



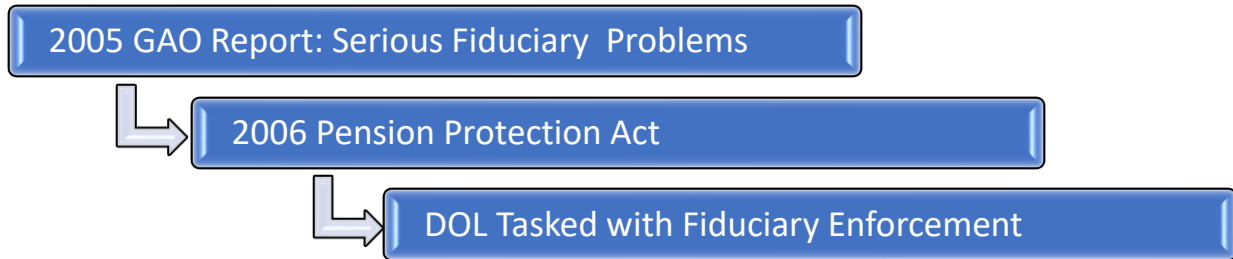
# Why Are Fiduciary Requirements Now Under The Microscope?

*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
<b>Knowledge of fiduciary duties or outsource to a fiduciary expert-</b>	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
<b>Applicable governing documents support fiduciary standards</b>	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
<b>Roles &amp; 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</b>	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).
<b>Conflicts of Interest must be addressed and resolved</b>	ERISA §3(14)(A) Tibble v. Edison, Whitfield v. Tomasso	Conflicts must be resolved to meet the duty of loyalty test
<b>Contracts for all service providers that are consistent with fiduciary standards</b>	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
<b>Holding plan assets within the jurisdiction of Federal District Courts</b>	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
<b>“Core” investments must meet proper risk standards &amp; expected returns</b>	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
<b>Use of a “funding policy” or Investment Policy Statement for managing the plan’s assets</b>	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
<b>Due diligence process to select and monitor the service providers</b>	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