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# How to Be a Fiduciary During a Pandemic (and the Related Turmoil)

Julie Stapel and Elizabeth Goldberg

**June 25, 2020**

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# Today's Presenters



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# Overview of Today's Agenda and Objectives

Recap of ERISA's  
fiduciary duties

Eight specific  
considerations for  
fiduciaries  
navigating these  
uncharted waters

The importance of a  
prudent fiduciary  
process

# Recap of ERISA Fiduciary Duty of Prudence

## What ERISA Requires

Section 404(a)(1)(A) of ERISA requires a fiduciary to discharge his or her duties “with the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent man *acting in a like capacity* and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .”

## Let’s Focus on Some of Those Words

- “*Under the circumstances then prevailing*”
  - This means that the specifics of a fiduciary’s duty of prudence depend on the circumstances.
  - The circumstances now prevailing are a global pandemic, social unrest, and a recession.

## Let’s Focus on Some of These Words

- “*Acting in a like capacity*”
  - The capacity is a fiduciary in a global pandemic, social unrest, and a recession.
  - Our view, based on this language, is that a fiduciary in a pandemic should be judged based on the activities of a prudent person acting in a global pandemic, social unrest, and a recession.

## Why It Matters

- Times of financial stress lead people to look for someone to share their losses.
- Fiduciary decisions may be particularly ripe for second guessing, whether by participants or regulators.
- Thus, ERISA fiduciaries may want to consider adjustments to their fiduciary processes in light of these circumstances now prevailing and the capacity they find themselves in.

# Considerations

**1. Take Advantage of COVID-19 Fiduciary Relief and Recent Disclosure Rule Changes**

**2. Consider COVID-19 Circumstances in Claims and Appeals (and Take Advantage of Fiduciary Relief)**

**3. Discuss Preparedness with Investment Managers and Investment Consultants**

**4. Review—and Then Closely Watch—Plan Investments**

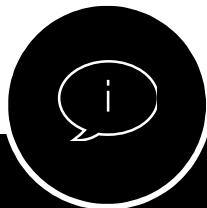
**5. Consider Capital Preservation Options (for DC Plans)**

**6. Increase Participant Education (Especially for DC Plans)**

**7. Review and Adjust the Committee Process**

**8. Evaluate the Plan's Fraud Protection Mechanisms**

# 1. Take Advantage of COVID-19 Fiduciary Relief and Recent Disclosure Rule Changes



## EBSA Disaster Relief Notice 2020-01 Provides COVID-19 Relief, Including Relief Applicable to Communication

- Extension of deadlines for ERISA disclosures for a period of 60 days after national COVID-19 emergency.
- Requires disclosure as soon as administratively possible. Also, expands electronic disclosure options.



## In May, the DOL Finalized a New Electronic Disclosure Rule Which Provides a Safe Harbor for Electronic Communications

- Permits disclosure of certain retirement plan communications by posting to a website or sending an email.
- While this relief is not specific to COVID-19, it can be a tool to make fiduciary communications easier during the COVID-19 period.



## But Even with Relief, Care May Need to Be Taken

- With respect to 2020-01 relief, it is unclear what the DOL will consider appropriate delay, so it may need to be taken before relying on relief.
- The new electronic disclosure rule has limitations, including the need to monitor invalid emails.
- Under both sets of relief, care should be taken to document compliance.

## 2. Consider COVID-19 Circumstances in Claims and Appeals (and Take Advantage of Fiduciary Relief)



### Disaster Relief Notice 2020-01 Reminds Fiduciaries to Consider COVID-19

“The guiding principle—must be to act reasonably, prudently, and in the interest of the covered workers. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments—and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.”



### Disaster Relief Notice 2020-01 Also Provides Relief Around Claims

- The DOL provides relief on the claims and appeals deadline.
- Approach emphasizes compliance assistance and appropriate relief to claims and appeals deadlines.



### Even While Taking Advantage of DOL Relief, Care Should Be Taken

- The guidance reminds fiduciaries that their duties may require “extra care” with participants impacted by COVID-19.
- It is unclear what the DOL will consider appropriate under the claims and appeals relief standard, so care should be taken before relying on relief and care to document reasons for missing claims and appeals deadlines.

# 3. Discuss Preparedness with Investment Managers and Investment Consultants



## Service Provider Check-In

This is a good time for ERISA plan fiduciaries to reach out to service providers (such as investment managers and consultants) to check in on the provider's ability to handle—and adjust to—economic and societal disruption.



## Consider Questions About:

- Business continuity plans
- Capacity to handle operational disruption
  - Investment continuity
  - Possible delays in reporting
- The role of key personnel and backup plans should a key person become unavailable



## Goal of Confirming Operational Viability

The goal of this inquiry could be to confirm (and document that confirmation) that the provider appears able to continue to operate—or adjust—to future economic and societal disruptions, so that the plan is able to continue investment-related operations.



