

Who Does What in a Retirement Plan?

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Agenda

- Statutory/Legal Framework
- Examples from ftwiliam.com document
- Other considerations
- Outsourcing duties in a retirement plan

Overview

- General Classes:
 - Plan Sponsor (settlor)
 - Fiduciaries
 - Named fiduciary - ERISA section 402(a)(2)
 - Trustee
 - Administrator - ERISA section 3(16)
 - Investment Fiduciary
 - Investment Manager - ERISA section 3(38)
 - De Facto - ERISA section 3(21)
 - Outside providers – TPAs, custodians, FAs

Plan Sponsor (Settlor)

- Establish Plan
- Amend Plan
- Authorize participation in plan by other entities
- Designate Plan Admin, Trustee & Investment fiduciary
- Curtis Wright Corp. v. Schoonejungen, U.S. S. Ct. - an employer is not engaged in plan administration and thus is not acting in a fiduciary capacity when it decides to create, amend, or terminate a plan.

Plan Sponsor (Settlor)

- Is designation of Plan Admin, Trustee & Investment fiduciary a fiduciary act?

Named Fiduciary

- Often the same as the Plan Administrator
- ERISA section 402(a)(2)(a):
 - (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who *jointly or severally* shall have authority to control and manage the operation and administration of the plan.
 - (2) For purposes of this subchapter, the term “named fiduciary” means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary

Trustee - ERISA 403(a)

- Most misunderstood role
- Plan assets must be held trust by one or more trustees who is named in the plan instrument or appointed by a fiduciary
- Have exclusive authority and discretion to manage and control the assets of the plan (discretionary trustee) except if managed by
 - Investment Fiduciary
 - Investment Manager

Trustee

- Duties in ftwilliam.com document
 - Determine valuation of assets (9.05)
 - Vote shares held in fund (9.06)
 - Article 10:
 - Hold assets
 - Accept contributions
 - Invest upon direction
 - Pay upon direction

Trustee

- Investment powers
 - Section 10.03
 - 10.03(u) - To do all such acts and exercise all such rights and privileges, although not specifically mentioned herein, as the Trustee may deem necessary to carry out the purposes of the Plan.
 - May amend plan relating to investments and the duties of trustees without losing pre-approved status of plan
 - PPA document will have a fill-in-the-blank for this purpose

Trustee

- Limits on a directed Trustee's non-discretion
 - A directed trustee may not follow a direction that the trustee knows or should know is contrary to ERISA
 - Tension between “may” and “shall”
 - While “may” implicates discretion it allows the Trustee to do something that it otherwise could not do.

Trustee

- Trustee does ***not***
 - Authorize disbursements from the plan
 - Determine eligibility for in-service withdrawals and loans
- These are all duties of the Plan Administrator

Plan Administrator

- Legally, “Plan Administrator” has very specific, and limited roles under ERISA and the Code.
- Many functions attributable to a Plan Administrator in a document are actually functions defined under 3(21) rather than 3(16).

Plan Administrator

- In ftwilliam doc, does everything that others do not.
- Article 12:
 - (i) to make factual determinations, to construe and interpret the provisions of the Plan, to correct defects and resolve ambiguities and inconsistencies therein and to supply omissions thereto. Any construction, interpretation or application of the Plan by the Plan Administrator shall be final, conclusive and binding;
 - (ii) to determine the amount, form or timing of benefits payable hereunder and the recipient thereof and to resolve any claim for benefits in accordance with this Article 12;
 - (iii) to determine the amount and manner of any allocations and/or benefit accruals hereunder;
 - (iv) to maintain and preserve records relating to Participants, former Participants, and their Beneficiaries and Alternate Payees;
 - (v) to prepare and furnish to Participants, Beneficiaries and Alternate Payees all information and notices required under applicable law or the provisions of this Plan;

Plan Administrator - Cont

- (vi) to prepare and file or publish with the Secretary of Labor, the Secretary of the Treasury, their delegates and all other appropriate government officials all reports and other information required under law to be so filed or published;
- (vii) to approve and enforce any loan hereunder including the repayment thereof;
- (viii) to provide directions to the Trustee with respect to the purchase of life insurance, methods of benefit payment, valuations at dates other than regular Valuation Dates and on all other matters where called for in the Plan or requested by the Trustee;
- (ix) to hire such professional assistants and consultants as it, in its sole discretion, deems necessary or advisable; and shall be entitled, to the extent permitted by law, to rely conclusively on all tables, valuations, certificates, opinions and reports which are furnished by same;
- (x) to determine all questions of the eligibility of Employees and of the status of rights of Participants, Beneficiaries and Alternate Payees;
- (xi) to arrange for bonding, if required by law;
- (xii) to adjust Accounts in order to correct errors or omissions;
- (xiii) to determine whether any domestic relations order constitutes a Qualified Domestic Relations Order and to take such action as the Plan Administrator deems appropriate in light of such domestic relations order;



Plan Administrator

- (xiv) to retain records on elections and waivers by Participants, their spouses and their Beneficiaries and Alternate Payees;
- (xv) to supply such information to any person as may be required;
- (xvi) to establish, revise from time to time, and communicate to the Trustee and/or the Investment Fiduciary and Investment Manager(s), a funding policy and method for the Plan; and
- ***(xvii) to perform such other functions and duties as are set forth in the Plan that are not specifically given to the Investment Fiduciary or Trustee.***



