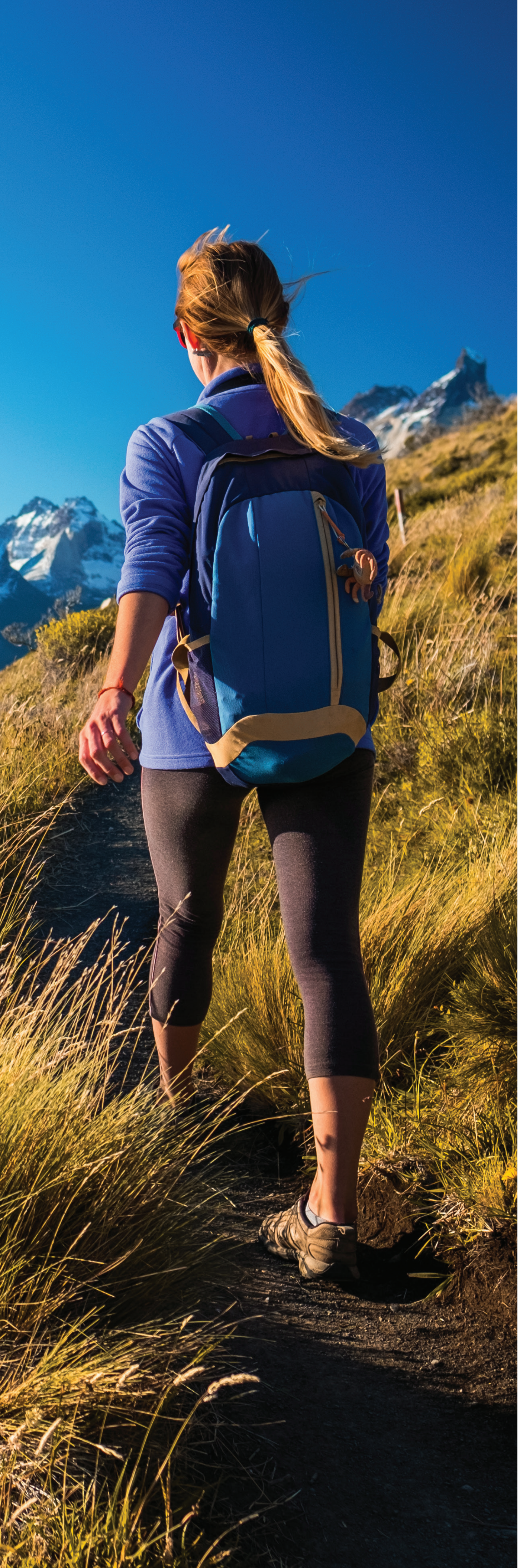


Fiduciary *responsibility*— an employer's guide

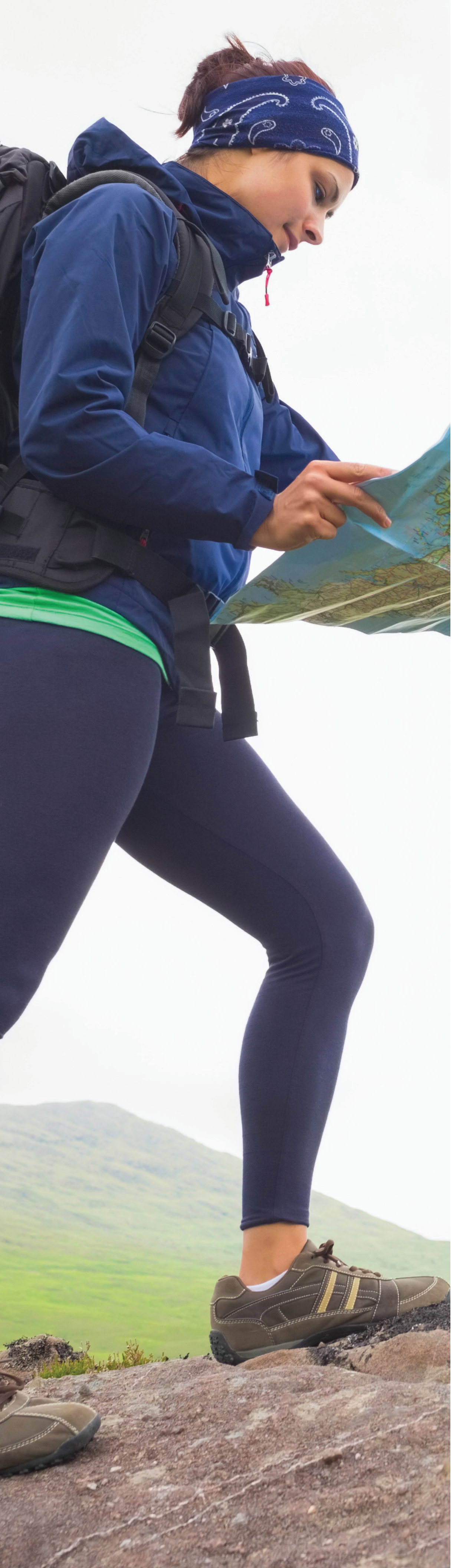


Table of contents

Overview

A qualified retirement plan is a valuable benefit that helps both your employees and your business

What makes a plan successful?

A successful plan gives your employees the tools and information that they need to save for their retirement. It must also meet Employee Retirement Income Security Act of 1974 (ERISA) fiduciary requirements, the federal law that governs the administration of employee benefit plans.

ERISA aims to promote the interests of the participants and beneficiaries of those plans by establishing fiduciary standards of conduct, responsibility, and obligations. Under ERISA, fiduciaries must act solely in the interest of plan participants and their beneficiaries, and for the exclusive purpose of providing benefits to them. Having a good understanding of those duties and requirements can help protect fiduciaries from liability.

How this guide can help your understanding of ERISA

This guide provides a high-level overview of what's meant by fiduciary, and describes four main areas of responsibility of which you should be aware. In addition, we can provide the following checklists to help you fulfill your ERISA duty:

- Compliance and due diligence checklist
- §408(b)(2) compliance and service provider checklist
- §404(a)(5) compliance checklist
- §404(c) compliance checklist
- Participant disclosures and compliance calendar

Once you understand your fiduciary roles and responsibilities, you'll be in a better position to reduce your legal risk and help your employees reach their retirement goals.

Being a fiduciary doesn't have to be complicated, as long as you approach the role with *prudence*.

