



IDRIVE
2022 NATIONAL CONFERENCE



ERISA
CASH CAB

If an advisor makes a recommendation for a rollover, is it fiduciary in nature?

WORTH* *\$100

- **If it meets the 5-part 1975 test, YES**
 - **Make an investment recommendation**
 - **Regular basis**
 - **Mutual agreement**
 - **Primary basis for action**
 - **Individualized for particular needs**

ANSWER

What if rollover recommendation is one-time basis?

WORTH* *\$100

- **Single, discrete instance will not meet “regular basis”**
- **Ongoing relationship or beginning of intended future ongoing relationship will meet “regular basis”**

ANSWER

**Can advisor receive commissions, 12b-1 fees,
revenue sharing, mark-ups/-downs?**

WORTH* *\$100

- **Will not be a prohibited transaction if advisor meets the requirements of PTE 2020-02**

ANSWER

**What requirements are imposed by PTE 2020-02
if advisors are going to rely on the exemption?**

WORTH* *\$100

- **Acknowledge fiduciary status in writing**

ANSWER

- **Disclosure services and material conflicts of interest**

ANSWER

- **Impartial Conduct Standards (ICS)**
 - **Investigate/evaluate investments, provide advice, exercise sound judgment in way knowledgeable and impartial professionals would (“prudent”)**
 - **Act with undivided loyalty – never place own interest ahead of interests of retirement investor**
 - **Reasonable compensation/best execution**
 - **Avoid misleading statements**

ANSWER

- **Policies and procedures designed to ensure compliance with ICS and mitigate conflicts**

ANSWER

- **Document and disclose reasons that rollover recommendations in investor's best interest; and**

ANSWER

- **Conduct annual retrospective compliance review and certification**

ANSWER

Can an advisor be banned from access to the exemption?

WORTH* *\$100

- **Yes, 10-year ban after conviction for specified crimes or if engaged in systematic/intentional violation of exemption's conditions or providing materially misleading information to DOL**

ANSWER

What should to be considered when determining rollover recommendation is in investor's best interest?

WORTH* *\$100

- **Alternatives to rollover (leave in plan)**
- **Investments available**
- **Fees and expenses**
- **Whether employer pays fees**
- **Taxation considerations**
- **Different levels of services**

ANSWER

When applying ICS, how does advisor get data necessary for comparisons?

WORTH

\$100

- **Get from prospect**
- **If advisor on the plan – use what you have**
- **Review publicly available 5500s**
- **All else fails – can use reasonable estimates, but must document/explain**

ANSWER

What needs to be considered in conflict mitigation policies/procedures?

WORTH* *\$100

- **Protect against excessive trades, investments not in investor's best interest, excessive allocate to illiquid/risky investments**

ANSWER

- **Should be both individual and firm conflicts considered**

ANSWER

- **Careful not to use quotas, bonuses, prizes or performance standards as incentives to make recommendations not in investor's interest**

ANSWER

- **DOL recognizes all risks cannot be eliminated**

ANSWER

What is this retrospective review???

WORTH ***\$100***

- **Review of recommendations provided during year that resulted in movement of assets**
- **Methodology and results in written report to senior executive officer**
- **Senior executive officer makes certification regarding review of the report**

ANSWER

What happens if the advisor fails to meet conditions?

WORTH

\$100

- **Financial institutions can correct violations of exemption within 90 days after learns of violation**

ANSWER

Is cryptocurrency or bitcoin illegal in a qualified plan?

WORTH

\$200

- Yes, but only if it is being used in lieu of flexPATH.

WRONG ANSWER

- There is no codified prohibition from using crypto as an investment option in a plan.
- However, the DOL has “cautioned” fiduciaries “to exercise extreme care before they consider adding a cryptocurrency option to its 401(k)”

RIGHT ANSWER

What are the concerns with adding crypto to a qualified plan?

WORTH

\$200

- **DOL's Compliance Assistance Release No. 2022-01 – the “EBSA expects to conduct an investigative program aimed as plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants . . . plan fiduciaries . . . should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks”**

ANSWER

- **Fraud, theft, and loss**
- **Speculative and volatile investments**
- **Challenge for participants to make informed decisions**
- **Custodial and recordkeeping concerns**
- **Valuation concerns**
- **Evolving regulatory environment**

ANSWER

What is the Financial Freedom Act?

