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Governmental Plan Fiduciary Duties

One area of continued confusion for many governmental plan sponsors is what, if any, fiduciary responsibility is associated with their plans.

Sources of fiduciary law for governmental plans

The federal Employee Retirement Income Security Act, better known as ERISA, imposes fiduciary duties (and liability for breaching those duties) with respect to *most* employer-sponsored retirement plans. ERISA *does not* apply to governmental employers.

Instead, each state may impose fiduciary duties on its own state and local governmental employers. This may come in the form of:

- State constitutional law
- State statutory law as enacted by the state legislative bodies
- Common law — the collective judicial decisions, which rely on custom and precedent

We generally refer to common law in the singular form; however, common law has developed separately in each of the 50 states. The common law of trusts imposes fiduciary responsibility on trustees and applies in the context of retirement plans because a plan sponsor, through a trustee, holds plan contributions in trust for the benefit of the plan participants. Representative samples of the common law on specific subjects have been compiled into Restatements of the Law, including the Restatement of Law on Trusts.

Who is a fiduciary?

State statutes may specify who is a fiduciary of that state's governmental plans. As an example:

> *Each retirement system or plan shall have one or more named fiduciaries with authority to control and manage the administration and operation of the retirement system or plan. However, the plan administrator, and any officer, trustee, and custodian, and any counsel, accountant and actuary of the retirement system or plan who is employed on a full-time basis, shall be included as fiduciaries of such system or plan.*

Many states, however, do not identify governmental plan fiduciaries by statute. Under common law, the plan trustee is a fiduciary. Others who advise the trustee as to the investment of plan assets, such as an investment manager or investment advisor, would likely also be a fiduciary under common law.

Fiduciary duties

Many state statutes provide specific rules about the fiduciary duties imposed on governmental plan fiduciaries. An example would be:

> *The retirement system's board will discharge its duties solely in the interest of the participants and beneficiaries for the exclusive purpose of:*
>
> - *Providing benefits to members, retired members and their survivors and beneficiaries and defraying reasonable expenses of administering the system;*
> - *Minimizing the employers' costs of providing benefits; and*
> - *Investing with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.*

This language is virtually identical to ERISA. At least 31 states have adopted fiduciary standards that are derived from ERISA's prudent man standard with 15 adopting the standard verbatim.

Some states impose a code of ethics on its fiduciaries, while others have adopted specific prohibited transactions such as “no member, officer, agent or employee of the state investment board may profit in any manner from transactions on behalf of the funds” in addition to affirmative duties. Several states have also enacted specific guidance that a fiduciary must follow regarding the investment of retirement plan assets.

Turning to common law, the Restatement of Trusts provides that a trustee has the following duties:

Prudence — the duty to administer the trust as a prudent person would, in light of the purposes, terms and circumstances of the trust. This requires the exercise of reasonable care, skill and caution.

Loyalty — the duty to administer the trust solely in the interest of beneficiaries.

Impartiality — the duty to deal fairly with beneficiaries and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter.

Avoid self-dealing — the duty to strictly avoid, except in discrete circumstances, from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee’s fiduciary duties and personal interest.

Fiduciary liability

While many states specifically address fiduciary duty by statute, only a limited number have explicit provisions about fiduciary liability. As example would be:

> *Any person who is in a fiduciary position with the Public Employee’s Retirement Association and who is adjudicated of violating any provisions of this article [on standards of conduct] shall be personally liable to pay to the association an amount equal to any losses resulting from such violation and shall be subject to such equitable or remedial relief as the court deems appropriate.*

The Restatement of Law on Trusts provides that a judge may impose an “equitable remedy” for a fiduciary breach such as requiring the fiduciary to take a specific action, suspending or removing the trustee or providing for damages that restore the participant’s position as if the fiduciary breach had not occurred.

Sovereign immunity

Most states provide some form of liability protection to their governmental plan fiduciaries either through the statute governing the retirement system or generally through the state’s sovereign immunity law. Sovereign immunity is another common law concept. It is the legal protection that prevents a sovereign state or person from being sued without consent. This protection usually extends to state governmental employees.

Best practices

It should now be clear that governmental plan sponsors and their delegates have numerous fiduciary responsibilities with respect to their retirement plans and could be held liable for breaching their duties. It should also be clear that general guidance on those responsibilities is not as straight forward as it is for private sector plan sponsors who rely on ERISA for guidance.

With this in mind, we offer up the following best practices for governmental plan fiduciaries:

- Become familiar with any and all state law that apply to your plan (consider the sources laid out at the beginning of this paper)

- Consider looking to ERISA as a best practice where it makes sense for your particular plan
- Hire experts where appropriate
- Create and follow an investment policy statement
- Prudently select a core fund lineup of investments
- Within the core fund lineup of investments, have a broad range of investment alternatives
- Monitor the plan's investments on an ongoing and regular basis
- Know what your plan documents say
- To the extent not specified by law, assign responsibilities among fiduciaries and service providers
- Document assignments and delegations
- Establish sound processes and procedures in writing
- Provide for initial and recurrent training of fiduciaries
- Distinguish the roles of each fiduciary position and maintain separate records based on position
- Establish an accountability system of checks and balances
- Maintain written (electronic) records for a minimum of six years

Based on common law principles, a recent Supreme Court decision, Tibble v. Edison International, 575 U.S. _________ (2015), No. 13-550, provides additional insights on fiduciary duties with respect to retirement plan investments for both private sector and governmental plans. Among these are:

- A fiduciary's duty to monitor investments is separate from the duty to prudently select the investment
- A plan fiduciary should have a monitoring program in place which includes a specified timeline as to when reviews will happen (for example, quarterly, semi-annually, or potentially annually at the outside)
- Different types of investments may require different types of review, different review criteria or review at different intervals
- Support the use of an investment policy statement to spell out the plan's procedures for adding, retaining and removing investment options

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