



# Fiduciary Responsibilities for Non-ERISA Governmental Plans

The last of a three-part series addresses the fiduciary responsibilities of non-ERISA plans established and maintained by government entities.

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This article is the last in a three-part series summarizing the fiduciary responsibilities of those who sponsor retirement plans that are not subject to ERISA. Part 1, published in the Fall 2014 issue, looked at non-ERISA 403(b) plans established and maintained by non-profit employers. Part 2, published in the Winter 2015 issue, looked at non-ERISA church plans.

## THE GOVERNMENTAL PLAN EXEMPTION FROM ERISA

When ERISA was passed, the federal government declined to include governmental plans within its scope. Concerns over federalism are often raised as the primary reason.

Additional reasons include these three:

*[f]irst, it was generally believed that public plans were more generous than private plans with respect to their vesting provisions ... second, it was believed that the ability of the governmental entities to fulfill their obligations to employees through their taxing powers was an adequate substitute for both minimum funding standards and plan termination insurance ... [third] there was concern that imposition of the minimum funding and other standards would entail unacceptable cost implications to governmental entities.<sup>1</sup>*

Though fiduciary governance is not often raised as an issue, exempting from ERISA's other rules included the comprehensive fiduciary rules found in sections 404 through 408.

Section 4(b)(1) of ERISA provides that Title I of ERISA does not apply to an employee benefit plan that is a "governmental plan" as defined in ERISA section 3(32). ERISA section 3(32) defines a governmental plan as: *a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.<sup>2</sup>*

Sometimes it is easy to determine whether a plan falls under the governmental exemption; other times it is not as clear. Certain factors are examined in making the determination, including:

- whether there is specific legislation creating the organization;
- the source of funds for the organization;
- the manner in which the organization's trustees or operating board members are appointed or elected; and
- whether the state considers employees of the organization to be employees of the state.

If a plan is considered to be a governmental plan and thus exempt from ERISA's Title 1 requirements, another source for proper fiduciary responsibilities must be determined. Interestingly, governmental plans are also exempt from a number of requirements found in the Internal Revenue Code for private qualified plans, such as the minimum participation requirements, minimum vesting standards, joint and survivor annuity rules, assignment or alienation of benefits requirements (excluding QDROs) and others.

## STATE LAW SOURCES OF NON-ERISA FIDUCIARY RESPONSIBILITY

*Perform a Search of State Laws*

Most governmental plans are sponsored by states or state level organizations. In many instances (depending heavily on the proactive nature of the state legislative body and/or the lobbying efforts of unions), rules governing these plans are established in state statutes and regulations. Thus it is imperative to perform an exhaustive search or when trying to determine what fiduciary rules apply to a governmental plan. For example, in Missouri, each of the major governmental pension plans has an enabling statute.<sup>3</sup>

<sup>1</sup> *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910 (2d Cir.1987).

<sup>2</sup> The definition of governmental plan in the Internal Revenue Code is found at 26 U.S.C. §414(d).

<sup>3</sup> For example, Chapter 104 of the Missouri Revised Statutes established both the Missouri State Employees' Retirement System and the Missouri Department of Transportation and Highway Patrol Employees' Retirement System.

# “More and more claims are being brought under a state’s consumer protections laws.”

Sometimes state statutes can be as comprehensive as ERISA or even more so. For example, a state statute may be very explicit in who can be a fiduciary (or trustee) to a plan and provide in detail how often the fiduciaries must meet, what topics they must train on or exactly how they must perform record keeping for the plan. Other times, state law borrows from ERISA and repeats verbatim the fiduciary duty language found in ERISA section 404.<sup>4</sup> Inclusion of this language can have unintended consequences. Despite the fact that a governmental plan is not subject to ERISA, many state court cases borrow from federal court ERISA cases discussing ERISA fiduciary duties where the language is similar or the same. Whether this is prudent is beyond the scope of this article, but knowing that this is possible should put a governmental plan fiduciary on notice that conducting a comprehensive search to understand what laws apply to them is a top priority.

