WHAT IS FIDUCIARY LIABILITY INSURANCE, AND WHY PRIVATE COMPANIES NEED IT.

CLAIMS EXAMPLE:

Failure to Timely Follow Employee's Instructions

An insured company sponsored a 401(k) plan for its employees. An employee participating in the plan issued instructions to the plan administrator, asking for a revision of his 401(k) investments. The plan administrator executed the transfer within the week.

However, in the interim, the market imploded, and the employee suffered investment losses of $150,000. The employee sued for the lost principal plus lost investment income, claiming that the fiduciaries took too long to process and execute his transfer instructions, thus leaving him exposed to the losses.

BUKATY COMPANIES
Property & Casualty
Insurance – Expertise – Solutions

What is Fiduciary Liability Insurance?

Providing a competitive employee benefits program is an important tool in recruiting and retaining a top-talent workforce. In doing so, an employer assumes a legal obligation to manage that program in the best interests of its employees. Fiduciary liability insurance protects an employer against many claims of employee benefit plan mismanagement related to the Employee Retirement Income Security Act (ERISA).

Fiduciary Liability coverage provides legal defense and settlement for breach of fiduciary duty as governed by ERISA. While it does not cover fraudulent acts or satisfy ERISA bonding requirements, there typically is affirmative defense coverage for defendants who were not aware of an alleged dishonest act.

It is a common misconception that Employee Benefits Liability insurance (EBL) provides adequate coverage against ERISA-related claims when coupled with Directors and Officers liability insurance (D&O).

However, EBL insurance only protects against common law claims related to plan administration negligence – not against the more expensive and complex statutory law claims related to ERISA violations that arise from discretionary decision-making. D&O liability insurance typically excludes claims for EBL and breach of ERISA fiduciary duty.

Why Private Companies Need Fiduciary Liability Coverage

When sponsoring an employee benefit plan, a company needs protection against potential errors in plan administration and breaches of duty under ERISA. Plan fiduciaries (plan sponsors and administrators) can be held personally liable for losses to an employer-sponsored benefit plan resulting from alleged errors, omissions or breach of their fiduciary duties. Hiring outside advisors may mitigate their exposure to this personal liability, but it does not entirely relieve them of their ERISA obligations.

Without fiduciary liability insurance, plan fiduciaries may be forced to pay for legal defense costs, judgments and settlements out of pocket. Fiduciary Liability Insurance is an effective tool for managing this risk. It provides piece of mind to plan sponsors and administrators who may face personal exposure to financially devastating claims through no fault of their own.

In today's litigious society, the willingness of disgruntled employees to sue presents a significant risk to your business. Law firms specializing in securities litigation are actively pursuing fiduciary liability claims. Because mismanagement often begins a chain reaction affecting a large pool of employees, the potential for sizable judgments is present.

WHAT IS ERISA?

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law establishing minimum standards, and a clear code of conduct, for managing employee benefit plans falling under its regulatory jurisdiction. Most employee benefit plans are subject to ERISA.

ERISA allows for plan "fiduciaries" to be held personally liable for mismanagement of an ERISA qualified plan. A fiduciary is defined by ERISA as a person or entity who has discretionary authority or control over a plan's management or assets.

Hiring outside advisors to manage fiduciary functions does not relieve employers from associated liabilities; they are still responsible for monitoring their advisor's activities.

- ERISA regulates most employee benefit plans, including group health, life, retirement, profit sharing, disability and employee leave.
- Employee benefit plans maintained by a governmental or church employer are exempt from ERISA.
- All employers are subject to ERISA's requirements, unless they meet the exemption for governmental employers or churches.
- ERISA has been amended many times over the years, expanding the protections available to plan participants and beneficiaries.
- The Department of Labor (DOL), enforces most of ERISA's provisions.

How Fiduciary Liability Insurance Protects Your Company

What Rises to the Level of a Claim?

Under ERISA, Benefit Plan Fiduciaries owe a duty to follow plan documents and a duty of loyalty, prudence and diversification.

Fiduciary liability claims may involve a broad range of allegations, such as:

- Denial or change of coverage benefits.
- Reduction or elimination of benefits.
- Administrative error.
- Improper advice or counsel.
- Wrongful termination of a plan.
- Failure to adequately fund a plan.
- Conflict of interest.
- Imprudent investment of assets or lack of investment diversity.
- Imprudent choice of insurance company, mutual fund, or third-party service provider.
- Errors in computing that result in lost benefits.
- Improper enrollment or terminations.
- Inadequate communication or instructions resulting in lost benefits.
- Charging excessive fees.

Who Can Make a Fiduciary Liability Claim?

