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Human Resources Professionals: Reducing Your Personal Liability In 401(k) Plan Administration

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EXECUTIVE SUMMARY

Many human resources professionals administer their employer's 401(k) plan (and health and welfare plans) and may unknowingly be accepting personal liability for fiduciary breaches. In accordance with ERISA, a human resources professional becomes a plan fiduciary (subject to personal liability) by being named a fiduciary in the plan documents or to the extent that he/she (i) exercises discretionary authority or discretionary control respecting the management of the plan or exercises any authority or control respecting management or disposition of its assets; (ii) renders investment advice for a fee or other compensation; or (iii) has any discretionary authority or discretionary responsibility in the administration of the plan.

Once a human resources professional is determined to be a plan fiduciary, ERISA Section 404 imposes on the fiduciary a duty of loyalty, a duty of prudence, a duty to diversify to prevent large losses, and a duty to follow the plan documents. The duty of loyalty requires plan fiduciaries to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses for administering the Plan. The duty of prudence requires plan fiduciaries to perform their duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use. This duty of prudence, which is often called the "prudent-expert standard," requires plan fiduciaries to act as an "expert" would act under the same circumstances and not as a "reasonable person" would act. The "prudent-expert standard" of care is a much higher standard of care.

The duty to follow the plan documents requires plan fiduciaries to follow all plan documents. However, the adoption agreement and basic plan document are often difficult to follow due to the number of cross-references. Both are often even more difficult to interpret.

If you are a plan fiduciary, we recommend the following personal liability risk reduction strategies:

1. **Plan Committee:** Establish a plan committee and charter to allocate authority and responsibilities.

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2. **Indemnity:** Ask the company to agree to indemnify all fiduciaries for a breach of fiduciary duties.
3. **Fiduciary Liability Insurance:** Consider purchasing insurance to cover liability or losses under ERISA.
4. **Breaches:** Use the DOL's Voluntary Fiduciary Correction Program to correct errors, if applicable.
5. **Training:** Ensure appropriate employees understand ERISA's fiduciary standards and the plan.

Finally, we encourage all fiduciaries to engage the services of an investment advisor to help select and monitor 401(k) plan investments. Because the provider (Fidelity, Prudential, ADP, Great West, etc.) has no obligation to "defray the expenses of the plan," the ERISA prudent-expert rule suggests that unless a fiduciary has the requisite investment knowledge to evaluate investment performance, share classes, revenue-sharing, etc., a plan fiduciary should engage an investment advisor to evaluate plan fees and expenses. When evaluating the cost of an investment advisor's services, please consider that most 401(k) plan litigation involves an allegation that the plan fiduciary(ies) breached their duty of loyalty and prudence by knowingly or unknowingly permitting the plan provider to charge excessive fees and expenses to plan participants, resulting in smaller participant retirement account balances.

Please contact Frank Del Barto, Chair of Masuda Funai's Employment Practice, or your Masuda Funai relationship attorney with any questions.

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