ALASKA SHRM STATE COUNCIL

Getting It Right:
Know Your Fiduciary Responsibilities

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U.S. Department of Labor

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2015-2016

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NHRMA

Reminder: **Human Resource Academy**
February 8-10
Anchorage – Crown Plaza Midtown
http://alaska.shrm.org/events/2016/02/nhrma-academy-2016

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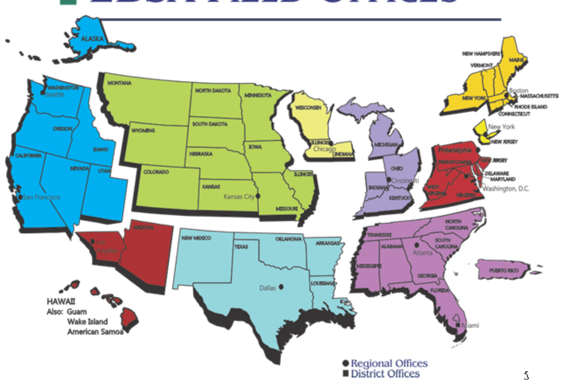
The Employee Benefits Security Administration
U.S. Department of Labor

Getting it right –

Know Your Fiduciary Responsibilities

A Compliance Assistance Program

EBSA Field Offices



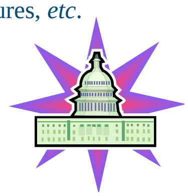
ERISA and Internal Revenue Code

ERISA –

reporting, disclosure, fiduciary responsibility, prohibited transactions, benefit claims procedures, *etc*.

Internal Revenue Code –

tax qualification rules



Fiduciary Responsibility – Overview

- What and who is a "fiduciary"
- Primary duties of a fiduciary
- Limits on fiduciary duties
- Failure to discharge fiduciary duties
- Avoiding problems

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What is a "fiduciary"?

- **In general –** position of trust, acting for the benefit of others with a high duty of care and loyalty
- **ERISA –** any person who exercises discretionary authority or control over plan assets or administration, or gives investment advice

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Fiduciary?

- Plan administrator
- Trustee
- Plan sponsor
- Investment manager
- Plan attorney or accountant
- Insurance company

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Basic fiduciary duties

- Acting **solely** in the interests of the participants and their beneficiaries
- Being prudent
- Paying only **reasonable and necessary** expenses of the plan
- Following the terms of the plan

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Prudence – If you need help, get it!

- **Fiduciary must act with the care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use.**

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Reasonable expenses *means -*

- Expenses are reasonable only if they are necessary for the operation of the plan, and are not excessive for the service received.
- For example –

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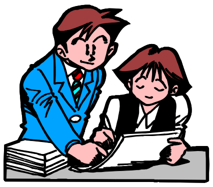
Following terms of the plan *means -*

- Follow the terms of the plan – do not exercise personal discretion when terms of plan are clear
- For Example -



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Limits on fiduciary liability

- **If plan permits, fiduciaries may allocate responsibilities**
- **Not all acts relating to a plan are "fiduciary" acts**

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Allocation to other fiduciaries

- If plan permits, fiduciaries may allocate responsibilities – not liable for acts or omissions of other fiduciaries.
- Appointment of "investment manager" – not liable for acts or omissions of investment manager.
- Duty to monitor other fiduciaries.

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Section 404(c) of ERISA

- Fiduciaries of individual account plans (such as a 401(k)) not liable for investment decisions of participants – if participants exercise control
- Must meet requirements of our regulations
- Liability for investment options
- Investment education and advice

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Default Investments

- Selection of a qualified default investment alternative (QDIA) is a fiduciary act
- Fiduciaries of 401(k)-type plans may limit liability for investing contributions on behalf of participants who fail to provide investment directions
- Must meet requirements of QDIA regulation
- Examples of QDIAs include balanced funds and target date funds

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"Settlor" (business) vs. fiduciary acts?

