





ERISA's Fiduciary Duties

June 12th , 2024



This presentation does not constitute legal advice. Please consult legal & tax counsel re: specific guidance for benefit Plan actions based upon the facts & circumstances of the inquiry.



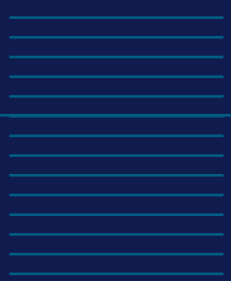
ERISA's Fiduciary Duties

Learning Objectives

- Understand the *nature* of a fiduciary.
- List ERISA's 5 fiduciary duties.
- Identify fiduciary failures.
- Implement plan best practices.



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COMPLIANCE



COMPLEX

Compliance



EASY WIN





Hot Topics in Benefits Compliance

Employee
Mental Health
NQTLs Pending

Contraceptives
OTCs & Services

Transparency
Reporting

Fiduciary Suits
Provider Oversight



How ERISA Governs Plans



Streamlines regulations via federal preemption



Requires plans to provide plan information to participants



Outlines requirements for protection of plan assets and fiduciary responsibilities



Requires plans to establish a grievance and appeals process for participants and beneficiaries



Gives participants the right to sue for benefits and breaches of fiduciary duty

What is an ERISA Plan?

- A plan, fund, or program;
- Established or maintained by the employer;
- **To provide a benefit*** to participants or beneficiaries.

Essential Elements?

- A **written** plan → describes the benefit structure & guides day-to-day operations;
- A **trust** → hold the plan's **assets***;
- A **recordkeeping system** → track contribution & benefit payments, maintain participant & beneficiary information, & accurately prepare **reporting** documents; and
- Documents → **provide plan information to participating employees and government.**



ERISA

Compliance Assistance
Consumer Information on Health Plans
Continuation of Health Coverage (COBRA)
ERISA
Fiduciary Responsibilities
Health Benefits Education
Mental Health Benefits
Newborns' and Mothers' Protections

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans.

ERISA requires plans to provide participants with [plan information](#) including important information about plan features and funding; provides [fiduciary responsibilities](#) for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

There have been a number of amendments to ERISA, expanding the protections available to health benefit plan participants and beneficiaries. One important amendment, the [Consolidated Omnibus Budget Reconciliation Act \(COBRA\)](#), provides some workers and their families with the right to continue their health coverage for a limited time after certain events, such as the loss of a job. Another amendment to ERISA is the [Health Insurance Portability and Accountability Act](#) which provides important protections for working Americans and their families who might otherwise suffer discrimination in health coverage based on factors that relate to an individual's health. Other important amendments include the Newborns' and Mothers' Health Protection Act, the Mental Health Parity Act, the Women's Health and Cancer Rights Act, the Affordable Care Act and the Mental

Fiduciary

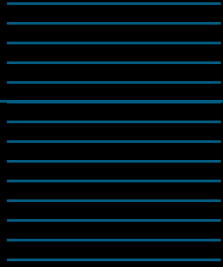
What's it mean?



"...of, relating to, or involving a confidence or trust..."

