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The Selfish Retirement Plan Fiduciary: An Introduction

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The Selfish Retirement Plan Fiduciary: An Introduction

The Employee Retirement Income Security Act (“ERISA”) puts labels on people. As impolite as that may be in our “politically correct” society, it is indisputable and Congress and the Department of Labor (“DOL”) have gone to great lengths to ensure that result through a multitude of statutes and regulations.

One of those labels, “fiduciary”, can be a particularly troubling one. At a plan sponsor level, being labeled as an ERISA fiduciary in connection with a retirement plan is almost always a sad occasion for those who understand the label and its attendant responsibilities. In fact, but for the significant tax benefits that may be attained through the establishment and operation of a properly designed retirement plan, it is almost a certainty that no one would purposely allow themselves to be labeled as such.

For those who don’t already understand, the fiduciary label triggers many burdensome obligations. In this regard, an ERISA retirement plan fiduciary must both prudently and expertly discharge every duty and responsibility imposed upon him or her under ERISA. In general, this involves difficult tasks such as avoiding all potential conflicts of interest by acting solely in the interest of plan participants and their beneficiaries with the exclusive purpose of providing benefits to them; diversifying plan assets in order to avoid the risk of large losses as well as accurately and precisely following the plan document’s terms. And what may happen if any of these somewhat nebulous responsibilities are not satisfied? Why nothing less than personally liability of course!

For purposes of this discussion, we generally limit our focus to the ERISA obligation of certain fiduciary employees (or owners) of a plan sponsor to act solely in the interest of plan participants and their beneficiaries with the exclusive purpose of providing benefits to them. So then, by statutory mandate, ERISA is obligating such a retirement plan fiduciary to put the interests of the plan’s participants and beneficiaries ahead of all others, even those of the fiduciary him or herself. Fiduciaries are obligated to become the selfless defender of the rights and interests of each plan participant and beneficiary without a care for the interests of any other, especially themselves. Right? Wrong! An ERISA retirement plan fiduciary should be selfish! And not just “taking the last cookie from the cookie jar” selfish but “George Costanza pushing children and old women with walkers to the ground in order to best improve his own chances to escape a fire” selfish. Extremely selfish!

Selfish? Wait, a selfish fiduciary? Isn’t personal *selfishness* the antithesis of the *selfless* duties and obligations that a retirement plan fiduciary owes to a plan’s participants and beneficiaries? Well, that may be true but before you dismiss the prior statement entirely, “selfish” in this context refers

selectively to the self-preservation instincts that every plan fiduciary needs to develop in order to protect him or herself from the staggering amount of personal liability that can be created in the event of a violation of ERISA's fiduciary responsibilities. In an extreme and comedic way, the George Costanza example demonstrates a necessary, if somewhat overdeveloped, sense of self-preservation. Fortunately, in this context, we don't have to go quite that far.

Notwithstanding, only a selfish ERISA retirement plan fiduciary, with proper planning and processes of course, can effectively prevent and control his or her personal liability through careful liability insulation techniques. The remainder of this article is the first in a series that focuses on some practical advice that will allow an ERISA retirement plan fiduciary to begin to take several important steps towards "looking out for number one" and becoming the "Selfish Fiduciary".

Principle number one of the Selfish Fiduciary is: never be afraid to ask for help. ERISA demands that fiduciary duties be performed "with the...care [and] skill...that a prudent man...*familiar with such matters* [emphasis added] would use". Let me help with the translation of that mouthful. This means that an ERISA fiduciary is expected to perform his or her duties as an expert regardless of what field the decision making may relate to. However, the fact that most ERISA fiduciaries are not financial advisors, ERISA attorneys or third-party retirement plan administrators presents a serious problem with satisfying this requirement.

So, how can a non-professional ERISA fiduciary exercise the level of expertise necessary to fulfill his or her ERISA duties? Often, it simply is not possible unless professional assistance is obtained. Therefore, the Selfish Fiduciary doesn't pretend to be a legal, financial, administrative, etc. expert unless he or she actually is. The Selfish Fiduciary hires expert assistance whenever it is necessary in order to satisfy the "level of expertise" requirement imposed upon ERISA fiduciaries. Although this could become expensive, remember that "reasonable expenses" which can be paid from plan assets may, at times, include costs incurred as a result of hiring an ERISA professional. Therefore, such expenses need not always be borne solely by the plan sponsor.

Principle number two of the Selfish Fiduciary is: obtain the proper insurance coverage. Although premiums for fiduciary liability insurance may have gone up in recent years, fiduciary liability insurance is broadly available to cover claims relating to a breach of fiduciary duty under ERISA. Therefore, Selfish Fiduciaries are insured to protect themselves from this risk. Obviously, it is always important to carefully review any insurance policy in order to understand the coverage that is actually being provided. Be aware that there generally is a distinction in coverage between fiduciary liability insurance (relating to ERISA fiduciary breach claims) and employee benefits liability insurance (relating to administrative errors). Do not assume that a fiduciary liability policy provides both layers of coverage. Read the fine print and, if necessary, refer to Selfish Fiduciary Principle #1 above and obtain additional professional input as necessary.

Last words of caution with respect to fiduciary liability insurance, premiums can be paid from plan assets. However, due to the DOL's position on doing so, paying fiduciary liability insurance premiums from plan assets can severely limit the coverage available to the fiduciary insured. Therefore, be very careful if attempting to pay fiduciary liability insurance premiums from plan assets.

Principle number three which generally has the greatest application to Selfish Fiduciaries who are non-owner employees of the plan sponsor is: demand indemnification from the plan sponsor. Employees who agree to accept an ERISA retirement plan fiduciary role have agreed to put themselves in harm's way for their employer. Therefore, it seems reasonable that employees in that situation should expect their employers to indemnify them with regard to at least some of the liabilities they may be exposed to. Thus, a binding legal agreement obligating the plan sponsor to indemnify the fiduciary with regard to any (or, more likely, certain) allegations, claims or judgments that occur as a result of providing fiduciary services to the plan constitutes another practical way for a retirement plan fiduciary to protect oneself. However, just as a thorough examination of a fiduciary liability insurance policy is necessary in order to understand what protections it provides, any indemnity agreement must be examined with the same skeptical eye. Does the agreement cover expenses incurred prior to the filing of a formal legal claim in court? Does it carve out exceptions to the right of indemnification in the event of the fiduciary's negligence? The level of flexibility available under such an agreement is extremely high. Therefore, proceed with caution and be careful not to assume what sort of protections the agreement may provide.

The daily dangers that an ERISA retirement plan fiduciary is exposed to are significant so remember that the Selfish Fiduciary takes his or her ERISA responsibilities seriously but does so in a way that avoids graduating from being a protector and watch dog to becoming a martyr. If you are an ERISA retirement plan fiduciary, go ahead, be selfish and take a little "me time" to ensure that you are protected to the best of your ability. However, engaging experts, obtaining insurance and seeking indemnification are truly only a few of the initial steps to be performed in order to attain the goal of becoming a Selfish Fiduciary. I welcome you to read additional, subsequent articles in this series which will explore other concerns and begin to examine prudent processes to further insulate the Selfish Fiduciary from potential liability.