- When a plan sponsor makes a business decision in relation to plan design, plan amendment, plan termination, acting as settlor not as fiduciary – decisions not governed by fiduciary rules.
- Plan assets may **NOT** be used to pay for settlor activities
- Implementation of settlor decisions may be fiduciary acts

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DOL Guidance -

- **Advisory opinion 2001-01A –**
  - No apportioning required for expense of maintaining tax-qualified status of plan.
- **Hypothetical examples –**
  - Posted on website with AO 2001-01A at **www.dol.gov/ebsa/regs/aos**

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For example -

- Decision to offer participant loans is “settlor.”
- Plan assets may not be used to pay for any studies done in making decision or to amend the plan to add the program.
- Once the loan program is in place, decisions concerning loans (e.g., rate, duration, security) are fiduciary.

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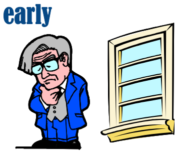
For example -

- **Company A wants to establish an early retirement window.**
  - $10,000 plan design study
  - $5,000 to amend plan
  - $300 IRS determination letter
  - $3,000 to communicate information about the window to employees



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Missing Participants – FAB 2014-01

Locating Missing Participants of Terminated Defined Contribution Plans

Plan fiduciary *must always:*

1. Use Certified Mail
2. Check Related Plan and Employer Records
3. Check with Designated Plan Beneficiary
4. Use Free Electronic Search Tools

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Missing Participants – FAB 2014-01

Making Distributions

- **Preferred Option:**
  - Rollover to Individual Retirement Plan
  - E.g., Safe Harbor for Terminated DC Plans
- **Other Options:**
  - Interest-bearing, federally insured bank account
  - State unclaimed property fund

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Missing Participants – FAB 2014-01

Other Issues

- 100% income tax withholding is **not** an acceptable distribution option
- **USA PATRIOT Act** compliance not required at time fiduciary establishes account in name of missing participant
  - **FAQs: Final CIP Rule**
    www.fincen.gov/finalciprule.pdf

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What happens if a fiduciary fails to fulfill his or her obligations?

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Pay the plan

- Restore losses
- Give up any profits

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Pay the Government

- The DOL and IRS may assess civil penalties and excise taxes.

- Fiduciary may be removed, barred from being a fiduciary.

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Co-fiduciary liability

A fiduciary will be liable for another fiduciary's violation if the fiduciary –

- participates in or acts to conceal a violation
- permits the other fiduciary to commit a violation
- has knowledge of another fiduciary's violation and fails to take reasonable steps to remedy

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Getting it right means– avoiding problems

- In most instances, a basic understanding of fiduciary responsibility and the exercise of common sense will keep plan sponsors and fiduciaries out of trouble.
- Problems can be costly to correct and result in bad employee and public relations.

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Steps to avoid common problems

1. Understand plan and responsibilities
2. Carefully select service providers
3. Make timely contributions
4. Avoid prohibited transactions
5. Make timely reports to government and disclosures to participants.

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Step 1

Understand your plan and your responsibilities

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Know who is responsible for various activities required by plan

- Custody of plan assets
- Recordkeeping
- Benefit decisions
- Directing investments

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Delegations

When assigning responsibility (whether to an internal committee, human resources department or external service provider):

- ✓ Make sure they understand their responsibilities
- ✓ Make sure they have the knowledge and information necessary to carry out their responsibilities
- ✓ Monitor to make sure they carryout their assignments

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Step 2

Carefully selecting service providers for the plan

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Careful selection of service providers

- ✓ **When you need help, get help –** ***remember the prudent expert rule***
- ✓ **A fiduciary's success may depend on how well the fiduciary selects the plan's service providers**
- ✓ **The selection of service providers is a fiduciary act –** ***prudence is a process***

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Tips for selecting service providers

- ✓ **Consider what services you need**
- ✓ **Obtain information from more than one service provider (services, experience with employee benefit plans, costs)**
- ✓ **For valid comparison, make sure each provider has same information**
- ✓ **Consider "bundled" and "unbundled" services**

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Tips *continued*

- ✓ If a license is required (attorney, accountant, etc.), check with state or federal licensing authorities to confirm provider has up-to-date license
- ✓ If handling plan assets, confirm provider is bonded
- ✓ Make sure you understand terms of agreements or contracts

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Tips *continued*

- ✓ Document the process you followed in reviewing and selecting service providers
- ✓ Obtain commitment from provider for regular updates on services
- ✓ When renewing contracts with service providers – repeat the selection process / confirm that facts on which initial selection was made have not changed

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Monitor plan service providers

Plan fiduciaries must prudently select plan service providers and periodically monitor them to make sure the services are being delivered as agreed.

