

# Fiduciary Liability for Club Retirement Plans: Answers for Club Leaders

BY THOMAS D. CASE, CLU, CHFC, AIF®

*Fi•du•ci•ar•y (noun): a trustee or a manager entrusted to control property or to act on behalf of and for the benefit of another.*

Surprise and concern are two emotions we often encounter when club managers and directors learn from us they may be considered fiduciaries in the 401(k) retirement plan offered to their employees. These emotions can turn to dismay and disbelief when they learn that they can be personally liable and have their own assets at risk in certain circumstances.

The goal of this article is to help you identify several of the major issues surrounding the fiduciary responsibility (with its associated liability) that accompanies the offering of a 401(k) plan to your employees, and to offer solutions that should enhance the plan for the employees while reducing (or eliminating) liability for those overseeing the plan.

## Who are the Fiduciaries in a Qualified Plan?

The key point to remember in answering this question is that the fiduciary is determined by his or her responsibilities and/or actions regarding the plan. Position in the company or job title has little to do with defining a fiduciary. This fact is set forth very clearly in the ERISA Act of 1974. ERISA (Employee Retirement Income Security Act) is the body of law that sets standards of conduct for the operation of Qualified Retirement Plans. It identifies many actions common to managing a plan that cause the person or entity (i.e., committee) to be considered a Plan Fiduciary. For example, when *discretion or control* is used in managing the plan from either an investment or administration standpoint, that person or entity becomes a fiduciary as a result of that action.

Typically, there are at least three fiduciaries found in any plan: (1) the Plan Sponsor (generally the employer), (2) the

Plan Trustee(s), and (3) the Plan Administrator. How do these different groups become fiduciaries to the plan?

■ **Plan Sponsor** – the owners, the board of directors, and the officers of the organization may be considered plan fiduciaries under ERISA to the extent they act or serve in a capacity of discretionary authority or in the operation of the plan, the selection of the plan advisors or investments, or if they have involvement in this process.

■ **Plan Trustee** – ERISA requires that there be at least one named fiduciary in the plan document. This fiduciary is frequently the named trustee. This trustee typically has the responsibility of selecting the plan's investment managers.

■ **Plan Administrator** – the person or committee in this position has the responsibility of making sure that the terms of the plan document are followed, the employees are correctly covered under the plan, and benefits are properly paid.

*So a fiduciary is defined not by job title, but by the functions and operations which are performed.*

Based on this criterion, some of the people who become, even if unwittingly, fiduciaries to retirement plans are:

- Organization owners
- Board of Directors
- The Employer or the Plan Sponsor
- General Manager, Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, etc.
- The plan's Investment Committee and/or Administration Committee

This list is certainly not exhaustive, but it should clearly demonstrate that almost anyone who takes action with respect to the operation of the plan may be a fiduciary. Even though these same people are responsible for managing the day-to-day operations of the club, they also wear a second hat of being a Plan Fiduciary and must act accordingly. ►►

# Fiduciary

*Best practices suggest that an organization create an Investment Policy Statement (IPS) to provide a clear, definitive process on how the plan's investments should be selected and monitored.*

## Can I Obtain Insurance to Cover Fiduciary Liability?

After the initial shock wears off, our newly educated club manager or director is usually interested in how best to protect the fiduciaries from personal liability. Confusion frequently exists about the coverage provided by fidelity bonds versus coverage for fiduciary liability insurance.

All qualified plans are required to have a fidelity bond to cover the plan in the event plan assets are stolen. Minimum coverage required is an amount equal to 10 percent of plan assets, not to exceed \$500,000. The cost of the fidelity bond can be deducted from plan assets if the club chooses to do so. It should be made clear, however, that the fidelity bond does not provide any liability protection for the fiduciaries of the plan.

Fiduciary liability coverage must be purchased separately in order to provide that protection. Coverage may be issued as an individual policy or as part of a package policy, but it is most commonly issued as part of the Directors and Officers (D&O) policy. These policies should be carefully reviewed with your insurance professional to ensure proper coverage. Unlike fidelity bond premium payments, the cost of providing fiduciary liability coverage to Plan Fiduciaries must be paid separately and cannot be deducted from plan assets.

## What is the Role of a Plan Fiduciary?

Here are a few of the major issues that should be addressed by Plan Fiduciaries. A Plan Fiduciary must:

- Invest plan assets “with the care, skill, prudence, and diligence that a prudent person acting in a similar capacity would use under similar circumstances.” [ERISA Sec. 401(a)]
- Establish and follow a carefully considered plan for handling investments, administration procedures, etc.

