

## ***On What Grounds May a Fiduciary be Sued?***

Retirement plan fiduciary responsibility is to execute the plan's fiduciary duties. Failure to properly execute that duty ("breach of duty") is the only grounds for a fiduciary suit.

ERISA assigns five fiduciary duties.

1. Benefits are exclusively for the participants and beneficiaries
2. At reasonable costs
3. Prudent decisions
4. Diversify the plan's investments
5. Follow the rules and regulations
6. ( In effect provision of sufficient information to participants in self-directed plans like a 401(k) is a 6<sup>th</sup> duty)

The fiduciary duty most often named in a lawsuit as having been violated is prudence.  
(see "*Prudence*" below)

Provide proof of prudent process of review by documenting it. Available on this site.

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## **Sec. 1104. Fiduciary duties**

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. 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries --

(A) for the **exclusive purpose** of:

(i) **providing benefits** to participants and their beneficiaries; and

(ii) **defraying reasonable expenses** of administering the plan;

(B) with the **care, skill, prudence**, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by **diversifying the investments** of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) **in accordance with the documents** and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

## **Prudence**

"Prudence focuses on the **process** of making fiduciary decisions therefore it is wise to document decisions and the basis of those decisions."

Department of Labor  
*Guidelines on Prudence*

"The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions."

"Fiduciary breach claims under ERISA are often dismissed when the fiduciaries can establish that they satisfied procedural prudence. On the other hand, ERISA claims of this type have survived motions for dismissal when the record raises material questions about whether a plan's fiduciaries established and followed proper procedures."

Bloomberg Law Reports  
*Avoiding Personal Liability for 401(k) and Retirement Plan Investments*

*408(b)-2 reviews created on this site follow a prudent process to arrive at reasonable decisions, just like the guidance suggests and court rulings reinforce. That is why the documents are so valuable.*

Court Rulings Stress Prudent Process and Documentation		
Year	Fiduciary Defendant	Winner / Loser
1999	UNISYS	Fiduciaries <b>won</b> Written documentation, demonstrated a process for implementing and reviewing, retained outside consultants for guidance
2000	RJR Nabisco	Fiduciaries <b>lost</b> Failed to conduct a thorough investigation
2007	Prudential	Fiduciaries <b>won</b> Documented due diligence and procedural prudence
2008	Bechtel	Fiduciaries <b>won</b> Documented regular meetings with outside consultants
2009	W.R. Grace	Fiduciaries <b>won</b> "Considering the thorough investigation and decisional process, it is ...impossible ...to legally challenge their actions"
2009	United Technologies	Fiduciaries <b>won</b> Case dismissed: employer documented a selection process
2009	John Deere	Fiduciaries <b>won</b> "Nothing in ERISA requires every fiduciary to scour the market to find the cheapest possible fund."