



2024 Fiduciary Training Series, Part 1: Roles & Responsibilities (Webinar Recording)

As a retirement plan sponsor, your fiduciary responsibilities are complex and ever evolving. Ongoing fiduciary training can help you understand these duties, minimize risk, and create better outcomes for participants.

In 2023, CAPTRUST launched a quarterly series of live, online fiduciary training sessions. This year, the series returns with new topics, new experts, and the same intention: to help plan sponsors decipher and manage their fiduciary obligations.

In the first quarter of 2024, the discussion centered on fiduciary roles and responsibilities. Watch the one-hour, on-demand recording below.

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Dawn McPherson:

Welcome, everyone, to our quarterly webinar series for 2024. You might recall we rolled this out last year and we're pleased to be able to bring you four more quarters of solid information, either initial or ongoing education opportunities for your support in your oversight of your corporate retirement plan or your employer's retirement plan. So welcome, thanks for joining us. Today's conversation is going to revolve around roles and responsibilities, which are fundamental aspects for those of you engaged in retirement plan management and oversight. And I'm thrilled to be joining you today with some very seasoned tenured panelists. You'll see on the screen here we had a fourth member who was unable to join us due to some technical difficulties this afternoon. So we're sorry to miss you, Lisa, but please to introduce you to my two panelists, Jean and Jenny. First of all, Jean Duffy is a veteran of the retirement industry and also here with us at CAPTRUST.

She hails from Des Moines, Iowa. And Jean's extensive experience really lies in crafting robust governance processes and delivering top-notch educational opportunities to empower her plan sponsor clients. Thanks for being with us today, Jean, and also thrilled to welcome our guest, Jenny Eller. She's a principal in Groom Laws retirement services practice group and their fiduciary practice. Jenny joined Groom in 1998. She not only advises financial institutions on designing and delivery of products and services to the retirement plan marketplace, but she also advises plan sponsors on all aspects of ERISA fiduciary compliance. So what better guests to join us on roles and responsibilities. Welcome Jenny.

Together both of these panelists bring a host of knowledge, insights, experience, and I think you'll really enjoy hearing from them today. So let's dive in and explore the critical roles and responsibilities that surround the management and oversight of retirement plans. I say corporate, but we know they're not all corporate. Jenny, it's probably safe to assume that our listeners today have heard of ERISA, but I think it would still be helpful to start our conversation since this is such a foundational topic. If we just start it with a high level reminder of ERISA and why, when we're talking about fiduciary roles and responsibilities, why do we talk about ERISA?

Jennifer Eller:

Sure, let's go to the next slide for this part of the conversation. So ERISA is the federal law that governs retirement plans that are sponsored by private employers. And so



that's really at the highest level. What it does, it has for our purposes, really kind of three parts. The first one, which is mostly what we'll be talking about is the fiduciary responsibility rules, and we're going to unpack a lot of what that is. But one thing that's important for folks to know is that this law imposes really the highest duty that is known under US law. So it's more than a negligence standard. It's really a very exacting standard, and we'll talk about how to meet that. And the standard of the fiduciary standards are supplemented by what are called prohibited transaction rules that fiduciaries have to navigate as well. Less of a topic for today.

Then in addition, there are just administrative requirements, right? ERISA plans have to file forms with the government, have to provide participants with certain types of disclosures and that sort of thing, have to document things like how the plan is set up, how claims are governed and that sort of thing. And then there's a liability and enforcement scheme. So if you don't meet your standards under the law, if you don't comply with the administrative requirements, then there's a pretty extensive set of rules that apply in terms of how either the Department of Labor, which is the federal agency that regulates ERISA plans or even private plaintiffs can bring actions to enforce the terms of the law.

Dawn McPherson:

That's great. Thank you Jenny. And I think we may have gotten Lisa. Lisa,

Lisa Keith:

Can you hear me?

Dawn McPherson:

We can hear you. This is great.

Lisa Keith:

We can't see you. Wonderful. Thank you. I'm going to work on everyone seeing me as we speak, so okay, I apologize. No worries.

Dawn McPherson:

Thanks for joining. And for those of you who are already on the call, Lisa was our guest who was highlighted on the intro page and wasn't, I thought she wasn't going to be able to join us. She's a member, a senior manager on our plan consulting team here at CAPTRUST and regularly delivers fiduciary training to plan sponsor clients and also fields a host of questions technical in nature from our advisors and clients. So Lisa's a very valuable resource here to us at CAPTRUST, and we're happy you were able to get on even if only by audio Lisa. So with that, I think I'm going to take the next question to you since you were able to join. So Jenny talked to us a little bit about ERISA and why it's of importance when we're talking about rules and responsibilities. We do know that



not all plans are subject to ERISA and that many listeners who have joined us today have responsibilities for plans that fall outside of ERISA. So they may be governmental four, three B plans, healthcare, higher ed, things that where ERISA does not apply. So answer for the group if you could. Do they have the same requirements or why would they want to tune into a conversation about roles and responsibilities today?