Investment Fiduciary

- ERISA 403(a) specifically contemplates an Investment Fiduciary managing investment of assets
- In the case if a directed trustee who is the Investment Fiduciary?
 - ftwilliam.com document defines the role of Investment Fiduciary
 - Other documents – hit or miss

Investment Fiduciary

- ftwilliam.com document
 - Direct the Trustee in the investment of assets - 10.04 and 10.06
 - Designate Investment Managers
 - Section 12.02:
 - manage the investment of the Trust Fund
 - appoint one or more Investment Managers
 - hire professional assistants and consultants
 - establish an investment policy for the Plan
 - supply information as may be required

Investment Manager – 3(38)

- Has the power to manage, acquire, or dispose of any asset of a plan;
- Three types:
 - Registered as an investment adviser under the Investment Advisers Act of 1940;
 - Registered as an investment adviser under the laws of the State in which it maintains its principal office and place of business; or
 - A bank, as defined in that Act; or is an insurance company qualified to perform services under the laws of more than one State
- Has acknowledged in writing that he is a fiduciary with respect to the plan.



Investment Manager

- ftwilliam.com document 10.06(c):
 - Appointment of Investment Managers. The Investment Fiduciary may appoint one or more Investment Managers with respect to some or all of the assets of the Trust Fund
 - Separation of Duties. The assets with respect to which a particular Investment Manager has been appointed shall be specified by the Investment Fiduciary and shall be segregated in a separate account for the Investment Manager (the "Separate Account")
 - Other 3(38) requirements

De Facto - 3(21)(A)

- ... A person is a fiduciary with respect to a plan to the extent:
 - (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
 - (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
 - (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

De Facto

- Mertens v. Hewitt
 - Interpreting plan provisions
 - Discretion in denying or approving claims

- Tension:
 - Providing service to clients
 - Being a fiduciary

De Facto

- How to avoid?
 - Everything in writing
 - Include statement in all communications that the Plan Administrator (or other appropriate fiduciary) makes final decision
 - What if a decision that is in the realm of the Plan Administrator is approved by Trustee?
 - Defer to client's Attorney/CPA
 - Esp. in controlled group situations
 - Service Agreement

De Facto

- I am a fiduciary – so what?
 - Prudent man rule.
 - Work solely in the interest of the participants and beneficiaries
 - With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims
 - Requires actions that may be contrary to interests of your client

De Facto

- I am a fiduciary – so what?
 - If large plan get sued by trolling plaintiff's attorneys
 - If small plan with feuding owners, get sued
 - If other small plan, DOL
 - Likely E&O coverage does not cover fiduciary acts
 - Get indemnification in service agreement

De Facto

- I am a fiduciary – so what?
 - Ability to receive compensation may be limited.
 - Ability to sell certain products may be limited
 - Compensation subject to being returned to plan, and excise taxes applicable, if receipt is a prohibited transaction.

De Facto

- I am NOT a fiduciary – so what if I act like one?
 - Act in the interest of P&Bs
 - Not in the interest of your client
 - It's OK to be on the side of the settlor.

Other Considerations

- Who can act as a fiduciary?
 - Any fiduciary must meet prudent person standard.
 - Can an inventory clerk serve as trustee?
- Who can serve as Trustee?
 - Any person(s) with trust powers under state law
 - Individuals
 - Artificial entities
 - generally limited to corporations with trust powers
 - Some states allow entities without bank/trust powers
 - Plan Sponsor



Other Considerations

- Indemnification
 - Trustee
 - Plan Administrator and Investment Fiduciary
 - None for Investment Manager in ftwilliam.com documents
 - TPA acting in any capacity in service agreement

Outsourcing Duties

- Contract issues:
 - Finely defined, very granular, definition of which party is responsible for the exercise of what authority.
 - Multiple parties in a single package need a common, written agreement between them, addressing particularly on how it unwinds.
 - Compensation is particularly sensitive; one cannot have the authority to approve one's own comp, or to claim an increase.
 - Having a process to deal with "problem children" - orphaned and uncooperative clients is important.



Outsourcing Duties

- Other issues:
 - The party to whom the obligation is outsourced must have the ability to perform that function. For example, a 3(16) in Illinois may not have the physical ability to distribute an SPD to new employees in California, or maintain worksite documents as is required of a plan administrator under 3(16)
 - Pay attention to the penalty of perjury statement if signing the Form 5500



Outsourcing Duties

- Other issues:
 - Access and control are key to the successful outsourcing: if you outsourced the duty to hire others, you need access to their data to monitor them.
 - Employers will need support in performing their oversight function
 - Financial advisors will have a very difficult time performing the 3(16) function
 - Watch for multiple "responsible plan fiduciaries" under 408(b)(2)



Continuing Education

Please – before you leave:

1. Sign in

- Verify your attendance
- Check the box if you want your attendance reported to IRS (for ERPA reporting and those with a PTIN only)

2. Pick up your certificate of attendance

- Certificates will not be emailed after the conference