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Benefits Guide: Basics

Retirement and Pension Plan Administration, Fiduciary Standards: Overview

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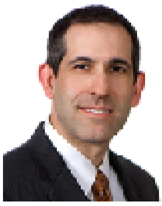

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FIDUCIARY BASICS —

The Employee Retirement Income Security Act of 1974, as amended (ERISA) imposes significant obligations on those responsible for the management and administration of an ERISA covered employee benefit plan.

Covered Plans: ERISA employee benefit plans—welfare benefit plans (e.g., medical plans) and pension benefit plans (e.g., 401(k) plans and pension plans) sponsored and maintained by private employers—are subject to the fiduciary requirements of ERISA. In contrast, governmental, church, and executive deferred compensation plans are exempt from ERISA fiduciary duties.

Defining an ERISA Fiduciary: A person is a “fiduciary” under ERISA to the extent he or she—

- exercises discretionary authority or control over the management of the plan, or the management or disposition of its assets;
- renders investment advice for a fee or other compensation, direct or indirect, with respect to money or property of the plan (or has authority or responsibility to do so); or
- has any discretionary authority or responsibility in the administration of the plan.[1]

[1] ERISA § 3(21).

There are a few key concepts to note from this definition. First, the definition is functional; it does not require formal designation or appointment of a person to trigger fiduciary status. In other words, if a person performs a fiduciary function, the person is a fiduciary regardless of his or her title. Second, the definition limits a person's status as a fiduciary; the use of the language “to the extent” demonstrates that fiduciary status generally is limited to those activities undertaken that are fiduciary in nature. For example, a plan sponsor that is a fiduciary in connection with the administration of the plan is not a fiduciary when it performs “settlor” functions such as when it considers whether to change the design of plan benefits.

Whether a person becomes a fiduciary by providing investment advice for a fee has been the subject of much scrutiny and regulatory rulemaking. For more on investment advice fiduciaries, see *Investment Advice* below.

Beyond the functional definition of a fiduciary, ERISA requires formal designation of one or more "named fiduciaries" with authority to control and manage the operation and administration of the plan. The employer sponsoring the plan is often identified as the named fiduciary. ERISA also requires that plan assets be held in trust by one or more trustees. Subject to exception, a plan's trustee has the exclusive authority and discretion to manage and control the assets of the plan.[2]

[2] ERISA § 402; ERISA § 403.

Fiduciary v. Settlor Functions: Wearing "Two Hats"

As previously noted, a person acts as a fiduciary to a plan "to the extent" that he or she engages in a fiduciary function. ERISA recognizes that a person may wear "two hats": the person may serve as a fiduciary in one context and may also serve in a non-fiduciary role with respect to the plan.

Example: A company sponsoring a retirement plan for its employees often serves as the administrator for the plan. However, the company, as plan sponsor, may decide to change the design of the plan without fiduciary restraint. In that event, the company is acting as settlor, not a fiduciary to the plan.

Accordingly, because certain persons may serve in multiple roles with respect to a plan, it is important to determine the capacity in which the person serves in analyzing what, if any, fiduciary obligations the person is bound to follow.

While not exhaustive, the Department of Labor has issued guidance describing common settlor and fiduciary functions.[3]

[3] DOL Ad. Op. 2001-01A.

For more on who is an ERISA fiduciary, see *Application of ERISA Fiduciary Duties: Who is a Fiduciary?.*

Persons Prohibited From Serving as Fiduciaries : ERISA bars persons convicted of a variety of crimes from serving as fiduciaries, administrators, plan officers, plan employees, or plan consultants, or filling any other position involving the authority over and control of plan assets, for 13 years after the conviction or end of imprisonment, whichever is later. The sentencing court can reduce the 13-year prohibition to a minimum of three years. This prohibition applies to people convicted of such crimes as robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, felony drug crimes, murder, rape, kidnapping, perjury, assault with intent to kill, and racketeering. Any person who knowingly hires a prohibited person for a plan can be fined $10,000 and imprisoned for five years.[4]

[4] ERISA § 411.

Beyond this statutory prohibition, plaintiffs' counsel in several high-profile cases have pursued removal of plan fiduciaries pursuant to the remedies provided under ERISA.[5]

[5] *See, e.g., Sacerdote v. NYU*, Case No. 1:16-cv-06284-KBF (S.D.N.Y. August 14, 2018), post-trial motion to remove fiduciaries.