ERISA Fiduciary

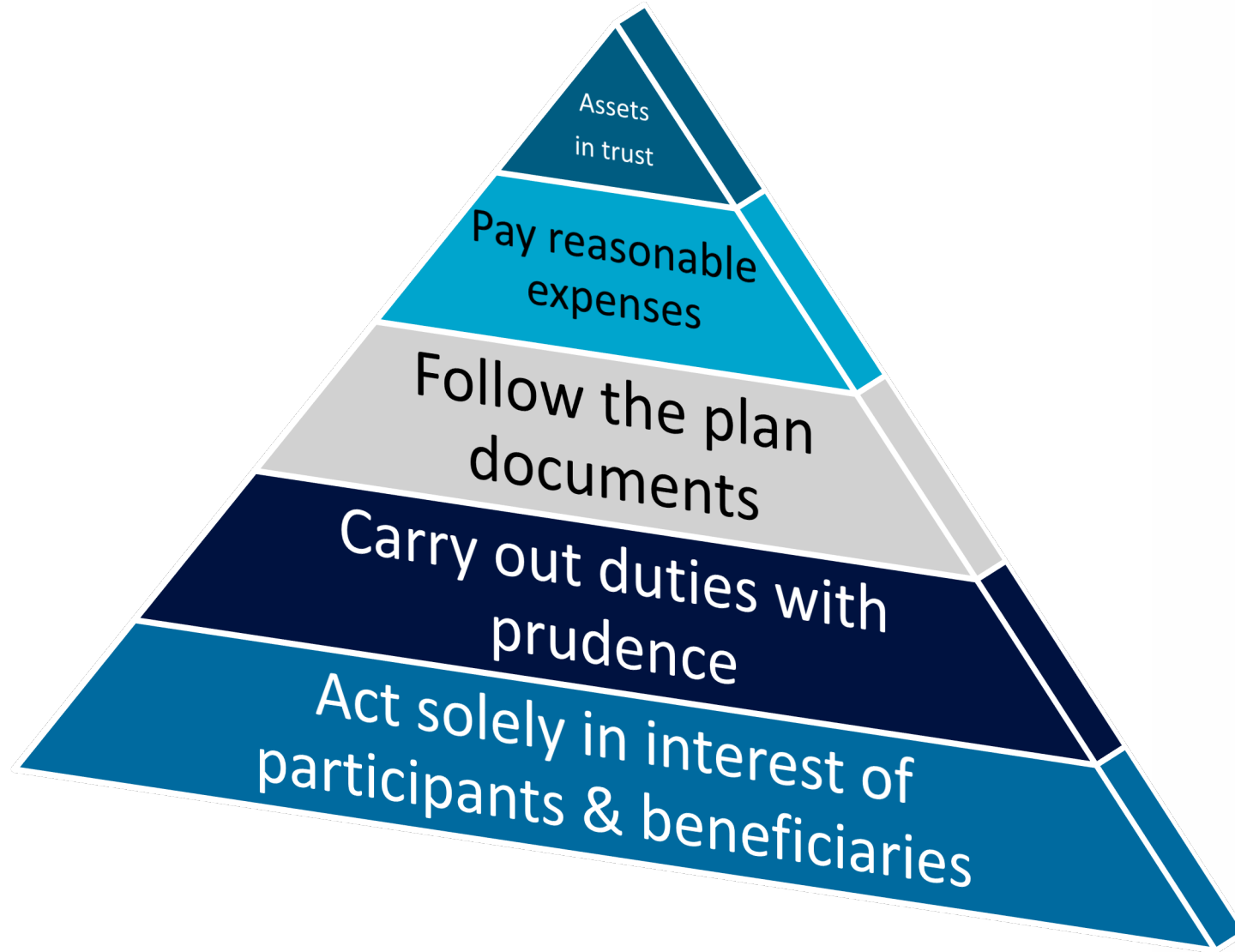
*A person using **discretion** in **administering & managing** a plan or **controlling** the plan's assets **is a fiduciary** to the extent of that discretion or control.*



ERISA's 5 Duties

1. Act solely in interest of participants.
2. Do so with prudence.
3. Follow plan documents.
4. Pay reasonable plan expenses.
5. Hold assets in trust*








Functional Fiduciary

Any individual who 'de facto' performs specified, discretionary duties respecting management, assets, or administration of the plan.



