



## Am I a Fiduciary? Well, That Depends...

By Michael A. Webb, TGPC, AIF™, CEBS, Chair, NTSAA Education Committee

The question of whether one is a fiduciary for a 403(b) plan is a complicated one. First of all, the regulatory framework that address fiduciary issues at the federal and state levels runs the gamut from being crystal clear to as clear as mud. Secondly, as so expertly pointed out in Ellie Lowder's recent [403\(b\) Advisor Article](#) (pages 14-15), much misinformation on the topic is being disseminated, especially to school districts, which further complicates a situation that is already difficult to comprehend. In this article, we will attempt to unravel the complexities of identifying fiduciaries for plan sponsor and advisors.

Page | 1

In order to determine whether an individual at a plan sponsor is a fiduciary, the very first question one needs to ask is a simple one. As former ASPPA Educator of the Year Derrin Watson has famously inquired in a book and numerous other forums: Who's the Employer? The identity of the employer sponsoring the plan is so important in many contexts and the realm of identifying 403(b) plan fiduciaries (or lack thereof) is no exception. Depending on the plan sponsor employer, fiduciaries and their responsibilities can range from comprehensive to nonexistent, as follows:

- **Private (non-governmental, non-church) 501(c)(3) tax-exempt organizations**—with the exception of elective deferral-only plan with limited employer involvement, fiduciary responsibility for the 403(b) plans of such organizations (hospitals, private secular universities, museums, etc.) is quite clear. The reason for this is that such plans are governed by federal law in this regard; specifically, ERISA. ERISA identifies fiduciaries as the following individuals:
  1. The trustee [generally does not apply to 403(b) plans where typically assets are not held in trust]
  2. The investment advisor
  3. ALL individuals exercising discretion in the administration of the plan
  4. ALL members of a plan's administrative committee
  5. Those who select committee officials

**Adviser Practice Pointer: Item #2 generally individuals who provide investment advice for a fee. At the present time, only Registered Investment Advisors would generally be fiduciaries under this provision, but it should be noted that there is currently regulatory discussion about extending fiduciary responsibility to broker-dealers as well.**

If you are a fiduciary, you have the following specific responsibilities under ERISA:

1. Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;

This information is not to be considered as tax advice. In publishing this material, the NTSAA is not rendering legal, tax, accounting or other professional advice. If legal or other expert assistance is required, please consult the services of an appropriate professional.

2. Carrying out their duties prudently;
3. Following the plan documents (unless inconsistent with ERISA);
4. Diversifying plan investments; and
5. Paying only reasonable plan expenses.

**Adviser Practice Pointer: If you work with ERISA plans, the DOL Brochure [Meeting Your Fiduciary Responsibilities](#) is a must-read.**

- **Public School Districts, Public colleges and universities**—since these entities are governmental 403(b) plans they are not subject to ERISA and thus there is NOT a clear identification of fiduciaries or their responsibilities as described above. Such plans are subject to state law regulation, which ranges from clear (and, in fact, some states make it clear that NO ONE at the plan sponsor is a fiduciary), to somewhat ambiguous, to impossible for anyone but an attorney to even attempt to understand. To complicate matters: a) for many plan sponsors, multiple state laws will apply, since participants/retirees will live in states other than that of the plan sponsor, and b) most state fiduciary law is written with respect to trusts, but technically, the vast majority of 403(b) plans do not hold assets in trust [note, this is in contrast to 457(b) plans, where assets ARE held in trust, and to which such state trust laws would apply]. Thus, before attempting to take any action with respect to fiduciary determination, such plan sponsors should consult with benefits counsel well versed in such issues. In fact, if school districts/public colleges/universities attempt to identify fiduciaries and take fiduciary actions, it is even possible that such actions might be in violation of certain state laws!

**Adviser Practice Pointer: Become well-versed in [Ellie Lowder's 403\(b\) Advisor article on this issue](#), so that you can become your district's source for accurate information.**

- **Churches and religious organizations**—this latter group, which includes church hospitals and faith-based universities, is in a similar situation to public schools in terms of state law applicability. However, many such organizations feel they have a moral obligation to act as fiduciaries and in the best interest of plan participant and beneficiaries, so they will act as if ERISA applied to them for this specific purpose. There are also a small number of such entities who voluntarily elect ERISA coverage in general and thus would be subject to the fiduciary provisions of ERISA. At any rate, such groups should also work closely with benefits counsel to make certain that well-intentioned fiduciary procedures that are implemented do not have the unintended consequence of conflicting with state law.

**Conclusion:** though it would be great if one fiduciary standard applied to all types of 403(b) plans, clearly that is not the case. Thus, advisers need to be aware of the differences, especially if they work in more than one 403(b) market segment. In addition, the successful advisor may be able to utilize his or her mastery of such rules to further the trust-building process at his or her plan sponsor clients/prospects.

*Michael Webb is the NTSAA Education Committee Chair and Vice President, Retirement Services, at Cammack LaRhette Consulting.*

This information is not to be considered as tax advice. In publishing this material, the NTSAA is not rendering legal, tax, accounting or other professional advice. If legal or other expert assistance is required, please consult the services of an appropriate professional.

*Cammack LaRhette is an independent HR benefits consulting firm specializing in non-profit industries. Offering tailored, actionable solutions, to help clients achieve the greatest return on their employee benefits and human resources investment, Cammack LaRhette delivers end-to-end solutions for complex HR challenges.*

*Please note that this article is for general informational purposes only and is not intended to be taken as legal advice or a recommended course of action in any given situation. Readers should consult their own legal advisor before taking any actions suggested in this article.*