As helpful as these resources are, they don't constitute legal advice and shouldn't be solely relied on. To be certain that you follow your fiduciary responsibilities, be sure to check with your legal counsel. Your financial professional or third-party administrator (TPA) are also great resources. They can help you establish processes that may help you stay in compliance.

Benefits of a retirement plan

- Attract and retain talent
- Provide corporate tax deductions for employer contributions
- Provide participants with potential earnings on tax-deferred benefits
- Help employees prepare for retirement

I. The basics

Who's a fiduciary?

You can become a fiduciary under ERISA either by functioning as a fiduciary or by being named as a fiduciary in the plan document. And all fiduciaries, whether functional or named, are held to ERISA's standards of conduct.

Functional fiduciary

Under §3(21) of ERISA, if you exercise discretionary authority over plan management, administration, or assets, or you render investment advice for a fee with respect to the assets of the plan, you're functioning as a plan fiduciary, even if you aren't specifically named as a fiduciary in the plan document. Functional fiduciaries could include your plan's service providers.

Named fiduciary

Other fiduciaries are named in the plan document, such as the plan's trustee. The named fiduciary is designated in the plan document by name or title to have authority to control and manage the operation and administration of the plan. The named fiduciary is often the employer—the plan sponsor. And, unless noted otherwise in the plan document, the plan sponsor will also be the plan administrator.

A fiduciary who's who

An overview of those involved in a qualified retirement plan

Financial professional—person who supports the plan fiduciary by providing investment advice or education

Plan administrator—person responsible for the administration of the plan, such as making important disclosures to plan participants and selecting the plan's service provider; generally, the plan sponsor will serve in this capacity, unless another party is designated to do so in the plan document.