ERISA Roles & Responsibilities

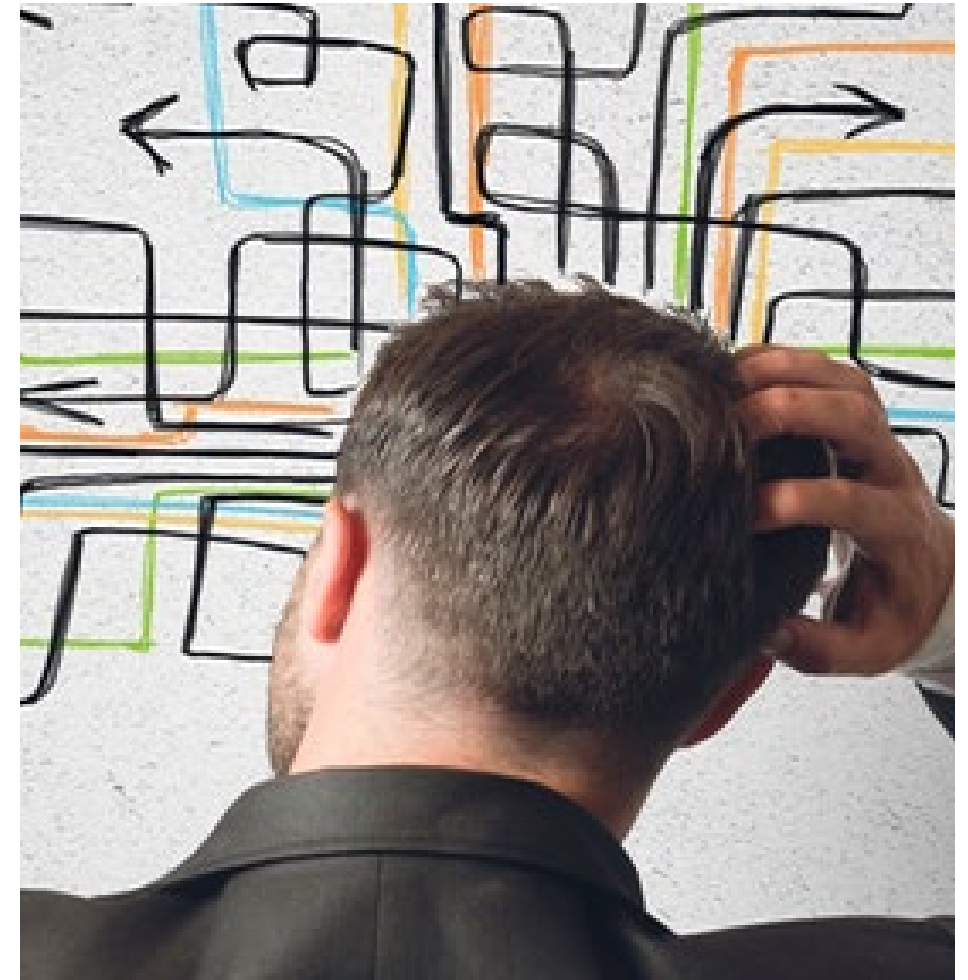
Plan Sponsor → The employer

- Fund, establish, maintain, amend, & end plans

Plan → legal entity

Plan Administrator → Plan Sponsor

- Primary role to administer plan
- Assumes liability for failures



ERISA Roles & Responsibilities

Plan Administrator → Plan Sponsor

- Named in plan document
- Administrative duties:
 - Form 5500 filing
 - Plan disclosures
 - COBRA, HIPAA, QMCSO,
 - Recordkeeping

What about the TPA?

- NOT fiduciary unless specifically named
- Unless they make **final decisions on claims** or **access** to accounts with **plan assets**



What do fiduciary decisions look like?

1 **Monitoring** plan document creation, distribution, & maintenance & **following** the plan

2 **Maintaining** financial health of the plan, including diversification of plan assets.

3 **Documenting** reasons underlying who & why a person was chosen to act on the plan's behalf.

4 **Making** discretionary administrative & **claims decisions.**

5 **Selecting** plan providers & negotiating contracts

6 **Evaluating** performance of plan providers.

What aren't fiduciary decisions?



