

Fiduciary Liability Insurance

Does your company have a pension plan?
A 401K plan?

An employee stock option plan (ESOP)?

Any other employee benefits plan?

If so, the fiduciary liability might be at risk.



Employers, administrators, employees, directors and officers, who have a position of trust and possess the power to influence the interests of those vulnerable to their actions, are accountable as fiduciaries (trustees). The Quebec Supplemental Pension Plans Act requires that plan fiduciaries meet several requirements and comply with legal requirements. The fiduciaries must act solely in the best interest of the plan beneficiaries. Failure to do so may invoke personal liability.

We have all read the headlines in the press on Canadian pension plans, especially since it personally affects us all: "Pension surpluses prove fleeting amid market meltdown", "Pension plans suffering their largest quarterly loss in a decade."

Such headlines reflect the fact that many plans have suffered large losses which may lead to further losses as fiduciaries will have to justify their investments, or some corporations will have to inject large amounts of cash in an already difficult financial market. Couple this with the fact that Canadians are living longer, the work force is aging, the ratio of workers to retirees is declining, interest rates are fluctuating, class action litigations are increasing, benefits are reduced by many corporations, etc. All these factors are heightening risks associated with administering pension and benefits plans, thereby triggering Fiduciary Liability.

Here are some examples of situations that could trigger your liability as a fiduciary:

- Administrative errors;
- Improper investment strategy;
- Failure to comply with plan documents;
- Failure to diversify;
- Violation of terms, regulatory duties;
- Failure to enroll;
- Conflict of interest;
- ESOP class action;
- Misunderstanding of plan provisions;
- Not reviewing the fund management;
- Failure to adequately inform, educate, or communicate information to plan participants.

A fiduciary might consider his/her risk mitigated because:

- Fiduciaries have an indemnification agreement with the employer - there are occasions where indemnification by the corporation is not permitted, thereby making the fiduciary personally liable;
- They carry a Directors & Officers policy - such policies exclude Fiduciary exposure. The responsibilities differ: a fiduciary acts solely in the best interest of the plan beneficiaries and the directors or officers act in the best interest of the company with the goal of maximizing stockholder value;
- The plan is participant directed - you still have an exposure. For example, you may be involved in the education of employees or determining what options will be provided;
- Fidelity Bond will address any loss - this is not so as the bond provides protection for loss by theft by the fiduciaries and no coverage for breach of duty;
- You transferred the administration and investment activities to a Bank or Third Party Administrator (TPA) - this would not negate your liability as ultimately the plan administrator selects the provider (team of experts).

One way to mitigate some of the risks and transfer the potential cost of defense associated with defending a fiduciary is through a Fiduciary Liability policy. A Fiduciary policy which would defend the plan sponsor, the plan and any trustees (fiduciaries) employed by the sponsor.

At GPL we can introduce you to options to help mitigate the risks associated with the administration of these plans.

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