- Follow-up and monitor the plan on an annual (or more frequent) basis and take remedial action if the plan and/or procedures need to be adjusted.

- Document the procedures and processes in place and retain that documentation in case there is an audit. This documentation is commonly maintained in a Due Diligence Notebook with duplicate copies for the club and the Plan Advisor.

The provisions of ERISA hold the Plan Fiduciaries to the highest standard, so it is very important that fiduciaries seek outside professional assistance if they do not possess the skills necessary to provide proper fiduciary prudence and diligence. In most situations, the items listed above can be best managed by hiring a qualified and experienced outside expert. When hiring a professional, there should be a clear understanding of the role that is being assumed. Will the professional be acting simply as a plan or investment advisor, or will he/she take on the role of an outside ERISA Fiduciary? Once agreement is reached, it should be recorded in writing.

There is a growing movement within the retirement plan industry for independent Registered Investment Advisory firms to take on the role of outside fiduciary to the plan. Plan Sponsors may delegate much of the responsibility (and associated liability) to such a fiduciary. ERISA authorizes two categories of fiduciaries that can be very valuable to Plan Sponsors and Trustees:

- **ERISA 3(38) Fiduciary.** In this category, the fiduciary accepts the responsibility for selecting, monitoring and replacing the investment options available in the plan. A 3(38) Fiduciary is given the authority to make changes within the investment lineup at their sole discretion (though in practice the Plan Sponsor or Trustee should be carefully advised of his actions).

- **ERISA 3(21) Fiduciary.** There is a wide range of responsibilities that may be accepted by the second category of fiduciary. A Limited Scope 3(21) Fiduciary may only be charged with advising and educating the Plan Sponsor, Trustee or Investment Committee with the final decision for change remaining with that individual or committee. In contrast, a Full Scope 3(21) Fiduciary is a Named Fiduciary [ERISA 402(a)] who is charged with all aspects of the plan and becomes the plan's main decision-maker.

## Why Establish a Retirement Plan Investment Committee?

Most clubs are large enough to have a functional Investment Committee responsible for the investments of its Qualified Retirement Plan. A well-run Investment Committee working in concert with a Qualified Retirement Plan Advisor can effectively manage the plan. The committee should meet at least annually, though we recommend the investment lineup be thoroughly reviewed quarterly. Each time the committee meets, minutes should be taken to clearly document its decisions.

In addition, best practices suggest that an organization create an Investment Policy Statement (IPS) to provide a clear, definitive process on how the plan's investments should be selected and monitored. As with any process, the Investment Committee should review its own procedures on a regular basis to determine if modifications are in order.

Throughout the process, the Investment Committee is also charged with making sure the investments offered to the participants are appropriate and diversified. This is very important in any plan, and it is even more important in a plan that is participant directed. While ERISA Section 404(c) offers limited protection to Retirement Plan Fiduciaries when some basic diversification standards are met, most Retirement Plan Advisors recom-

ment a much broader menu of investment options than the minimums established in this section of the code.

A Qualified Retirement Plan Advisor or outside fiduciary can be very effective in helping an Investment Committee manage these aspects of the plan. An advisor who is qualified and willing to take on the role of ERISA Fiduciary as described above can relieve the committee and the club of much of the responsibility and associated liability it would otherwise bear in administering the plan.

### Review Your Service Providers

Clubs should consider reviewing their retirement plan service providers approximately every three years, including the following:

- **The Plan Provider** – possibly a bank, trust company, insurance company, mutual fund company or an “open architecture” platform.

- **Investment Advisor** – the Plan Committee has an ongoing responsibility to monitor the job being done by the Investment Advisor.

- **“Bundled” Provider** – many programs on the market today are considered “bundled” because they pull together all necessary services in an attempt to simplify the process for the club.

- **Investment Broker** – if you have a person or group acting as the plan’s broker, you should carefully review that individual or group to make certain they are providing satisfactory service to the plan.

- **Third Party Plan Administrator** – many times Plans hire Third Party Administrators (TPAs). Service levels vary greatly between TPAs, which makes periodic comparisons important.

