

Frequently Asked Questions about Fiduciary Responsibilities under an Apprenticeship and Training Plan



U.S. Department of Labor
Employee Benefits Security Administration

To meet their responsibilities as plan sponsors, employers need to understand some basic rules, specifically those under the Employee Retirement Income Security Act (ERISA), which governs retirement, health, and welfare plans, including many apprenticeship and training plans (ATPs). ERISA is a Federal law that sets standards of conduct for those who manage an employee benefit plan and its assets (called fiduciaries).

Apprenticeship and training programs that cover private sector workers generally are ERISA-covered plans. Not all private sector employment-based educational programs, however, are ERISA plans. For example, scholarship programs paid from an employer's general assets, payments of compensation out of the employer's general assets for time spent in training, and in-house professional development programs financed out of the employer's general assets are not ERISA plans. Most private sector collectively bargained apprenticeship and training programs are covered by ERISA because the Labor-Management Relations Act requires that the expenses of any joint labor/management apprenticeship committee be defrayed out of monies placed in a separate fund.

The questions and answers below provide an overview of the basic fiduciary responsibilities applicable to ATPs under ERISA. It provides a simplified explanation of the law and regulations. It is not a legal interpretation of ERISA, nor is it intended to be a substitute for professional advice.

What are the essential elements of a plan?

Each plan has certain key elements under ERISA. These include:

- A written plan that provides for at least one official who has authority to control and manage the operation and administration of the plan;
- A trust to hold the plan's assets; and
- Documents to provide plan information to employees participating in the plan and to the government.

Plan sponsors may hire outside professionals or, if applicable, use an internal administrative committee to manage some or all of a plan's day-to-day operations. Indeed, there may be one or a number of officials with discretion over the plan. These are the plan's fiduciaries.

Who is a fiduciary?

Many of the actions involved in operating a plan make the person or entity performing them a fiduciary. Using discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control. Thus, fiduciary status is based on the functions performed for the plan, not just a person's title.

A plan must have at least one fiduciary (a person or entity) named in the written plan, or through a process described in the plan, as having control over the plan's operation. The named fiduciary can be identified by office or by name. For some plans, it may be an administrative committee.

A plan's fiduciaries will ordinarily include the trustee, all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee (if it has such a committee), and those who select committee officials. Attorneys and accountants generally are not fiduciaries when acting solely in their professional capacities. The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan.

What is the significance of being a fiduciary?

Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a plan and their beneficiaries. These responsibilities include:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carrying out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA); and
- Paying only reasonable plan expenses.

The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out these functions. Prudence focuses on the process for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions. For instance, in hiring any plan service provider, a fiduciary may want to survey a number of potential providers, asking for the same information and providing the same requirements. By doing so, a fiduciary can document the process and make a meaningful comparison and selection.

Following the terms of the plan document is also an important responsibility. The document serves as the foundation for plan operations. Fiduciaries will want to be familiar with their plan document, especially when it is drawn up by a third-party service provider, and periodically review the document to make sure it remains current. For example, if a plan official named in the document changes, the plan document must be updated to reflect that change.

How can a fiduciary limit liability?

With these fiduciary responsibilities, there is also potential liability. Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions.

However, fiduciaries can limit their liability in certain situations. One way fiduciaries can demonstrate that they have carried out their responsibilities properly is by documenting the processes used to carry out their fiduciary responsibilities.

A fiduciary can also hire a service provider or providers to handle fiduciary functions, setting up the agreement so that the person or entity then assumes liability for those functions selected. However, the appointing fiduciary is required to monitor the service provider periodically to assure that it is handling its responsibilities prudently and in accordance with the appointment.

Moreover, a fiduciary should be aware of others who serve as fiduciaries to the same plan, because all fiduciaries have potential liability for the actions of their co-fiduciaries. For example, if a fiduciary knowingly participates in another fiduciary's breach of responsibility, conceals the breach, or does not act to correct it, that fiduciary is liable as well.

Bonding

As an additional protection for plans, those who handle plan funds or other plan property generally must be covered by a fidelity bond. A fidelity bond is a type of insurance that protects the plan against loss resulting from fraudulent or dishonest acts of those covered by the bond.

How do these responsibilities affect the operation of the plan?

Even if plan sponsors hire third-party service providers or use internal administrative committees to manage the plan, there are still certain functions that can make a plan sponsor a fiduciary.

Hiring a Service Provider

Hiring a service provider in and of itself is a fiduciary function. When considering prospective service providers, provide each of them with complete and identical information about the plan and what services you are looking for so that you can make a meaningful comparison.

For a service contract or arrangement to be reasonable, service providers must provide certain information to the hiring plan fiduciary. This information will assist you in understanding the services, assessing the reasonableness of the compensation, direct and indirect, and determining any conflicts of interest that may impact the service provider's performance.

A plan sponsor should document its selection (and monitoring) process, and, when using an internal administrative committee, educate committee members on their roles and responsibilities.

Fees and Expenses

Fees and expenses are an important factor fiduciaries need to consider in deciding on service providers. Because fees and expenses usually are paid out of plan assets, fiduciaries will want to understand the fees and expenses charged and the services provided. While the law does not specify a permissible level of fees and expenses, it does require that the fees and expenses charged to a plan be "reasonable."

For ATPs, fiduciaries must ensure the reasonableness of plan expenses in light of the educational objectives of the apprenticeship or training program. In every instance, apprenticeship and training plan fiduciaries must be able to justify plan expenses as appropriate means of carrying out the plan's mission of training workers. When fiduciaries use plan assets without determining that the fees and expenses are reasonable and likely to promote legitimate plan objectives, they breach their fiduciary responsibilities under ERISA and are personally liable for the resulting loss of plan assets.

