FIDUCIARY STANDARDS UNDER ERISA

WHAT TRUSTEES NEED TO KNOW

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INTRODUCTION

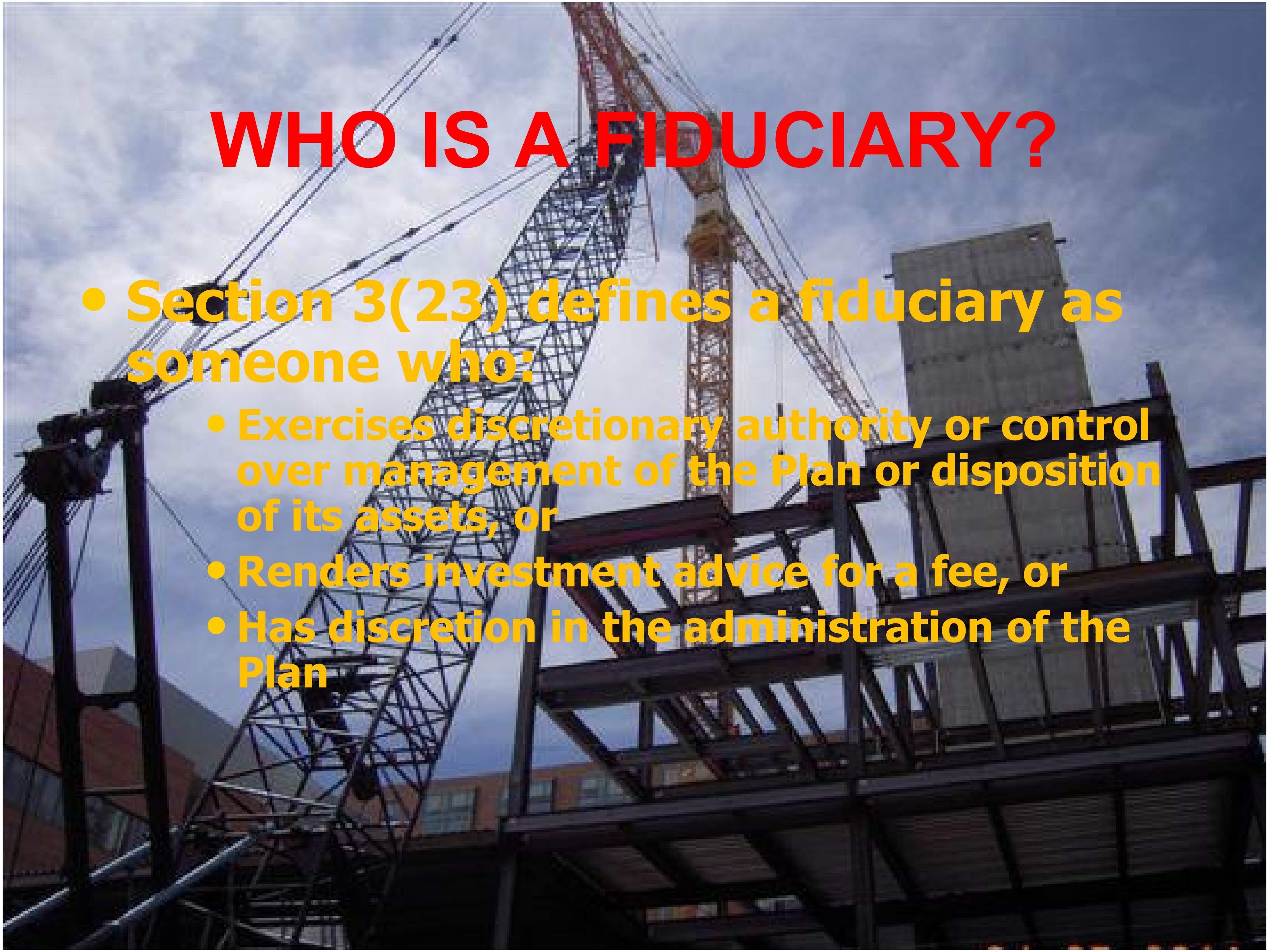
- Title I of the Employee Retirement Income Security Act, at Part 4, sets forth the fiduciary rules that Fund Trustees must know about and follow in order to satisfy their duties to Plan participants and beneficiaries
- Section 409 imposes personal liability on a fiduciary who breaches his duties to make good to the plan for any losses to the plan resulting from the breach and to restore to the plan any profits made by the fiduciary by misuse of plan assets
- Section 502(l) imposes civil penalties on violations by fiduciaries of 20% of the amount recovered because of the breach

CONGRESSIONAL FINDINGS

- **In enacting ERISA, Congress declared that the policy of the Act included establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans <u>and</u> providing for appropriate remedies, sanctions, and ready access to Federal courts**

FIDUCIARY STANDARDS UNDER PART 4

- Establish the Plan
- Establish the Trust
- Fiduciary Duties
- Liability for Breach of Co-Fiduciary
- Prohibited Transactions
- Limitation on holding Employer securities and real property
- Prohibited Transaction Exemptions
- Liability for Breach of Fiduciary Duty
- Exculpatory Provisions (Insurance)
- Persons Prohibited from holding certain positions
- Bonding
- Limitation of Actions



WHO IS A FIDUCIARY?