Lisa Keith:

Yeah, sure, Don. So no, they don't have to follow the duties of ERISA obviously because they're T subject to eissa, but we always strongly recommend that they do follow the duties as a best practice because they are subject to state statutes. So again, following the duties of ERISA is highly recommended.

Dawn McPherson:

That's great. Thank you, Lisa. Jenny, I'm coming back your way and I think we're also going to flip to the next slide here. What makes somebody, we're talking about fiduciary roles and responsibilities, but let's back up. What makes someone a fiduciary?

Jennifer Eller:

Sure. So again, I think we're on slide five. The things that make someone a fiduciary really are is the function that they fulfill. So one important thing to know is it's not what your job title is or any of those things. It's really the old that walks like a duck and talks like a dog, right? If you do the things that make you a fiduciary than you are one, and there are a few different things that can cause you to be a fiduciary. One, if you have authority or control over the management of the plan's assets. So retirement plan assets are held in trust. If you have the ability to make decisions about the assets in the plan's trust, then you're a fiduciary if you have discretion over plan administration. So that's things like claims decisions, how the plan is administered, interpreting the plan, and then if you provide investment advice for a fee, which is of the type of thing that the CAPTRUST does.

So those are things that cause someone to be a fiduciary. There are sort of special fiduciaries called named fiduciaries, and that's literally just in the plan document. If it's the X, Y, Z plan benefit committee, that's a named fiduciary of the plan. So that's something to also look out for and it's really that fiduciary status is important because all of the obligations that we're going to talk about, the duties that apply under ERISA apply to plan fiduciary. So the first question is not only what is my role, but am I acting as a fiduciary? And then we know what bucket we're in and we know what things to do.

Dawn McPherson:

That's great. I remember when we were doing some prep sessions for this panel, Jenny, that you mentioned, you like to demonstrate which hat are you wearing? So you like to



demonstrate by wearing your fiduciary hat. Did you bring your hat with you today? I don't

Jennifer Eller:

Know without it. This is my fiduciary hat. Love it. And if you're a fiduciary, you could just think about the fact that when you're acting in that capacity, when you're doing undertaking fiduciary acts, it's like you're wearing that hat. And that is an important thing to remember because other times you might have a different role and you're not acting as a fiduciary and you can think about yourself taking that hat off.

Dawn McPherson:

That's great. Very funny. I'm glad you brought that and it is a good demonstration visual for us to remember that. If we could go to the next slide, would you mind walking us through the various decisions that an employer makes and what buckets those fall into? And yeah, just talk to us a little bit about the various actions.

Jennifer Eller:

Sure. So ERISA was kind of based off of trust law, and so we have this kind of old trust term called the setr. And so there's really two different sets of activities that people can undertake with respect to an ERISA plan. Setr activities are really design decisions. You're not required to offer a retirement plan as a private employer. There's no rule that says you have to have one. If you choose to have one, you can design it in a lot of different ways. So the decision about whether to establish a plan when you want to terminate the plan, if you want to make changes to the plan to add some features like automatic enrollment or a Roth feature or some other things about really how the plan is designed and the types of features that it has, and then within some boundaries, like decisions regarding plan funding, how much money you might put in a plan, how you set it up, do you have a match, do you have a discretionary contribution?



That sort of thing. So there's a lot of things you can do with respect to a plan that are not fiduciary activities, and those are really about how you design the features of the plan. And many of you might have a role in plan design and also a fiduciary role. And so that's another reason why it's really helpful to sort of think about what activities you're undertaking when you have on your fiduciary hat, right? Then you're in that ERISA governed role. ERISA's obligations don't apply to design decisions, so you don't have to undertake the same process when you're doing plan design, but when you're acting as a fiduciary, that's really when the ERISA rules apply and they apply to things like how you invest the plan's money or how you interpret the plan or decisions around claims and appeals. If you're going to settle a claim against the plan or engage in litigation on behalf of the plan or even if the plan sponsor amends the plan, but you have to implement that. Those are all examples of fiduciary decisions.

