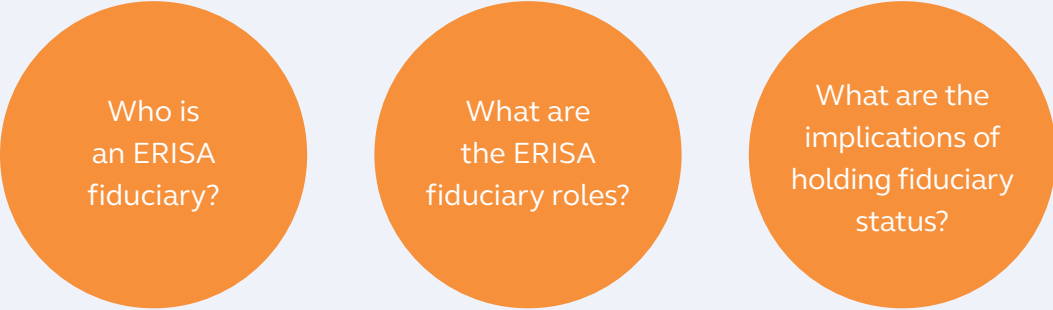


Fiduciary Status

# Understand your role as an ERISA fiduciary



A retirement plan fiduciary carries a lot of responsibility when it comes to plan administration and investment selection and monitoring. We want to help you understand the different roles of an ERISA (Employee Retirement Income Security Act) fiduciary so you can navigate the challenges of this important status. This guide helps plan sponsors and their financial professionals better answer several key questions:



Who is  
an ERISA  
fiduciary?

What are  
the ERISA  
fiduciary roles?

What are the  
implications of  
holding fiduciary  
status?

# Who is an ERISA fiduciary?

Before digging into the details, let's take a closer look at the definition of an ERISA fiduciary. The definition of an ERISA fiduciary is based more on the actions and responsibilities of a person (or entity) than a person's title. In other words, even those not listed as a named fiduciary or trustee can become a fiduciary based on their actions taken with regard to the plan.

As defined in section 3(21)(A) of ERISA, a person is a fiduciary to the plan to the extent they perform any of the following:

- Exercise any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets.
- Render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so advice.
- Have any discretionary authority or discretionary responsibility in the administration of such plan.

The extent of fiduciary status can vary from person to person, depending on the specific plan duties each person performs. For example, an individual responsible for investment selection or monitoring will be a fiduciary for the assets under their control, but won't be a fiduciary when it comes to benefit claim decisions assuming this is outside their duties.

## Specific actions can drive fiduciary status

To better grasp what triggers fiduciary status, keep in mind the following:

- A person's fiduciary status is determined **primarily** by whether any of the fiduciary activities listed above are performed.
- Fiduciary status is not driven by actual title or whether the person has acknowledged fiduciary status, with the exception of the plan's named fiduciary and trustee.



**Non-investment professional service providers** like attorneys, accountants and actuaries are not considered ERISA fiduciaries when performing normal professional services. But these individuals may have fiduciary obligations under other laws. Individuals performing simple plan administrative functions may not meet the definition of what actions trigger fiduciary status.

# What are the ERISA fiduciary roles?

A person who carries out any of the functions listed in ERISA Section 3(21)(A) is considered a fiduciary. But, within this broad definition, ERISA recognizes four categories of fiduciaries:

**1 Named fiduciary** — ERISA requires each plan to designate at least one fiduciary by name as having control over the plan’s operation. This can be identified by office or name. Typically, the named fiduciary is the employer sponsoring the plan, but it doesn’t need to be.

Also, under ERISA Section 3(16), the plan administrator generally has discretion over administration of the plan, thus making them a fiduciary.

**2 Investment manager under ERISA Section 3(38)** — A fiduciary (other than a trustee or named fiduciary) who:

- Has the power to manage, acquire or dispose of any asset of a plan;
- Is either a registered investment advisor (RIA) under the Investment Advisers Act of 1940, a bank or an insurance company; and
- Has acknowledged in writing that they are a fiduciary with respect to a plan.

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**Note:** Only the named fiduciary or its delegates can appoint an investment manager. And the investment manager has fiduciary responsibility only for the portion of a plan’s investments that the named fiduciary or plan trustee delegates to them.  
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**3 Trustee** — ERISA requires (with limited exceptions) that a plan’s assets be held in trust by one or more trustees. Unless the trustee is subject to the direction of another party, such as plan participants, the plan trustee is the person recognized as having exclusive authority and discretion over the management and control of plan assets.

