



401(k) Plan Investment Guidelines

Employment, Labor & Benefits Practice Group

Foster Swift Employment, Labor & Benefits Quarterly

March 2009

PRACTICE AREAS

Employee Benefits

Many employers are increasingly concerned about potential fiduciary liability relating to poor performance of 401(k) plan investment alternatives. An employer sponsor of a 401(k) plan can take several steps to protect itself from such fiduciary liability. One practical step that an employer can take involves the establishment of a written investment policy statement. Although federal pension law does not require such an investment policy statement (usually referred to as an "IPS"), regulations issued by the U.S. Department of Labor endorse the use of an IPS by a retirement plan. An IPS is a written guideline that is adopted by the employer sponsor of a retirement plan. It provides guidance to the employer when selecting appropriate investments for a plan, as well as when monitoring and judging the performance of those investments. The IPS can provide written confirmation (for example, in the case of a lawsuit) that the retirement plan's investment fund selection process as executed by the plan's fiduciaries was systematic and that the performance of those investment funds is being monitored routinely and effectively. The IPS can be used to show that the plan fiduciaries are fulfilling their responsibilities under the "prudent person" standard of relevant law.

A written investment policy statement should be tailored to the specific needs of each retirement plan and its sponsor. Examples of the kinds of information that should be in the IPS include:

1. A statement of the plan's investment goals;
2. A statement of the roles and responsibilities of the individuals or groups that are involved with plan investments;
3. Identification of the criteria that will be used when selecting and replacing investments and investment managers; and
4. Procedures for monitoring investment performance.

A carefully written IPS can allow the plan fiduciary to demonstrate a thoughtful process that is designed to create a reasonable asset allocation and to ensure that the investment opportunities available under the plan further the plan's purposes. It provides a framework for fiduciaries to follow. It can help them to understand the basic



parameters of their own ongoing responsibility to the plan, either independently or with the help of professional investment advisors. We strongly recommend that every retirement plan sponsor adopt and follow an IPS with regard to its plan assets.