Plan participant—an employee (or beneficiary) with an account balance under the plan or, in the case of a 401(k) plan, an employee eligible to contribute to the plan

Plan sponsor—employer or organization that establishes and maintains the plan

Plan trustee—person or entity that has exclusive authority and discretion over the management and control of plan assets, unless the plan provides that the trustee is subject to the direction of a named fiduciary or the authority to manage plan assets has been delegated to an investment manager

Recordkeeper—generally, a third-party service provider retained to keep certain financial and retirement plan records, at both the participant and plan level

TPA—an unrelated service provider retained to provide specific plan services, including assisting the plan sponsor with plan design, plan documentation, and ongoing plan administration

The D factor: understanding basic fiduciary duties and standards of conduct

ERISA sets out fiduciary duties that you must adhere to, including the:

Duty to act for the "exclusive purpose" of providing benefits and paying the "reasonable expenses" of the plan—Fiduciaries must act solely in the interests of participants and beneficiaries.

Duty to act in accordance with the plan document— Fiduciaries must strictly follow the terms of the documents governing the plan, unless they're inconsistent with ERISA.

Duty to avoid engaging in prohibited transactions— Fiduciaries must avoid causing the plan to engage in transactions with "parties in interest" and must also avoid transactions that involve self-dealing or conflicts of interest, unless an exemption applies.

Duty to be a *prudent* expert (i.e., prudent man rule)— Fiduciaries must be more than well intentioned. They must perform their duties with care, skill, prudence, and diligence in each area in which they make decisions for the plan. The duty of prudence is generally satisfied, if the fiduciaries, at the time a decision is made, consider facts and circumstances that are relevant to the particular decision and act accordingly; therefore, a fiduciary will generally be able to demonstrate that they acted prudently if they engage in a prudent process—meaning that the fiduciary gathered all of the information relevant to making a decision, reviewed the information, and consulted with a financial professional, if needed.

Duty to disclose—The plan administrator is responsible for providing employees with various disclosures, such as a summary plan description (SPD), quarterly benefit statements, investment information, and §404(a)(5) notifications.

Duty to diversify plan investments—ERISA provides that a fiduciary responsible for investment selection has a general duty to diversify the plan's investments to minimize the risk of large losses, unless, under the circumstances, it's clearly prudent not to do so. For participant-directed plans, such as 401(k) plans, this duty generally doesn't apply to the investments that are directed by the participant, although to comply with §404(c), the plan sponsor must still select a broad range of investment alternatives from which employees can select. If the plan contains any investments that aren't directed by participants, however, then the fiduciary will generally have a duty to diversify.

Duty to monitor—After selecting service providers, the fiduciary is under continuing duty to monitor the performance of all service providers and investment options.

Be diligent with your Ds!

Not all plan decisions are fiduciary in nature. A plan fiduciary can wear two hats—one as a fiduciary and one as the employer.

For example, the decision to establish, amend, or terminate a plan is a business decision that a person can make in their capacity as the employer. These types of decisions aren't governed by ERISA's fiduciary duties; however, the execution of business decisions regarding the plan is considered to be a fiduciary act, and compliance with ERISA's fiduciary duties is required.

The duties outlined under ERISA are basic fiduciary guidelines that must be followed. Not doing so has its consequences. Yet, many fiduciaries find themselves in situations where they've breached their fiduciary responsibilities because they didn't have the right information or support. That's why it's important to understand your role as a plan fiduciary.

Noncompliance can have consequences

Breaching your fiduciary duties can result in:

- Personal liability for plan losses
- Possible civil penalties and, in certain circumstances, criminal prosecution, fines, and imprisonment
- Removal from your fiduciary role

The four main areas of fiduciary responsibility are:

1

Management of plan operations

2

Service provider selection and monitoring

3

Investment selection and monitoring

4

Participant communication

II. Areas of fiduciary responsibility

Being a fiduciary doesn't have to be complicated or overwhelming, but it does involve being prudent about how the plan is managed, in the same way that you're prudent about how your business is managed

1 Management of plan operations

Follow the plan document

The plan document describes the terms and conditions related to the operation and administration of a plan. Generally, it should contain the following information:

- Designation of the named fiduciary or fiduciaries
- Description of the benefits provided
- Standard of review for benefit decisions
- Eligibility criteria (e.g., classes of employees, employment waiting periods, and hours per week)
- Effective date of participation (e.g., next day or first of month following waiting period)
- Amendment and termination rights and procedures, as well as what happens to plan assets, if any, in the event of plan termination
- How the plan is funded (e.g., employer or employee contributions)

Both named and functional fiduciaries should be aware of the extent of their fiduciary duties, so they can ensure compliance with the applicable terms of the plan and ERISA by establishing prudent procedures.