Fiduciary Duties: An ERISA fiduciary to a plan must act solely in the interest of plan participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable plan expenses. Fiduciaries also must:

- act prudently, using the care and skill that an expert would use under like circumstances;
- diversify plan investments to minimize large losses, unless it is clearly prudent not to do so; and
- act according to the plan document to the extent consistent with ERISA.[6]

[6] ERISA § 404(a)(1)(A) through ERISA § 404(a)(1)(D).

Fiduciary Liability: A fiduciary is personally liable for any losses sustained by a plan because of the fiduciary's breach of his or her duties. A fiduciary also must restore to the plan any profits earned by using plan assets for personal gain.[7] Further, another plan fiduciary may be liable for a co-fiduciary's breach of his or her duties.[8]

[7] ERISA § 409.
[8] ERISA § 405.

Practice Tip: One should not mistake the fiduciary bond required under ERISA for fiduciary liability insurance coverage. The fiduciary bond protects the plan from fraud and dishonesty on the part of plan fiduciaries while fiduciary liability insurance coverage provides protection to the plan's fiduciaries. Individuals serving in a fiduciary capacity should inquire regarding what, if any, fiduciary liability insurance the plan sponsor (and likely their employer) maintains for their benefit.

Disclosure Requirements: In addition to the general disclosure requirements of Title I, part 1 of ERISA, the DOL has issued two rules requiring disclosures to and from plan fiduciaries. The first rule requires prospective service providers to disclose to the responsible plan fiduciaries of 401(k) and other covered retirement plans information about their expected fees and services. These disclosures are intended to provide information necessary for the responsible plan fiduciary to evaluate the reasonableness of service arrangements.[9] The second rule requires fiduciaries of participant-directed individual account plans to disclose to participants and beneficiaries certain plan and investment-related information, including fee and expense information.

[9] Generally, ERISA § 406 prohibits the engagement of service providers by a plan. However, ERISA § 408(b)(2) provides a broad exemption from this prohibition for service engagements for necessary services for which the service provider will receive no more than reasonable compensation.

Practice Tip: Plan service providers—whether recordkeepers, third-party administrators, consultants or communications specialists—often assist responsible plan fiduciaries in discharging their disclosure obligations. While these services can be helpful, the ultimate responsibility for the disclosures remains with the plan fiduciaries. Accordingly, all disclosures should be carefully reviewed and approved by the responsible plan fiduciaries.

Investment Advice: Persons who provide investment advice for a fee to ERISA-covered plans or plan participants are ERISA fiduciaries. As noted above, the fiduciary definition is functional. As a result, investment advice fiduciaries may include registered investment advisors, registered representatives of broker-dealer firms, as well as others to the extent they satisfy the functional test. To the extent they are ERISA fiduciaries, persons providing investment advice for a fee are governed by the fiduciary standards previously discussed and must avoid engaging in non-exempt prohibited transactions.

DOL guidance defines investment advice in this context.[10] Under the rule, a person renders investment advice if he or she—

[10] 29 C.F.R. § 2510.3-21.

- renders advice to the plan as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property,

- on a regular basis,

- pursuant to a mutual agreement, arrangement or understanding with the plan, plan fiduciary or IRA owner, that

- the advice will serve as a primary basis for investment decisions with respect to the plan or IRA assets, and that

- the advice will be individualized based on the particular needs of the plan or IRA.

In 2016, the DOL published a final regulation that would have altered this definition and have led to an expansion of advice and recommendations considered investment advice.[11] However, the U.S. Court of Appeals for the Fifth Circuit vacated the final regulation in June 2018, effectively reverting to the five-part rule described above.[12] In July 2020, the DOL issued a technical amendment formally reinstating the five-part test but, in the preamble to a new proposed prohibited transaction exemption, modified its interpretation and application of the five-part test.[13] This guidance signals a shift in the DOL's interpretation-and possible future enforcement-of the investment advice rule.

[11] 81 Fed. Reg. 20945 (April 8, 2016).
[12] *Chamber of Commerce v. U.S. Dept. of Labor*, 885 F.3d 360 (5th Cir. 2018).
[13] 85 Fed. Reg. 40834 (July 7, 2020).

