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What ERISA Numbers need to be Decoded Now?

The Employee Retirement Income Security Act (ERISA) has existed since 1974. It governs the operations of qualified retirement plans and plan fiduciary governance. Increased awareness of ERISA has risen due to new laws and regulations plus increased enforcement by the Department of Labor (DOL).

The plan sponsor and those making discretionary decisions for the plan are considered plan fiduciaries. The responsibilites of a fiduciary are very broad. If you lack the knowledge or expertise to fulfill those fiduciary and ministerial responsibilities, you are to hire and/or delegate some of those responsibilities to experts. As a plan fiduciary, you must always conduct regular due diligence on service providers and monitor the results they deliver. That responsibility NEVER goes away.

There are many ERISA section numbers to decode. Be careful of statements made by service providers and advisors regarding how they can absolve you of fiduciary liability. Some are more comprehensive than others but most provide limited coverage.

402(a) – Named Fiduciary – this is the ***full scope*** fiduciary. All aspects of the plan management and operation start here. This is the plan sponsor decision-makers, including the Board of Directors. The Named Fiduciary delegates various fiduciary, non-fiduciary and ministerial functions and activities to others. This includes Trustees, custodians, Third Party Administrators, auditors, investment firms and professionals, 3(21) Investment Advisors, 3(38) Investment Managers, and 3(16) service providers. This delegation of authority allows the Named Fiduciary to mitigate or share some of the risk in fulfilling those duties. However, they still must monitor the results.

3(21) – The authority to act on behalf of the plan and the participants comes from ERISA Section 3(21). That section defines the fiduciary roles that involve discretionary authority or control with respect to the management of the plan or assets. If someone says they are a 3(21) fiduciary, have them clearly define what kind and to what degree of responsibility.

3(21) Investment Fiduciary – This is a subset of 3(21). The focus is the plan investments. They provide advice and guidance to plan fiduciaries on plan investments and custodians, conduct investment due diligence, prepare and implement investment policies and processes, review participant education, plan design and service providers. The plan fiduciary and 3(21) Investment Fiduciary meet regularly and make joint decisions.

3(38) Investment Fiduciary – This fiduciary's focus is making discretionary plan investment decisions in accordance with the plan's investment policy statement. Decisions are made without input from the 3(21) or 402(a) fiduciary. While the delegation of authority on investment related matters is greater than a 3(21) Investment Fiduciary and the liability to the plan fiduciary reduced, it is not eliminated. Results of the 3(38) must still be measured and monitored. If results are not achieved, the plan fiduciary has a duty to remove them.

3(16) Plan Administrator – This is a ***full scope*** fiduciary and not to be confused with a Third Party Administrator. The 3(16) is appointed by the Named Fiduciary or designated in the plan document. They manage and operate the plan. The areas under the authority of the 3(16) include Plan Qualification and Operations; Reporting and Disclosure; Plan Coverage and Testing; Contributions, Withdrawals and Distributions; and Plan Asset Management. This role includes filing the Form 5500, providing disclosures, communications with plan participants and any party dealing with the plan, providing complete and accurate census, eligibility determination, hiring service providers and other plan operational functions. Some of these responsibilities are fiduciary and some are ministerial in nature. Third Party Administrators (TPA) are often hired to support the 3(16). A duty to monitor the results of the service provider still remains.

3(16) Plan Administrator – Service Provider – This is a ***limited scope*** fiduciary. The service provider in a 3(16) role will only assume fiduciary responsibility and liability for services in which they have adequate control over the information, but many functions will be covered. These can include many of the items described above, such as signing and filing the Form 5500, approving distributions and loans, and can act as the service of legal process for the plan in case of a lawsuit. Not all service providers will assume this liability and the scope of services may be different.

In employing any service provider, ask the tough questions regarding their expertise, experience, systems, processes, resources and ability to effectively communicate with you.

Recent and upcoming events

This past April, Keith Gredys was a speaker on ERISA section 3(16) services at the 2014 fi360 National Conference in Nashville, Tennessee. In October, he will also be a panelist on 3(16) services at the 2014 Center for Fiduciary Due Diligence National Advisor Conference (CFDD) in San Antonio, Texas. Hundreds of financial advisors, Investment Fiduciaries, ERISA attorneys, and plan sponsors attend these national conferences.

Coming fall of 2014, Kidder Benefits Consultants, Inc. will be one of the first TPAs to offer the 3(16) Discretionary Fiduciary Authority service.