Remember - the plan fiduciary may be liable if the service provider fails to carry out its responsibilities.

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Fees and expenses

Field Assistance Bulletin 2003-3

- **Who can pay plan expenses?**
  - Plan sponsor / participant
- **How can fees and expenses be allocated among participants?**
  - Pro rata / per capita

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Fees and expenses *continued*

- Fiduciary has a duty to ensure that fees and expenses paid by the plan are reasonable in light of the quality and quantity of services provided.
- Both costs and quality are important factors.
- Ask if the provider is receiving fees from third parties, such as "12b-1" fees.

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Fee and investment disclosures

- **Disclosure Requirement**
- **Participant-Directed Plans Only**
- **Field Assistance Bulletin**
  - 2012-02R

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Fee and investment disclosures

What information must be disclosed?

"Plan-related information"

- Administrative expense information
- General plan information
- Individual expense information

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Fee and investment disclosures

What information must be disclosed?

"Investment-related information"

- Performance data
- Benchmark returns
- Fee and expenses
- Internet website address
- Glossary

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Fee and investment disclosures

When must the information be disclosed?

- Up front
- Annually (2-month grace period available)
- On request

How must the information be disclosed?

- Comparative chart
- Model provided

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Fee and investment disclosures

Any other information?
"statement of expenses actually deducted"

Plan-related expenses
- ✓ **Administrative expenses**
- ✓ **Individual expenses**

At least quarterly
- ✓ **May be included in the individual benefit statement**

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For help - *see*

- **Selecting an Auditor for Your Employee Benefit Plan**
- **Understanding Retirement Plan Fees and Expenses**
- **Meeting Your Fiduciary Responsibilities**

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Step 3

Make timely contributions

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Contributions - Overview

- Employer contributions - contribute per plan documents – failure may result in legal action by plan fiduciary
- Participant contributions – become "plan assets" when reasonably segregable from employer's general assets – failure may result in violation of trust requirements and prohibited transactions.

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Participant contributions – *the rule*

Amounts withheld from employees' wages must be transmitted to plan *as soon as they reasonably can be segregated from the company's* ***general assets***.

A small plan (with fewer than 100 participants) will be deemed to be in compliance if participant contributions are received by the plan within 7 business days. (This is an optional safe harbor for small plans.)

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Participant contributions - *tip*

Delinquent participant contributions is one of the **biggest** problems for sponsors of 401(k) plans.

✓ Review your payroll system and work with service providers to ensure that participant contributions are forwarded to the plan on the earliest possible date in compliance with the law.

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Step 4

Avoid prohibited transactions

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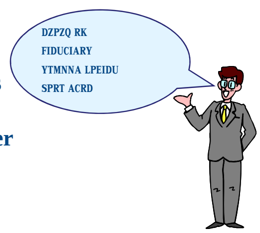
ERISAspeak

A fiduciary of a Plan shall not cause the Plan to engage in a transaction, if he knows or should know that such transaction is either directly or indirectly between the Plan and a party in interest.



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Translation

As a fiduciary, you can't cause the Plan to engage in transactions with people or businesses that have a close relationship to you or the Plan.

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Parties in Interest

Generally, people or entities that are related to a Plan.

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Who Are They?

The main categories are:

- **Fiduciaries**
- **Employees of a Plan**
- **Sponsoring Employer**
- **Service Providers**

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More Parties in Interest

- **Employees, officers, and directors of the sponsoring employer, service providers and 50% or more owners of the employer**
- **Relatives (spouses, ancestors, lineal descendants, spouses of lineal descendants) of fiduciaries, service providers, sponsoring employers**

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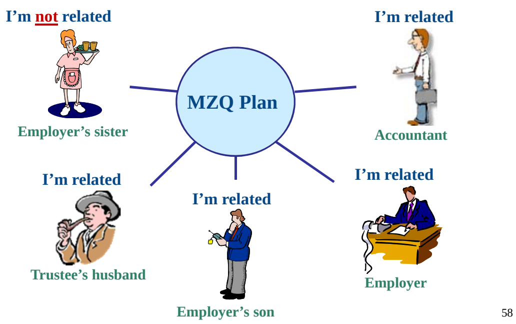
Example



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Prohibited Transactions

(AKA – What not to do with the Plan's money and/or assets and who not to do it with)

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Prohibited Transactions

-Remember – if you're a decision-maker regarding a Plan, you are responsible to the Plan as a Fiduciary.