In the review of all of these providers, careful attention should be given to the fees that are being charged against the account balances of the participants. >>>

## Employee Pension Plans in Private Clubs

In NCA’s *2008 Club Industry Compensation and Benefits Report* it was reported that 89.7 percent of private clubs offered a retirement plan to their employees. Of that total, 93 percent were 401(k) plans, 15 percent were defined benefit plans and the balance were other types of retirement plan vehicles, such as IRAs and profit-sharing plans.

NCA recently updated that information with a brief survey on retirement benefits that also looked at how well clubs understand their fiduciary responsibilities with respect to employee pension plans. In the 2010 study, 84 percent of the respondents offered retirement plans to their employees, with 401(k) plans again being the predominant choice (91 percent of respondents). Slightly more than half of those responding indicated that they match the employee contribution, with the matching percentage varying widely between 2.5 percent to 100 percent, but most commonly falling within a range of 3–6 percent.

For defined contribution plans, respondents were also asked to indicate the maximum club and employee contributions to their plans. The contributions made by clubs in 2010 ranged from 2–6 percent of base salary and averaged 4 percent. Despite the challenges of the economy, that figure has not changed much from the 2008 survey, when the club contribution averaged 4.1 percent. The contributions of employees varied in 2010 and averaged 27 percent, a slight drop from the 33 percent average in 2008. Approximately 60 percent of respondents also indicated that their club utilizes a written investment policy statement to manage funds in their 401(k) plan.

When asked about the frequency of evaluating the maintenance costs of a 401(k) plan, respondents were more evenly divided, with 41 percent indicating they had done this type of analysis within the last year, 25 percent within the previous 1–3 years and the balance more than three years prior. Nearly three fourths of the respondents also utilize the services of an outside fiduciary to help manage and reduce the liability associated with a retirement plan.

# At Case Pearlman Corporate Benefits, we are experts in providing advisory and fiduciary services in retirement plans

*We specialize in golf and country club 401(k) retirement and profit sharing plans*



Tom Case      Dennis Pearlman  
CLU, CPCU, ChFC, AIF®      AIF®



Phone: 239-482-8002

A registered investment advisory firm  
Securities offered through Triad Advisors Member FINRA/SIPC  
Advisory Services offered through Case Pearlman Corporate Benefits  
Case Pearlman Corporate Benefits is not affiliated with Triad Advisors

One way to increase the net return on a plan investment is to reduce the costs associated with its purchase.

## Government Oversight and Other Issues

Government oversight continues to grow as is evidenced by recent actions taken by the Internal Revenue Service (IRS) and the Department of Labor (DOL). The IRS has intensified its audit process to ensure that plan documents are current and have been amended in a timely fashion. The IRS is also looking at the ongoing operation of the plan to ensure that contributions are being properly determined, the various legal limitations are being considered and vesting calculations are accurate.

The DOL continues to focus on the timeliness of deposits into retirement plans. In addition, the DOL is beginning to focus on the fiduciary aspects of the operation of the plan (e.g., selection and monitoring of the plan investments, service providers and reasonableness of fees).

On July 16, 2010, the DOL published new regulations that will require much closer examination of the management of plans (particularly the fees associated with self directed plans). The Interim Final regulations on fee disclosure for employment-related retirement plans covered by ERISA are scheduled to take effect on July 16, 2011.

Finally, plan participants are becoming increasingly aware of the possibility of recovering lost retirement plan assets through legal action when plans are not properly managed. We are seeing an increased level of litigation relating to the management (or mismanagement) of retirement plans.

## Plan Fiduciaries

Most clubs today use their benefits packages as a vital component in the hiring and retaining of quality employees. In most cases, the 401(k) plan is a very important part of that package. For long-term employees, 401(k) savings can

become the most significant asset in their overall retirement strategy.

For these reasons, acting as a Plan Fiduciary is a significant responsibility. While the liability associated with that responsibility can seem daunting, it can certainly be successfully managed. Proper fiduciary care can reduce and in some cases eliminate the liability associated with managing a 401(k) plan. By implementing a prudent standard of care, Plan Fiduciaries can be confident that they have addressed and met the fiduciary responsibilities that are associated with the management of the club's 401(k) retirement plan. ■

*Thomas D. Case, CLU, CPCU, ChFC, AIF is Principal of Case Pearlman Corporate Benefits, LLC, a Registered Investment Advisory firm, located in Fort Myers, Fla. Tom is a licensed Investment Advisor Representative and Accredited Investment Fiduciary. He can be reached at 239-482-8002 or by e-mail at [tom@casepearlman.com](mailto:tom@casepearlman.com).*