WORTH

\$200

DRIVE
SHOUT OUT



- **Legislation introduced by Senator Tommy Tuberville prohibiting DOL from restricting types of investments workers can access via SDBAs**

ANSWER

Is the DOL's crypto CAR considered settled law?

WORTH

\$200

- **No, it is sub-regulatory guidance and even the Acting Assistance Secretary of the EBSA stated “I don’t view this guidance as a forever and ever thing”**

ANSWER

Some recordkeepers are offering opportunities to open plans to crypto/Bitcoin investing – will that be shaky ground?

WORTH

\$200

- **Appreciate service providers trying to meet the demands/desires/needs of clients**

ANSWER

- **Fidelity received a letter from the U.S. Senate inquiring as to their position in light of the DOL's CAR and asking pointed questions, particularly in regards to potential conflict of interest with Bitcoin mining**

ANSWER

- **ForUsAll has filed a lawsuit against the DOL alleging violation of Administrative Procedures Act**

ANSWER

What did the Sixth Circuit rule in *Smith v. CommonSpirit Health*?

WORTH

\$400

- **The Sixth Circuit upheld the District Court's ruling in favor of Defendant's motion to dismiss (a fiduciary win)**

ANSWER

What issues did the Sixth Circuit ruling address?

WORTH

\$400

- **Whether it is imprudent to offer actively managed funds in a 401(k) Plan – No**

ANSWER

- **Whether passively managed funds are meaningful benchmarks for actively managed funds with respect to performance or fees –
No**

ANSWER

- **Extent to which circumstantial allegations of fund underperformance can support inference that fiduciary acted imprudently – Can support, cannot be sole evidence**

ANSWER

- **Extent to which allegations of excessive recordkeeping/investment management fees can support inference of imprudence based on industry averages – Can support, cannot be sole evidence**

ANSWER

What are the key comments from the Sixth Circuit?

WORTH

\$400

- **“Plausibility [of breach] requires the plaintiff to plead sufficient facts and law to allow ‘the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’”**

ANSWER

- **“Nor does a showing of imprudence come down to simply pointing to a fund with better performance.”**

ANSWER

- “[C]laims require evidence that an investment was imprudent from the moment . . . selected, that [it] . . . became imprudent over time, or . . . was otherwise clearly unsuitable for the goals of the fund”

ANSWER

- **“Merely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly please an imprudent decision – largely a processed-based inquiry”**

ANSWER

- “[D]isappointing performance by itself does not conclusively point towards deficient decision-making . . . such allegations standing alone do not move the claim from possible and conceivable to plausible and cognizable.”

ANSWER

What is the importance of the **CommonSpirit** ruling?

WORTH

\$400

- **Makes plaintiff evidence defect in process, not just 20-20 hindsight to plausibly plead imprudence**
- **Motions to Dismiss become easier for defendants – before litigation gets so expensive settlement is necessary**
- **Other Circuits adopt standards could lead to decrease in class action suits**

ANSWER

Your client's 401(k) plan includes low-cost index funds, which as we all know are less expensive than actively managed funds.

Has your client satisfied ERISA's fiduciary duty of prudence?

WORTH

\$600

Supreme Court Decision Hughes v. Northwestern Univ. (Jan 24, 2022)

- Yes – according to the 7th Circuit.
- No – according to the U.S. Supreme Court.

ANSWER

- **7th Circuit Court of Appeals held that plan fiduciaries satisfied their duty of prudence by offering low-cost index funds as plan investment options, even though other plan investment options may have been imprudent.**
- **The court found that the plan provided an adequate array of investment choices, including “the types of funds plaintiffs wanted (low-cost index funds).”**

ANSWER

- **The court reasoned that these offerings “eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu.”**
- **Because participants’ preferred type of investments were available, they could not complain about the flaws in other options.**

ANSWER

- **Supreme Court held (8-0 decision) that lower court's reasoning was not correct. ERISA requires that plan fiduciaries monitor all plan investments and remove any imprudent ones.**

ANSWER

- **Plan fiduciaries are required to evaluate and determine which investments may be prudently included in the plan's menu of investment options.**

ANSWER

- **As the Court explained, “even in a defined contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan’s menu of options.”**

ANSWER

- **If the plan fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty.**

ANSWER

Your client's 401(k) plan names the Employer as the Plan Administrator.