-As a fiduciary you cannot cause the Plan to buy or sell or lease property from/to a related party.

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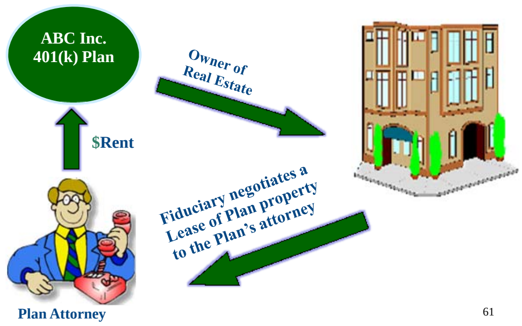
Example



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Prohibited Transactions

A fiduciary cannot cause a Plan to receive a loan from or grant a loan to a related party, or cause there to be an extension of credit between the Plan and a related party.

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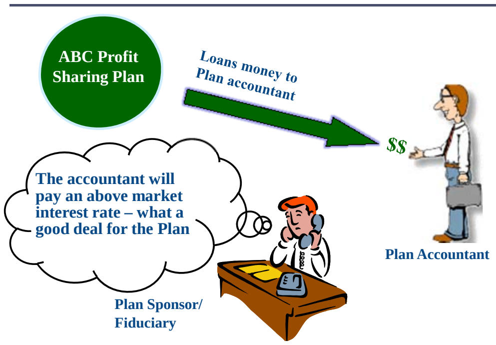
Example



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Prohibited Transactions

A fiduciary cannot use Plan assets to benefit a party in interest.

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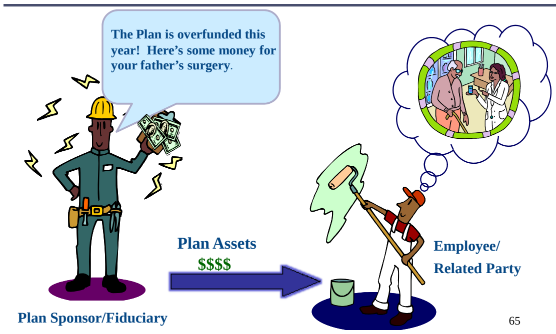
Example



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Prohibited Transactions

In your capacity as a Plan fiduciary, you cannot deal with the Plan's assets for your own benefit.

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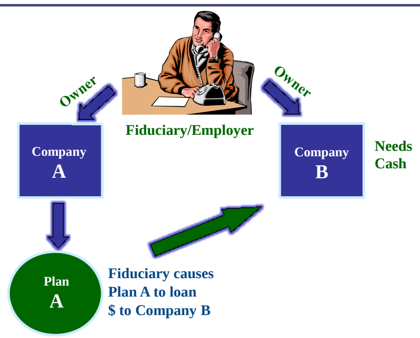
Example



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Prohibited Transactions

In your capacity as a Plan fiduciary, when dealing on behalf of the Plan you cannot represent or act on behalf of anyone who has adverse interests to the interests of the Plan.

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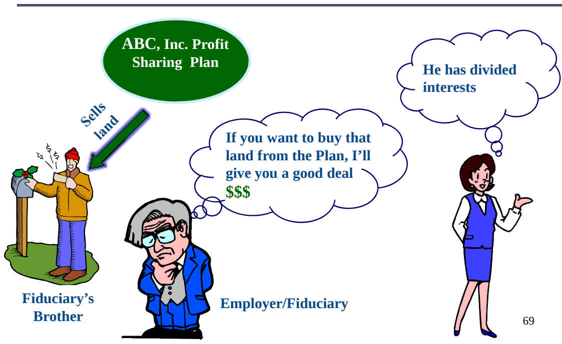
Example



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Prohibited Transactions

As a Plan fiduciary you cannot get a payment or benefit from anyone in connection with a Plan transaction.