Practice Tip: Plans often retain independent investment advisers to assist the responsible plan fiduciaries with the selection and monitoring of plan investments. For the avoidance of ambiguity, the governing agreements should clearly articulate the services that are fiduciary in nature and those that are not.

Investment Education: Not all advice and recommendations that touch on investments are considered investment advice. The DOL has long recognized the distinction between investment advice and investment education. Discussion of this distinction including a variety of examples can be found in DOL Interpretive Bulletin 96-1.[14]

[14] 29 C.F.R. § 2509.96-1.

Plan Expenses and Cost of Investments: A fiduciary's duties under ERISA include paying only reasonable plan expenses and costs for investments. For more on those requirements, see *Fiduciary Standards: Plan Assets and Investments.*

Plan Termination and Missing Participants: The decision to terminate a plan isn't a fiduciary decision. However, when a plan sponsor terminates a single employer pension plan and elects to establish a qualified replacement plan or to increase benefits under the terminated plan, certain fiduciary duties ensue. For more on these requirements, see Missing Participants.

Cybersecurity: There exists an ongoing debate regarding whether and to what extent cybersecurity is a fiduciary responsibility. Despite the ongoing debate and given the general fiduciary duty to act as a prudent expert would under like circumstances, caution dictates that plan fiduciaries take steps to ensure that the plan's service providers (recordkeepers, trustees, investment advisors, etc.) take appropriate precautions to protect the security and confidentiality of participant data. In general, a prudent approach should include securing private participant data, assessing the plan sponsor's vulnerabilities and capabilities to respond in the event of a data breach, and developing best practices.

Practice Tip: HIPAA privacy and security rules and related guidance that apply to HIPAA covered entities (including group health plans) can serve as helpful resources when designing and implementing cybersecurity policies for retirement plans.

Additional Resources: TM Portfolio 365: ERISA—Fiduciary Responsibility and Prohibited Transactions; Employee Benefits Guide: *Prohibited Transactions and Exemptions*; *Investments*; *Retirement Plan Data Privacy and Security*; TPS ¶ 5530.02 Fiduciary Standards.

THE EXCLUSIVE BENEFIT RULE

Exclusive Benefit Rule in ERISA Plans —

ERISA Plan fiduciaries must act for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses of the plan.[15] The exclusive benefit rule requires that:

[15] ERISA § 404(a)(1)(A).

- only reasonable administrative expenses may be paid from plan assets (and as a corollary, the plan must not pay unreasonable or unnecessary service provider or investment expenses)

- plan fiduciaries appropriately communicate information (and refrain from making misleading statements) to participants necessary to make informed decisions

Similarly, I.R.C. § 401(a)(2) generally prohibits the use or diversion of any plan assets for purposes other than exclusive benefit of the plan participants and beneficiaries.

For more on the exclusive benefit rule, see TM Portfolio 365.VI.C.: Fiduciary Responsibility and Prohibited Transactions, Fiduciary Duties Loyalty.

For more on exceptions to this prohibition, see Exceptions to the Exclusive Benefit Rule.

Transfers of Certain Frozen Plans Would Violate the Exclusive Benefit Rule of the Tax Code: While seemingly straightforward, these rules can have broad implications. For example, the IRS has ruled that the exclusive benefit rule prohibits a plan sponsor from transferring sponsorship of a qualified pension plan to an unrelated company if the transfer isn't part of a transfer of business assets, operations, or employees.[16]

[16] Rev. Rul. 2008-45.

A corporation with an underfunded frozen defined benefit plan transferred sponsorship of that plan to the corporation's subsidiary that didn't maintain any trade or business and had no employees and nominal assets. As part of the transfer, the plan document was amended to make the subsidiary the plan sponsor, assuming plan responsibilities. The corporation also transferred cash and marketable securities to the subsidiary that exceeded the underfunding. Then ownership of at least 80% of the subsidiary's stock was transferred to an unrelated corporation, so that the subsidiary wasn't part of the first corporation's controlled group under I.R.C. § 414.

In this scenario, the revenue ruling said the transaction wasn't in connection with the transfer of business assets (other than cash or marketable securities transferred to the subsidiary), operations, or employees from one corporation's controlled group to another corporation's controlled group. “The only business risk or opportunity in the transaction for [the receiving corporation] is to profit from the acquisition and operation of the plan,” the ruling said.

