

Understanding ERISA Fiduciary Duties

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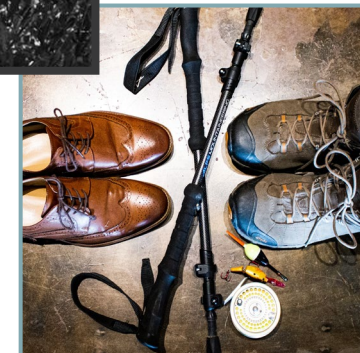
Meet Dave Mandel

*Vice President – Investment Consulting
Regional Director*

Credentials/Certifications: Series 65

Dave has over 18 years of retirement plan consulting experience, with a special focus on working with plan sponsors to limit fiduciary liability and promote financial wellness initiatives that help foster healthy decision-making. He is a member of a number of local and national associations and currently involved in his community by serving on multiple municipality boards.

Outside of the office, Dave can usually be found spending time with his family outdoors hiking, camping, fishing, and kayaking.



Meet Mike Francis

President, Co-Founder Principal

Mike has been advising qualified retirement plan clients since 1988. He has been a featured columnist for the Milwaukee Journal Sentinel as the 401(k) Advisor since 1995, as well as a frequent public speaker on retirement plan governance and investment issues. Mike was recognized as one of the top 25 retirement plan advisors in the country by PLANSPONSOR Magazine in 2006 and guided the firm to be named Retirement Plan Advisor (large-team) of the Year in 2018.

Mike's time outside the office is dedicated mostly to his growing family. Spending time with his wife and five adult children is his priority. With kids settled all around the country, traveling to spend time with them keeps Mike and his wife plenty busy.



Meet Kevin Skow

Vice President – Retirement Plan Consulting Regional Director

Credentials/Certifications: Series 65, Certified Pension Consultant (CPC), Qualified Pension Administrator (QPA), Qualified 401(k) Administrator (QKA)

Kevin co-leads Francis' Minnesota division in the Twin Cities and brings over 25 years of retirement plan recordkeeping and consulting experience to his role. Prior to his time at Francis, Kevin was a partner and senior consultant for a large international consulting, actuarial and employee benefits firm.

Kevin lives in MN with his wife and two teenage children, both adopted from the FANA orphanage in Bogota, Colombia. He serves on the board of directors of Friends of FANA Minnesota. When he is not serving the community, he can be found skiing, golfing, running and waiting for March Madness to come around again.



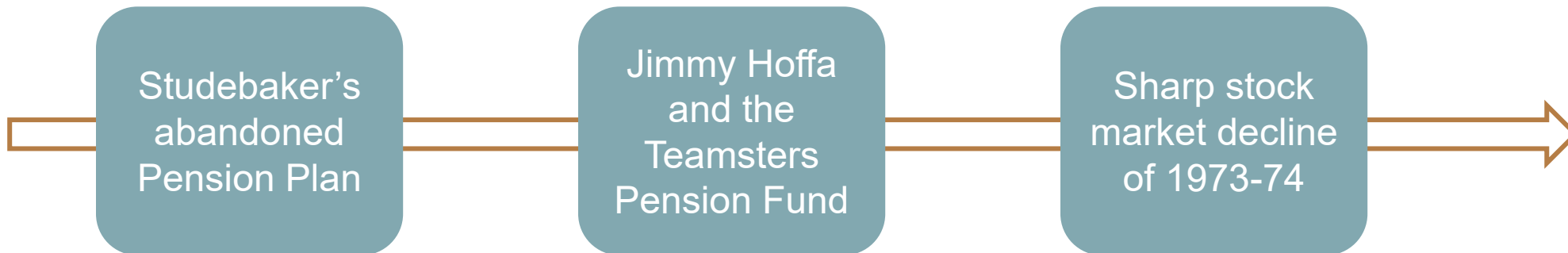
Training Agenda

- I. UNDERSTANDING ERISA
- II. UNDERSTANDING YOUR FIDUCIARY DUTIES
- III. PROCESS IS KEY

Understanding ERISA

Employee Retirement Income Security Act of 1974 (ERISA)

Background: Why it passed Congress in 1974



Who Are ERISA Fiduciaries?

- **Named** – Plan Administrator, Trustee
- **Functional** – Committee Members with a vote
- **Discretionary Control** – People who exercise *any* discretionary control over plan administration or assets
- **Power to Appoint** – People who appoint other fiduciaries
- **Investment Advisors** – Anyone who renders investment advice to a Qualified Plan for a fee (direct or indirect)

Limits to Fiduciary Exposure

You are a fiduciary “to the extent” you are performing fiduciary functions

ERISA permits fiduciaries to wear two hats (employer/employee) but not at the same time

Who is and is *not* an ERISA fiduciary?