Dawn McPherson:

Those are great examples, and again, a great visual and really focusing thinking about what action am I doing and am I acting as a fiduciary will help. We did get a lot of questions in the submission about that, so thanks for the time spent there. We also got a lot of questions and Lisa and Jean, I think I'm going to come your way with this. We got a lot of questions around structure, and I think we're going to flip to the next slide here, but a lot of questions around structure and we see a lot of different structures when it comes to committees or involvement in the oversight of plans. So Jean, we'll start with you. Does every plan have a committee and then we'll flip it over to Lisa to talk about if they do have a committee. What is the committee's role?

Jean Duffy:

Yeah, thank you. I think all the plans that I work with, every plan does have a committee. Some of them are quite small, maybe two to three individuals serving on the committee and some are larger where you might have 10, 12, 15. I think the organizations that have very maybe a single simple plan design only need that small committee where if you've got a plan, a larger organization that maybe has a complex plan or multiple plans, that's where we usually see the committees being a little bit bigger. And sometimes the really large plans probably you're getting up into the billion dollars where about 25% of plans smaller than a billion would have a multiple committee design where they might have a committee that's really focused on the administrative side and then a committee who's focused more on the investment fiduciary side. So we do see all our plans that we work with here, having committees.

Most committees I would say are usually in the three to seven member range, and we like to see odd numbers so we don't end up with a tie a decision. And so I would say our average committee size is right around five, and I would say the breakup of that



committee tends to be about a third with executives from that company, maybe a third from the HR side and a third from either the investment or the finance side. So I see that pretty equally divided on the committees that I work with. And I think really it's an important role and a lot of the times I might leak over into a little bit of what Lisa says, but I think it's an important message. It could be said a couple times. It's a very important responsibility that people are willing to step up and serve as a committee member, as a fiduciary because you are now the group that's responsible for making sure that the plan is operated and doing the things it needs to do, and you're really being held in a position of trust for those people.

So we don't ask our committee members to be experts, but we do ask them to have some level of familiarity with the plan and that they can be committed to the process and we'll help them with the fiduciary training, which we do every year for our committees. But it's an important role that we're asking them to step into. So I think it's really important for those committee members to be devoted to what they're being asked to do and to show up and ask good questions, and if there are things that they need help with to reach out and seek that help to seek the help of experts,

Lisa Keith:

Go ahead and add on. So the role of the committee is really to insulate the board from liability. You never completely, the board can never completely get rid of the obligation or the responsibility, but they're actually mitigating that or insulating themselves by delegating that specific responsibility to the committee. And there are different, the way you want to form a committee is really dependent on your organization. Most committees we see do have some kind of administrative and investment focus. There are some that are just focused on investments, some that are just administrative, some that have subcommittees. So there's really no right or wrong answer. It's really what works for your organization and your governance. We're actually going to talk much more about that in a future webinar if you want to listen in on that. But I'm going to ask you a question, Jenny, on your opinion on questions we get on committee makeup. So we oftentimes will have a CEO sitting on a committee or maybe an in-house council. So what your opinion on how you feel about that?

Jennifer Eller:

Right. Well, I'll start with the in-house council. And again, I totally agree with you. There's no right or wrong way and there's no hard and fast rules. The tricky part about having in-house counsel as part of the committee is sometimes it can be unclear when that person is providing legal advice and when they are participating as a member of the committee. And there's some sort of attorney client privilege things we don't need to get into, but there can be some confusion there. So I do have some clients who have in house council serve on committees, but those are typically council who really wouldn't



be in a position to advise the committee. So it kind of does away with that confusion, but that's generally the concern with having lawyers on the committees. And then in terms of the CEO, again, it really kind of depends. I've certainly had some clients say as to the CEO or the cfo, this person is so good and so invested as a committee member that we really think it's important that they continue to be on the committee. That said, I always tell people you want committee members who are senior enough in the organization that they can really exercise some independence on behalf of the plan, but not so senior that they can't really focus on their duties. And oftentimes C-E-O-C-F-O level, that's pretty hard. It's pretty hard to get on someone's calendar. And as you point out, Lisa, there's some role for shielding the board and the CEO is often a member of the board.

Jean Duffy:

Yeah. Can I add something there too, Lisa? I think one of the things I've seen at the CEO EO level is I've had one instance where the CEO was just such a strong personality that whatever he said, nobody else was going to argue it or bring up. So I think that's the other risk that sometimes making sure that we're asking the CEO or the CFO to serve in that capacity, that they're a good leader and they're nimble enough to engage in conversation and get the opinions of others. So that's one thing that I would say.