Exceptions to the Exclusive Benefit Rule —

Despite the broad application of the exclusive benefit rule to prevent the plan sponsor from using assets of the plan for purposes other than for the exclusive benefit of participants and beneficiaries, several exceptions may apply in connection with:

- contributions made by mistake of fact by an employer to a single employer plan, where the contribution is returned within a year of being made.

- contributions made by mistake of fact or law by an employer to a multiemployer plan, where the contribution is returned within six months of the plan administrator's determination that the contribution was a mistake.

- contributions conditioned on the initial qualification of the plan can be returned to the employer if the plan receives an adverse determination letter.

- contributions conditioned on their deductibility to the employer can be returned within one year after the disallowance of the deduction.

- assets from a terminated plan, which isn't a successor plan, allocated according to Title IV of ERISA.[17]

- assets from an underfunded plan terminated by the Pension Benefit Guaranty Corporation go to the PBGC to defray the cost of paying the guaranteed minimum benefits.[18]

[17] ERISA § 403(c)(2); ERISA § 403(c)(3).
[18] ERISA § 403(d).

INVESTMENTS

Fiduciary Duties Regarding Investments —

ERISA imposes fiduciary obligations regarding investments, including a duty to diversify investments to mitigate against the risk of large losses.[19]

[19] ERISA § 404(a)(1)(C).

According to the governing DOL regulation, to discharge its duty of care in connection with an investment decision, a fiduciary must (i) give appropriate consideration to the facts and circumstances relevant to the investment or investment course of action involved, including the role the investment or course of action plays in the portion of the investment portfolio for which the fiduciary has investment duties, and (ii) act accordingly.[20]

[20] 29 C.F.R. § 2550.404a-1.

For this purpose, “appropriate consideration” includes a determination that the investment or course of action is reasonably designed to further the purposes of the plan taking into consideration the risk of loss and opportunity for gain, and consideration of (i) the composition of the portfolio with regard to diversification, (ii) the liquidity and current return of the portfolio relative to cash flow needs, and (iii) the projected returns relative to funding objectives of the plan.

Within the framework of ERISA's prudence, exclusive purpose and diversification requirements, plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans. In this regard, there is nothing in ERISA or the regulations that would limit a plan fiduciary's ability to take into account the risks associated with benefit liabilities or how those risks relate to the portfolio management in designing an investment strategy.

Example: A fiduciary of a defined benefit plan may, consistent with the requirements of ERISA § 404, consider the liability obligations of the plan and the risks associated with such liability obligations in determining a prudent investment strategy for the plan.[21]

[21] DOL Opinion Letter 2006-08A.

Since the 1990s, there has been varied (and seemingly inconsistent) guidance regarding the extent to which investment fiduciaries may consider non-pecuniary factors and goals in the selection of plan investments. These factors—commonly referred to as environmental, social and governance (ESG) goals or factors—serve goals other than the economic performance of the investment. For example, a “green” fund may avoid investing in companies in the business of extracting, refining, or delivering fossil fuels. In June 2020 the DOL issued a proposed regulation that would clarify the role non-pecuniary factors may play in the selection of plan investments.[22] As currently formulated, the proposed regulation would likely have a chilling effect on ESG investments.

[22] 85 Fed. Reg. 39113 (June 30, 2020).

Practice Tip: Plan fiduciaries should carefully document their investment review and monitoring efforts and decisions. This is often accomplished by maintaining written fiduciary meeting minutes and written copies of supporting data and recommendations from retained independent investment advisers.

Employer Securities: Investment fiduciaries responsible for the selection and monitoring of employer securities held within a plan are subject to the same fiduciary obligations that apply to the selection and monitoring of other plan investments, except that investment fiduciaries to eligible individual account plans do not violate the duty of diversification as a result of inclusion of employer securities.[23] However, the circumstances involved with investments in employer securities often lead to enhanced fiduciary risks due to the potential conflicts of interest involved.

[23] ERISA § 404(a)(2).

