Fiduciary Liability

- ERISA § 405(a)
 - Liability not only comes from your own acts
 - But also
 - Knowingly participating in or concealing a breach
 - Enabling another fiduciary to commit a breach
 - Knowing of a breach and failing to make reasonable efforts to remedy
 - Includes discovery of and failure to correct prior breach!
 - Duty of inquiry

The 2-Hatted Trustee

- Management and Labor representatives who
 - Sit at the bargaining table one day, and
 - Sit at the round table of the Plan's board the next
- Clear delineation of what you are doing, when
- No requirement to consider only the plan at the bargaining table, but
- **REQUIRED** to only consider the interests of the participants when acting as a trustee, free of any loyalty or benefit to the bargaining party

The 2-Hatted Trustee

- One caveat:
- Even when acting in your business capacity, one who is a trustee **CANNOT**
 - Mislead a participant
 - Make false or negligent statements about the Plan

Questions?

Thank you for your attention!