- Plan participants (employees).
- The government: The Department of Labor and The Pension Benefit Guaranty Corporation.

Benefits Provided:

- Defense costs within the available policy limits after payment of any applicable deductible or self-insured retention.
- Settlement costs.

Additional Coverage Benefits Available:

- **HIPAA violations available** including civil penalties assessed under the Health Insurance Portability and Accountability Act (HIPAA).
- **502(i) and 502(l) penalties** including penalties of up to 5% imposed under ERISA Section 502(i) for inadvertent violations of ERISA Section 406, and up to 20% imposed under ERISA Section 502(l) for breaches of fiduciary duty.
- **Defense cost outside policy limit.** As defense costs are often a significant portion of any claim, this option provides additional protection while preserving the policy limit for other claims or indemnity payments.
- **Settlor coverage.** Provides coverage for business decisions involving an ERISA-qualified benefit plan that are not explicitly governed by ERISA. While ERISA outlines operational guidelines for employee benefit plans, some decisions related to the framework of a plan are not regulated by ERISA.

BUKATY COMPANIES
Property & Casualty
Insurance – Expertise – Solutions

Contact:

Dan Bukaty
4601 College Blvd., Ste 100
Leawood KS 66211
913.647.3941
dbukaty@bukatyagency.com

FIDUCIARY LIABILITY CLAIMS EXAMPLES:

Failure to Comply with Policy Terms

An employee worked for a company that provided health benefits through an HMO. The employee became ill and notified the employer's plan administrator's office of her illness and impending hospitalization.

The employee was told by the plan administrator's office that it was not necessary to also call the HMO since the employer was now on notice. This advice was erroneous as the HMO's notification rules had recently changed.

The HMO denied coverage for the hospital bills, claiming it had never been notified of the hospitalization in violation of the plan requirements. The employee sued her employer for giving her improper advice and interfering with her ability to procure medical benefits. The claim eventually settled for more than $500,000, including the plaintiff's' attorney's fees.

Underpayment of Medical Benefits

An employer sponsored a self-funded health plan for its employees and retained a third-party health insurer as the plan administrator (the "TPA"). The TPA determined the appropriate reimbursement amount for medical services.

Out-of-network medical service providers, via an assignment of benefits form from the plan participants, filed a class action lawsuit against the plan and the TPA, alleging systemic underpayment for emergency services provided under state law, and seeking payment of uncovered medical services.

The plaintiffs specifically alleged that plan fiduciaries breached their fiduciary duties by selecting an inappropriate TPA and by being complicit in the systemic underpayments. Defense costs exceeded $1,000,000.

Improper Plan Advice

The partner of a law firm became ill and began investigating purchasing additional life insurance benefits through his firm's plan. After he was advised by the firm that he was eligible for these supplemental benefits, he completed and submitted all the necessary paperwork.

Sometime thereafter, his condition worsened, and he passed away. When his widow attempted to collect life insurance proceeds, she was advised that her late husband was not eligible for supplemental life insurance benefits under the terms of the plan, and that he had been given improper advice by the firm.

The widow demanded payment from the firm for the promised supplemental benefits, as well as additional monies to offset the higher income tax rate associated with receiving the funds in the form of a settlement, as opposed to life insurance proceeds.

The firm tendered the matter to its Fiduciary Liability Insurance carrier, which paid the full amount demanded and settled the matter, avoiding litigation.

Failure to Enroll in a Healthcare Plans

An employer offered healthcare benefits to its employees through a third-party health insurer. The health insurer allowed participants to add newborn dependent children to their plan as long as notice was provided within 60 days of the child's birth.

Following the birth of his child, an employee worked with his employer's HR department and immediately submitted all of the necessary paperwork to add his child to his plan. However, the insured employer failed to submit the paperwork to its health carrier within the 60-day window allotted, and thus the child was not insured.

The child developed serious medical complications within the first year of her birth, incurring significant medical bills. When the bills were submitted to the health insurance carrier, they denied coverage because the child wasn't enrolled in the plan.

Cyber Breach of Personal Information

A corporate employer offered a benefit plan to its employees, and in the course of administering this plan, the employer obtained access to the employees' protected personal information, including Social Security numbers.

The employer's employee benefit plan records were subsequently hacked and the personal information was stolen.

Plan participants sued the plan fiduciaries for breaching their fiduciary duties under ERISA. These breaches included failing to safeguard personal information and neglecting to employ appropriate cyber security methods or retain competent cyber security personnel. Defense costs exceeded $2,000,000.

BUKATY COMPANIES
Property & Casualty
Insurance – Expertise – Solutions

4601 College Blvd., Ste 100, Leawood KS 66211
913.647.3941
WWW.**BUKATYAGENCY**.COM