Example: If the plan's investment fiduciary responsible for selection and monitoring of employer securities is also an officer or other high-level employee of the plan sponsor, it may be alleged that the fiduciary breached the exclusive benefit (loyalty) and prudence rules to serve the interests of the plan sponsor rather than the plan participants and beneficiaries. This may be exacerbated if the fiduciary also is privy to non-public information.

These circumstances coupled with the inherent volatility of any individual stock holding has resulted in significant litigation in so-called “stock drop” cases. The U.S. Supreme Court has ruled that fiduciaries investing in employer securities are subject to the same duty of prudence as other ERISA fiduciaries. However, in determining whether a plaintiff adequately states a claim in a case involving publicly-traded securities, allegations that a fiduciary should have known that the securities were under or over-valued based on public information do not adequately state a claim for relief. To state a viable claim for breach of the duty of prudence based on inside information, the complaint must allege alternative actions the fiduciary could have taken, that were legal (e.g., would not violate securities laws), and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the plan than to help it.[24] These standards have proven difficult to meet in subsequent stock drop cases.[25]

[24] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). See the Point of Law on this issue.

[25] *See, e.g.*, Dormani v. Target Corp , Case No. 18-2543, 2020 BL 280628 (8th Cir. July 28, 2020). See also Allen v. Wells Fargo, No. 18-2781, 2020 BL 284115 (8th Cir. July 27, 2020) “A prudent fiduciary—even one who knows disclosure is inevitable and that earlier disclosure may ameliorate some harm to the company's stock price and

reputation—could readily conclude that it would do more harm than good to disclose information about Wells Fargo's sales practices prior to the completion of the government's investigation."

Diversification of Plan Investments —

Plan fiduciaries must diversify plan investments to minimize the risk of large losses unless it's clearly prudent not to do so under the circumstances.[26]

[26] ERISA § 404(a)(1)(C).

In a participant-directed individual account plan setting (e.g., a 401(k) plan), the plan fiduciary generally will construct an investment lineup which includes a variety of different investment alternatives with differing characteristics (e.g., funds investing in domestic equities, international equities, and bonds, to name a few) from which participants can construct a portfolio that achieves their desired risk profiles.

Additional rules apply regarding the investment in items such as derivatives, hedge funds, and publicly traded employer securities.

For more on investment diversification, see TM Portfolio 365.VI.B.:Fiduciary Responsibility and Prohibited Transactions, Fiduciary Duties, Diversification.

Selecting and Monitoring Plan Investments —

The fiduciary charged with responsibility for a plan's investments must prudently select and monitor the investments. As noted above in Fiduciary Duties Regarding Investments, fiduciaries must evaluate and monitor investments based on the role the investment will play in the overall investment portfolio taking into account various factors.

Practice Tip: To assist fiduciaries in discharging these responsibilities, many plans adopt investment policy statements to describe and implement the fiduciary's processes for selecting, monitoring and, if necessary, removing investments from the plan. Although not technically required under ERISA, adopting and following written investment policies can help demonstrate prudence on the part of the responsible investment fiduciaries and is broadly considered a best practice.

The failure to prudently select and monitor plan investments has been a common allegation in lawsuits. The continuing duty to monitor has also diminished the utility of statute of limitations defenses. Indeed, the U.S. Supreme Court has ruled that a participant in a 401(k) plan can allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones, and that the claim is timely in such a case as long as the alleged breach of the continuing duty occurred within six years of the lawsuit.[27]

[27] *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015).

REVIEWING BENEFIT DENIALS, PROXY VOTING, AND PLAN AMENDMENTS

Review Upon Denial of Benefits —

ERISA-covered plans must establish and maintain reasonable claims and appeals procedures for filing benefit claims, providing notification of benefit denials, and appealing denied claims. DOL regulations govern minimum requirements claims and appeals procedures must meet to be considered reasonable.[28] To the extent that a plan's claims and appeals procedures comply with these requirements, participants must exhaust the procedures before they may pursue a claim for benefits in court. However, if the procedures fail to meet the minimum requirements, a participant will be deemed to have exhausted the administrative remedies under the plan and may pursue the participant's legal remedies.[29]

[28] ERISA § 503(b).
[29] 29 C.F.R. § 2560.503-1.