Dawn McPherson:

Yeah, that's great perspective. Thank you all. So we've talked a lot about what makes somebody a fiduciary, the varied structures of committees, this and then their fiduciary or their responsibilities. This slide in particular, Jenny, I think depicts the various roles of and makeup of fiduciary structure. What I think I'd like to do, if you don't mind, is take a few minutes and talk about, we got a lot of questions around what other providers that we're engaged with in support of our retirement plan are acting as fiduciary or in what capacity are they acting? And so where does that line end? And so maybe we could take this into parts as well. And I'll ask you, Jenny, the question, is my record keeper a fiduciary? Can I the plan sponsor, outsource or transfer that responsibility? And then we'll flip things to Jean to maybe talk about it from an advisor side.

Jennifer Eller:

Sure. So typically record keepers are not fiduciaries. There's a pretty old authority that essentially says if you are carrying out kind of ministerial responsibilities, if you're following directions essentially. So record keepers, they keep track of contributions, they keep track of distributions, they follow directions in terms of investments, that sort of thing. And so typically they don't, as a record keeper, they don't have a fiduciary role. Now your record keeper might be related to the plan's trustee, they don't have to be, but often those two services are bundled together and the trustee of a plan is a fiduciary. Now they can be kind of a limited purpose fiduciary or not most of the time, these days



in 401k type plans, the plan's trustee will be a directed trustee, which means they have a pretty narrow universe of fiduciary responsibilities. And then sometimes the plans record keeper might have other sort of services that they provide, like 3(21) type services, which Jean can talk about that again, where they'd have a fiduciary responsibility.

And then real quick on the outsourcing question, we sort of see that a lot. What are the options for outsourcing? And there's a few different ones. There are some obligations that the law imposes about plan administration on the plans administrator, and those are a little harder to outsource, but there's some ways you can contract with your record keeper to at least carry out a lot of those functions, if not assume the legal liability. And then in terms of investments, you can outsource a lot of that to a particular type of investment provider, which I'll turn it over to Jean to talk about.

Dawn McPherson:

That's perfect segue. Thank you so much. So Jean, I think you'll explain the difference or how those roles or how that responsibility is transferred and the difference between, we got lots of questions around 3(21) and 3(38) and how each of those impacts the sponsor's liability. So I'll turn it over to you to cover that.

Jean Duffy:

Yeah, certainly when Jenny talked about what makes a fiduciary one is someone who's paid to give an investment advice. So CAPTRUST is a fiduciary to our clients. The question becomes are we a 3(21) investment advisor or a 3(38) investment manager to decide that level of fiduciary responsibility? So 3(21), the investment advisor relationship is where the advisor is going to make investment recommendations to the committee, the plan sponsor or the committee is going to make the final decision on the investments, and it's going to own the liability for that investment decision with a 3(38) investment manager, which we're seeing a lot more interest in this and a lot of our clients moving this direction also, you'll refer to it, people refer to it as taking discretion as your investment advisor taking discretion. And that is where the investment advisor is really making the final decision on the investments and is going to own the liability on that investment decision.

This really represents the highest level of investment liability transfer possible under ERISA. So I like to explain this to my committees or plan sponsor is basically turning the keys of the car over to me and I'm driving, I'm deciding which turns we're making, where we're stopping when we're going, and I'm taking on that responsibility. Air cap trust is for our clients. So this really relieves the plan sponsor and all the plan fiduciaries of all fiduciary responsibility for the investment decisions made by the investment manager. The plan sponsor of the committee does still have the responsibility to monitor that



service provider to make sure that we're doing what we're supposed to be doing. It doesn't mean that they have to second guess the investment decisions. They just have to be responsible for making sure that we've done what we've said we're going to do by serving as that 3(38) investment manager. So really the shifting of the fiduciary responsibility is probably the biggest item there and the biggest advantage to clients of using that 3(38) investment manager, and we know this with lawsuits and litigation and heightened scrutiny on the legislative side, many plan sponsors are looking for ways to insulate themselves to produce more protection for themselves, excuse me. And the 3(38) investment manager is one way that they can do that, especially if they're not comfortable making those investment decisions. So that's how I would describe the difference between 3(21) and 3(38) investment manager.

Dawn McPherson:

Thank you. Jean. We're going to shift to the next slide, and I think we've spent some time alluding to and talking at a high level about some of the duties under ERISA, but I'd like us to spend the next few minutes on some of these key fiduciary obligations. And I think the three of you have divvied these up based on the questions for received. So Jenny, why don't you start us off and talk about the duty of prudence?

Jennifer Eller:

Sure. As you said, we've been talking about, well, what does it mean to be a fiduciary? What's the difference between the fiduciary role and the set law or the plan sponsor role? And again, we really care about that because identifying who's a fiduciary means now we know upon whom do these duties rest. And Lisa made the good point that often you want fiduciary committees, and one of the reasons you want to have a fiduciary committee in addition to maybe some liability protection say for the board is because then you can better document that you've done the things you're supposed to do as a fiduciary. Committees have meetings and they take minutes and we know who's on them, and we know when someone joins a committee and when someone leaves a committee, when we know when we're in a committee meeting. So there's lots of good reasons to have a fiduciary committee.