**4 Investment advisor** — ERISA Section 3(21) states a person is an investment advisor fiduciary if the person renders advice or provides recommendations for a fee. This is the specific focus of the DOL’s new fiduciary regulatory package. (See appendix for more information.)



**In 2016, the Department of Labor (DOL) issued its final regulatory package** on the definition of who is a fiduciary when providing investment advice. The DOL made significant changes to the definition of fiduciary investment advice and what constitutes a recommendation. Going forward, most investment recommendations to ERISA plans, participants, beneficiaries and Individual Retirement Account (IRA) holders will be considered fiduciary advice. In addition, recommendations with respect to rollovers, transfers, and distributions will fall under fiduciary investment advice. (See the appendix for more details.)

# ERISA Sections 3(21) vs 3(38)

Under ERISA, there are two specific types of fiduciaries commonly referred to as ERISA Section 3(21) and 3(38). Here's a closer look.

## Section 3(21) Investment Advice fiduciary

3(21) fiduciary status is understood to mean a person who renders non-discretionary investment advice regarding plan's investment options for a fee.

A 3(21) fiduciary is hired by the named fiduciary to help with investment option decisions. The plan's named fiduciary maintains fiduciary responsibility and ultimately makes decisions to take action or not, based on the non-discretionary investment advice. The 3(21) fiduciary bears responsibility for the advice they provide, but generally not for the outcome if that advice is not followed.

Determining whether someone is functioning as a 3(21) fiduciary involves a "facts and circumstances" analysis. Just because someone holds himself to be a 3(21) fiduciary doesn't necessarily trigger 3(21) status. A person's fiduciary status is determined solely by whether fiduciary functions are performed.

## Section 3(38) Investment Manager fiduciary

An ERISA section 3(38) fiduciary status is attained by:

- 1 | Meeting the 3(38) requirements as noted in the outline of ERISA fiduciary roles and
- 2 | Being appointed as the "investment manager" to a plan by the plan's named fiduciary and accepting the appointment in writing.

An ERISA section 3(38) fiduciary is also a 3(21) fiduciary due to having authority and control over plan assets. However, the 3(38) fiduciary is authorized to carry out investment decisions on behalf of the plan and assumes legal responsibility and liability for the decisions it makes.

**Note:** The named fiduciary cannot completely eliminate its fiduciary liability regarding investment decisions. Even after appointing a 3(38) fiduciary, the named fiduciary still retains ongoing responsibility for the prudent selection, monitoring and evaluation of the 3(38) fiduciary. The named fiduciary is responsible and liable for the resulting outcome should it override any decision made by the 3(38) fiduciary.

### 3(21) fiduciary

- Controls plan management or management of plan assets
- Provides non-discretionary investment advice for a fee (or other compensation)
- Maintains responsibility for plan administration<sup>1</sup>

### 3(38) fiduciary is an investment manager who is:

- Registered as an investment advisor, bank or insurance company.
- Appointed by the plan's named fiduciary and accepts fiduciary status in writing.
- Authorized to manage, acquire or dispose of any plan assets.
- Assumes legal responsibility and liability for decisions made.

<sup>1</sup> For purposes of comparing 3(21) vs 3(38), we are limiting the 3(21) scope to the selection and monitoring of investment options for investment options of a qualified retirement plan.

# What are the implications of holding fiduciary status?

Because virtually every aspect of ERISA's fiduciary duty impacts how plan investments are managed, ERISA imposes significant responsibility on section 3(16) and 3(38) fiduciaries.

## Standards of Conduct

ERISA fiduciaries must meet heightened standards of conduct including:

- Acting solely in the interest of plan participants and their beneficiaries.
- Carrying out duties prudently.
- Following plan documents (unless inconsistent with ERISA).
- Diversifying plan investment options.
- Paying reasonable plan expenses.

Every fiduciary has an obligation to act in the best interest of plan participants and to manage the plan prudently. This requires expertise in a variety of areas, such as investment options. If a fiduciary doesn't have expertise in a particular area, they'll want to hire someone to assist in carrying out these functions. The fiduciary should have an established process for investment decisions, which they understand, follow and document. And they should both understand and document the process used to arrive at any decision.

