

Duties & Responsibilities of Board Members

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Common Misconceptions of Fiduciary Status

- Governmental plan board members often have the following misconceptions:
 - ERISA fiduciary standards do not apply to them
 - They are protected by sovereign immunity
- However, the truth is:
 - Governmental plan board members, as trustees, are held to high fiduciary standards similar to the federal ERISA duties
 - State law contains significant limits on indemnification protection for governmental fiduciaries

Board Members are Fiduciaries

- A fiduciary is a person legally appointed and authorized to hold assets in trust for another person. The fiduciary manages the assets for the benefit of the other person rather than for his or her own profit.

Legal Basis of Fiduciary Responsibility

- Law of Trusts
- Contractual Provisions
- Statutes
 - Federal statutes – ERISA
 - Missouri Uniform Prudent Investors Act (§ 456.900 R.S.Mo. et. seq.)
 - Uniform Management of Public Employee Retirement Systems Act (UMPERSA)
 - Retirement system enabling statutes
 - State statutes - § 105.660 - § 105.691 R.S.Mo.
 - Municipal ordinances and charters

Fiduciary Duties

- Fiduciary duties fall into two broad categories – the duty of loyalty and the duty of care
- Duty of loyalty requires the trustees to act:
 - Solely in the best interests of the members, retirees, and beneficiaries of the retirement system
 - For the exclusive purpose of providing benefits
 - Impartiality, avoiding conflicts of interest and self-dealing

Fiduciary Duties

- The duty of care requires the trustees to act:
 - With the care, skill, and prudence exercised by similar fiduciaries in investment-related matters, including diversification of investments
 - To perform due diligence in matters related to investment of the system's assets
 - To incur only costs that are appropriate and reasonable
 - To act in accordance with applicable statutes and regulations
 - Act in accordance with the plan document

Investment Responsibilities

- Missouri statutes define an “investment fiduciary” as a person who either:
 - Exercises any discretionary authority or control in the investment of a public employee retirement system’s assets or
 - Who renders for a fee advice for a public employment retirement system.
 - § 105.687(3) R.S.Mo.

Who are Investment Fiduciaries?

- Investment Fiduciaries are:
 - Members of the Board of Trustees
 - Certain staff members
 - Actuaries
 - Legal advisors
 - Money managers
 - Investment consultants

Investment Responsibilities

- The duties of investment fiduciaries are set out at § 105.688 R.S.Mo. The statute provides:
 - An investment fiduciary shall discharge his or her duties in the interest of the participants of the system and their beneficiaries and shall:
 - (1) Act with the same care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims;
 - (2) Act with due regard for the management, reputation, and stability of the issuer and the character of the particular investments being considered;

Investment Responsibilities

- (3) Make investments for the purposes of providing benefits to participants and participants' beneficiaries, and of defraying reasonable expenses of investing the assets of the system;
- (4) Give appropriate consideration to those facts and circumstances that the investment fiduciary knows or should know are relevant to the particular investment or investment course of action involved, taking into consideration the risk of loss and the opportunity for gain or other return associated with the investment or investment course of action; and consideration of the following factors as they relate to the investment or investment course of action:
 - (a) The diversification of the investments of the system;
 - (b) The liquidity and current return of the investments of the system relative to the anticipated cash flow requirements of the system; and

Investment Responsibilities

- (c) The projected return of the investments of the system relative to the funding objectives of the system;
- (5) Give appropriate consideration to investments which would enhance the general welfare of this state and its citizens if those investments offer the safety and rate of return comparable to other investments available to the fiduciary at the time the investment decision is made.
- Missouri statutes have a separate provision at § 86.590 R.S.Mo. for investments by boards of trustees of police and firemen's pension systems, which states that they shall invest funds are permitted by § 105.687 to § 105.690.

Personal Liability

- Nearly all states, including Missouri, adopt the bedrock fiduciary standards from ERISA that fiduciaries may be held personally liable for losses to a plan resulting from a fiduciary breach and may be required to restore to the plan any profits that result from the use of plan assets.

Breach of Fiduciary Duty Claims

- In order to maintain a claim for breach of fiduciary duty, a plaintiff must establish the following:
 - Existence of a fiduciary relationship
 - Breach of a fiduciary relationship
 - Causation
 - Harm (i.e. damages)
- A breach of fiduciary duty claim can be filed against the individual trustees, as well as the Board itself.
- Beware of lawsuits seeking to transform negligence into breach of fiduciary duty.

Best Practices for Fiduciaries

- Purchase fiduciary liability insurance
- Adopt a Board Governance Policy, including conflict of interest guidelines
- Written statement of Investment Policy and Objectives
- Annual financial and management audits
- Periodic review of administrative policies/procedures
- Criminal records check of prospective employees
- Establish trustee education program
- Staff education and training
- Ask questions about investment proposals

Best Practices for Fiduciaries

- Ensure accurate information is provided to retirees, spouses, and beneficiaries
- Adhere to your system's rules, regulations, policies, and procedures
- Establish a written administrative appeal procedure
- Due diligence in selecting investment managers and professional consultants
- Monitor portfolio structure and investment manager performance
- Legal review of consultant and investment management agreements

Questions?

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