

## Fiduciary Liability Insurance – The Basics

Fiduciary liability insurance can protect retirement plan fiduciaries against allegations of breach of their fiduciary duties under ERISA (or similar common law or statutes) and errors and omissions in the plan administration.

As with any insurance product, the devil is in the details. That's why it is of paramount importance to understand what it is that is being purchased so the plan fiduciaries can understand the protection they're purchasing and receive the most protection available. The following is a brief overview of some common items to understand and consider when purchasing fiduciary liability insurance.

### Who Can Purchase Fiduciary Liability Insurance

-  The benefit plan
-  The employer that sponsors the benefit plan
-  The fiduciary

### Who's Typically Covered

-  The benefit plan
-  The company sponsoring the plan
-  Fiduciary-employees of the company
-  Employees in plan administration

### Who's **NOT** Typically Covered

-  Outside fiduciaries
-  Third party administrators

### What Claims are Typically Covered

-  Breach of fiduciary duty
-  Improper participant disclosures
-  Negligence in plan administration
-  Lack of investment diversity
-  Improper investment advice
-  Imprudent service provider selection

### What claims are **NOT** Typically Covered

-  Fraud
-  Illegal personal profiting
-  Bodily injury/property damage
-  Failure to collect contributions
-  Failure to return contributions
-  Pending or prior litigation
-  Late claim notices

### What Expenses are Typically Covered

Costs associated with the following for a covered claim:

-  Defense
-  Investigation
-  Negotiation
-  Settlement

### What Expenses are **NOT** Typically Covered

-  Civil, criminal or punitive fines or penalties
-  Exemplary or punitive damages
-  Amounts without legal recourse
-  Legally uninsurable amounts

### Who Can Assert the Types of Claims Covered by the Fiduciary Insurance Policy?

ERISA and the common law generally limit the ability to assert claims against individuals in their capacity as a plan fiduciary to the following:

- |   |   |
|---|---|
|  Plan participants and beneficiaries |  Pension Benefit Guarantee Corporation |
|  Internal Revenue Service            |  Securities and Exchange Commission    |
|  Department of Labor                 |  State Attorney General                |

## Provisions to Pay Special Attention To

-  **Exclusions:** Make sure to check the policy's Definitions section and all Endorsements to fully understand what is not covered. Some policies exclude real estate claims where investments are not managed by a QPAM. Also, many exclude claims for discrimination allegations, denial of benefits, reversion of assets and failure to collect contributions.
-  **Waiver of Recourse Provision:** To personally protect fiduciaries, the policy must include a waiver of recourse provision, although the premium for such waiver cannot be paid out of plan assets.
-  **Severability:** A severability clause will prevent the dishonesty of one fiduciary from voiding the coverage under the policy for the other named insureds under the policy.
-  **Payment of Penalties or Fines:** Policies may exclude the payment of IRS or DOL penalties, taxes or fines that arise out of a fiduciary duty breach, although this could be added by an endorsement to the policy.
-  **Change in Control Provisions:** Policies may dictate if and how claims are covered before or after an acquisition or disposition of a company. Some policies may terminate coverage on a change in control of the company.
-  **Cancellation Provisions:** Insureds should understand what circumstances will trigger a policy termination.
-  **Extended Reporting (or Discover) Period:** There is sometimes the possibility to arrange for an extended period in which to report claims that would have been covered after the policy cancels or non-renews.
-  **Hammer clause:** Most policies contain a provision which prohibits insureds from settling a claim without the insurer's approval (thus requiring the insurer's mutual agreement). Some policies permit the insurer to limit its liability based on the settlement offer.
-  **"Claims-Made" vs. "Occurrence" Policies:** Claims-made policies cover only claims reported during the policy period, while Occurrence policies cover acts that occurred during the policy period regardless of when they are reported.
-  **Notice provisions:** Policies typically require that the insurer be notified of a claim in a timely manner (usually as soon as possible). Failure to meet the Policy's notice requirements can result in non-coverage of the claim.

Again, it is important to read and fully understand the Fiduciary Liability Insurance policy so that its coverages and limitations meet the expectations and needs of the individuals and entities that it is intended to cover.

*Gallagher Benefit Services, Inc. is a non-investment firm that provides consulting services to employers regarding employee benefit plans. Gallagher Retirement Services is the national retirement plan services and consulting division of Gallagher Benefit Services, Inc. Securities offered through NFP Securities, Inc., Member FINRA/SIPC. Investment advisory services and corresponding named fiduciary services may also be offered through GBS Investment Consulting, LLC (GBS IC), a Registered Investment Adviser and wholly owned subsidiary of Gallagher Benefit Services, Inc. Not all individuals of Gallagher are registered to offer securities through NFP Securities, Inc. NFP Securities, Inc. is not affiliated with Gallagher Benefit Services, Inc., GBS Investment Consulting, LLC, or the Gallagher Retirement Services division. Neither Gallagher Benefit Services, Inc., NFP Securities, Inc., or their affiliates provide legal or tax advice.*