Protecting Yourself from Personal Liability as a Trustee

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Euclid Specialty Managers, LLC
Labor Affinity and Commercial Programs
Introduction

Lessons from the San Diego Pension Fund Crisis:

- **First**: Volunteer trustees face serious personal liability when events go badly.

- **Second**: Indemnification from governmental entities is not guaranteed.
Agenda

- The **first part** of this presentation will demonstrate the fiduciary liability of governmental plan trustees.
- The **second part** of this presentation will discuss fiduciary liability claim trends.
- The **final part** will outline how to protect yourself, including purchasing fiduciary liability insurance.
Fiduciaries of Governmental Plans often believe that they are immune from personal fiduciary liability for several misplaced reasons:

1. They believe they do not face liability since governmental plans are exempted from ERISA;
2. They believe that sovereign immunity protects them;
3. They otherwise believe that they will be indemnified for their volunteer service.
Misconceptions

(1) Liability for Governmental Plan Trustees

• ERISA Title I does not apply, **BUT**:
  ○ **ERISA Title II tax provisions apply**, imposing the exclusive benefit rule;
  ○ **State and local law applies**: Pennsylvania law imposes the “prudent person” or prudent man” rule;
  ○ **Common law rules apply** – such as the duty of loyalty and duty of prudent investment.
  ○ These laws generally mirror the fiduciary standards contained in ERISA.
The Basics of Fiduciary Liability for Governmental Plans

- **Personal Liability** for any plan losses resulting from the breach and for any profits that were attained through the misuse of plan assets.

- **Penalties**: Fiduciaries may also be liable for statutorily imposed penalties and reasonable attorney fees and costs incurred by the plaintiff.

- **Parties with Standing**: A lawsuit to establish the liability of a fiduciary may be brought by (1) any plan participant or beneficiary, (2) **co-fiduciary liability** by another plan fiduciary, or (3) a governmental entity.
Four Basic Fiduciary Duties for Investing Plan Assets

- Duty of Loyalty (Exclusive Purpose Rule)
- Duty to Act with Prudence
- Duty to Diversity Plan Assets
- Duty to Follow Plan Documents
(2) Sovereign Immunity is Limited

- Most states have sovereign immunity statutes
- But state agent immunity is a qualified immunity:
  - limited to scope of authority and employment;
  - no protection for willful conduct;
  - In Pennsylvania, retirement systems may not be considered state instrumentalities for 11th Amendment protection.
Misconceptions

(3) Express Limits on Indemnification

Indemnification is Extremely Limited

- Limited to “good faith” – liability for bad faith, willful, wanton or grossly negligent conduct.
- Who determines whether the act was taken in good faith: the attorney general; the board of trustees; or the courts?
- Limited to scope of employment.
- Scope of indemnification limited:
  - What costs are covered?
  - When can defense costs be reimbursed?
  - Who can be indemnified? Just trustees?
Fiduciary Liability Claim Trends

1. Imprudent Investments
2. Benefit Claims
3. Funding Claims
4. Service Provider Claims
5. Social Investing
6. Prohibited Transactions/Alleged Dishonesty/Conflicts of Interest
How to Protect Yourself

- Maximize Indemnification Protection from the Sponsoring Organization
- Delegate to Qualified Service Providers
- Require Indemnification from All Service Providers to the Plan
- Purchase Fiduciary Liability Insurance
Questions & Contact Information

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