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Fiduciary Liability Insurance (or “FLI”) is an insurance policy generally designed to pay for (subject to certain terms and conditions) the defense costs and any damages resulting from a claim brought against a plan or a trustee arising from the alleged erroneous administration of and/or mismanagement (including unlawful or imprudent decisions) regarding a plan or plan assets.
Why Do Fiduciaries Need Fiduciary Liability Insurance?

- ERISA imposes upon plan fiduciaries the highest duty of care known
- ERISA imposes *personal* liability on fiduciaries
- Plans cannot indemnify for fiduciary breaches
- Fiduciaries who don’t have fiduciary liability insurance may be placing their personal assets at risk
What Fiduciary Liability Insurance Is Not

- Fidelity bond
- Directors and officers insurance
- Commercial general liability and property insurance
- Professional liability insurance
- Employer practices liability insurance
- Workers compensation insurance
FLI vs. Bonds

• Discretionary 3rd party coverage versus mandatory 1st party coverage

• Bonds Requirements:
  – Must be in place at the beginning of the plan year for any funded plan.
  – Covers plan officials (persons handling plan assets)
  – Insured against a fiduciary’s fraud or dishonesty
  – Must be for 10% of plan’s assets, with a $1K minimum and $500K maximum ($1M if plan holds employer securities)
  – As practical matter, this requirement can be met by adding a sponsor’s welfare benefit plan to the same fidelity bond covering its pension plan.
Who Does FLI Cover?

- The plan (enumerated in the declarations)
  - Can be pension, health, welfare, etc.
  - Not limited to ERISA plans
  - Board of trustees of any plan or any committee established by the plan
- Insured persons
  - Any trustee of a plan
  - Any employee of a labor union while engaged in the administration of a plan
- Does NOT cover 3rd party providers
What Conduct Does FLI Cover?

- Breaches of Fiduciary Duties: making imprudent or unlawful decisions in managing the plan or plan assets
  - Imprudent investment
  - Prohibited transactions
  - Compliance with plan documents
  - Benefit calculations in violation of plan

- Errors in Administration: mishandling of routine administration
  - Change in beneficiary
  - Failure to enroll
  - Document processing
What Does FLI Cover?

- Defense costs (insureds' attorneys fees and expenses)
- Damages (settlements or judgments)
- Certain fines and penalties (may have sublimits)
  - 502(i) 5% for prohibited transaction
  - 502(l) 20% for breach of duty
  - 502(c)/507 notice issues
  - 4975 15% excise tax for prohibited transactions
  - HIPAA
- Plaintiffs' attorneys fee award
  - Change in beneficiary
  - Failure to enroll
  - Document processing
What Doesn’t FLI Cover?

• Taxes, fines and penalties not otherwise carved out
• Benefits due unless an individual is paying
• Disgorgement/nonloss (profit, funding obligations, etc.)
Typical ERISA Claims

- Failure to enroll
- Improper advice on eligibility
- Prohibited transaction
- Imprudent investment
- Improper benefit calculation
- Reduction in retiree benefits
- Failure to comply with plan documents
- Wrongful termination
Common Coverage Issues

• Don’t negate coverage by your own late report
  – Know the policy’s notice provisions!
  – Know how to identify a claim
  – Raise awareness of the policy
  – Engage your broker

• Who picks defense counsel; duty to defend

• DOL investigations as claims

• Pre-tender fees

• Consent to settlement and hammer clauses

• Third party providers
Market Innovations

- Preclaim investigations
- benefit claim denials
- ability to select defense
- Patient Protection and Affordable Care Act
- Voluntary compliance program
  - Pays associated fines, penalties and fees
  - VFCP, DFVCP, VCP, Audit CAP, etc.
Considerations When Purchasing FLI

- Quality of claims administration
- Scope of coverage (DOL investigations, fines and penalties, consent provisions)
- Limits of liability
- Carrier—financial security
- Premium
- Market conditions
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The Nuts and Bolts of Fiduciary Insurance

- Fiduciary Liability Insurance—not bonds—protects a fiduciary’s personal assets.
- Know your insurance reporting provisions, consent requirements, and what qualifies as a claim; failure to do so could negate an otherwise covered claim.
- Discuss and negotiate the defense provisions of a policy before a claim is made.
- Consider securing broader coverage (preclaim investigations and benefit denials).
- Pricing should not be the bottom line in purchasing fiduciary liability insurance.

Website Resources

https://www.ifebp.org/Resources/trusteeresourcecenter/Pages/LiabilityInsurance.aspx
(Members Only)
https://www.youtube.com/watch?v=UzfLVO-n-bo
2017 Educational Programs
Fiduciary Responsibility

63rd Annual Employee Benefits Conference
October 22-25, 2017
Las Vegas, Nevada
www.ifebp.org/usannual

New Trustees Institute—Level I: Core Concepts
February 20-22, 2017
Lake Buena Vista (Orlando), Florida
October 21-22, 2017
Las Vegas, Nevada
www.ifebp.org/trusteesadministrators

Trustees and Administrators Institutes
February 20-22, 2017
Lake Buena Vista (Orlando), Florida
June 26-28, 2017
San Diego, California
www.ifebp.org/trusteesadministrators

New Trustees Institute—Level II: Concepts in Practice
October 21-22, 2017
Las Vegas, Nevada
www.ifebp.org/trusteesadministrators

Related Reading
Visit one of the on-site Bookstore locations or see www.ifebp.org/bookstore for more books.

Trustee Handbook:
Item #7068
www.ifebp.org/books.asp?7068