In addition to specific statutes providing for the governmental plan fiduciary’s duties, the following is a shortened summary of other applicable laws that were previously discussed in Part 1 of this series. Governmental plan fiduciaries should refer to that article for a more thorough analysis.

## *State Common Law of Trusts and the Restatement of Trusts*

Common law, which is also

known as case law or precedent, is law developed by judges through decisions of courts and similar tribunals, as opposed to statutes adopted through the legislative process or regulations issued by the executive branch. Such legal practices have the same legal force as if they were passed into law by a state’s legislative body.

Responsibilities are most likely to arise under the common law of trusts. Due to a multitude of state variations, the Restatement of Trusts has typically been used to represent the prevailing developments in the common law. Under the Restatement, the trustee’s duty to administer the trust commences when the individual accepts the appointment. The standards governing the trustee’s duties include “diligence” and “good faith in accordance with the terms of the trust and applicable law.” The Restatement specifies the trustee’s responsibilities when administering the trust and execution of three functions:

- ascertaining the duties and powers of the trusteeship, and the beneficiaries and purposes of the trust;
- collecting and protecting trust property; and
- managing the trust estate to provide returns or other benefits from trust property.

The trustee under the Restatement has “core” and “ancillary” fiduciary responsibilities they must follow with regard to plan administration. The Restatement

contains three fiduciary duties classified as core duties:

- Duty of Prudence (Restatement §77)
- Duty of Loyalty (Restatement §78)
- Duty of Impartiality (Restatement §79)

The Restatement contains five duties classified as ancillary duties:

- Duty with Respect to Delegation (Restatement §80)
- Duty with Respect to Co-Trustees (Restatement §81)
- Duty to Furnish Information to Beneficiaries (Restatement §82)
- Duty to Keep Records and Provide Reports (Restatement §83)
- Duty to Segregate and Identify Trust Property (Restatement §84)

## *Uniform Trust Code*

Check to see if your state has passed a version of the Uniform Trust Code (UTC). The UTC typically codifies longstanding common law in a state. Additionally, the UTC closely follows the Restatement of Trusts, but often makes important changes and adjustments, which is why it is important to have a qualified party review the law.

## *The Restatement’s Prudent Investor Rule and the Uniform Prudent Investor Act*

The Restatement also provides duties specific to investing. The General Standard of Prudent Investment (Restatement §90) incorporates some of the earlier duties such as prudence and loyalty. Additionally, Restatement §91

<sup>3</sup> For example, Chapter 104 of the Missouri Revised Statutes established both the Missouri State Employees’ Retirement System and the Missouri Department of Transportation and Highway Patrol Employees’ Retirement System.

<sup>4</sup> For example, Section 105.688.1 of the Missouri Revised Statutes explicitly repeats the duty of prudence found in ERISA.

requires adherence to investment provisions found in the trust itself or in a statute.

Similar to the adoption by states of the UTC, the Uniform Prudent Investor Act (UPIA) has been adopted with modifications by a limited number of states. The UPIA attempts to provide a model statute for adoption that strongly correlates to the Prudent Investor Rule.

#### *Other State Common Law or Statutes*

Unlike ERISA, most state laws providing fiduciary duties do not preempt other state laws. Often other state law claims may be asserted. For example, if a plan participant files suit for benefits allegedly owed under a plan, that claim may be brought as a breach of contract claim. Depending on the state, the law governing the plan could be found in common law or the state may have adopted the

Uniform Commercial Code (UCC), which may have applicability — again, depending on how the state crafted the law when it was adopted.

Alternatively, claims can be brought under an agency/principle theory if the facts support it. Claims have also been brought as tort claims for negligence.

Lastly, more and more claims are being brought under a state's consumer protections laws. If this type of law arguably applies in your state, make sure to fully understand the types of claims and damages that can be sought, since typically these laws include provisions for punitive damages or double/triple damages if the facts support it.

#### **CONCLUSION**

The most important source of fiduciary duties concerning governmental plans will primarily

be found in the state law enabling statute. Unlike the ERISA statute, information is often not found in the same place. Thus the governmental plan fiduciary would benefit from an exhaustive search of state statutes and regulations or a consultation with experience benefit counsel. **PC**



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