Strong financial controls and written policies and procedures regarding travel, reimbursement, and credit card use are important ways to help the fiduciaries of an ATP meet their responsibilities. The Office of Labor-Management Standards, which may conduct joint investigations with EBSA, has developed resources to help create effective internal financial controls at www.dol.gov/olms/regs/compliance/internal.htm.

For a service contract, after careful evaluation of the contract during the initial selection, the plan's fees and expenses should be monitored to determine whether they continue to be reasonable.

Monitoring a Service Provider

A fiduciary should establish and follow a formal review process at reasonable intervals to decide if it wants to continue using the current service providers or look for replacements. When monitoring service providers, actions to ensure they are performing the agreed-upon services include:

- Considering the service provider's notice of changes to the information provided to assess the contract and the information provided in advance of the possible extension or renewal of the contract;
- Reviewing the service providers' performance;
- Reading any reports they provide;
- Checking actual fees charged; and
- Following up on participant complaints.

Are there some transactions that are prohibited? Is there a way to make them permissible if the actions will benefit the plan?

Certain transactions with parties who may be in a position to exercise improper influence over the plan are prohibited under the law. In addition, fiduciaries are prohibited from engaging in self-dealing and must avoid conflicts of interest that could harm the plan.

Prohibited Transactions

Who is prohibited from doing business with the plan? Prohibited parties (called parties in interest) include the employer, the union, plan fiduciaries, service providers, and statutorily defined owners, officers, and relatives of parties in interest.

Some of the prohibited transactions are:

- A sale, exchange, or lease between the plan and party in interest;
- Lending money or other extension of credit between the plan and party in interest; and
- Furnishing goods, services, or facilities between the plan and party in interest.

Other prohibitions relate solely to fiduciaries who use the plan's assets in their own interest or who act on both sides of a transaction involving a plan. Fiduciaries cannot receive money or any other consideration for their personal account from any party doing business with the plan related to that business. See, for example, FAQs on Multiemployer Plan Leasing Arrangements, which provide guidance for fiduciaries of multiemployer plans regarding prohibited transactions that may arise in leasing or service provider arrangements.

Exemptions

There are a number of exceptions (exemptions) in the law that provide protections for the plan in conducting necessary transactions that would otherwise be prohibited. The Labor Department may grant additional exemptions.

Exemptions are provided in the law for many dealings that are essential to the ongoing operations of the plan. One exemption in the law allows the plan to hire a service provider as long as the services are necessary to operate the plan and the contract or arrangement under which the services are provided and the compensation paid for those services is reasonable.

The exemptions issued by the Department can involve transactions available to a class of plans or to one specific plan. Both class and individual exemptions are available at [dol.gov/agencies/ebsa](https://www.dol.gov/agencies/ebsa) under Compliance Assistance. For more information on applying for an exemption, review the procedure on this web page.

How do employees get information about the plan? How are plan sponsors required to report plan activities?

If an ATP plan provides only apprenticeship training benefits, other training benefits, or a combination of both, it is exempt from annual reporting (Form 5500), audits, disclosures (Summary Plan Description, Summary of Material Modifications), and recordkeeping requirements if it files a notice and complies with certain filing requirements. The notice must be filed with the Department of Labor and include the plan's name, the plan sponsor's employer identification number (EIN), the plan administrator's name, and the name and address of someone from whom an employee can get a description of courses offered by the plan, including prerequisites, and a description of the enrollment procedure. The fiduciary also must disclose this information to employees who may be eligible to enroll and make the notice available to these employees upon request.

Can a fiduciary terminate its fiduciary duties?

Yes, but there is one final fiduciary responsibility. Fiduciaries who no longer want to serve in that role cannot simply walk away from their responsibilities, even if the plan has other fiduciaries. They need to follow plan procedures and make sure that another fiduciary is carrying out the responsibilities left behind. It is critical that a plan has fiduciaries in place so that it can continue operations and participants have a way to interact with the plan.

What help is available for correcting mistakes in operating a plan?

The Department of Labor's Voluntary Fiduciary Correction Program (VFCP) encourages employers and plan fiduciaries to comply with ERISA by voluntarily self-correcting certain violations. Two general transactions may be of particular interest to apprenticeship plans: the sale or purchase of an asset to or by a party in interest and the payment of duplicate, excessive, or unnecessary compensation. The program includes a description of how to apply, as well as acceptable methods for correcting violations. In addition, the Department gives applicants immediate relief from payment of excise taxes under a class exemption.

If the administrator of an ATP fails to file the notice described above, the plan must comply with the reporting and disclosure requirements under the law. Those who have not filed the notice, or who filed too late to avoid incurring other reporting and disclosure obligations may use the Department's

Delinquent Filer Voluntary Compliance Program (DFVCP). By using the DFVCP Program to file the ATP notice, an ATP administrator will be considered as having elected compliance with the exemption.

For an overview of both programs, consult EBSA's Web site.

Tips for Apprenticeship and Training Plans

Understanding fiduciary responsibilities is important for the security of an ATP and compliance with the law. The following tips may be a helpful starting point:

- Have you identified your plan fiduciaries, and are they clear about the extent of their fiduciary responsibilities?
- If you are hiring third-party service providers, have you looked at a number of providers, given each potential provider the same information, and considered whether the fees are reasonable for the services provided? Have you documented the hiring process?
- Are you prepared to monitor your plan's service providers?
- Have you reviewed your plan document in light of current plan operations and made necessary updates?
- Have you identified parties in interest to the plan and taken steps to monitor transactions with them?
- Are you aware of the major exemptions under ERISA that permit transactions with parties in interest, especially those key for plan operations (such as hiring service providers)?
- If the reporting and disclosure exemption has been elected, have all the conditions been satisfied including whether the required notice been filed timely with the Department?