Is that a problem?

WORTH

\$800

Naming the Plan Administrator

- **Maybe.**
- **You may have just caused members of the company's board of directors to be considered fiduciaries with respect to the plan.**
- **Here's why:**

ANSWER

- **Problem with naming the Employer as the named fiduciary**
 - **Example: California Corporations Code Section 300(a) – *“the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board”***

ANSWER

- **ERISA Interpretative Bulletin 75-8 - Are members of the Employer's board of directors, fiduciaries with respect to the Plan?**
 - **Yes, to the extent they exercise, or have authority to exercise, discretionary authority or control over the management of the plan.**

ANSWER

- **So, reasoning that the business of the Employer is managed by the board of directors and all corporate powers are exercised under the direction of the board of directors . . . and you've named the Employer as the Plan Administrator,**

ANSWER

- **Then you've – arguably – made each director a fiduciary with respect to the Plan.**
- **IB 75-8 further provides that the board of directors' liability may be limited pursuant to a procedure in the plan for the designation of persons to carry out fiduciary responsibilities.**

ANSWER

Allocation of Fiduciary Responsibility

- **ERISA Section 405(c) – If named fiduciaries allocate responsibilities in accordance with a procedure set forth in the plan, the named fiduciaries will not be liable for acts or omissions of the other named fiduciaries.**

ANSWER

- **What are the ongoing responsibilities of a fiduciary who has appointed other fiduciaries?**

ANSWER

- **At reasonable intervals, the performance of the other fiduciaries should be reviewed by the appointing fiduciary to ensure that their performance has been in compliance with the plan and statutory standards.**

ANSWER

- **So, we want to remove the board of directors from fiduciary oversight**
- **Note – Distinction between “settlor” functions and “fiduciary” functions**

ANSWER

- **Settlor decisions – Not subject to ERISA’s duties of loyalty and prudence. “Business judgement” rule.**
- **Plan design, Plan amendments, funding**

ANSWER

- **Fiduciary decisions**
 - **Interpreting plan terms,**
 - **Hiring service providers,**
 - **Selecting investment options**

ANSWER

- **Delegate to a corporate officer (e.g., the president) the power and authority to appoint the named fiduciary.**

ANSWER

WHEREAS, the Company wishes to delegate to [Name], Chief Executive Officer, the power and authority to appoint the Administrator of the Plan.

NOW THEREFORE BE IT RESOLVED, that the Company hereby delegates its power and authority to appoint an Administrator of the Plan to [Name], with such delegation to continue until revoked by this Board of Directors;

ANSWER

- **The corporate officer (e.g., the president) appoints the named fiduciary.**

ANSWER

WHEREAS, [Name of CEO] wishes to appoint three individuals to serve as a committee in the capacity of Administrator of the Plan, as contemplated in Section __ of the Basic Plan Document for the Plan.

NOW THEREFORE BE IT RESOLVED, that _____, _____ and _____, be, and hereby are appointed to serve as the initial members of a committee, to be called the Plan Administrative Committee, and that the Plan Administrative Committee shall act as the Administrator of the Plan as contemplated by Section __ of the Basic Plan Document.

ANSWER

- **Name the “Plan Committee” in the Plan document as the Plan Administrator.**
- **For most clients, the board of directors and the officers who run the day-to-day business are one-in-the-same.**
- **If that is the case, then this allocation is not so important.**
- **But, larger employers where board of directors includes independent directors (not an employee), removing directors from direct “line of sight” responsibility may be more important.**

ANSWER

Common Plan Document Problems

Is it important to always ask your client,

“Does your company have any W-2 employees who are not eligible for the plan?”

WORTH

\$800

ERISA Fiduciary Duties/IRS “Qualification”

Yes!

- IRS – “Qualification failure” means any failure that adversely affects the “tax-qualified” status of a plan.
- “Operational failure” – Failure to follow the terms of the plan.