Develop due diligence procedures

Below are three ways fiduciaries can help ensure compliance with the plan document and their fiduciary duties, along with some best practices for your consideration, in consultation with counsel.

Establish procedures

- Develop policies and procedures around administrative functions, such as reviews, reporting, contributions, and withdrawals, to help ensure the plan is prudently managed.
- Review and, if necessary, implement internal safeguards and controls, as well as checks and balances, for all key plan processes. This can include monitoring the performance of delegates or other service providers.
- Prepare a calendar to help ensure the ERISA plan administrator fulfills their reporting and participant communication obligations.

Document decisions

Document actions in writing. As a general rule, meeting minutes should be taken whenever the plan is being discussed by those responsible for its management. These minutes can serve as important documentation to demonstrate that a prudent process was followed and that the plan was prudently managed.

Maintain a due diligence file

Leave a paper trail—Maintain all documentation in a due diligence file. That way, if a legal issue ever arises, your documentation can help protect you. (See Section III.)

You may also want to consider

having an independent third party perform periodic, in-depth operational or compliance reviews that focus on the implementation and application of documented procedures.

2 Service provider selection and monitoring

Seek expertise when needed

Under ERISA, plan fiduciaries are expected to act as prudent experts. Given the breadth of knowledge required to manage a plan, fiduciaries may want to consider partnering with a service provider that may have skill sets or expertise that the fiduciary doesn't have.

You may want to designate service providers to take on certain fiduciary duties, such as the following:

- A 3(16) plan administrator can help you with certain plan management responsibilities.
- A 3(38) investment manager will select and monitor the investments for a plan.
- A 3(21) fiduciary can give you advice regarding the selection and monitoring of the investments for a plan.
- A financial professional can help you and your employees better understand the investment options available.
- A TPA can help you with plan audits and compliance testing.
- A recordkeeper can help you with your day-to-day plan administration.

Although obtaining third-party support can sometimes help provide the expertise required by ERISA, it doesn't absolve you of your fiduciary duties, which also include monitoring the provider. That's why demonstrating *procedural prudence* (e.g., by documenting your hiring decision, the provider's role and responsibilities, and related discussions and reviews) is necessary.

Establish clear selection criteria

You should establish clear criteria for hiring a service provider, and for why you choose to retain or remove them. For example, what expertise are they bringing to the table? As part of that selection process, be sure to consider their:

- Experience with plans similar to yours in size and makeup—based on performance and benchmarked results
- Credentials, including education, certifications, and licenses
- Level of service and support
- Competitiveness of fees for the level of service
- References and reputation

Advice vs. education

Generally, if a person provides investment advice to the plan or the plan participant regarding the investment of the assets in the plan or plan participant's account, respectively, then that person will be a fiduciary under ERISA; however, a person can provide investment education to either party without becoming a fiduciary.

Advice

Involves specific recommendations

Education

Involves providing general information and explanations about features, risks, costs, and suitability

Know what's required under §408(b)(2)

To help you evaluate covered service providers (CSP) effectively, ERISA §408(b)(2) mandates that, before you enter into any arrangement with them, the CSP must provide you, the plan fiduciary, with written disclosures about their services, compensation, and fiduciary status.

And with this information, you should then assess the reasonableness of the arrangement being entered into.

Questions to consider include:

- Is the CSP providing the necessary services?
- Are their fees reasonable?
- Are there any conflicts of interest?

By reviewing and acting on the information presented, you'll be better able to demonstrate the prudence of your selection decision. On the other hand, if a CSP doesn't provide you with their disclosures, you should consult with your legal counsel to determine whether entering into the arrangement may be a prohibited transaction.

U.S. Department of Labor guidance on managing incomplete 408(b)(2) disclosures

If you entered into an agreement with a CSP and later discovered that their disclosures were incomplete, you can protect yourself from a prohibited transaction by:

- Sending the CSP a written request for the missing information; the CSP has 90 days to respond.
- If the CSP fails to comply with your request, notifying the U.S. Department of Labor (DOL) within 30 days of the earlier of a) the CSP's failure to comply with the written request for information or b) 90 days after the written request.

And if information requested relates to future services and isn't disclosed promptly after the 90-day period, the DOL states that plan fiduciaries must "terminate the contract or arrangement as expeditiously as possible," but in a prudent manner.