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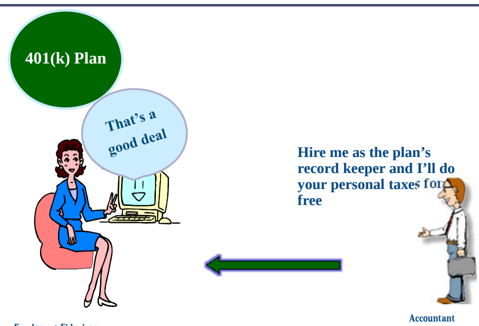
Example



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Fiduciary Tips

- **Identify the related parties to the Plan.**
- **Do not use the Plan or its assets to benefit the related parties or yourself.**
- **Do not cause or allow the Plan to engage in transactions with related parties unless the transaction is exempted.**

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Exemptions

- Some transactions that are prohibited are allowed if they are covered by an exemption.
- Some exemptions are specified in ERISA. These are called “statutory exemptions.”

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Example of Statutory Exemption

Service Provider Exemption-
ERISA section 408(b)(2)

- PT - fiduciary causes a Plan to receive services from a related party.
- EXEMPTION - permits service contracts with related parties provided that very specific conditions are met.

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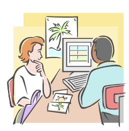
Service Provider Exemption 408(b)(2): Conditions

- Necessary service
- Reasonable compensation
- Reasonable contract:
  - as clarified in DOL final rule



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Final Rule for the Service Provider Exemption Reasonable Contract

The final rule relating to the Service Provider Exemption requires that certain service providers disclose specified detailed information to assist plan fiduciaries in assessing the reasonableness of contracts or arrangements.

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Covered Plans

- Defined Contribution – individual account – Plans
- Defined Benefit Pension Plans
- Exceptions: SEPS, SIMPLEs, IRAs, Individual Retirement Annuities and Certain ("Frozen") Pre-2009 Contracts or Accounts in 403(b) Plans

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Covered Service Providers

Any service provider that enters into a contract or arrangement with a covered plan under which it expects to receive $1000 or more in compensation for:

- ERISA fiduciary or investment advisory services to either the plan or a plan asset vehicle
- Recordkeeping or brokerage services to an individual account plan in connection with an investment platform
- Certain additional services if it is reasonably expected that such person will receive indirect compensation for the service

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Disclosures: Relevant Information

Plan service providers must furnish specific information to responsible plan fiduciaries concerning:

- The services to be provided
- If applicable, their status as a fiduciary or a registered investment advisor
- All compensation, direct, indirect and on termination, to be paid to the service provider, its affiliates, and subcontractors

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Example

I know the Plan custodian is a related party. Can I hire her to provide fiduciary services to the Plan?

Plan Sponsor

Plan Custodian

401(k) Plan

Yes, if

- services are necessary
- compensation is reasonable
- contract is reasonable – the custodian is a *covered service provider*, so she must give me all of the disclosures required under the regulation

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Step 5

Make timely reports to the government and timely disclosures to participants

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Overview

- Reporting to DOL/IRS/PBGC
- Disclosures to participants and beneficiaries
- Recordkeeping requirements
- Bonding requirements

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Reporting to the Government

The Form 5500/Form 5500-SF Annual Return/Report

- One Form satisfies DOL, IRS, PBGC
- Financial condition and general operation of the plan for the prior year
- Required information depends on type of plan and number of employees covered

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Form 5500/Form 5500-SF – Common Mistakes

- Failure to file timely report
- Failure to include accountant’s audit report where required
- Failure to monitor service providers (accountant, insurance company, benefits consultant)

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Form 5500/Form 5500-SF – Preventing and correcting mistakes

- Prevent filing mistakes by validating and correcting before submitting your filing.
- Check your status report after you file and fix any errors that you find.
- You can file an amended Form 5500/Form 5500-SF at anytime to correct a mistake you discover.