One of them is to be able to document what we call a prudent process. So one of the duties that applies to fiduciaries under ERISA is the duty to act in a prudent manner. And it's not just sort of prudence as in just a regular prudent person, but it's really what we'd call a prudent expert standard. You have to make decisions and engage in the process in the same way that someone who is familiar with this type of decision in the same way that they would, it's not the same as guaranteeing the success of a decision. We're not the insurer that never makes a decision that doesn't turn out well. Nobody can anticipate market movements and things like that, but so it's not the case that you have an absolute duty, but what you do have a responsibility to do is to document a good



decision making process. And I like to quote from an old case, it's not enough to mean, well, a pure heart and an empty head, that's not a substitute for proper analysis. So those are sort of the bookends, right? You're not guarantor, but you can't just have good intentions. And in order to really establish a prudent process, you have to find a way to document the decisions that you've made, and you have to be able to document that you've employed the process that would be done in by a similarly situated expert.

Dawn McPherson:

I think the next slide is a good demonstration or visual of that process,

Jennifer Eller:

Right? Because the next thing people ask is like, okay, fine. How do I do that? How do I demonstrate that I've engaged in this prudent process? And it's a little frustrating because courts and the labor department will say, well, it's a facts and circumstances analysis, and it's one of those, you kind of know it when you see it, which there's nothing more frustrating for someone who's sitting in a fiduciary committee meeting and they just decided they have one of these hats and they want to know what they're supposed to do. So here's a breakdown of the types of things that go into a prudent process, and it's, as you see, pretty conceptual. So what's the information that you need to know to make a good decision? And what do you get that information from? You get it from reliable independent sources. That often means consulting with experts.

One of the reasons that many, many plans have plan fiduciaries work with an investment advisor is because that's a place to get that expertise, especially as it relates to plan investments. That's a really common way to identify that expertise. And then when you make a decision like what in the information that you've received, what's the basis for that decision? And it's not always black and white. Sometimes the answer is, well, some committees do it this way, and some committees make a different decision. There's not only one right decision, just have to identify what are the things that form the basis for that decision. Make an informed decision on the basis of the information provided and then write it down, document your decision. It doesn't have to be, well, two people voted this way and one person voted that way, but we talked about this, we gathered some information and we thought it was most important factors, A, B, and C, and therefore made that particular decision.

Dawn McPherson:

Yeah, I like that visual. It's very helpful. And I stacked you up here, so you can't even take a sip of water or anything because we're going to flip into the next slide and have you also cover our duty of loyalty. And then I promise Jean and Lisa, you're up next.

Jennifer Eller:



So one of the other key responsibilities that you have as an ERISA fiduciary is to act solely in the interest of participants and beneficiaries. And again, this is another guys are going to be sick of me in my hat, but when you're acting as a fiduciary, then that's all you're allowed to think about is what is best for participants and beneficiaries, not sort of a trade off. Well, what's good for the employer and what's good for participants and beneficiaries. You really have to only think about what's in participant's best interest. But that's one of the reasons it's important to understand when you're not acting as a fiduciary. So if you are the plan sponsor and you're thinking about, well, should I add auto enrollment and auto escalation? You can think about, well, how much money will that cost me as an employer? What are the things that as an employer, I want to incent? What are the things that are important to me? So you can absolutely think about those things when you're thinking about design decisions, but when for instance, you're deciding, gee, should we keep this plan, this investment option as part of the plan, or should we get rid of it? Should we choose the lower cost investment option or something that costs more? And what are the trade-offs? Those are the times you really have to be focused solely on this duty of loyalty. So it's really important to know what capacity you're acting in.

Dawn McPherson:

Do you pass those hats out at your committee meetings and make people put them on in their acting seats?

Jennifer Eller:

Meetings? Well, I wouldn't get invited to as many committee meetings as I go to if I made people put them on, but I will tell you that we send them out and people tell me that they like them perhaps in order not to hurt my feelings, but it is a good visual and I've seen them on many a client's bookshelf.

Dawn McPherson:

I like it. Alright, Lisa, I promised I was coming your way. Let's dive in a little bit, and I know you get asked a lot about this, but about following the plan document and how important that is, and we can flip to the next slide.