Follow and document monitoring processes

Plan fiduciaries have an ongoing duty to monitor the provider's performance and to ensure the provider's performance complies with the terms of the plan, ERISA, and any applicable contract.

To do this effectively, consider establishing ongoing review processes and performance criteria that can help you determine whether the plan is receiving the value-added, reasonably priced services for which it bargained. And don't forget to document the information you receive and any related decisions that you make to demonstrate ongoing procedural prudence.

The value of benchmarking

Although not a fiduciary requirement, benchmarking is a good way for plan fiduciaries to evaluate a provider's performance.

Common plan benchmarks include:

- Participation rate
- Contribution and deferral rates
- Maximizing company match
- Use of catch-up contributions
- Use of goal-setting tools

3 Investment selection and monitoring

Offer diversified options

Selecting and monitoring investment options is one of the most important roles performed by plan fiduciaries. Generally, plan fiduciaries have an ongoing duty to select and monitor investments, as well as to ensure that the plan has a well-balanced investment lineup.

There are **three safe harbors** available with respect to participant-directed plans that can help fiduciaries reduce their liability for losses resulting from investments.

Safe harbor #1—ERISA §404(c)

ERISA §404(c) may relieve plan fiduciaries from liability for losses resulting from participants' direction of their investments. While not mandatory, if plan fiduciaries want to obtain fiduciary relief under §404(c), they must comply with its provisions, which include:

- Provide all employees with the disclosures and notifications outlined under the §404(a)(5) regulation.
- Notify employees that the plan is designed to comply with §404(c) and, therefore, the fiduciary may not have liability for losses resulting from their investment choices.

And they must provide employees with the ability to:

- Choose from a broad range of investment alternatives consisting of at least three core diversified investment options with materially different risk and return characteristics.
- Make changes to their investment elections at least quarterly or as frequently as the market volatility of the particular investment option dictates.

If the provisions of §404(c) aren't followed, you may not qualify for relief under §404(c)—and you could be held liable for any investment losses suffered by employees.

Safe harbor #2—QDIA

In situations where an employee doesn't choose investments, such as when there's a change in investment provider or in an auto-enrollment, plan fiduciaries can limit their liability by investing such employee's contributions in a qualified default investment alternative (QDIA).

Under ERISA §404(c)(5), a QDIA must be:

- Based on a generally accepted investment theory
- Diversified to minimize the risk of large losses
- Focused on long-term appreciation and capital preservation through a mix of equity and fixed-income exposures

Although a QDIA can provide a safe harbor for plan fiduciaries, it doesn't relieve them of their responsibility to prudently select and monitor the QDIA. You must adhere to the following two QDIA guidelines:

1. Provide participants and beneficiaries with the QDIA notice at least 30 days before they become eligible to participate in the plan or their money is initially invested in the QDIA, and generally at least 30 days prior to the start of each plan year thereafter. Generally, the QDIA notice must contain a description of the QDIA, as well as information about its performance, fees, and expenses.
2. Provide participants and beneficiaries, on whose behalf the investment in a QDIA is being made, the opportunity to direct the investment of assets in their accounts.

Safe harbor #3—qualified fund mappings

If there are certain changes in investment options under a plan, such as when there's a change in the investment provider, plan fiduciaries may need to direct (map) a participant's or beneficiary's assets as they're being transferred from an existing investment option to another.

In such situations, plan fiduciaries may be able to rely on the mapping fiduciary relief offered under ERISA to limit their liability, if they take the following measures:

- Ensure the plan satisfies all §404(c) requirements before the transfer.
- Ensure the new investments' characteristics (e.g., risk and rate of return) are reasonably similar to those of the existing investments.
- Ensure the participant or beneficiary is given:
  - 30-day advance notice of the change in investment options,
  - Information regarding the existing and new investment options, and
  - An explanation that, if they don't make an investment selection, the existing investment will be mapped into a reasonably similar investment.

If the requirements of this safe harbor aren't satisfied, then the fiduciary relief may not be available.

Consider an investment policy statement

An investment policy statement (IPS) is a document that provides fiduciaries with a framework to help them detail the standards by which investment decisions are made and monitored, and investment performance is measured, under the plan.

