

# [Podcast]: ERISA's Bonding Requirements

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In this episode of the Proskauer Benefits Brief, partner [Ira Bogner](#) and senior counsel [Adam Scoll](#) discuss ERISA's bonding requirements. ERISA's bonding rules generally require that every fiduciary of an ERISA-covered employee benefit plan and every person who handles funds or other property of such a plan be bonded. We will break down these bonding rules and their importance, so be sure to tune in to this episode.

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**Adam Scoll:** Hello, and welcome to the Proskauer Benefits Brief, legal insights on employee benefits and executive compensation. I'm Adam Scoll, senior counsel in the firm's Boston office, and I'm here with Ira Bogner, partner in our New York office, and today, we will be discussing ERISA's bonding requirements. By way of background, ERISA's bonding rules are set forth in section 412 of ERISA, and they generally require that every fiduciary of an ERISA-covered employee benefit plan, and every person who handles funds or other property of such a plan be bonded. ERISA refers to such persons as plan officials, and these rules are intended to protect ERISA-covered employee benefit plans from the risk of loss due to fraud or dishonesty on the part of such plan officials, including, but not limited to, as a result of larceny, theft, embezzlement, or forgery.

**Ira Bogner:** ERISA requires that a plan official must be bonded for at least 10% of the amount of the plan assets he or she handles, subject to a minimum bond of \$1,000 per plan. In most instances, the maximum bond amount that can be required under ERISA, with respect to any one plan official, is \$500,000 per plan. However, the maximum required bond amount is \$1,000,000 for officials of plans that hold employer securities, and deductibles are generally prohibited.

**Scoll:** Again, in order to be considered a plan official, you must be considered to be handling plan assets. And this definition is broader than how it sounds. It covers physical contact, or the power to exercise physical contact or control, with cash, checks, or similar property, the power to transfer funds or other property from the plan to oneself or to a third party, or to negotiate such property for value. It includes disbursement authority, check-signing authority, and supervisory or decision-making responsibility over any such activities. For the most part, if you have access to plan assets to the extent that you could steal such plan assets, then you probably would be considered a plan official.

**Bogner:** To be clear, not all plan fiduciaries and service providers need to be bonded. Only those person who handle funds or other property of an ERISA-covered employee benefit plan are required to be bonded under ERISA. Accordingly, a person who provides investment advice to an ERISA-covered plan but who does not exercise or have the right to exercise discretionary investment authority over the plan's assets will generally not be required to be bonded solely by reason of providing such investment advice. Further, certain banks, insurance companies, brokers, and dealers are exempt from these rules.

**Scoll:** As to the structure for most ERISA fidelity bonds, an insurance company is the party that provides the bond and the applicable plan or plans are specifically listed as the named insurance. However, you can also use an omnibus clause that clearly identifies the insured plan, or multiple insured plans, in a way that would enable each insured plan to make a claim under the bond. And the person whose potential bad acts are covered by the bond are the plan officials.

**Bogner:** ERISA does not actually prescribe who much purchase or pay for the bond. A service provider or fiduciary can purchase its own bond, or the plan can add a fiduciary or service provider to its own existing bond or purchase a new bond. And because the purpose of these bonding requirements is to protect the plan and not the plan official being bonded, ERISA allows for the plan to pay for the bond without violating the prohibited transaction rules imposed by ERISA.

**Scoll:** And to be clear, as this is commonly misunderstood, an ERISA fidelity bond is not the same as ERISA fiduciary liability insurance. An ERISA bond insures the plan against losses due to fraud or dishonesty on the part of plan officials. Fiduciary liability insurance, on the other hand, generally protects the plan fiduciary and ultimately the plan as well against losses caused by breaches of fiduciary responsibilities. Further, ERISA requires that plan officials be bonded. However, ERISA does not require that a plan fiduciary obtain or maintain fiduciary liability insurance.

**Bogner:** One quick item to note for those folks in the private investment fund world. Quite often, a fund or other investment structure might include what we sometimes refer to as a hardwired plan asset conduit feeder. Although we plan to discuss those vehicles in a bit more detail in a future podcast, it is important to note that if any such vehicle is holding plan assets, regardless of how it is structured, the ERISA bonding rules still apply with respect to any plan officials considered to be handling such plan assets.

**Scoll:** Thanks, Ira. That concludes our discussion of ERISA's bonding requirements. Thank you all for joining us on the Proskauer Benefits Brief. Stay tuned for more legal insights on employee benefits and executive compensation, and be sure to follow us on iTunes, Spotify, and Google Play.

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