



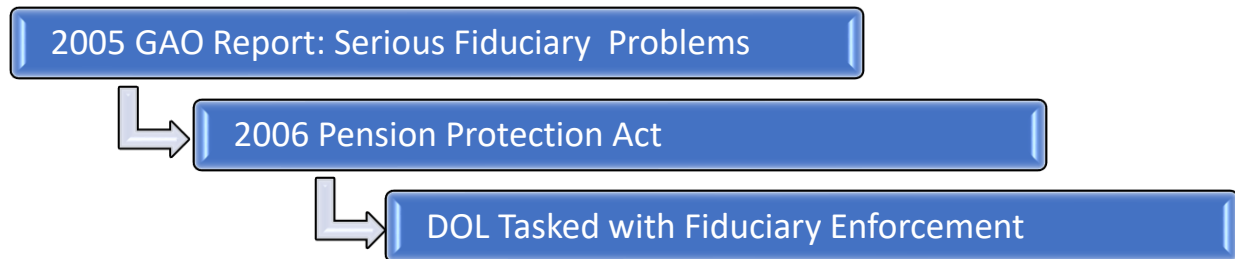
Why Are Fiduciary Requirements Now Under The Microscope?

The most revolutionary shake-up since the passing of ERISA

Litigation has skyrocketed bringing attention to regulatory enforcement

- ENRON
- LaRue 2008: enabled class action lawsuits
- Daubert v. Merrill Dow Pharmaceuticals
- Bilewicz v. FMR (Fidelity)
- Tibble v. Edison (Supreme Court!)
- Bell v. Anthem
- Pledger v. Reliance Trust

Regulatory Enforcement Changes



DOL “Hit List”

- Penalties for Disclosure Violations
- Fiduciary Training – Must Prove Expertise
- Improper Plan Bonding
- Must Demonstrate Expert Processes
- Background Check on Associated Persons
- Prove Reasonableness of Fees
- Establish Qualification of Service Providers
- Unsuitable Investment Policy Statement

ERISA is clear, if the plan fiduciaries are not qualified to perform the duty at the level of a “prudent-expert” and, if the duty is not delegated to a “prudent-expert” the plan fiduciary is fully-responsible for all fiduciary breaches (both as a plan sponsor and personally under ERISA §409 [ERISA §404(a)(1)(B)].

FIDUCIARY  WISE

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Required Fiduciary Duties

Duties & Responsibilities	Validation	What It Means
Knowledge of fiduciary duties or outsource to a fiduciary expert-	ERISA §404(a)(1) Marshall v. Metal Association, Donovan v. Mazzola	The plan sponsor must know their stewardship duties and do them at the highest standards or outsource to a fiduciary expert
Applicable governing documents support fiduciary standards	ERISA §402(a) Liss v. Smith, White v. Martin	All documents that govern the ERISA plan are meeting ERISA fiduciary standards and are being managed in accordance with the documents
Roles & responsibilities are clearly defined for the plan sponsor and service providers and a designation of whether the duty is being completed as a fiduciary or not	ERISA §405(c) Fink v. National Savings & Trust, Ellis v. Rycenga Homes	The plan fiduciary must know that all roles & responsibilities are assigned. They must also know which assignments have been delegated to an ERISA fiduciary (Approximately 150+ duties).
Conflicts of Interest must be addressed and resolved	ERISA §3(14)(A) Tibble v. Edison, Whitfield v. Tomasso	Conflicts must be resolved to meet the duty of loyalty test
Contracts for all service providers that are consistent with fiduciary standards	ERISA §408 George v. Kraft Foods Global, Inc. Liss v. Smith	Every service provider must provide a written contract to the named fiduciary and all contract language must be consistent with ERISA
Holding plan assets within the jurisdiction of Federal District Courts	ERISA §404(b) Varity Corporation v. Howe H.R. Report # 93-1280	Assets in a qualified retirement plan must be protected for the exclusive benefit of the participants and beneficiaries
“Core” investments must meet proper risk standards & expected returns	ERISA§404(a)(1)(b) ERISA§404a-1(b)(1)(A) ERISA §408(b)(2) Tibble v. Edison Metzler v. Graham Chase v. Pevear	ERISA fiduciaries must select, monitor & meet certain return expectations, non-fiduciaries are not required to meet this standard
Use of a ‘funding policy’ or Investment Policy Statement for managing the plan’s assets	ERISA §404(a) Unisys Savings Plan Litigation Harley v. 3 M	A written, sufficiently detailed and followed IPS will implement and monitor the investment strategy and be an excellent resource for “procedural prudence” in an ERISA plan
Due diligence process to select and monitor the service providers	ERISA §408(b)(2) Howard v. Shay Braden v. Wal-Mart Stories, Inc.	ERISA is about the process. Under ERISA§405, delegation of duties and responsibilities can only really happen and continue under a reasonable due diligence process