Generally, an IPS may:

- Identify the investment alternatives.
- Document the process and criteria for selecting and monitoring investment options.
- Highlight the types of educational and advisory services available to help employees make decisions.

Although not required under ERISA, an IPS can help fiduciaries demonstrate prudence with regard to how the investment options offered under a plan were selected and monitored. This could also prove to be advantageous, if the plan is ever audited by the DOL down the road.

IPS guidelines

Implementation steps

Consider your employees' demographics, investment knowledge, and retirement horizon.

Determine the plan's investment options based on your participant base.

In doing so, consider if the plan's designated investment alternatives (DIA) provide:

- Diversified risk and return potential
- A variety of asset classes and investment styles
- Good management and performance

Ongoing monitoring steps

Monitor compliance with a plan's IPS by regularly reviewing all appropriate investment options based on your evolving employee demographics.

Monitor the performance of the underlying investment managers and change the DIAs, as required.

Modify the IPS, as needed, and maintain your documentation, including relevant reports and reasons for your decisions, in a due diligence file.

4 Participant communication

An important fiduciary consideration is plan health, defined, for example, as strong participation and deferral rates. To achieve this, you'll need to help your employees become engaged about their retirement by:

- From a fiduciary standpoint, meeting the disclosure requirements under ERISA
- From a non-fiduciary standpoint, providing value-added education and support

When a plan is committed to both communication and education, employees have a better-rounded picture of the plan's features and benefits and the resources available to help them take control of their retirement.

Meet mandatory disclosure requirements

Under ERISA, the plan administrator, usually the plan sponsor, must provide employees with certain disclosures and notifications about the plan, investment options, and related fees, so they, in turn, have the information they need to make informed decisions.

The type of disclosures these plan fiduciaries must provide is dependent on circumstances. For example, §404(a)(5) plan and investment disclosures apply only to plans that have participant-directed accounts. Meeting §404(c) requirements applies only to plans with a fiduciary who wants to take advantage of the safe harbor it provides, while others, such as the provision of the SPD, apply to all plans.

As a plan fiduciary, it's important for you to be aware of the disclosures that you must provide and to provide them in accordance with ERISA.

Examples of mandatory disclosures

SPD: a document that explains how the plan works, including features, benefits, and employees' rights under ERISA

404(a)(5) plan and investment-related disclosures: disclosures that inform employees of the plan and investment-related information associated with the plan; plan administrators must furnish this information to eligible employees on or before the date they can first direct the investments in their account. Changes to the plan-related information must also be provided 30 to 90 days in advance.

Participant quarterly statement: provides employees with information about the fees charged to their accounts, their account balances, and vested benefits

Summary annual report: summarizes what's in the plan's Form 5500 annual report

Blackout notice: notifies employees of a transaction freeze at least 30 days in advance of a change in recordkeepers or investment options

Provide value-added education and support

The use of an education policy statement (EPS), although not a fiduciary requirement, is a best practice. Just as an IPS documents your plan's investment objectives, an EPS can be used to document your plan's communication objectives.

It does so by including the following information:

- **Plan overview**
- **Education objectives—**identify the type of campaigns being rolled out to help employees better understand their retirement objectives and investment options
- **Education strategies—**identify how the education program will be rolled out and measured
- **Education calendar—**outlines a year-long schedule for the various campaigns
- **Roles and responsibilities—**identify who will deliver and measure the education program
- **Results metrics—**measure a campaign's effectiveness against predetermined metrics

Also, if used together, an IPS and EPS can complement each other. Consider including the following topics in an EPS:

- Financial planning and strategies, such as diversification principles
- Asset allocation concepts, such as target-date and risk-based investment options
- Relevance of performance versus returns
- Investment fees
- Retirement savings/planning calculators