## 4. Review—and Then Closely Watch—Plan Investments



### Emphasize Investment Reviews

During this time of uncertainty, it may be even more appropriate for ERISA fiduciaries to review the plan's investments and fund lineup (in the case of a defined contribution plan) to consider whether they remain prudent.



### Consider Reviews, for Example:

- Rebalancing
- Liquidity
- Preparation for volatility (for example, whether the prospect of future market volatility warrants adjustments)
- Employer stock monitoring



### Consider Frequency of Oversight

Also, if the investment review raises concerns, fiduciaries may wish to explore appropriate adjustments (and, again, document those adjustments).

## 5. Consider Capital Preservation Options (for DC Plans)



### Consider the Spectrum of Risk in the Current Fund Lineup

Participants nearing retirement (or participants who are simply more risk averse) may be looking for investment options offering capital preservation. Market disruptions can have an outsized effect on those participants nearing retirement.



### Evaluate Whether More Conservative Options May Be Desirable to Add to the Lineup

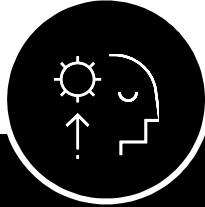
Fiduciaries may wish to engage with their consultants and other advisers to evaluate whether the investment options on the more conservative end of the lineup may warrant further consideration.



### Review Performance of the Investment Options on the Conservative End of the Spectrum

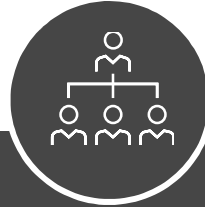
Conservative investment options sacrifice investment return for safety. Thus, confirming that safety is a key consideration.

# 6. Increase Participant Education (Especially for DC Plans)



## Now May Be a Time for Participant Education

In the face of market challenges, it may be wise to increase participant education efforts, particularly for defined contribution plans. The move to remote work may also cause employees to feel disconnected from the plan. A new educational initiative may help to reengage them.



## Value of Education

If the markets continue to experience volatility, both the plan participants and the plan fiduciaries will benefit from an increased focus on educating participants to empower them to make decisions that best suit their investment and retirement goals.



## Consider the Following:

- More frequent education sessions, including undertaking virtual participant education sessions (to fit remote work environment).
- On capital preservation options, education on both the benefits (especially for those nearing retirement) and also the risks.
- For long-term needs, explore hiring a third-party education provider and/or implementing a participant advice service.

# 7. Review and Adjust the Committee Process



## Committees Should Not Lose Focus on Appropriate Procedures

Instead, during the pandemic, committees may need to adjust their processes to ensure they can continue to function and engage in an appropriate level of oversight of the plan in a virtual and “work from home” environment.



## For Example:

- Rather than forgoing meetings altogether because of remote work environments, committees should consider moving to virtual or telephonic meetings.
- Some committees may find that more frequent meetings are necessary during this time of disruption and volatility.



## Consider Committee Rules

These types of process changes may require amendments to the committee’s governing documents (i.e., charter or by-laws) and so now might be a good time to review those documents and rules, and to make any updates to fit the COVID-19 world.

For example, what does your charter say about meeting remotely?

# 8. Evaluate the Plan's Fraud Protection Mechanisms



## The COVID-19 Crisis May Trigger Increased Fraud Activities

There may be increased fraud risks due to economic disruptions and increases in electronic communications.

Benefit plans can be a prime source for fraud, given the data and assets held by such plans.

Risks include both identity theft and fraudulent benefit payouts.



## Fraud May Raise Fiduciary Duty Concerns

The ERISA fiduciary duties of loyalty and prudence could be deemed to impose an obligation to take reasonable steps to shield participants from losses stemming from benefit plan fraud.



## Consider a Review of Plan's Fraud Protection Structures, For Example:

- Inquire with the plan's service providers (such as the plan's recordkeeper) on fraud protection mechanisms.
- Conduct a formal audit to evaluate how participant information is protected.
- Becoming a topic of increasing interest in ERISA litigation.

# The Importance of a Prudent Fiduciary Process

## Procedural Prudence

- Courts have interpreted the duty of prudence as essentially a duty of procedural prudence.
- A fiduciary should not be required to guarantee the outcomes of its investment decision making.
- But fiduciaries are responsible for the prudence of the process that led to those decisions.

## What Does It Require?

- Remember your high school math teachers—Show Your Work!
- Procedural prudence requires a record to show the steps that led to the decision.
- A rigorous process with no way to show it may be little comfort.

