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FIDUCIARY LIABILITY: OFTEN OVERLOOKED AND UNDERESTIMATED

Limited liability is a prominent reason for the existence of business organizations other than general partnerships. Corporations, limited liability companies, and limited partnerships all offer protection to owners against personal liability. Directors and Officers (D&O) coverage and internal indemnification agreements also provide a level of protection and comfort for those making the big decisions.

However, there is one area of the law that doesn't blink twice, but rather charges right through these metaphorical walls of personal liability protection – ERISA. The Employee Retirement Income Security Act of 1974 (ERISA) imposes personal liability on any person acting as a fiduciary who breaches a fiduciary duty.[1] ERISA goes even further to explicitly state that any agreements attempting to relieve a fiduciary of personal liability, such as indemnification agreements, are void as against public policy.[2] ERISA does allow for the purchase and use of fiduciary liability insurance to protect against this personal liability.

Many fiduciaries are unaware of the depths of ERISA's exposure and that their personal assets remain vulnerable despite organizational protections. Some people may not even know they are fiduciaries. In an environment of increasing ERISA litigation, it is essential to know the facts and protect yourself.

Are you a Fiduciary?

ERISA defines a fiduciary as anyone exercising discretionary authority or control respecting plan management, plan assets or plan administration. ERISA

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[1] 29 USCS § 409(a).
[2] 29 USCS § 410(a).

also states that persons who render investment advice to a plan, or have the authority to do so, are fiduciaries.[3]

While this definition is broad on its face, courts have broadened it even further. Courts reiterate that the fiduciary test is a functional one; looking at facts, rather than merely the name listed on the plan document. In addition, you can be a fiduciary for one purpose or transaction but not for another. This is often referred to as acting in a fiduciary capacity. Also, delegation to third party administrators or investment advisors does not circumvent fiduciary liability.

Will Other Coverage Suffice?

ERISA mandates that plans be "bonded".[4] However, such ERISA bonds serve to protect *the plan* against employee dishonesty. These bonds do not protect fiduciaries from personal liability.

D&O coverage protects high-level decision makers, which are also usually the most common fiduciaries of employee benefit plans. However, D&O liability insurance almost always carries a specific exclusion for liability arising out of ERISA.

Employee Benefits Liability (EBL) coverage is another common type of insurance. Normally, this coverage is tacked on to commercial general liability coverage. However, EBL covers only liability arising out of the administration of employee benefits by human resources personnel; it does not cover more critical discretionary judgment exposure.

These common coverage schemes leave a gaping hole around the personal liability cast upon fiduciaries by ERISA. Therefore, it is important to ensure proper coverage under a Fiduciary Liability policy. In addition, utilization of legal counsel proficient in ERISA serves as another layer of protection and support.

Conclusion

Many people who accept the challenging job of dealing with employee benefits are taking a risk with their personal assets. Those that do not know of

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[3] 29 USCS §3(21)(A).
[4] 29 USCS § 412.

their fiduciary status and those that are inadequately covered should seek information about fiduciary liability coverage. As the field of ERISA litigation grows, it is important to stay informed and seek proactive solutions.

The next article in this series will discuss the typical fiduciary liability policy and important things to consider when selecting coverage.

For more information, please contact Haynes Benefits – Legal Counsel Benefiting You at 816.875.1919 or visit www.haynesbenefits.com.