Lisa Keith:

Yeah, absolutely. So following the plan document is a fiduciary responsibility. And when I'm doing these trainings, oftentimes I just assume what everyone knows what I need by plan document. And so I'll kind of go into more detail for all of you who wonder, what do you mean here? So the plan document is really, I'd like to maybe attend it to a user manual. So it's the user manual for your plan. So within your plan, it talks about the provisions of your plan, what your eligibility is, contribution levels, provisions that are governed by the IRS. So the document is governed by the IRS. We talked about the



DOLA lot, but this is one area that this is the IRS's purview. Now, failure to follow the plan provisions in your plan could result in fines or penalties from the IRS. So it is really important to make sure that you are following those provisions.

Now, I think maybe Jenny mentioned this a little bit ago. As a committee member, you don't need to know every provision of the plan inside and out, but you should have a good overall understanding of your plan document. So I do recommend that you do look at least at the summary plan description. That is the layman's book that you give to your participants. So I do recommend you do that. And typically you do have someone on the committee or who's close to the committee that works very closely with your record keeper to make sure that you're on task. But one thing I do recommend that committee members do periodically is to set time aside to talk to their relationship managers. And I know you talk about planned health, that's always important, but also to talk about changes in the law that may affect your plan such as Secure 0.0, which we're all dealing with now to talk about plan design changes.

You're thinking about how it might affect your plan and just to ask questions. So it's really important to have that regular dialogue with you, with your relationship manager. And also keep in mind that those plan documents do need to be updated to reflect changes in the law. If you do have a prototype plan document, which many of us do have, that needs to be restated, it was every six years. I think they're changing that now. But it does need to be restated periodically. Your plans will need to be amended, for example, secure 2.0. So whoever is drafting that document for you, they're going to drive that process for you. They're going to let you know if your plan needs to be restated or amended, but it's still your ultimate responsibility to make sure those documents are reviewed first and then dated and signed timely.

Dawn McPherson:

That's great. Lisa, thank you so much. Let's go right into monitoring and supervising and make a few comments on that before Jean talks about reasonable plan costs.

Lisa Keith:

Sure,

Dawn McPherson:

We can go to the next slide.

Lisa Keith:

So Jean already set us up for this slide as well as Jenny. So you do hire a prudent expert to perform certain duties for you. In this case here we're talking about the steps that CAPTRUST will take as your advisor to monitor and supervise the fund managers in your plan. So we're performing these duties for you as your expert, and it depends on



the level of fiduciary responsibility, 3(21) or 3(38) on how that works. Jane did a great job explaining that. So you've hired us to do that, but you still have an ultimate responsibility to monitor and supervise us as well as all your other service providers to make sure they're all doing what that they would do in our case that we are providing impartial conduct and best standards. Now the DOL says, you should do this every few years. One thing I do tell committees, a great way to make sure you're meeting this goal or accomplishing this duty is that you do have a regular dialogue with all of your service providers and that you document that you're doing. So that will go a long way to fulfill that.

Dawn McPherson:

I might also throw in, I've been monitoring the chat and the questions that are coming in, and this is timely because it seems to fit between monitoring and supervising and evaluating your plan fees. And so we can have Jean talk about fees and then if Jean, Jenny or Lisa want to comment on this, but lots of questions around someone else coming in and providing a quote for services that it's lower than what you're currently paying and them telling you you're not being a good fiduciary because they can save you money and you're not going with them. So maybe a little conversation about, which I know is part of the next slide that Jean's going to cover on the ensuring reasonable plan costs. Maybe a little commentary also on what other factors you're considering and the fact that it doesn't have to be the lowest cost Jean.

Jean Duffy:

Yes, absolutely. Thanks Dawn. I would like to add a couple things to Lisa's comments around knowing the plan document and following the plan document because there's so many times it happens every year where I get a call from a client where they've realized they did something wrong. And lots of times I would tell you if you want an actionable item around what are the key items where people make mistakes on their plan document in the administration of the plan. One is the definition of compensation. So if you want an area to look at the definition of compensation, make sure you're using the right definition of compensation. The second one is around eligibility. And I would say that people still get confused with the law around health insurance and 401k plans and they're not the same. So people think, well, they don't work 30 hours a week, so I didn't have to include them in the 401k plan.

That's not how it works in the 401k plan and especially depends on what your plan document says if you're even using any hours measurement at all or if you're just using elapsed time. So I think that'd be another area to dig into, make sure you're not excluding people who shouldn't be excluded. And then if you haven't started to dig into conversations around the new part-time employee rule, that is when Lisa and I have been on clients calls with many clients trying to dig in, figure this out for them, what do



they need to do? How do they want to proceed? So I would encourage you to take a look at that if you have an opportunity to do that. But if we look at,

Lisa Keith:

Oh, and Gina, I just want to add one more thing. I know we go on and on about that. If you even suspect you have any kind of issue, please reach out to us or your record keeper. The IRS has made it much easier to make corrections. A lot of things can be self-corrected, but it's always better to just if you think you have a problem to reach out and try to resolve it as opposed hoping it will go away. So go ahead Jean.