## What Should the Record Look Like?

- There's no "one size fits all" method of documenting the fiduciary process, but it might include:
  - Preparing written agendas for meetings
  - Compiling materials considered during the meeting
  - Effective minutes

## Consider Fiduciary Training

- If your fiduciaries have not had fiduciary training in a while (or ever), now might be a good time.
- The DOL and courts have viewed fiduciary training as a favorable component of procedural prudence.

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# QUESTIONS?

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# Biography



**Julie Stapel**

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**Julie K. Stapel** helps employee benefit plan sponsors and financial service providers with the investment, and management of employee benefit plan assets. She advises clients on ERISA fiduciary and prohibited transaction rules, and their impact on investment products and services, and helps those clients use investment documentation and other tools to manage potential fiduciary risks while providing top-quality benefits and services. She also works with plan sponsors and financial service providers to address ERISA–related compliance issues.





# Biography



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**Elizabeth S. Goldberg** advises clients on ERISA matters with a focus on fiduciary responsibility provisions, prohibited transaction rules and exemptions, and the management of employee benefit plan assets. She negotiates investment-related agreements on behalf of plans and financial services providers; designs, implements, and administers employee benefit plans; and counsels clients on US Department of Labor (DOL) investigations, plan fiduciary governance structures, ERISA reporting and disclosure obligations, ERISA litigation, and general benefit plan compliance considerations. Liz's work experience includes several years at the DOL's Office of the Solicitor.

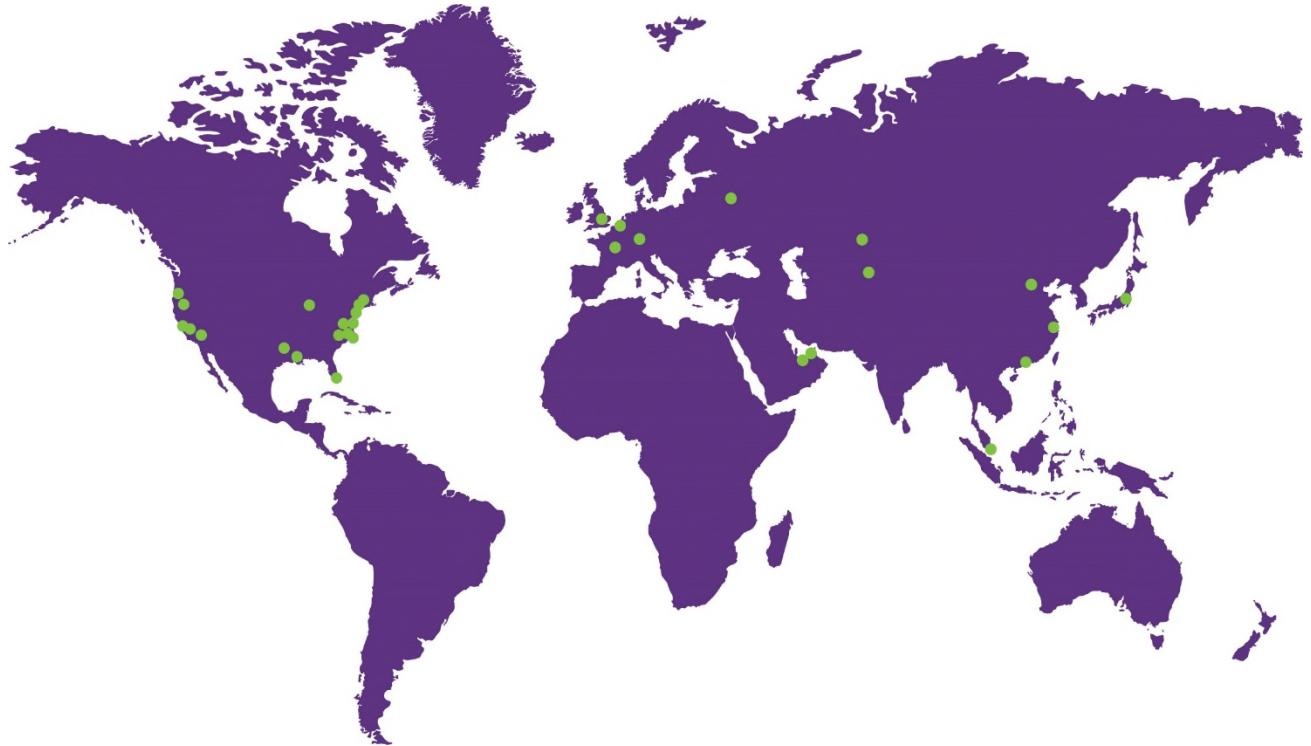


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Latin America  
Middle East  
North America

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Houston  
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