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Form 5500/Form 5500-SF – Timely Respond to Correspondence from DOL

- If DOL discovers a mistake, you will be sent a notice
  - Read the notice carefully and respond timely
  - Personal liability for penalties – plan CANNOT pay

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Form 5500 – Late filings

If you fail to file or file a late Form 5500, check out the Delinquent Filer Voluntary Compliance Program

- Reduced late filing penalties
- IRS, PBGC also may grant relief to DFVCP users
- Too late for DFVCP if notified of failure by DOL
- Call 202-693-8360 with DFVCP Questions

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Form 5500 – Getting help

- Reporting and Disclosure Guide
- Troubleshooter's Guide to Filing the ERISA Annual Report (Form 5500 and Form 5500-SF)
- ERISA Filing Acceptance System 2 (EFAST2) website at www.efast.dol.gov
- EFAST2 Help Line at 1-866-463-3278 (toll free number)

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Disclosures to Participants and Beneficiaries

- Summary Plan Description (SPD) and Summary of Material Changes (SMM)
- Summary Annual Report (SAR)
- Pension Benefit Statements
- Plan Documents

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What is an SPD?

- SPD is basic ERISA disclosure document
- Must accurately summarize plan, including benefits, rights, and obligations under the plan
- Must be written to be understood by average plan participant

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Who gets an SPD and when?

- Must furnish automatically to participants within 90 days of being covered by plan and to pension beneficiaries within 90 days of receiving benefits
- Must furnish current SPD on request to participant or pension beneficiary receiving benefits
- Generally, must redistribute every 5 years

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Pension Benefit Statements

Provided automatically to participants.

- Quarterly statements – participant-directed DC plans
- Annual statements – DC plans
- Triennial statements – DB plans

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Voluntary Fiduciary Correction Program

The Department of Labor's
Voluntary Fiduciary Correction Program
(VFC Program) administered by EBSA

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OOPs - Delinquent Participant Contribution Example

"I always send the participant contributions to the Plan 15 days from payday."

Plan Sponsor/Employer

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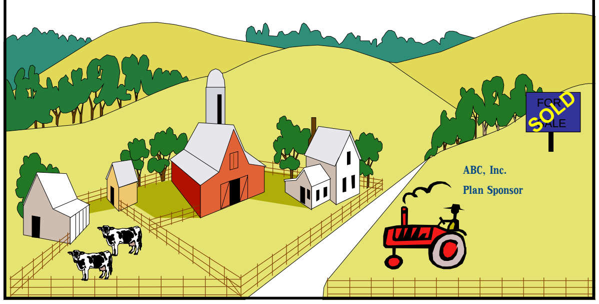
OOPs - Prohibited Sale Example

"I sold my back two acres to the Plan last year."



What is the VFC Program?

Allows "Plan Officials" to correct certain violations before DOL investigates and if done properly, receive a "No-Action" letter from the Department.

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VFC Program

- ✓ Covers 19 specific transactions and describes acceptable methods on how to correct them.
- ✓ Eligibility is conditioned upon not being "under investigation" and upon the application not containing any evidence of criminal violations.
- ✓ Correction must be made prior to submitting an application to the VFC Program Coordinator in the EBSA Regional Office.

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Will I need help?

- The VFC Program is designed to be used by a Plan Official without assistance from an EBSA Regional Office.

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It's Easy to Apply

- Online calculator and display of IRS rates and factors on EBSA website.
- Model Application Form available on EBSA website.
- Includes online compliance assistance tools and reduced documentation requirements.

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How Easy?

1. Identify ERISA violations involving the plan and determine if they are covered by the VFC Program.
2. Make sure the Plan Official is not under investigation.
3. Follow the VFC Program for correcting specific violations (i.e., improper loans, purchases, sales, etc.)
4. Follow the VFC program to calculate and restore amounts due to the plan including any lost earnings or profits.
5. Complete, sign, and date the checklist.
6. File a complete application with your EBSA Regional Office.

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EBSA Contact Information

- Contact EBSA electronically at www.askebsa.dol.gov
- EBSA Regional Offices (866) 444-EBSA (3272)
- Office of Regulations & Interpretations (202) 693-8500
- Office of Exemption Determinations (202) 693-8540
- EBSA website: www.dol.gov/ebsa

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Thank You!!

You may download your credit certificates at http://alaska.shrm.org/certificate

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