Jean Duffy:

Awesome. Absolutely. So the duty to ensure reasonable plan costs. So ERISA does require that fees and expenses paid to service providers for your retirement plan must be reasonable when considering the value of the services you're getting. It doesn't mean you have to have the lowest cost. Obviously, the best way for you to know is to do a fee benchmark every couple years. We recommend an external fee benchmark every two to three years where we're going to the marketplace for our clients and getting bids and making sure that the fees stay competitive. Again, not necessarily the lowest. I just delivered a fee benchmark yesterday to a new client and they're leaning on if I ranked the lowest one as number one and the second lowest as two. And then on down to number five, they're looking at bringing in three and four based on the reputation of the firm, based on what they know, the technology, how they're going to work with the participants, how they're best known for what size of plans are they mostly record keeping and administering.

If they're known to be really work in the small plan space and this client is a 200 million or 400, \$500 million plan, they might not want the ones that are best known in the smaller end of the space. So I think you've got to consider those other factors. And ERISA doesn't require you to have the lowest cost just for it to be reasonably priced. And the range we're seeing on the bids coming in have really compressed anyway. They're really close together. So usually the ones that we're putting in front of 'em we're like Any one of 'em is fine. We wouldn't have put 'em in front of you if we didn't think any one of them was fine. So I think just to keep that in mind, we definitely want our clients to know what they're paying for expenses, who they're paying, how they're being paid and if they're reasonable.

So those are conversations we had in the past. It was very common to use revenue sharing to pay for some or all of the plan costs. And this is for those of you who don't understand revenue sharing, this is where the expense ratios include an additional amount called revenue sharing that is then provided back to the record keeper to use to offset the fees lots of times for the record keeping fees, sometimes for the investment

advisory fees as well. And now the contemporary way to really handle plan expenses is to make things as transparent and clean as possible. So a lot of plans are looking to remove that revenue sharing. Most of my clients have removed the revenue sharing. There are still a few of the smaller ones that have it in there, and it's not necessarily prohibited, but you just have to have an understanding of how those fees are being collected and how the participants are seeing those fees or not those fees, how that's being displayed, and make sure you're comfortable with that.

So I think on the expenses, remember it isn't required that you have the cheapest, but that the fees are reasonable. And then I think one of the things that I will add there is we often get questions about what expenses can be paid from the plan, and Jenny's done a really nice job setting up the difference on what our fiduciary activities versus settler. So generally speaking, fees related to fiduciary activities can be paid by the plan assets. So record keeping plan administration, advisory fees, audit fees are all fees that would be acceptable for the plan to cover those expenses. So I'd open it up and see if Jenny or at Lisa have anything else they would want to add around fees.

Jennifer Eller:

The only thing I would add is I like to just remind clients that there are exactly two things that assets of an ERISA plan can be used for. They can be used to pay benefits, that's the whole point of the plan, and they can be used to pay the reasonable expenses of plan administration. There's nothing else. ERISA the plan assets of your 401k plan cannot be used to pay benefits under your health plan or your pension plan fiduciaries that are on your committee. Internal fiduciaries can't get a special fee if they're already getting paid as part of their regular employment. So I a hundred percent agree with the not required to have the least expensive plan or the least expensive record keeper or the least expensive investment option. And I think a lot of plan committees and sponsors are pretty spooked by that. They see so much litigation over fees, but as you point out, plan expenses have come down, there's a lot of fee compression, all that sort of thing. And so I like everything that you said.

Dawn McPherson:

Yeah, and just would you say, Jenny, that it's just of most importance that with whatever your decision is, if you're picking the lowest cost provider or you're picking something different for other reasons, it's just important that you recognize how you made the decision and document why you made the decision.

Jennifer Eller:

Right, exactly. You might look at two investment options and there of the type that you think, well, we really think that provider A has a better track record and we think they've got a better philosophy and more things that are important to how that fund would fit in



our lineup. Same thing with a record keeper. So really understanding what the differences are, why they're different. Courts have not said, you can only have index funds in your plan. There's no rule that says that. If that makes sense for your plan and your population, great. And if not, that's okay too.

