

ERISA Bonds & ERISA Investment Bonds

An ERISA Bond is an amended Fidelity bond that meets the requirements of ERISA law. Unlike a Fidelity Bond, which pays losses to the insured, an ERISA Bond pays losses directly to the client whose assets are managed. It has no deductible, calculates limits on plan assets up to \$500,000 and is specific to each plan.

The bonding requirements are **designed to protect employee benefit plans from the risk of loss due to fraud or dishonesty** on the part of persons who “handle” plan funds or other plan assets. ERISA Bonds do not protect plan fiduciaries from breaches of their fiduciary duties.

In a typical bond, the plan is the named insured and a surety company is the party that provides the bond. Bonds must be placed with surety a company or reinsurer that is named on the Department of the Treasury’s Listing of approved Sureties.

Unlike the optional first party Fiduciary Liability Insurance and E&O Insurance, **ERISA Bonds and ERISA Investment Bonds are required.**

Unless exempted (banks, insurance companies & Registered B-Ds), **section 412 of ERISA requires every fiduciary of a funded employee benefit plan, and every person who “handles” funds or other property of the plan, to be bonded.**

In addition to the ERISA Bond requirements for plan officials, **many feel that investment advisors/service providers who control plan assets and make investment decisions for ERISA plans are required to maintain an Investment Advisor ERISA Bond.**

A person who provides investment advice, but does not exercise, or have the right to exercise, “discretionary” authority with respect to buying or selling plan assets is not, however, required to be bonded solely by reason of providing such investment advice.

The term “handling” carries a broader meaning than physical contact with plan funds or property. In other words, **a person is deemed to be “handling” funds or property when their duties or activities carry a risk that the funds could be lost in the event of fraud or dishonesty**, whether acting alone or in collusion with others.

When defining “handling,” the power to transfer funds, disbursement authority, authority to sign checks, supervisory or decision-making responsibility over activities that require bonding, fiscal controls, the closeness of supervision and who has final responsibility for disbursements most all be considered.

We have already noted that **every fiduciary of a funded employee benefit plan has to be bonded under section 412 of ERISA.** As noted by some ERISA attorneys, “A person who advises a plan as to the investment of plan assets, but does not have discretionary authority, will be a fiduciary if the advice is provided on a regular basis and is customized to the particular needs of the plan.”

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Furthermore, **“bonding is required regardless of whether the fiduciary has custody of, or otherwise actually handles assets of the plan, because the bonding rules apply to all plan fiduciaries that have these rights or powers, exclusive of the stated exceptions.”**

INVESTMENT ERISA BONDS

The issue over who is required to be bonded comes up frequently. Professional opinions vary widely and many advisors feel they are exempt from bonding requirements because they do not “handle” assets. Using a different qualifier, some insurance experts have concluded that **advisors who have ANY ability to steal funds from their ERISA plans are REQUIRED to be bonded.** They further believe that bonded advisors have a marketing edge and those who are not bonded are being short sighted.

If the aforementioned is correct, the investment professional is required to purchase a bond from an approved insurance company. The amount of the bond is 10% of the plan’s assets up to the maximum of \$500,000 for each qualifying plan without company stock. Plans with company stock require a \$1 million bond.

These bonds can be written on an individual basis, where each plan is identified, or as a blanket bond covering all plans. A blanket bond would include any new plans added after the policy effective date and each year the application would capture all the current plans.

In short, an RIA with twenty-five plans would have a bond that covers each client’s plan that is based on the assets of their plans. Additionally, **some plans may require the investment professional to carry a scheduled bond that specifically names just THEIR plan and the amounts could be much higher than the 10%.**

BONDING RESPONSIBILITY

The responsibility for ensuring that plan officials are bonded may fall upon a number of individuals simultaneously. In addition to a plan official being directly responsible for complying with the bonding requirements in section 412(a) of ERISA, section 412(b) specifically states that **it is unlawful for any plan official to permit any other plan official to receive, handle, disburse, or otherwise exercise custody or control over plan funds or other property without first being properly bonded** in accordance with section 412.

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In addition, section 412(b) makes it unlawful for “any other person having authority to direct the performance of such functions” to permit anyone to perform such functions without being bonded. Thus, by way of example, if a named fiduciary hires a trustee for a plan, the named fiduciary must ensure that the trustee is either subject to an exemption or properly bonded in accordance with section 412, even if the named fiduciary is not required to be bonded, because they do not handle plan funds or other property.

Plan officials may purchase ERISA bonds with plan assets, but they are under no obligation to purchase the ERISA Investment Bonds applicable to advisors and other third parties. **Service providers generally purchase their own separate bond insuring the plan and add it to the cost of their service.**

For an additional layer of protection, **plan sponsors should consider requiring all third party vendors that “handle” plan funds to provide a copy of a current in force ERISA Bond with the individual plan named as the indemnitee.**

For more information on ERISA Bonds, visit the DOL’s website located at: <http://www.dol.gov/ebsa/regs/fab2008-4.html>.

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