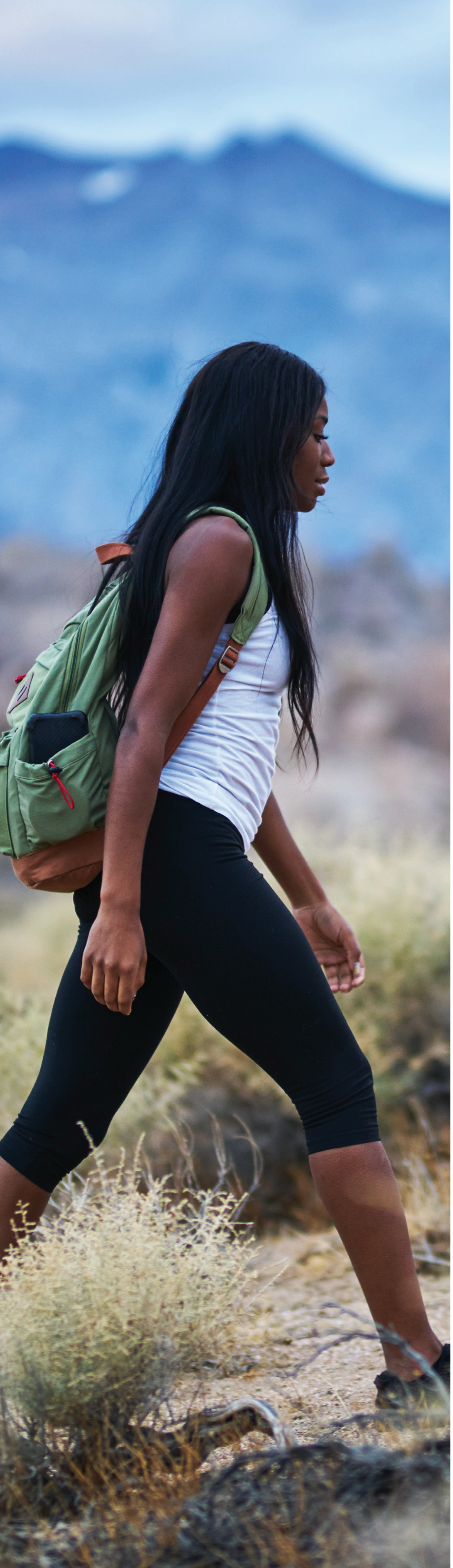
And if documented in an EPS, a plan fiduciary may be able to demonstrate the prudent steps they took to provide employees with the information and support they needed to help them make informed decisions.

Benefits of offering communication and education

- Provides employees with a more complete picture of a plan's provisions and investment options
- Helps them better understand their plan and their retirement objectives
- Empowers them with the information and tools they need to take control of their retirement

Always follow these basic principles to manage the four main areas:

- Understand your fiduciary roles and responsibilities, and establish well-documented fiduciary processes around them.
- Review and monitor your providers and investment decisions periodically.
- Communicate, communicate, communicate ... disclose fiduciary-related matters to those who matter—your participants and beneficiaries.
- Document, document, document ... be sure discussions, decisions, and outcomes are recorded and filed.



III. Limiting fiduciary exposure

Below, we list four examples of additional ways to mitigate fiduciary risk. To determine what makes sense for your plan, consult a benefits professional, financial professional, or TPA.

Fiduciary warranties

Warranties provide specific assurance from the investment provider to the plan fiduciary with regard to the provider's fund lineup. Generally, the investments are selected and monitored by the provider in a way that meets ERISA standards.

Fiduciary liability insurance

ERISA permits the purchase of fiduciary liability insurance to cover liability or losses occurring by reason of a breach of fiduciary duty. It's generally recommended that the insurance be purchased by the plan sponsor or by the individual fiduciary. If the insurance is purchased with plan assets, the insurance policy must permit recourse. In other words, insurance must allow the insurer to try to collect any losses from the fiduciary, if the fiduciary has breached their duties.

Plan committees

Plan committees can help limit fiduciary exposure by sharing the responsibility with others participating in:

- Plan governance
- Plan administration
- Oversight of the plan's investment options

Plan committees can also help demonstrate that prudent steps were taken with regard to a plan's administration and management. That's why minutes should be taken at every meeting and retained in each plan's due diligence file.

Committee members can include senior executives and personnel from human resources, finance, and operations. They can also include the experts the plan has hired, such as a financial professional or TPA.

All committee members should be aware that they have a fiduciary responsibility and liability under ERISA. When new members are added, they should also be trained to understand their fiduciary responsibility and liability.

Due diligence file

When government agencies audit a plan or in the event of a lawsuit, being prepared with evidence of fiduciary prudence is imperative

That's why it's important to document and keep records of all communications (e.g., disclosures, meeting minutes, plan-related documents, reports, reviews, audit tests, assessments, and participant notices) that pertain to your plan in a dedicated and readily accessible due diligence file. Use the following lists to guide what you save in your file.