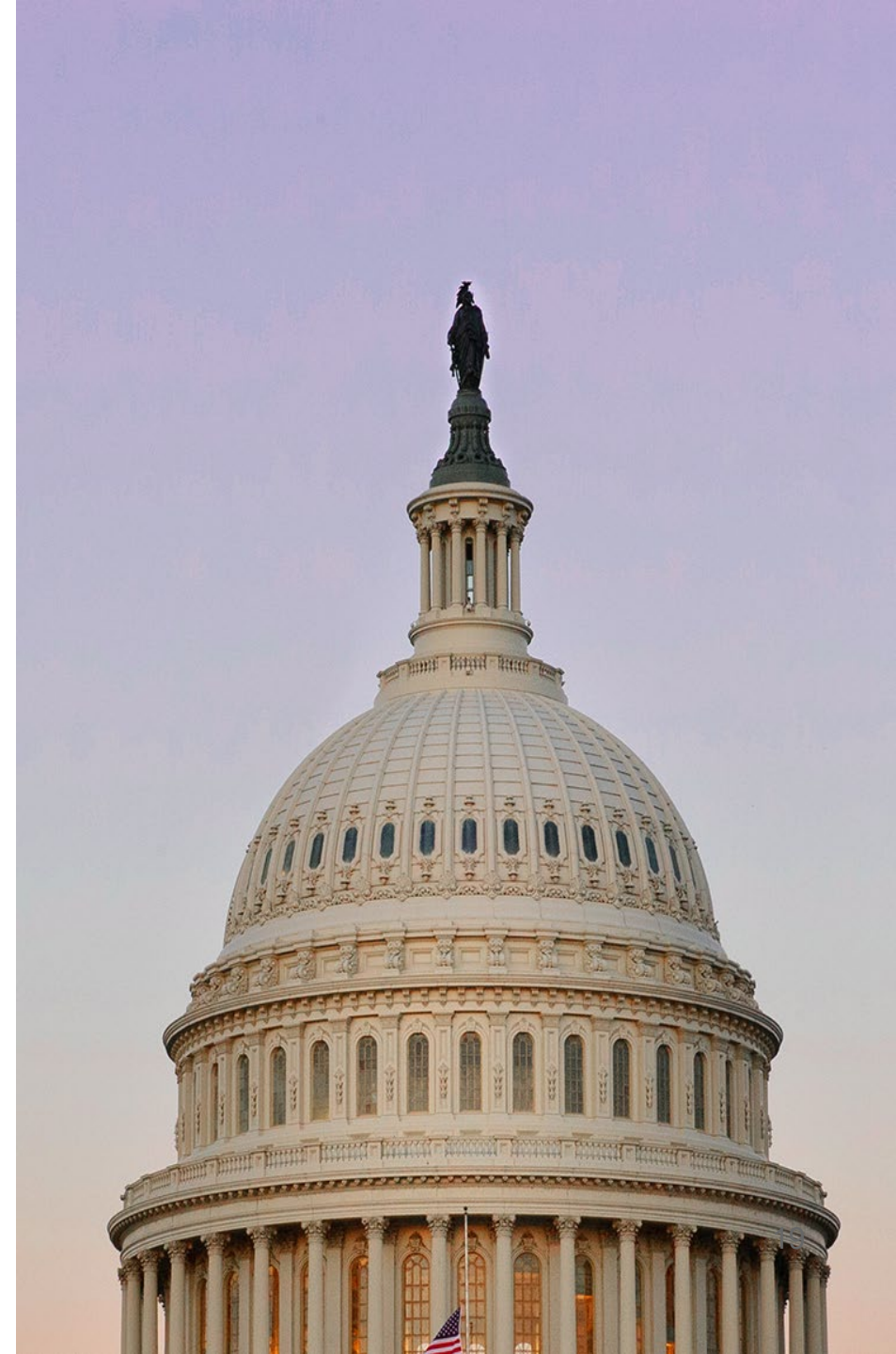
Establish
Plans

Amend
Design & Benefits

Terminate
Plan

Business Need

**Still follow notice & distribution requirements.*



Case Study #1 – *Johnson & Johnson*

Allegations → breach of duty of prudence

- ✓ Unreasonable plan costs.
- ✓ Failing to *prudently* select its PBM.
- ✓ Agreeing to undesirable contract terms.

Mismanaging drug benefits → **overpayment** for certain drugs

Source: [J&J Sued](#);

Allegation Details

Failure to *adequately*...

- ✓ Consider Non-Traditional PBMs.
- ✓ Negotiate Favorable Contract Pricing Terms
- ✓ Carve Out Specialty Pharmacy From Contract.

Participants Harmed:

- ✓ Overpayment of Cost-Sharing
- ✓ Inflated Overall Plan Cost
- ✓ Depressed wages

Source: [Seyfarth](#)

“This case principally involves **mismanagement** of prescription-drug benefits. Over the past several years, defendants breached their fiduciary duties and **mismanaged** Johnson and Johnson’s prescription-drug benefits program, **costing** their ERISA plans and their employees millions of dollars in the form of higher payments for prescription drugs, higher premiums, higher deductibles, higher coinsurance, higher copays, and lower wages or limited wage growth. Defendants’ **mismanagement** is most evident in (but not limited to) the prices it agreed to pay [its PBM] for many generic drugs that are widely available at drastically lower prices.”

Case Study #2 – W.W. Grainger, Inc.

Allegations → Aetna “took money under the guise of claims admin., etc. & kept the difference.”

