

What is Co-fiduciary Liability?

One plan fiduciary can be sued for failures by another plan fiduciary when

1. Fiduciaries breach duty together
2. One fiduciary knows about another fiduciary's failure and does nothing about it
3. Neglect by one fiduciary allows another fiduciary to commit a breach

Consider: If a hired co-fiduciary is involved in a lawsuit, the plaintiff attorney will allege the plan fiduciary **should have known** about its co-fiduciary's violation (argument #3 above) and sue both fiduciaries.

Co-fiduciary liability is uncontrolled, unlimited exposure for someone else's misdeeds and requires careful monitoring to avoid liability. The co-fiduciary arrangement must be entered into carefully. If you hire a co-fiduciary it would be prudent to hire an attorney to review the contract---and their practical implications -- before you put your personal (and your family's) net worth on the line for what someone else says they are going to do for you.

Liability protection relies heavily on the hiring fiduciary's exercise of oversight.

Documents created on this website assist in creating proof of oversight.

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle B--Regulatory Provisions
part 4--fiduciary responsibility
Sec. 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, **a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary** with respect to the same plan in the following circumstances:

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; [Comment: this clause refers to the requirement to be prudent.] or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.