Jean Duffy:

That's great. Hey Don, I think to specifically answer the one question about someone coming in and saying you're not doing your fiduciary responsibilities is to say that the response back would be to say, we know we have an obligation to benchmark and look at our fees every couple years, and we do. We also know that as a fiduciary, we don't have to have the lowest cost plan. We just have to pay reasonable plan expenses. I mean, I appreciate people bringing to the forefront, are you doing what you need to as a fiduciary? But I don't like, and Jenny and I were talking about this a little bit earlier, just the scare tactics seems to be a scare tactic because you're not doing what you're supposed to be doing. You should be paying attention to expenses, but there's nothing to say that you have to have the lowest cost out there.

Dawn McPherson:

I didn't mean to laugh at scare tactics, but I'm laughing because it's a great segue into one of our last slides, which is on liability enforcement and protection. And we don't want to scare people, but this slide can be a little scary. So Jenny, I'm going to let you handle that.

Jennifer Eller:

Sure. Well, so we talked about what it means to be a fiduciary, and then we talked about what your obligations are. You have to be prudent, you have to be loyal, you have to follow the plan terms, you have to do a good job monitoring. You have to make sure the expenses of the plan are reasonable. So what happens if you don't? What if you breach your responsibilities? So the law empowers the Department of Labor and individual participants to bring a lawsuit to enforce the terms of the plan and to recover losses from the plan courts and the labor department can impose penalties. So there's a lot of teeth in the law and predecessor laws didn't have those viability and enforcement provisions and ERISA does we say that not to scare people, but to help you understand why companies, you have a mission, which is important, and why is it that we spend time on this sort of activity?

Well, it's because there could be liability that ultimately would come back to the employer. You can be removed as a fiduciary if you don't do your job. And the law is this last, I just want to premise the very last bullet here. It is not exactly what we mean. The law is set up to impose what we call personal liability, which are the kinds of things that could affect the things that you own and your own assets in practice. Plans can have



insurance so that the insurance can make the plan whole for losses and plan sponsors typically do and can indemnify fiduciaries who are doing this job in the context of their employment. So it is not the kind of thing that is typically what planned fiduciaries worry about, but we do say that just to make clear that it's important and there can be real consequences. And I believe, right Don, you all are having, another part of this series will be on fiduciary insurance and some related topics, so that might be a good thing for people to tune into. Yes.

Dawn McPherson:

Thank you for mentioning that, Jenny. We'll be spending time talking about liability and ways you can mitigate that risk and protect your plan fiduciaries. So that will be our August or third quarter webinar this year. So we're coming up against our time and we want to make sure we get everybody out of here on time. But if we'll flip to the last slide, we left you with a few key takeaways and there was one thing that Jean had mentioned. We barely skimmed the surface though. This has been great information shared and you've covered a whole host of things. We've still barely skimmed the surface with what's out there that is helpful for fiduciaries as they're providing oversight to their plans. And Jean, you have a great tool that you leverage with your plan sponsor clients and many of us, many advisors across CAPTRUST utilize this. And we're going to be sending it out when we send the slides, but would you just touch on what the fiduciary checklist is?

Jean Duffy:

Yeah, I think the checklist provides a great framework for the plan sponsor or the committee to walk through. We annually just understanding what have we done? Do we know where our plan document is? Do we know where our fee disclosures are? When's the last time we did a fee benchmark? Do we know where our meeting minutes are? What's our process? Understanding the structure and then being committed to just taking a look at that. We used to talk a lot about the three Fs. We used to call it funds, fees and fiduciary. And now I think that the core of the discussions around these fiduciaries, maybe we've turned it into the three Ps, and I would say it's really about process prudent and protection. So have a great process in place, be a prudent expert or hire the expertise to help you do those things and then make sure you're doing what you need to do to have that. Obviously the fidelity bond is pretty easy. Fiduciary insurance. And then just making sure you document, I mean, it's the meeting minutes that are being asked for when these lawsuits are brought forth, what have these committees been doing? What process have they had in place? And I think having a checklist would just help you walk through that and make sure you're doing what you need to do to serve as a fiduciary for the plan participants.

Dawn McPherson:



Thank you, Jean. And thank each of you for joining us today. Thanks to our panelists. This has been a tremendous help and resource. I want to encourage you, if you've signed up today and you work with an advisor, if you have additional questions, please reach out. We are all here to help you. We will be sending a copy of this slide deck in addition to a link to the recording so you can listen to it again if you choose to, and we'll send that fiduciary checklist that Jean mentioned. I also want to note that we did get a number of questions in the chat that we weren't able to address, though we covered a lot. I will do my best to get answers to each of you in the coming days so that your questions don't go unanswered. So thanks again for joining us. We'll have three other sessions this year and hope you can join us for those. Have a great day.

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