A plan administrator denying a claim for benefits functions as a fiduciary and must comply with ERISA's fiduciary standards previously discussed. In addition to meeting other fiduciary responsibilities, a plan administrator denying a benefits claim must timely notify the participant of the following information:

- the specific reason for denial;
- the provision of the benefit plan document justifying the denial of benefits;
- additional material or information that the participant must provide to perfect the claim and an explanation of why the additional material or information is necessary; and
- a description of the plan's review procedures including a statement of the claimant's right to bring a civil action under ERISA § 502(a) following a denial of an appeal.[30]

[30] 29 C.F.R. § 2560.503-1.

Appeals procedure: To comply with governing law, an ERISA plan must allow claimants to appeal a denied claim to a designated plan fiduciary. The procedure at a minimum must allow claimants to submit a written appeal of a denied claim to a fiduciary, review pertinent plan documents, and to file written comments or explanations of issues. A plan can establish a time limit for appeal of not less than 60 days after a benefit denial.[31]

[31] ERISA § 503.

If an appeal of a claim is denied, the plan fiduciary must provide similar information as that required for a claim denial notification described above. ERISA allows participants to bring claims disputes to federal court after all possibilities for relief have been exhausted under the plan's appeals process.

Please note that the preceding describes the general claims and appeals procedures for non-health plan, non-disability claims and appeals. Enhanced rules and different timing requirements apply to claims and appeals that require a disability determination or that involve claims under group health plans. For more on this process, see *Pension Plan Claims Procedures and Appeals.*

For more, see TM Portfolio 374.II.E.: ERISA-Litigation, Procedure, Preemption and Other Title I Issues, Procedural Aspects of Civil Litigation Under ERISA, Exhaustion of Administrative Remedies.

Fiduciary Duties Regarding Plan Amendments —

The decision to amend or terminate a plan is not fiduciary in nature. Rather, the decision is a “settlor” function retained by the plan sponsor and, as a result, may be based on the interests of the plan sponsor.

While the decision to amend or terminate a plan is not fiduciary in nature, the steps taken to implement a plan amendment or plan termination often are fiduciary in nature

Example: Terminating a plan generally requires a variety of steps, some of which may require selection of service providers to assist with the implementation. The selection of service providers to assist in the termination would be a fiduciary decision.

Plan fiduciaries may, under certain circumstances, have an obligation to communicate plan changes under consideration to participants that inquire. Specifically, some courts have adopted a "serious consideration" standard: a plan amendment is under serious consideration when (i) a specific proposal (ii) is being discussed for purposes of implementation (iii) by senior management with the authority to implement the change.

Example: An employer-fiduciary was required to provide complete and truthful information concerning changes to its employee benefit plan that were under "serious consideration" at the time a plan participant asked for the information, the U.S. Court of Appeals for the Ninth Circuit held.[32] Absent a specific inquiry, the employer-fiduciary had no affirmative duty to inform plan participants about any changes it is considering prior to their final adoption. Furthermore, unless the employer agreed to do so, it didn't have a duty to follow up with a participant if, subsequent to the participant's inquiry, the proposed changes reached the serious consideration stage.

[32] *Bins v. Exxon Co. USA*, 220 F.3d 1042, 24 EBC 2377 (9th Cir. 2000).

Plan fiduciaries must also avoid providing materially misleading information to participants and beneficiaries. In evaluating whether a fiduciary breached this duty, courts generally consider:

- whether a plan change was under serious consideration;
- how significantly a statement misrepresented the present status of internal deliberations;
- the special trust and relationship between the fiduciary and the employee; and
- whether the employee was aware of other information from the company that would lessen the importance of the misstatement.[33]

[33] *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 20 EBC 2625 (2d Cir. 1997).

The fiduciary duty arises only in connection with amendments to existing benefit plans, not to creation of stand-alone future plans. Consequently, an employer owed no fiduciary duties when it failed to tell a retiring employee of its future plan to offer a voluntary severance benefits package to certain employees, the U.S. Court of Appeals for the Seventh Circuit ruled. The stand-alone welfare benefit plan created after the employee retired didn't amend, supplement, or replace another plan. Because the plan didn't exist until after the employee's retirement, the employer didn't owe him any fiduciary duty concerning its benefits.[34]

[34] *Beach v. Commonwealth Edison Co.*, 382 F.3d 656, 33 EBC 1577 (7th Cir. 2004).