



## Fiduciary Responsibilities for Non-ERISA Retirement Plans

If you sponsor a retirement plan, you likely know there is no uniform set of fiduciary rules that apply to all plan sponsors. Instead, fiduciary responsibilities for each institution depend on the type of organization and the state in which it operates. Since state laws vary, fiduciary responsibilities can range from nonexistent to comprehensive, or fall somewhere in between. With so much variation, it makes sense that plan sponsors may feel confused or overwhelmed by their legal duties.

Those who sponsor 403(b), 401(a), or 457(b) plans have additional reason to be puzzled: some of these plans are covered by the Employee Retirement Income Security Act of 1974, also known as ERISA, and others are not. ERISA is a federal tax and labor law, governed by the Department of Labor (DOL), that sets minimum standards for retirement plans and health plans in the private sector. The law does not cover retirement plans set up and administered by churches or government entities, such as tax-exempt healthcare organizations, local governments, or public school systems.

This means organizations that sponsor non-ERISA retirement plans are not subject to the law's fiduciary standards. "But following ERISA best practices is generally still a good idea," says [Mike Webb](#), senior financial advisor at CAPTRUST. After all, Webb says, it's not only the DOL that governs retirement plans; the Internal Revenue Service (IRS) and Security and Exchange Commission (SEC) also have jurisdiction. "The IRS does not have any fiduciary rules, but the SEC has many," says Webb. In other words, organizations that sponsor non-ERISA plans are not governed by the DOL but are still subject to SEC regulations for fiduciary behavior.

As an example, Webb points to the SEC's regulation best interest (BI) rule, which requires that financial professionals act in the best interest of their clients—similar to ERISA's exclusive benefit rule, which says fiduciaries must act solely in the interest of participants and their beneficiaries. To

comply with varied regulations from this patchwork of governing entities, many organizations opt to adhere to ERISA standards to ensure they are following best practices.

## **Why Follow ERISA Standards?**

For organizations that are not subject to ERISA but choose to follow its standards, risk management is typically one part of the decision. Organizations can mitigate the risk of litigation by implementing due diligence processes in accordance with a written investment policy statement (IPS).

But another, perhaps bigger part of that decision is that ERISA best practices are designed to help create optimal outcomes for employees, says CAPTRUST Financial Advisor [Michael Sanders](#). Nonprofit organizations, like many private sector organizations, feel a moral and ethical responsibility to be good stewards. They want to do the right thing for plan participants, and ERISA standards help them define what the right things are.

“ERISA standards are just good, healthy practices,” says Sanders. “Think about things like benchmarking your plan and not leaving investments in the plan that are no longer relevant or are underperforming. If these things are done right—if these best practices are followed—they’re going to lead to better results for your employees, whether you’re in the public sector or the private sector.”

ERISA standards help plan sponsors focus on their unique employee populations and work backwards to understand what participants will need to retire successfully. “First responders are a good example,” says Sanders. “People who work in police forces or in fire departments tend to retire about 10 years earlier than the average American because those are such physically demanding jobs. If you sponsor a retirement plan for first responders, you need to be set up to provide the best outcomes for this unique group, knowing they may need to retire long before the usual retirement age.”

Do ERISA standards help organizations protect themselves from legal risk? “They can,” says Sanders, “but that isn’t really the point. The point is to create the best possible outcomes for the people in your plan. Whether or not you are legally defined as a fiduciary, you are still responsible for and accountable to participants.”

## **Best Practices to Consider**

Webb and Sanders offer six best practices for non-ERISA retirement plan sponsors to consider. These practices can help optimize outcomes for plan participants while also improving operational efficiency.

1. Enroll in regular fiduciary training. “Look for ongoing training that is similar to ERISA training but also accounts for your state’s unique rules and regulations,” says Webb.
2. Have written policies in place. This includes an IPS, a summary plan document, and an investment committee charter. A written charter gives your investment committee the power to make decisions about plan investments, service providers, and more.



3. Implement regular investment committee meetings. Typically, this means once per quarter. Take minutes to document all decisions and the reasoning behind them.
4. Commit to annual fee benchmarking. “You want to make sure that people are paying the right amount of money for each plan service,” says Sanders. “Reviewing fees on an annual basis will help you be sure that things aren’t drifting away from what’s reasonable and fair.”
5. Do your investment due diligence. “Plan committees should be monitoring investments against certain benchmarks,” says Webb. For instance, you may choose to measure large-cap stock fund performance against the S&P 500 Index and core bond fund performance against the Bloomberg U.S. Aggregate Bond Index, two widely followed and representative indexes.
6. Communicate and educate. “Participants should be notified any time you make changes to the plan, whether that means swapping out an investment or changing your processes to account for evolving rules and regulations,” says Sanders. “Remember that you are a trustee of participants’ assets, so it’s always a good idea to make sure they know what’s going on.”

Consolidation of recordkeepers is also a good idea, although some state laws require nonprofits to have more than one recordkeeper in place. “One recordkeeper is the best practice,” says Sanders. “Having two will often lead to additional work and can complicate plan administration and communication. And to the best of my knowledge, there is no data that says having more than one recordkeeper creates better results.” If your financial advisor is performing regular fee benchmarking, one recordkeeper is all you need.

However, Webb cautions, you’ll want to be aware of any applicable state laws that mandate additional service providers. For instance, “California and a few other states have *any willing provider laws* that say 403(b) plan sponsors have to enter into contracts with all qualified providers that are willing to accept their plan’s terms and rates.”

Depending on the state in which your institution operates, you may be required to adopt state laws that seem to contradict fiduciary best practices, including those listed here. Webb’s advice: “Wherever state law allows, follow the ERISA standard.”

Partnering with a financial advisor who has experience with nonprofit retirement plans can also be a huge help. “If you don’t have anyone in your organization whose job is to manage employee benefits, operating a retirement plan becomes even harder,” says Sanders. “You don’t necessarily need an advisor who specializes in non-ERISA plans, but you will want someone who understands the public market and how it differs from the private sector.”

Plan sponsors can hire service providers as prudent experts to handle fiduciary functions, but they cannot outsource responsibility completely. “The fiduciary retains the responsibility of monitoring the service provider itself,” says Webb. That’s why it’s critical for plan sponsors to stay familiar with evolving federal and state laws where they operate.

To be sure you’re fulfilling your fiduciary responsibilities, stay focused on employee needs and tap into expert help when you need it. Even if your organization’s retirement plan is not subject to ERISA regulations, following ERISA best practices may be prudent.