The Top Ten Fiduciary Errors
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Thanks to Cammack Health, I had an opportunity earlier this year to discuss common fiduciary mistakes as part of the **Comply and Conquer** webinar series, with two of the leading subject experts on such matters: Eric Paley of the law firm of Nixon Peabody, and Steven Kronheim of TIAA-CREF. The complete webinar can be found [here](#).

Fulfilling fiduciary responsibilities is essential, as errors can have serious consequences for both the organization and the individual fiduciaries themselves. Below are the top ten most common errors that fiduciaries make.

### 1. FAILURE TO IDENTIFY ALL FIDUCIARIES
There are often several retirement plan fiduciaries in an organization, and probably the most egregious error is failure to identify all such individuals. The consequences of this omission can be costly, as it is not uncommon for individuals who had no idea that they were fiduciaries to be called to testify in court cases regarding their fiduciary conduct. Fiduciaries include all of the following individuals:

- The trustee (note: this term does not generally apply to 403(b) plans, where assets are not held in trust, but in annuity contracts and custodial accounts)
- The investment advisor (note: other service providers, such as recordkeepers, are typically not fiduciaries, or are only fiduciaries for limited purposes)
- All individuals exercising discretion in the administration of the plan(s)
- All members of a plan’s administrative committee(s)
- Those who select committee officials (e.g., the board)

### 2. FAILURE TO PROVIDE PROPER FIDUCIARY LIABILITY INSURANCE
It is extremely important to avoid this mistake since fiduciary liability is personal, and not corporate. If a fiduciary is not properly insured, his/her own personal assets could be used to settle claims! Many plan sponsors erroneously assume that retirement plan fiduciaries are covered by some sort of insurance, such as directors and officers or employment practice liability policies.

However, such policies do not generally cover ERISA retirement plan liability, so a separate policy or rider that specifically covers retirement plan fiduciaries must be purchased. A copy of the policy/certificate of coverage should be a part of the plan’s permanent file, and the adequacy of coverage should be examined at each renewal, with a view to plan asset growth.

It should also be noted that fiduciary liability insurance is often confused with the ERISA fidelity bond that is required to be purchased for the plan. An ERISA bond protects solely against employee fraud/dishonesty and has nothing to do with fiduciary liability insurance.

### 3. FAILURE TO UNDERSTAND THE TYPES OF THIRD-PARTY FIDUCIARIES
Though many service providers will claim to be fiduciaries of some sort, such claims may or may not be valid. There are only three types of fiduciaries under ERISA:

- 3(21) Fiduciary provides advice, but has no discretion over plan assets.
- 3(38) Investment manager has discretion over plan assets and is the decision maker. Plan sponsor does not make decisions with regard to plan investments, but remains responsible for oversight of investment manager.
- 3(16) Administrator (rare) has complete responsibility for all administrative functions of the plan, including selection of service providers and investment management.

If a service provider is a fiduciary, it should be clearly stipulated in the service provider agreement as to the type of fiduciary the service provider is, under ERISA, and for what specific services the provider is serving as a fiduciary.
4. INSUFFICIENT TRAINING OF FIDUCIARIES
This failure has recently surfaced as a Department of Labor audit issue. New fiduciaries should receive comprehensive training, with refresher training provided to all fiduciaries on a regular basis. Training should also be documented in the meeting minutes, with copies of training materials retained in the plan’s permanent file.

5. FAILURE TO TAKE APPROPRIATE ACTIONS AND DOCUMENT SUCH ACTIONS
Though this may sound straightforward, some fiduciary committees suffer from inertia due to an inability to reach consensus. But the bottom line is that much litigation results from fiduciaries failing to take appropriate action, so it important for actions to be completed and documented in the form of meeting minutes. The minutes of a meeting are nearly as important as the meeting itself, and all fiduciaries should carefully review meeting minutes to ensure that documentation of all actions is complete and accurate. Lack of thoughtful documentation is an open invitation to litigation.

6. SPENDING TOO MUCH TIME ON PLAN Investments
Of course investments matter, but committee meetings often suffer from a laser-like focus on investments at the expense of other areas of critical importance to fiduciaries, such as remitting plan contributions in a timely fashion, following the plan document, and monitoring/controlling plan expenses.

Try adding at least one topic to each meeting agenda that is not investment specific. You’ll be glad you did! For some plan sponsors, however, an investment committee is only responsible for plan investments. In that case, if investments and plan administration are monitored by separate committees, there should be sufficient coordination of activities to ensure that no fiduciary duties fall through the cracks.

7. SPENDING TOO MUCH TIME ON THE WRONG INVESTMENTS
Mutual funds (and, to a lesser extent, variable annuities) are fairly easy to evaluate. Stable value and target date funds, are less so. Guess which category generally receives much more attention at committee meetings? Often, since stable value and target date funds make up the largest component of plan assets and contributions, paying too much attention to mutual funds comes at the expense of assets categories in which participants are more likely to invest. The prudent plan sponsor should probably dedicate an entire committee meeting solely to stable value fund evaluation, and conduct a separate meeting dedicated to target date funds.

8. FAILURE TO FOLLOW THE PLAN’S INVESTMENT POLICY STATEMENT
An investment policy statement (IPS) is to investment due diligence what a plan document is to plan administration: a living, breathing document that should be referenced in every committee meeting. Accordingly, an IPS should be of a reasonable length and easy to understand, so that it can be readily implemented. The IPS should not be so constricting that it prevents the committee from acting appropriately under the circumstances.

9. FAILURE TO PROPERLY BENCHMARK PLAN EXPENSES
All plan expenses directly or indirectly paid to all service providers, including revenue sharing, should be thoroughly documented and benchmarked against appropriate peer plans. The DOL is increasingly focusing on this area. Historically, such benchmarking information was difficult to obtain, but most plan recordkeepers and/or advisors can now provide such data.

10. SPENDING TOO LITTLE TIME ON PARTICIPANT OUTCOMES
Most participants make mistakes in managing their retirement plan assets, which results in outcomes that are less than desirable for both the employee and the employer. For example, employees may lack sufficient money to retire, and therefore need to extend their working careers at the employer firm by up to several years. But a thorough examination of participant outcomes is still in the developmental stages in many plans.

How about actual efforts to change participant outcomes and measurement of the effects of such efforts? For many plans, that remains just a dream. However, as the number of employees reaching normal retirement age turns from a trickle into a flood, that dream must become a reality, with positive effects on retirement outcomes.
CONCLUSION
If fiduciaries can avoid committing these mistakes, their plans’ due diligence process would be much improved. While a better process may not guarantee better results - a prudent process, rather than actual results, is the focus of entities such as the Department of Labor. By bringing these common errors to light, we hope plan sponsors can avoid mistakes in the future.