- Section 3(23) defines a fiduciary as someone who:
  - Exercises discretionary authority or control over management of the Plan or disposition of its assets, or
  - Renders investment advice for a fee, or
  - Has discretion in the administration of the Plan

ESTABLISHING THE PLAN AND TRUST

- **The Plan must be established and maintained by written instrument. The document must provide for one or more named fiduciaries who jointly or severally have the authority to control and manage the operation and administration of the Plan.**
- The Plan must:
    - Have a procedure for a funding policy
    - Describe how responsibilities for operating and administering the Plan are allocated
    - Have a procedure for amending the Plan and identify who has the authority to amend
    - Specify how payments are made to the Plan

ESTABLISHING THE PLAN AND TRUST

- All assets of the Plan shall be held in trust by the Trustees
- The Trustees have the exclusive authority and discretion to manage and control the assets of the Plan, except:
  - Where authority to manage has been properly delegated to an investment manager
- The assets of the Plan shall never inure to the benefit of any employer and must be held for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable Plan costs

FIDUCIARY DUTIES

- A fiduciary must discharge his duties solely in the interest of the participants and beneficiaries and
  - Å For the exclusive purpose of providing benefits and defraying Plan reasonable expenses
  - Å With the care, skill, prudence and diligence under the circumstances that a prudent man acting in like capacity would use
  - Å By diversifying Plan investments to minimize the risk of large losses, and
  - Å In accord with the governing Plan documents

LIABILITY FOR CO-FIDUCIARY BREACH

- **A fiduciary is liable for a breach committed by a co-fiduciary if:**
  - He knowingly participates in the breach or knowingly conceals it
  - By his failure to comply with the prudent man rules, he enables the co-fiduciary to commit the breach, or
  - He has knowledge of the breach and fails to make reasonable efforts to remedy it
- **If an investment manager is appointed, the trustee is not liable for the IM's acts or omissions**

PROHIBITED TRANSACTIONS

- Transactions between the Plan and a Party-in-Interest
- Transactions between the Plan and a Fiduciary
- Transfer of real or personal property to the Plan by a Party-in-Interest

PROHIBITED TRANSACTIONS

- Transactions between the Plan and a Party-in-Interest-what is prohibited:
  - Sale or exchange, or leasing, of any property
  - Lending of money or other extension of credit
  - Furnishing of goods, services or facilities
  - Transfer to, or use by or for the benefit of any PII of any Plan assets
  - Acquisition of any employer security or real property in violation of Section 407(a)

- ***BUT, SEE SECTION 408 EXEMPTIONS***

- Party-in-Interest includes any Plan fiduciary, counsel, Plan employee, Plan service provider, contributing employer, or union

PROHIBITED TRANSACTIONS

- **Transactions between the Plan and a fiduciary-what is prohibited:**
  - **Self-interest dealing with Plan assets**
  - **Acting in a transaction involving the Plan on behalf of someone whose interests are adverse to the Plan, or**
  - **Receiving any personal consideration from someone dealing with the Plan in connection with a transaction involving Plan assets**

PROHIBITED TRANSACTIONS

- **Transfer of real or personal property to the Plan by a Party-in-Interest- what is prohibited:**
  - **This is treated as an unlawful sale or exchange if the property is subject to a mortgage or lien which the Plan assumes**

