# ERISA Fidelity Bonds

The Employee Retirement Income Security Act of 1974 (ERISA) sets rules and standards of conduct for employee benefit plans maintained by private-sector employers and those who invest and manage plan assets. One of ERISA's requirements is that people who handle plan funds and other property be covered by a **fidelity bond**.

ERISA's bonding requirement is intended to protect employee benefit plans from risk of loss due to fraud or dishonesty on the part of persons who handle plan funds or other property. A plan official must be bonded for at least 10% of the amount of funds he or she handles, subject to a minimum bond amount 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.

This Compliance Overview includes guidance from the Department of Labor (DOL) highlighting key elements that employers should know about ERISA's fidelity bond requirement.

## LINKS AND RESOURCES

- ERISA Section 412 and DOL Regulations on fidelity bonds
- DOL Field Assistance Bulletin 2008-4 – guidance on ERISA fidelity bonding requirements
- DOL publication on ERISA fidelity bonds
- DOL information letter on bonding requirements applicable to pooled employer plans (Sept. 7, 2022)

### What is an ERISA fidelity bond?

An ERISA fidelity bond is a type of insurance that protects the plan against losses caused by acts of **fraud or dishonesty**. Fraud or dishonesty includes, but is not limited to, larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication, and other acts. Deductibles or similar features are prohibited for coverage of losses within the maximum amount for which the person causing the loss is required to be bonded. In addition, it is important to make sure that the plan is named (or otherwise specifically identified) as an insured party on the bond so that the plan can recover losses covered by the bond.

### Is an ERISA fidelity bond the same thing as fiduciary liability insurance?

No. The fidelity bond required under ERISA specifically insures a plan against losses due to **fraud or dishonesty** (for example, theft) by persons who handle plan funds or property. Fiduciary liability insurance, on the other hand, insures fiduciaries, and in some cases the plan, against losses caused by breaches of fiduciary responsibilities. Although many plan fiduciaries may be covered by fiduciary liability insurance, it is not required and does not satisfy the fidelity bonding required by ERISA.

### Can I get an ERISA bond from any bonding or insurance company?

No. Bonds must be obtained from a surety or reinsurer that is named on the Department of the Treasury's Listing of Approved Sureties, Department Circular 570. Under certain conditions, bonds may also be obtained from underwriters at Lloyds of London. Neither the plan nor any interested party may have any control or significant financial interest, either directly or indirectly, in the surety or reinsurer, or in an agent or broker, through which the bond is obtained.

### Who must be bonded?

Every person who "**handles funds or other property**" of an employee benefit plan is required to be bonded unless covered under an ERISA exemption. (ERISA refers to persons who handle funds or other property of an employee benefit plan as plan officials). ERISA makes it an unlawful act for any person to "receive, handle, disburse, or otherwise exercise custody or control of plan funds or property" without being properly bonded.

Fidelity bonding is usually necessary for the plan administrator and those officers and employees of the plan or plan sponsor (employer, joint board or employee organization) who handle plan funds by virtue of their duties relating to the receipt, safekeeping and disbursement of funds. The bonding requirement is not limited to just plan trustees, employees of the plan and employees of the plan sponsor. Bonding coverage may also be required for other persons, such as service providers to the plan, whose duties involve access to plan funds or decision-making authority that can give rise to a risk of loss through fraud or dishonesty.

Where a plan administrator, service provider, or other person who must be bonded is an entity, such as a corporation or association, ERISA's bonding requirements apply to the natural persons or person who "handles" the funds.

## Plan Funds or Property

The term "funds or other property" generally refers to all funds or property that the plan uses or may use to pay benefits to plan participants or beneficiaries. Plan "funds or other property" includes all plan investments including land and buildings, mortgages, and securities in closely held corporations. It also includes contributions from any source (such as employers, employees and employee organizations) that are received by the plan, and cash, checks and other property held for the purpose of making distributions to plan participants or beneficiaries.

A person is deemed to be "handling" funds or other property of a plan whenever his or her duties or activities could cause a loss of plan funds or property due to fraud or dishonesty, whether acting alone or in collusion with others. The general criteria for determining "handling" include:

- Physical contact with cash, checks or similar property;
- Power to transfer funds from the plan to oneself or to a third party;
- Power to negotiate plan property (for example, mortgages, title to land and buildings, or securities);
- Disbursement authority or authority to direct disbursement;
- Authority to sign checks or other negotiable instruments; or
- Supervisory or decision-making responsibility over activities that require bonding.

## Who are the parties to an ERISA fidelity bond?

In a typical bond, the plan is the named insured, and a surety company (insurer) is the party that provides the bond. The persons covered by the bond are the persons who handle funds or other property of the plan. As the insured party, the plan can make a claim on the bond if a plan official causes a covered loss to the plan due to fraud or dishonesty.

## Do ERISA's bonding requirements apply to all employee benefit plans?

No. Although the bonding requirements generally apply to most ERISA retirement plans and many funded welfare benefit plans, the ERISA bonding requirements do not apply to employee benefit plans that are completely unfunded or to plans not subject to Title I of ERISA (for example, church plans or government plans).

## What plans are considered "unfunded" so as to be exempt from ERISA's bonding requirement?

An unfunded plan is one that pays benefits **only from the general assets** of an employer. The assets used to pay the benefits must remain in, and not be segregated in any way from, the employer's general assets until the benefits are distributed. Thus, a plan will not be exempt from ERISA's bonding requirements as "unfunded" if:

- Any benefits under the plan are provided or underwritten by an insurance carrier or service or other organization;
- There is a trust or other separate entity to which contributions are made or out of which benefits are paid;
- Contributions to the plan are made by the employees, either through withholding or otherwise, or from any source other than the employer involved; or
- There is a separately maintained bank account or separately maintained books and records for the plan or other evidence of the existence of a segregated or separately maintained or administered fund out of which plan benefits are to be provided.

