

This update is published by The Law Offices of Ilene H. Ferenczy, LLC to provide information to our clients and friends about recent developments in the benefits community. It is intended to be informational and does not constitute legal advice for any particular situation. It also may be considered to be "attorney advertising" under the rules of certain states.



## The Ferenczy Flash

FROM THE LAW OFFICES OF Ilene H. Ferenczy, LLC

### *The Latest Word in Employee Benefits . . .*

#### **ALL YOU NEED TO KNOW ABOUT FIDUCIARY DUTIES, YOU LEARNED IN KINDERGARTEN**

**\*(with apologies to Robert Fulghum)**

It seems as if everyone in the country is going hog-wild to better advise, educate, or scare plan officials about their fiduciary duties with regard to retirement plans. There are numerous notices and booklets, audits, compliance reviews, and advisors out there all attempting to make sure that participants' assets are properly protected. While the intent of all these people and entities is good – to ensure that retirement plans and those who are in charge of them operate for the benefit of plan participants – it has gotten quite overwhelming. But, if you think about it, all you really need to know is common sense that we learned as children.

#### Play Nice With Others and Be a Loyal Friend [Fiduciaries Need to Act in the Interests of Plan Participants]

Plan fiduciaries are supposed to play on the side of the plan participants. In kindergarten, you wouldn't be a fair weather friend, and you shouldn't do so in your fiduciary position either. Retirement plan fiduciaries are required to treat participants appropriately. They need to act towards them as they would act towards themselves – that is, they need to operate with regard to the plan in the interests of the participants and their beneficiaries.

If you have taken on the responsibility of doing something for your friend, you need to do what you promised, and not let him or her down. And, you definitely should not sell out your friend to someone else. You need to have your friend's interests at heart when you act.

#### Respect Others' Toys [Fiduciaries Need to Act with Care, Skill, and Prudence]

When you played at someone else's house, you were supposed to take care of their things. The funds in the retirement plans do not belong to the fiduciaries. They belong to the participants and beneficiaries. When fiduciaries take action with regard to plan assets, they need to be respectful of the fact that they belong to others, and they should ensure that they treat those assets with all the care and skill that they have. Investments should be carefully thought out. If the assets are endangered, action should be taken to be as protective as possible.

### Don't Lie and Don't Break Promises [Fiduciaries Need to Uphold Their Duties Under Law and the Plan]

To the extent that ERISA or the plan imposes duties on the fiduciaries, the fiduciary must perform those duties. Failure to do so can result in damages to the plan or improper actions by other fiduciaries or plan officials. If the fiduciary takes on those duties, the fiduciary cannot breach those requirements without personal liability.

If a fiduciary talks to participants, he or she must tell the truth. If the fiduciary doesn't tell the truth and the participants rely on their falsehood, the fiduciary can be held responsible.

### If You Are Using Someone Else's Stuff, Ask Permission. And, If You Possess Someone Else's Stuff, Be Careful About Letting A Third Person Use It [Fiduciaries Must Disclose Their Fees and May Not Engage in Prohibited Transactions]

If you are going to be compensated out of the assets that you are charged with handling, you need to tell the plan sponsor what you are going to get paid in advance so they know what to expect. People can't give you permission to act if they don't know what you are going to do. People can't agree to give you part of their stuff if you don't tell them what you're taking and why. Similarly, plan sponsors and those responsible for plan assets cannot engage people to provide services to the plan unless they know what the service provider is going to do and how much it is going to cost.

Just because someone entrusts you with his or her stuff doesn't mean that you can turn around and let someone else use it. Your friend's things can get damaged in the hands of others. The other guy could refuse to give the stuff back entirely. Similarly, plan fiduciaries should not engage in transactions that are either imprudent or prohibited by law. Again, the plan assets belong to the participants, and their interests must be safeguarded.

### If You Do Everything You're Supposed to Do and Something Bad Happens Anyway, It's Not Your Fault [Procedure Is the Important Thing for Fiduciaries]

Stuff happens. Stock markets go down. Companies have unexpected downturns. If a fiduciary acts prudently and carefully, courts will generally not hold the fiduciary responsible for a negative outcome. On the other hand, if the fiduciary acts without proper care and bad things happen, the fiduciary can be held responsible for the results. And, of course, it's best to have written proof of the actions that the fiduciaries took, so that it's not just a he-said-she-said history of the schoolyard fight.

Part of prudent action is to keep an eye on things on an on-going basis. So, don't just invest money and walk away – watch what the markets are doing and what the funds in which the plan invests are doing, and make changes as needed.

### Conclusion

Now, doesn't this cover about 98% of what normal fiduciaries do on a day-by-day basis? Now, go out there and be careful, and don't run with scissors!

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**RECORDED WEBINAR AVAILABLE FOR CE CREDIT: "ADP/ACP Testing: Back to Basics and Then Some"**

In early January, Ilene Ferenczy and Adam Pozek presented a webinar reviewing ADP/ACP testing and delving into some of the common oversights that can throw a wrench into the works. Topics covered included determining which employees must be included in the test, using the statutory exclusions and otherwise excludable rules, and taking advantage of the complete bag of tricks to correct failed tests.

This recorded webinar is an excellent refresher for seasoned compliance folks and a great introduction for those who are newer to the wonderful world of ADP/ACP testing. The webinar lasts approximately 100 minutes and is designed to provide participants with 2 hours of continuing education credit for ERPAs and other professional designations.

For more information, please email: [info@pensionpundits.com](mailto:info@pensionpundits.com).

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