IS A FIDUCIARY	IS NOT A FIDUCIARY
Plan Sponsors	Mutual Fund Companies
Retirement Plan Committee (all voting members)	Plan Service Providers (recordkeepers, plan counsel, plan auditors) <i>Note: service providers are “parties of interest” & their fees are subject to disclosure requirements</i>
Person’s giving investment advice to plan sponsors or participants for a fee	Company Employees who act under the guidelines put forth by plan fiduciaries

Understanding Your Fiduciary Duties

Basic Fiduciary Duties



Loyalty: Act solely in the interest of plan participants; avoid self-serving actions (i.e. avoid conflicts, kickbacks, transactions with “party in interest”)



Prudence: Act with the care, skill and diligence of someone familiar with such matters (i.e. an expert regarding performance, holdings and fees)



Diversify Investments: Avoid risk of large losses to plan assets



Obedience: Follow plan documents



Plan Lawsuits: Typical claims made by participants



- Plan Sponsor should have considered lower-cost share classes of mutual funds or less expensive vehicles like collective investment trusts or separate accounts.*
- Recordkeeper was compensated through asset-based revenue sharing from the funds, but as assets grew, plan sponsor didn't negotiate recordkeeping agreement.*
- Fiduciaries delayed in replacing poorly performing funds.*
- Plan Sponsor was slow depositing employee contributions into the plan.*

*Source: See, e.g., *White v. Chevron Corp.*, (N.D. Cal., complaint filed February 17, 2016)
JPMorgan "Understanding Your Fiduciary Role – An ERISA Primer for Defined Contribution Plan Sponsors 2021"

Protecting plan sponsor by shifting investment responsibility to employees: ERISA section 404(c)



- Compliance is voluntary, but most DC plan sponsors seek the protection it provides
 - Without 404(c), plan sponsor fiduciaries could be liable for participants' investment decisions
- In general, requirements include:
 - Notify participants that the plan intends to comply with 404(c) and that fiduciaries may be relieved of losses for participants' investment decisions
 - Offer a broad range of investment alternatives (at least three with different risk and return characteristics)
 - Allow participants to switch among investment alternatives at least quarterly or more frequently based on volatility
 - Provide participants with sufficient information about the investment alternatives, including the fee and investment information required by the DOL's participant disclosure rules
- Even though 404(c) protects employers against losses resulting from participants' choices, **plan sponsor fiduciaries are still responsible for prudently selecting and reviewing all designated investment alternatives****

What if you fail to fulfill your fiduciary duties?

**Section 409 of ERISA
states:**

“(a) Any person who is a fiduciary...who breaches any of the responsibilities...shall be **personally liable** to make good to such plan any losses to the plan resulting from each such breach”

Liable if:

- Know of breach, participates, tries to conceal, or fails to make reasonable efforts to remedy
- Enables others to breach

Key Takeaways:

- Importance of fiduciary liability insurance
- Importance of letter of indemnification from employer

Process is the key

Process is the key

“Prudence is determined by the process, not the outcome.”

Whitfield v. Cohen, 682F.Supp. 188, 194 (S.D.N.Y. 1988)

Build an Investment Oversight Process

GOVERNANCE PROCESS

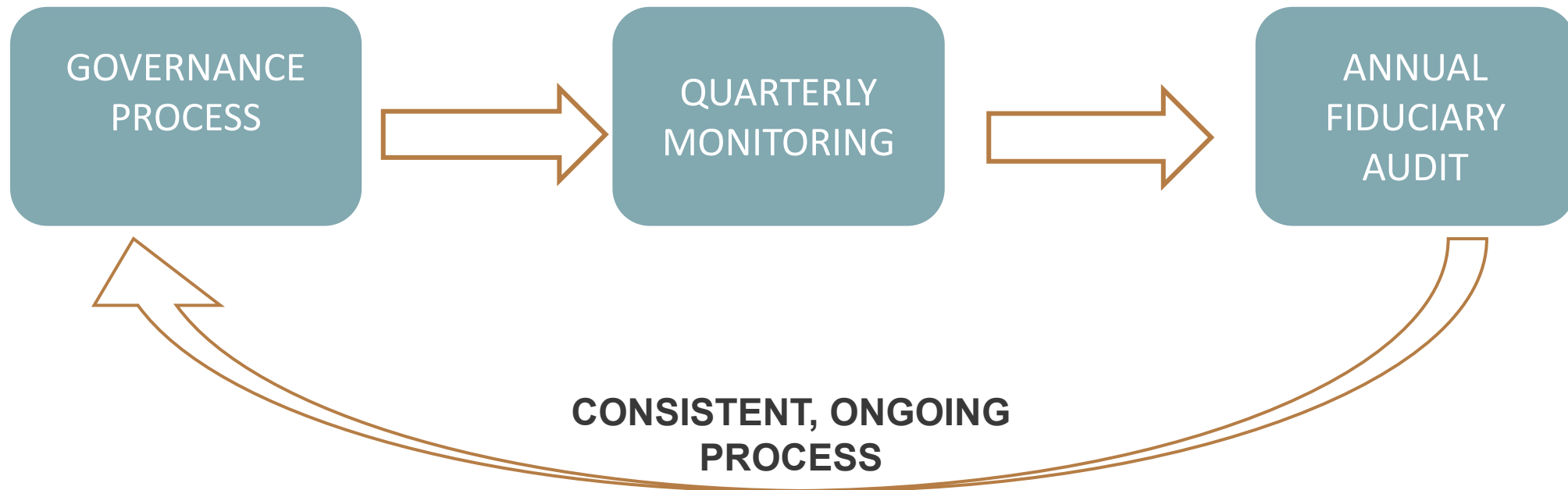
- Fiduciary Training
- Board Resolution
- Committee Charter
- Investment Policy
- Administrative Policy
- Communication Policy

Communicate Plan Benefits

“Fiduciaries have an obligation to fully and accurately communicate material information regarding future retirement benefits.”

Varity v. Howe, 516 U.S. 489 (1996)

Build an Investment Oversight Process



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QUESTIONS?

Contact Us



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