General materials

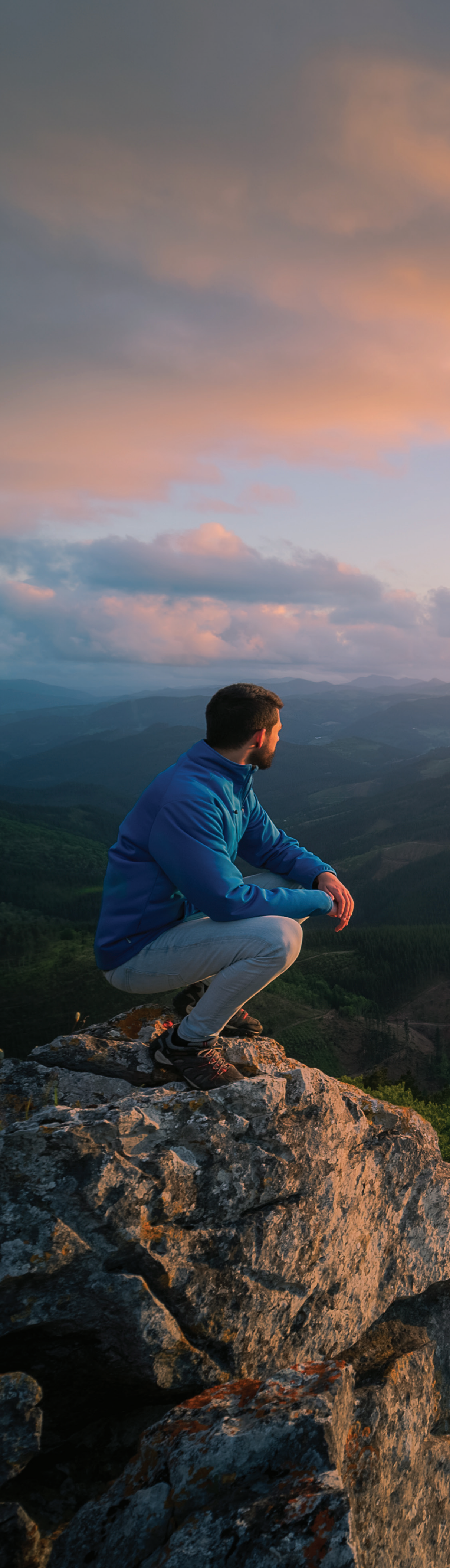
- Management of plan operations
- Plan document
- Plan testing
- Form 5500 filings
- Plan audits
- Service provider selection and monitoring
- §408(b)(2) disclosures
- Service agreements
- Selection and monitoring criteria and documentation
- Meeting discussions

Investment selection and monitoring materials

- IPS
- Prospectuses
- Selection and monitoring documentation
- QDIA documentation

Participant communication materials

- ERISA §404(a)(5) notice
- SPD
- Quarterly statements
- Other notices (blackout or QDIA)



What's next?

By reviewing this information, you're one step closer to fulfilling your fiduciary duty. And as you can see, the fiduciary standard of care is manageable—in many ways, it's similar to the care you take in running your business.

General fiduciary principles

- Understand your role.
- Establish and follow a well-documented fiduciary process.
- Review and monitor investments and providers.
- Communicate to your participants.
- Document!

And remember, you aren't alone!

Although, as the plan fiduciary, you're responsible for the plan and accountable for your decisions and actions, or lack thereof, you can enlist the services of retirement plan experts. From ERISA attorneys and accountants, to financial professionals and TPAs, knowledgeable retirement plan professionals are available to help you.

John Hancock is here to *help*

We have many tools and resources aimed at helping you better manage your fiduciary responsibilities.

Contact your John Hancock representative to learn more.

Consultative.

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We make retirement plans *work*.

For 50 years, we've helped people plan and invest for retirement; today, we're one of the largest full-service providers in the United States. (Source: "2020 Defined Contribution Recordkeeping Survey," *PLANSPONSOR*, 2020.)

For complete information about a particular fund, please read the fund prospectus. You should carefully consider an investment option's objectives, risks, charges and expenses before investing. The prospectus contains this and other important information about the investment option and investment company. Please read the prospectus carefully before you invest or send money.

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