EXEMPTIONS TO PROHIBITED TRANSACTIONS

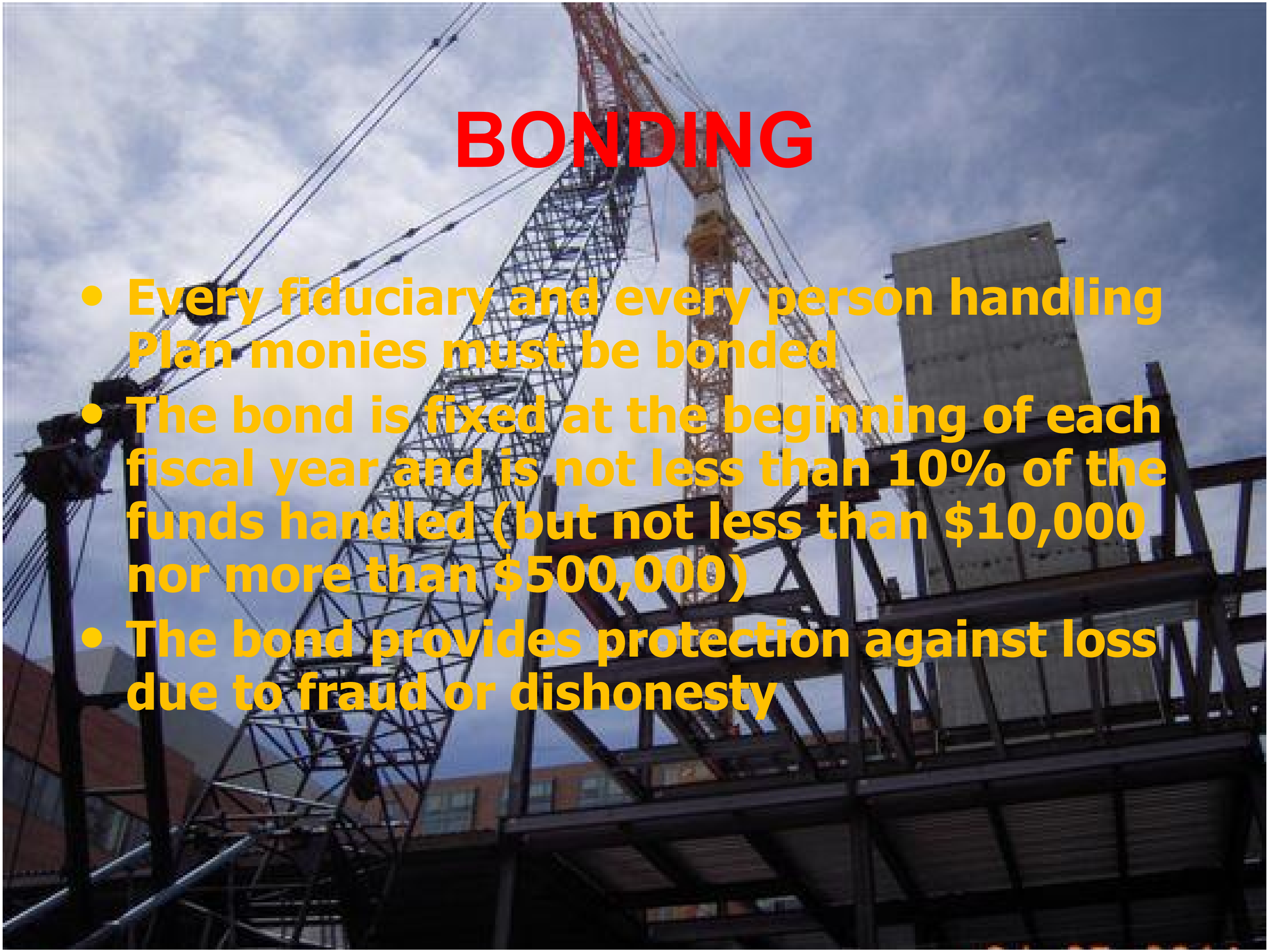
- The Secretary of Labor has an exemption procedure
- Statutory exemptions include:
  - Loans from the Plan to participants and beneficiaries if certain conditions met
  - Contracting with a Party-in-Interest for office space, legal, accounting, or other services necessary to operate the Plan if only reasonable compensation is paid
  - Any transaction between the Plan and a common or collective trust fund or pooled investment fund maintained by a Party-in-Interest which is a bank or trust company or insurance company if certain conditions are met
- Fiduciary is permitted to receive any benefit he is entitled as a participant or beneficiary in the Plan
- Fiduciary may receive reimbursement of expenses actually and properly incurred in the performance of his duties with the Plan
- Individual may serve as a fiduciary as well as an officer, agent or employee of a Party-in-Interest

LIABILITY FOR BREACH

- **The fiduciary is personally liable to make good to the Plan any losses resulting from the breach and restore any profits of the fiduciary made through use of Plan assets**
- **May be removed as fiduciary**
- **Not liable for a breach committed before he became a fiduciary or after he ceased to be a fiduciary**

EXCULPATORY PROVISIONS; INSURANCE

- Any provision in the Plan or Trust that purports to relieve a fiduciary from responsibility or liability is void as against public policy
- A Plan is allowed to buy fiduciary insurance to cover losses from fiduciary acts or omissions if the policy permits recourse against the fiduciary
- The fiduciary, in turn, may buy insurance to cover his liability (i.e., non recourse premium-$25)
- The Employer or Union may buy insurance to cover potential liability of one or more persons serving as fiduciaries


BONDING
• Every fiduciary and every person handling Plan monies must be bonded
• The bond is fixed at the beginning of each fiscal year and is not less than 10% of the funds handled (but not less than $10,000 nor more than $500,000)
• The bond provides protection against loss due to fraud or dishonesty

ENFORCEMENT

- Criminal penalties ($100,000 fine / prison) for willful violations
- Civil liability
  - Restore plan losses
  - Civil penalty of 20% of the recovery amount

CONCLUSION

- Questions

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