- ✓ Abuse of authority
- ✓ Failing duty of prudence
- ✓ Unjust enrichment
- ✓ Active deception
- ✓ Improper conduct

Source: [ASPPA](#)

Allegation Details → “Active deception...”

- ✓ Conceal its breaches
- ✓ Limiting audit rights
- ✓ False claims reports
- ✓ Preventing data access

Suit asks Court to:

- ✓ Reimburse for all losses
- ✓ Disgorge profits to plaintiffs
- ✓ Issue preliminary injunction
- ✓ Grant all equitable & remedial relief
- ✓ Pay attorneys fees & costs

Source: [Seyfarth](#)

“In its role as a third-party administrator (TPA) of the plans, Aetna had **contractual and statutory obligations to prevent fraud, waste, and abuse.**”

Aetna took money from Grainger “under the guise of claims administration, transferred the money to accounts under Aetna’s control, paid a fraction of that money to health care providers to settle the claims, and kept the difference.”

The suit claims that, as a result of its practices, Aetna was unjustly enriched “not only by **avoiding the cost of fraud prevention, but also by requesting and receiving money from the Plans to pay for claims that should never have been paid in the first place.**”

Aetna also engaged in “**active deception to conceal its breaches of its duties to the Plans,**” preventing Grainger from discovering Aetna’s improper conduct by, among other things, “limiting audit rights, **providing false or inaccurate claims reports,** and preventing Grainger from obtaining or accessing data about the actual financial transactions between Aetna and the health care providers.”

Who can penalize a plan?

- ERISA → IRS & DOL can penalize separately for same offense via EBSA
- HIPAA → HHS can penalize via OCR
- CMS levy penalties for MSP

ERISA Criminal & Fiduciary Penalties

Excise taxes and monetary penalties

- Breach of fiduciary duties
 - Penalties up to 20% recovery
 - Personal liability
 - Criminal prosecution.

Source: ComplianceDashboard

ERISA Criminal & Fiduciary Penalties

Excise taxes and monetary penalties

- Willfully violating reporting requirements → +\$100K
- Knowingly making false statement to prepare reports
- Cohersive interference with participant rights
- Theft or embezzlement from plan

Source: ComplianceDashboard

Functional Fiduciary: any person who

1. Exercises **discretionary authority** or control over management of the plan or disposition of plan assets;
2. Gives **investment advice for a fee**; or
3. Has **any discretionary authority or responsibility in the administration** of such plan.

Fiduciary Behavior – **What not to do**

1 **Engage** in self-dealing.

2 **Ignore** regulatory requirements.

3 **Create** conflicts of interest.

4 **Assume** plan providers are fine.

5 **Ignore** plan financials.

6 **Ignore** plan oversight.