As a general rule, however, the presence of special ledger accounts or accounting entries for plan funds as an integral part of the general books and records of an employer will not, in and of itself, be deemed sufficient evidence of segregation of plan funds to take a plan out of the exempt category, but must be considered along with the other factors and criteria discussed above in determining whether the exemption applies.

As noted above, an employee benefit plan that receives employee contributions is generally not considered to be unfunded. Nevertheless, the DOL treats an employee welfare benefit plan that is associated with a Code Section 125 cafeteria plan as unfunded, for annual reporting purposes, if it meets the requirements of DOL Technical Release 92-01, even though it includes employee contributions. As an enforcement policy, the DOL will treat plans that meet these requirements as unfunded for bonding purposes as well.

## Are fully insured plans "unfunded" for purposes of ERISA's bonding requirements?

No. As noted above, a plan is considered "unfunded" for bonding purposes only if all benefits are paid directly out of an employer's general assets. Thus, insured plan arrangements are not considered "unfunded" and are not exempt from ERISA's bonding requirements. The insurance company that insures benefits provided under the plan may, however, fall within a separate exemption from ERISA's bonding requirements.

In addition, if no one "handles" funds or other property of the insured plan, no bond will be required under ERISA. For example, in many cases contributions made by employers or by withholding from employees' salaries are not segregated from the general assets of the employer until paid out to purchase benefits from an insurance carrier, insurance service or similar organization. No bonding is required with respect to the payment of premiums, or other payments made to purchase such benefits, directly from general assets, or with respect to the bare existence of the contract obligation to pay benefits. These insured arrangements would not normally be subject to bonding except to the extent that monies returned by way of benefit payments, cash surrender, dividends, credits or otherwise, and which by the terms of the plan belong to the plan (rather than to the employer, employee organization or insurance carrier), were subject to "handling" by a plan official.

## Are there any other exemptions from ERISA's bonding requirements?

Yes. ERISA and underlying DOL regulations provide exemptions for some regulated financial institutions, including certain banks, insurance companies, and registered brokers and dealers. If the financial institution meets the conditions in the exemption, the institution and its employees do not need to be covered by an ERISA fidelity bond even if their activities include handling your plan's funds or property.

## Must all fiduciaries be bonded?

No. Most fiduciaries have roles and responsibilities that involve handling plan funds or other property, and generally will need to be covered by a fidelity bond, unless they satisfy one of the exemptions in ERISA or the DOL's regulations. However, an ERISA fidelity bond would not be required for a fiduciary who does not handle funds or other property of an employee benefit plan.

## Must service providers to the plan be bonded?

It depends. A service provider, such as a third-party administrator or investment advisor, must be bonded if the service provider or its employees handle funds or other property of your employee benefit plan.

## How much coverage must the bond provide?

Generally, each person must be bonded in an amount equal to at least 10% of the amount of funds he or she handled in the preceding year. The bond amount cannot, however, be less than $1,000, and the DOL cannot require a plan official to be bonded for more than $500,000, or $1,000,000 for plans that hold employer securities. These amounts apply for each plan named on a bond.

For example, assume your company's plan has funds totaling $1,000,000. The plan trustee, named fiduciary and administrator are three different company employees that each have access to the full $1 million, and each has the power to transfer plan funds, approve distributions, and sign checks. Under ERISA, each person must be bonded for at least 10% of the $1 million, or $100,000.

## Can a bond insure more than one plan?

Yes. ERISA does not prohibit more than one plan from being named as an insured under the same bond. Any such bond must, however, allow for a recovery by each plan in an amount at least equal to that which would have been required for each plan under separate bonds. Thus, if a person covered under a bond has handling functions in more than one plan insured under that bond, the amount of the bond must be sufficient to cover such person for at least 10% of the total amount that person handles in all the plans insured under the bond, up to the maximum required amount for each plan.

## If the plan purchases a bond to meet ERISA's requirements, may the plan pay for the bond out of plan assets?

Yes. The plan can pay for the bond using the plan's assets. The purpose of ERISA's bonding requirements is to protect the plan. Such bonds do not protect the person handling plan funds or other property or relieve them from their obligations to the plan, so the plan's purchase of the bond is allowed.

## Can a plan purchase a bond for a larger amount?

Yes. The plan can purchase a bond for a higher amount in appropriate cases. Whether a plan should spend plan assets to purchase a bond in an amount greater than that required by ERISA is a fiduciary decision.

## Who is responsible for making sure that the plan has proper bonded coverage?

The responsibility for ensuring that the plan has proper bonding coverage may fall on a number of individuals simultaneously. All persons who handle plan funds or other property are responsible for complying with the bonding requirements themselves. In addition, any other person who has authority to authorize another person to perform handling functions is also responsible for ensuring that those persons are properly bonded. For example, if a fiduciary hires a trustee for a plan, the fiduciary must ensure that the trustee is properly bonded or covered by an exemption.

## If a service provider is required to be bonded, must the plan purchase the bond?

No. A service provider can purchase its own separate bond insuring the plan. The plan may agree with the service provider that the service provider will pay for the bond. Plan fiduciaries can also decide to add a service provider to the plan's existing fidelity bond.

*Source: U.S. Department of Labor*

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