



Message from the Consultants

Happy New Year! The first of a new year is a great time to review your Section 457, 403(b) and/or 401(k) plan to determine if you are fulfilling your fiduciary duties to the plan and its participants. One of the most important fiduciary duties is selecting and monitoring your plan's investment menu.

This issue of *News & Views* focuses on this specific fiduciary role and steps you can take to reduce potential liability for participant investment decisions. This includes complying with ERISA Section 404(c).

The State of California recently adopted the principles of this ERISA provision in its laws. All state and local government plan sponsors, however, can benefit from following the 404(c) requirements as best practice guidelines.

One of the most important steps to meet your fiduciary requirements in regard to the investment menu is to develop and maintain an investment policy statement. If you have already completed this step, it may be time to review and update this document.

Your SST representatives are here to help you in this process and evaluate how well our plan complies with ERISA Section 404(c). Call us with any questions about your plan.

Sincerely,

Bill Tugaw, Paul Hackleman,

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SST Benefits Consulting

ERISA and State Statutes

As a public sector employer, you are not governed by the Employee Retirement Income Security Act (ERISA). These laws are designed to protect the benefits provided to employees of corporate employers and ensure employers don't abuse the income tax features inherent in the benefit programs.

State constitutions and/or statutes generally incorporate the same or similar benefit protections for state and local government employees. For instance, most states have statutes that guarantee benefits that have been earned by employees as well as provide fiduciary standards that are as stringent (or even more restrictive) than those found in ERISA. Other areas that may be addressed in state laws include investment menus (see ***ERISA Section 404(c)*** below) and eligibility requirements.

ERISA provisions are generally considered best practice guidance for the administration and operation of public sector retirement benefit plans. In the absence of applicable state laws or rules, courts may look to ERISA when ruling on matters relating to fiduciary decisions.

ERISA Section 404(c)

The state of California recently enacted a law to adopt ERISA Section 404(c) principles under California Government Code section 53213.5(b). As a result, plan sponsors that meet the requirements of 404(c), as specified in the California Code, are provided certain relief from responsibility for participants' individual investment decisions.

California Government Code section 53213.5(b) states: "... participants choosing individually directed investments shall relieve the trustee and local agency of responsibility under the terms of the plan and trust. That relief shall be conditioned upon the local agency compliance with communication and education requirements similar to those prescribed in [404(c) of ERISA] ... for private sector employers."

See article on page 3 – ***Participant Investment Decisions and Fiduciary Responsibilities*** – regarding ERISA 404(c) requirements.

The “Washington Insider” offers news about recent legislative and regulatory developments that may be of interest to state and local government plan sponsors

Washington Insider

Protecting American Families’ Retirement Advice Act

On January 6, Representative Joe Wilson (R-SC) introduced the ["Protecting American Families' Retirement Advice Act"](#) to delay the effective date of the Department of Labor (DOL) fiduciary rule. The current effective date of this rule is April 10, 2017. The Act, which is in front of the House Ways and Means Committee for consideration, would provide a two-year delay to the effective date to provide legislators time to reconsider the fiduciary rule and potentially seek to repeal it.

Social Security Reform Act of 2016

At the end of 2016, Representative Sam Johnson (R-TX) introduced the ["Social Security Reform Act of 2016."](#) This legislation would gradually increase the full Social Security retirement age to 69, revise the measure of inflation for the annual cost-of-living adjustment, eliminate the Retirement Earnings Test for everyone, as well as certain other changes to Social Security benefits and rules.

The Retirement Security Preservation Act (RSPA)

At the end of 2016, the ["Retirement Security Preservation Act of 2016"](#) was introduced by Senators Ben Cardin (D-MD) and Rob Portman, (R-OH) and Representatives Pat Tiberi (R-OH) and Richard Neal (D-MA). This bill had bipartisan support last year and was designed to address nondiscrimination testing issues (state and local government plans are exempt from nondiscrimination testing).

IRS News Release – Saver’s Credit

[IRS News Release 16-171: Plan Now to Get Full Benefit of Saver's Credit; Tax Credit Helps Low- and Moderate-Income Workers Save for Retirement \(PDF\)](#) was issued on December 15, 2016. This release provides useful information that can be shared with participants to help them understand who is eligible for this important tax credit.

NAGDCA Webinar

The National Association of Government Defined Contribution Administrators (NAGDCA) recently held a Webinar to discuss the DOL fiduciary rule and its impact on governmental plan sponsors - [How the DOL Fiduciary Rule Might Affect Governmental Plan Sponsors \(PowerPoint\)](#). Although public sector plans are not subject to ERISA and the DOL rules, service providers may apply the same treatment to all public and private sector plans and participants.

NCPERS Public Retirement Systems Study

The National Conference on Public Employee Retirement Systems [NCPERS] recently released the [“NCPERS Public Retirement Systems Study, 2016 \(PDF\).”](#) This is a “comprehensive study exploring retirement practices of the public sector. In partnership with Cobalt Community Research, NCPERS has collected and analyzed the most current data available on member funds’ fiscal condition and steps they are taking to ensure fiscal and operational integrity.”



Participant Investment Decisions and Fiduciary Responsibilities

Supplemental defined contribution plans – Section 457(b), 403(b) and/or 401(k) plans – play an increasingly important role in state and local government employees’ retirement income. As a government plan sponsor, one of your most important responsibilities is to design and monitor your plan’s

investment menu to ensure the choices offered are appropriate and meet a variety of investment needs.

ERISA Section 404(c) offers guidance and fiduciary relief for the decisions private sector employers make regarding their 401(k) defined contribution plan’s investment options. Some states, including California (see article on page 1) have adopted similar requirements in state laws. However, even if your state has not enacted these protections, all plan sponsors can benefit from understanding and adopting applicable 404(c) provisions as a best practice model. In addition, if any legal questions arise about the investment decisions made by the public sector plan sponsor, state courts may consider the 404(c) requirements for private sector plans when determining if fiduciary responsibilities have been met.

Under Section 404(c) to receive fiduciary protections, the plan must provide the following:

- **Exercise control:** Participants and beneficiaries must have a reasonable opportunity to give instructions to select investment options and/or redirect existing balances to other investments within the plan. Investment instructions that are not in writing (electronic or oral) must be confirmed.
- **Broad range of investment alternatives:** The plan’s investment menu must include a broad range of core options (at least three) that have materially different risk/return characteristics. This menu must allow participants to create a diversified portfolio that is appropriate for their own risk/return level.
- **Disclosures:** Participants are provided (or have access to) sufficient information to help them make informed election decisions. This includes both plan-specific and general investment information such as current and historical performance, diversification, etc. In addition, the requirements for participant fee disclosures under ERISA Section 404(a) must be met. Information on the participant-level fee disclosure requirements can be found on the Department of Labor’s [website](#).

Investment Policy Statement

Developing and maintaining an investment policy statement is critical in meeting your fiduciary responsibility and will help you comply with ERISA 404(c).

- 1) *The statement should include plan objectives, roles and responsibilities of all applicable parties as well as benchmarks and monitoring criteria.*
- 2) *The process and criteria for manager selection, evaluation, and termination should be documented.*
- 3) *Once established, fiduciaries should regularly review this document and update it as needed.*

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