ASK THE EXPERT

What is Fiduciary Liability and how does it affect you and your business?

Managing a company's insurance needs can be complex and stressful. It doesn't need to be when adding certain specialty insurance products, like fiduciary liability insurance. It protects the sponsoring company; its directors, officers and employees; its employee benefit plans and the plan's fiduciaries, against claims alleging error in the administration of a plan or a breach of ERISA (Employee Retirement Income Security Act of 1974), in either a civil suit or a criminal proceeding brought by the Department of Labor. Given this unique exposure, which includes litigation costs and the personal liability to directors, officers and plan fiduciaries, and the relatively inexpensive cost of the coverage, fiduciary insurance should be part of your company's insurance program. Here are six additional reasons why:

1. You may be a fiduciary whether you know it or not.

According to ERISA, a person or entity can be a fiduciary either through designation in the plan document or by virtue of control over the assets and management of a plan.

2. Being a fiduciary can put you and your organization's directors and officers at risk.

A fiduciary must adhere to ERISA, its duties and its obligations. Under Section 409, a breach of ERISA shall hold the fiduciary personally liable, and potentially threatens the fiduciary's home and other personal assets.

3. Fiduciary duties and liability cannot be contracted away.

There is a misconception that hiring a service provider for your retirement plan, or a third party administrator of your health plan, transfers all fiduciary liability from the organization, its plans and its fiduciaries. The selection and monitoring of service providers, including those who are hired to manage a plan, are duties under ERISA that cannot be contracted away.

4. ERISA litigation is costly and frequent.

While headlines over the past 12-18 months could lead one to conclude that only large companies and "jumbo" plans are targets of claims, do not be misled because small employers are also at risk. From 2013 to 2015, U.S. District Courts received an average of 7,326 ERISA suits each year. The Department of Labor's Employee Benefits Security Administration (EBSA), which is charged with the enforcement of ERISA violations, has been active as well. In 2016, EBSA recovered $352 million on behalf of plans, their participants and beneficiaries, and closed 333 criminal investigations, resulting in the indictment of 96 individuals. According to the latest Tillinghast Survey, the average cost of a paid fiduciary claim was $994,000, with an average defense cost of $365,000.

5. Breach of fiduciary duty under ERISA is not covered by other insurance policies.

There are other policies (Employee Benefits Liability, Directors & Officers Liability, ERISA Bond) frequently confused with the coverage provided by fiduciary liability. A fiduciary liability policy is the only one that provides coverage both for errors in administration of a plan and for breach of duties under ERISA.

6. Fiduciary liability insurance is readily available in the marketplace and relatively inexpensive.

There are a number of insurance carriers offering fiduciary liability insurance. Depending on the risk, the cost can be relatively inexpensive compared to most property casualty or specialty insurance policies. Given its coverage, low cost, and broad protection of directors, officers and employees' personal assets, the purchase of fiduciary liability insurance makes sense. Make sure to contact your local independent agent to review if Fiduciary Liability insurance is right for you and your organization.

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