## Co-fiduciary

A fiduciary should be aware of others who serve as fiduciaries to the same plan because all fiduciaries have potential liability for the actions of their co-fiduciaries. For example, if a fiduciary knowingly participates in another fiduciary's breach of responsibility, conceals the breach or doesn't act to correct it, that fiduciary is also liable.

## Prohibited transactions

Certain transactions are prohibited under the law to prevent parties from exercising improper influence over the plan. Fiduciaries are prohibited from taking advantage of their position or acting in one's own self-interest rather than in the best interest of the plan.

## Potential liabilities

A fiduciary that breaches any of the responsibilities, obligations or duties imposed under ERISA can be personally liable for reimbursing the plan for any losses. Even if a fiduciary delegates duties to others, the delegating fiduciary retains fiduciary responsibility for prudently monitoring their performance.

It's important to understand the implications of fiduciary status because those who don't uphold the high standard may be required to disgorge profits and can be subject to additional fines.

By understanding the definition and roles of an ERISA fiduciary, you'll be better able to manage your plan, mitigate risk and potentially improve outcomes.

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**For more information** and resources about the role of a fiduciary, visit the employer website at **principal.com**. Login and enter the keyword "fiduciary" in the help feature.  
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# Appendix

## **DOL fiduciary regulatory package redefines the role**

In 2016, the Department of Labor (DOL) issued its final regulation on the definition of who is a fiduciary when providing investment advice under ERISA section 3(21)(A)(ii). The DOL fiduciary regulatory package changes the rules for what activities are considered fiduciary investment advice under ERISA. This rule change is applicable as of June 9, 2017.

Financial professionals and service providers have always been held to an ERISA fiduciary standard when providing investment information to retirement plan sponsors and participants. The DOL fiduciary rule means more investment activities will likely be considered investment advice and will create fiduciary responsibility for the person or entity providing the advice.

The new definition of investment advice includes anyone who — for fee or other compensation — provides a recommendation to a plan, plan fiduciary, plan participant or IRA owner regarding:

- Acquiring, holding, disposing or exchanging securities,
- Determining how securities or investments should be invested,
- Taking a rollover or distribution from a plan or IRA, how much to take and where to place the distribution,
- Managing securities/investment options including recommendations on investment policies or strategies, portfolio composition, election of other persons to provide investment advice or investment management services.

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**The regulation defines a recommendation** as any communication that could be reasonably viewed as a suggestion to engage or refrain from a particular course of action.

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## IMPORTANT INFORMATION

In general, nonqualified plans are not regulated under ERISA. Different investment products and financing options apply to nonqualified plans. No member company of The Principal assumes any additional fiduciary responsibility for any nonqualified deferred compensation plan. This Investment Services information will not apply to securities held by a plan under the plan's self-directed brokerage account. Investment options that do not meet specific performance and other criteria may not be available for the Warranty until specific requirements are met.

References to prudence mean compliance with the prudent standard described in §404(a)(1)(b) of ERISA, including following prevailing industry standards and generally accepted investment theories. ERISA imposes on the plan administrator ongoing accountability for the selection and monitoring of those to whom specific fiduciary responsibilities have been delegated or on whom the plan administrator is depending for help in meeting its own fiduciary obligations.

Principal Life is not a fiduciary in the broader context of operating any plan. The selection of any investment options on behalf of a plan is the fiduciary responsibility of the appropriate plan fiduciary, which is not Principal Life. Principal Life does not guarantee performance of any investment option [other than the portion of a group annuity contract that constitutes a guaranteed benefit policy as described in ERISA §401(b)(2)]. Principal Life does not guarantee that any investment option will meet the criteria of any particular plan's investment policy statement, include reasonable fees, or otherwise be suitable for use by any specific plan. The fiduciary tasks undertaken by Principal Life do not eliminate all responsibilities of the relevant plan fiduciaries for the prudent selection of any investment option for a retirement plan. Plan fiduciaries remain subject to a varying amount of ongoing responsibility, depending on the structure of the plan the fiduciary serves and the nature of the plan fiduciary's position. Please consult with your counsel or other adviser as to the responsibility of a plan fiduciary with regard to the selection or retention of any plan investment option by a plan fiduciary.

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