ANSWER

- **ERISA Section 404(a)(1)(D) A fiduciary shall discharge his duties to a plan solely in the interest of the participants and beneficiaries and**
 - **In accordance with the documents . . . governing the plan.**

ANSWER

- **Generally, the answer will be “yes”**
- **Categories might include**
 - **Union employees**
 - **Part-time, temporary employees**
 - **Other “job categories” (e.g., project-based employee)**

ANSWER

- **Check the definition of eligible employees under your plan document**
 - **If the company is excluding certain job categories, make sure these employees are in fact excluded under the terms of the plan.**
 - **Otherwise, these employees are eligible!**

ANSWER

Should leased employees be excluded from eligibility under the plan?

WORTH

\$800

- No, because they could be investing in flexPATH.

WRONG ANSWER

Common Plan Document Issues

Yes

- **Leased employee - Individual works for your client on a substantially full-time basis, but is paid (i.e., gets his/her W-2) from another business (e.g., a temp agency)**

RIGHT ANSWER

- After one year (at least 1500 hours [@ 30 hours per week]), the individual is considered a leased employee
- Ask your client, “Does your company have any leased employees?”

RIGHT ANSWER

- **Leased Employees generally should be excluded**
- **Leased Employees count in minimum coverage test, but should not be a problem as long as Leased Employees are less than 30% of workforce**

RIGHT ANSWER

Should you always ask your client, “Does your company exclude any items of W-2 wages from the plan?”

WORTH

\$800

Common Plan Document Issues

Yes!

- **Categories might include**
 - **Spot bonus (paid “on the spot” for a specific action, result)**
 - **Non-cash wages (excess group term life insurance, autos)**

ANSWER

- **Check the definition of compensation under your plan document**
 - **If the company is excluding certain wages, make sure these wages are in fact excluded under the terms of the plan.**
 - **Otherwise, these wages count as compensation under the plan!**

ANSWER

Are there certain types of wages that should always (with very limited exceptions) be excluded under the plan?

WORTH

\$800

Common Plan Document Issues

Yes!

- Pre-entry date wages
 - Example:
 - Plan has quarterly entry dates

ANSWER

- **Jane starts work on 4/15/2022. Jane's compensation is \$5,000 per month.**
- **Jane enrolls in the Plan on 7/1/2022 and elects to contribute 5% of her compensation**

ANSWER

- **ADP testing**
 - **Measure comp from entry date – ADP = 5% (\$1,500/\$30,000)**
 - **Measure comp from start date – ADP = 3.53% (\$1,500/\$42,500)**

ANSWER

- **Fringe benefits should be excluded**
 - **“Bonus on a bonus” argument**
 - **The term “fringe benefit” is not defined, so can serve as a “catch all” for employer’s payroll practices**

ANSWER

Does your client's 401(k) or 403(b) plan provide for discretionary matching contributions?

WORTH

\$800

Common Plan Document Issues

Look at the plan document

“The Employer may make matching contributions, to be determined by the Employer”

- New notice requirements – to trustee and to participants**

ANSWER

- **How the discretionary matching contribution will be allocated to eligible participants, such as a uniform percentage of contributions or a flat dollar amount**

ANSWER

- **The computation period(s) to which the discretionary matching contribution formula applies, such as each pay period or the entire plan year, and**

ANSWER

- **If applicable, each business location or business classification subject to separate discretionary matching formulas**

ANSWER

**What is the “Top Paid Group” election?
When should your client generally make this election?**

WORTH

\$800

Common Plan Document Issues

- **Definition of “Highly Compensated Employee”**
 - **More than \$130,000 in 2021 (i.e., the prior year)**

ANSWER

- **Top Paid Group election**
 - **And the employee was in the top 20% of employees ranked by compensation (prior year)**
 - **Ask your client, “Do more than 20% of your company’s employees make more than \$130,000 per year?”**
 - **Law firms, tech companies (median salary at Microsoft - \$167K, Netflix - \$202K, Google - \$246K)**

ANSWER

- **If “Yes”, then make the Top Paid Group election**
 - **Pushes the company’s lower-paid HCEs into the NHCE category for testing**
 - **Many of lower-paid HCEs have high individual ADPs – grouping these workers as NHCEs rather than as HCEs should help to pass ADP test**

ANSWER

“Are there any other companies that have W-2 employees who are participating in the Plan?”

WORTH

\$1,000

Common Plan Document Issues

- Yes
- Participating employers
 - Make sure that the other companies have in fact signed Participation (or Adoption) Agreements to formally adopt the plan

ANSWER



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