LEVERAGE

Knowledge

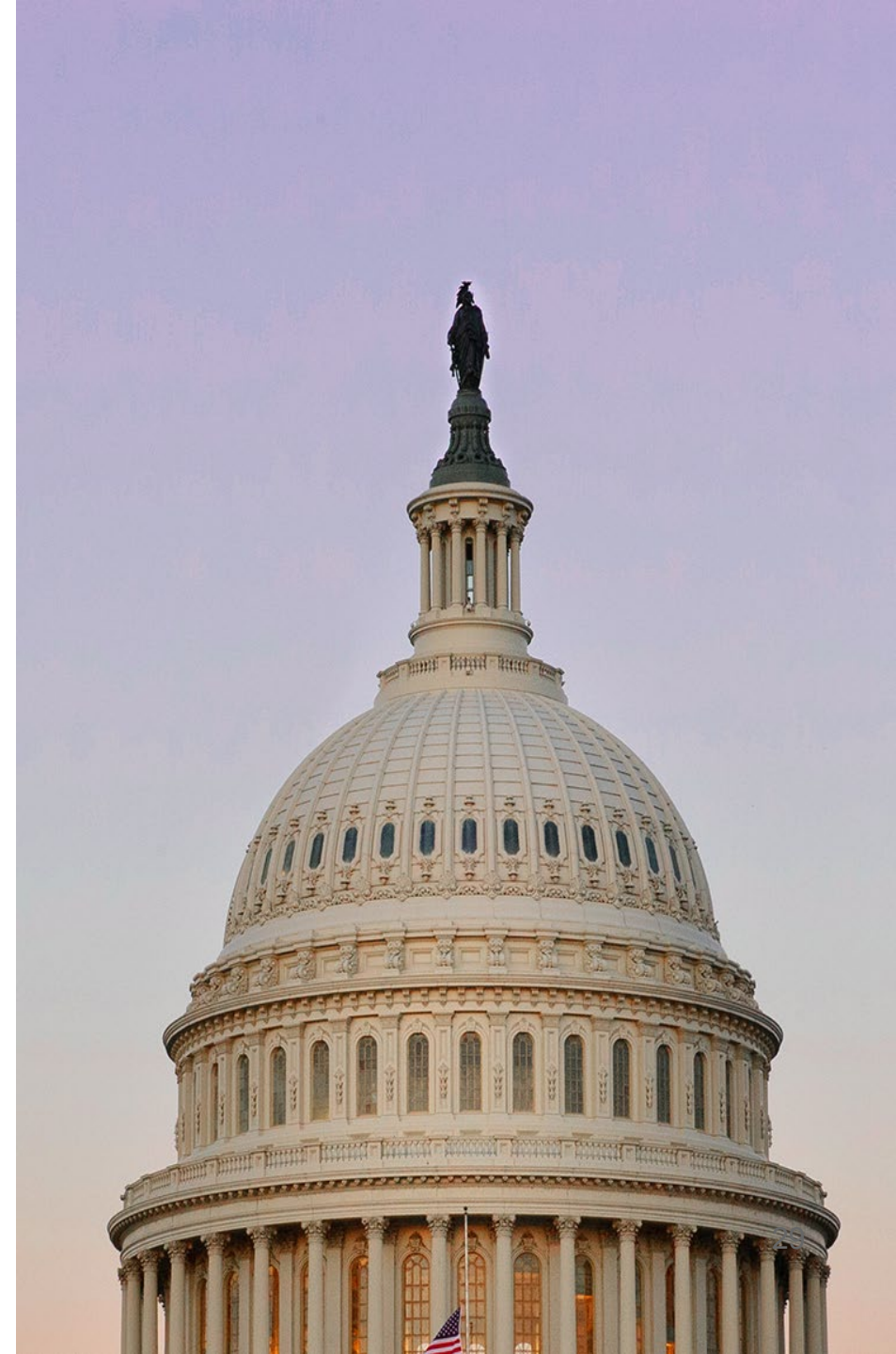
Body of Law

Processes

Agency-guided

Documentation

Core of Compliance



ERISA's Fiduciary Duties - Best Practices

What do prudent fiduciary practices look like?

Identify

Fiduciary v. Plan Decisions

Establish

Plan committee with named & discretionary decision makers

Document

Personnel choices & Plan decisions

ERISA's Fiduciary Duties - Best Practices

What do prudent fiduciary practices look like?

Train

Fiduciaries about their duties
& the plan

Maintain

Provider agreements

Evaluate

Provider pricing annually

ERISA's Fiduciary Duties - Best Practices

What do prudent fiduciary practices look like?

Create

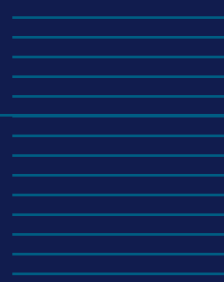
Plan-related documents

Follow

Plan compliance checklist & calendar

Comply

With transparency rules



Fiduciary Prudence

ERISA's Fiduciary Duties

1 Set a solid foundation in policies, processes & procedures.

2 Learn how plan size affects obligations.

3 State & local laws affect plan design & administration.

4 Agreements & Disclosures must be compliant.

5 Anticipate questions → think like an auditor.

6 Learn COBRA & HIPAA

Client responsibilities

- Adhere to federal, state, and local regulations for benefit programs, including ERISA
- Prudently select and monitor service providers, including all forms of direct and indirect compensation
- Act solely in the best interest of plan participants and beneficiaries, minimizing risks, with the prudence and diligence of a prudent person
- Maintain thorough documentation, provide timely disclosures, etc.

Consultant support checklist

- HR/Legal support
- Ongoing client education
- Regular compliance updates
- Annual RFP/Due Diligence
- Representation of broad market
- Education/awareness on new solutions
- Disclosure of all forms of compensation
- Discloses potential conflicts of interest
- Detailed record keeping
- Makes information available on request
- Turn-key compliance solutions
- Acts only in the best interest of the client

Thank you!



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