FIRMA National Training Conference 2019

ERISA Update: Tips & Traps for Fiduciaries

Jason Roberts
CEO, Pension Resource Institute
Partner, Retirement Law Group

Agenda

- Fiduciary "Investment Advice" vs. Education
- Fiduciary Duties & Prohibited Transactions
- Special Considerations Re: Cross-Selling & IRA Rollovers
- Prudent Selection/Monitoring Investments & QDIAs
- Selection & Monitoring of Service Providers
- Plan Administration & Reporting
- Best Practices for Best Interest™

A person is a fiduciary if he/she:

- Exercises discretion over the management of the plan or plan assets
- Renders investment advice to a plan or plan participant for compensation
- Has any discretionary authority in the administration of the plan.

See ERISA Sec. 3(21)

A person is a NOT a fiduciary with respect to other services provided, which are authorized, even if the person is acting as an ERISA fiduciary with respect to one or more of the above functions.

Definition of "Investment Advice"

ERISA plan participant education =

- Plan information;
- General financial, investment and retirement information;
- Asset allocation models;* and/or
- Interactive investment materials.

** Asset allocation models must contain specific disclaimers for ERISA plan participants and are not considered education for IRA clients or plan sponsors.*

See DOL Interpretative Bulletin 96-1

A fiduciary must use objective process..

that, among other things, gives "appropriate consideration" to those facts and circumstances that… the fiduciary knows <u>or should know are relevant</u> to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the [client's] investment portfolio with respect to which the fiduciary has investment duties.

See 29 CFR 2550.404a-1

Fiduciaries must act…

"solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan."

See ERISA 404(a)(1)(A)

Fiduciaries are prohibited from…

- Self dealing – providing advice that will increase the compensation paid to the advisor, his/her supervising firm and/or any affiliate(s);
- Dual representation – acting on behalf of or representing a party dealing with the plan in a transaction involving the assets of the plan; or
- Third party payments – receiving any consideration for his/his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

PRI

Fiduciary Conflicts

- Will advice or discretion result in an increase in compensation, dual representation and/or third-party payment(s)?
- If yes = Prohibited Transaction (PT).

Resolutions

- What remedies are available to eliminate the conflict / PT?
- If none, what Prohibited Transaction Exemptions (PTEs) are applicable?

Implementation

- What conditions must be satisfied to comply with the PTE?
- Can the firm reasonably expect to support the operational challenges of the PTE conditions?

Repeat Analysis for Each Recommendation

Advisory Opinion 2005-23A sets forth the DOL's position with respect to cross-selling (marketing additional services or products, including IRA rollovers, to plan participants and beneficiaries) stating that:

- ✓ using one's "authority" which makes him/her a fiduciary;
- ✓ to cause a participant to take a distribution; and
- ✓ coupled with a recommendation to invest the proceeds in a manner that results in greater compensation; being paid to the fiduciary (or his/her affiliates)

… may result in a violation of ERISA § 406(b).

DOL Guidance on IRA Rollovers (AO 2005-23A)

	Least Risk	Proceed with Caution	Most Risk
Does the Advisor provide fiduciary services to the Plan Sponsor?	No. Advisor's role is limited to investment education.	Yes.	(intentionally left blank)
Does the Advisor provide fiduciary services to Plan Participants?	No. Advisor's role is limited to investment education.	No.	Yes.

Special Considerations for IRA Rollovers

Advice	Education = Describing
DOL Advisory Opinion 2005-23A suggests that if one is already serving in a fiduciary capacity (i.e., plan sponsor advice or discretion or participant advice or discretion), then it may view advice concerning a distribution from the plan as an extension of your fiduciary authority. *See e.g., PRI Advisor Training – IRA Rollovers: Regulatory Considerations & Best Practices* THIS OPINION IS CURRENTLY UNDER REVIEW BY DOL AND GUIDANCE OR RULEMAKING IS EXPECTED.	▪ terms or operation of the plan/IRA; ▪ benefits of plan/IRA participation or increasing plan/IRA contributions; ▪ retirement income needs, impact of preretirement withdrawals on retirement income, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options; ▪ advantages, disadvantages & risks of different forms of distributions, including rollovers; ▪ product features and fee & expense information; and/or ▪ investment alternatives available under the plan or IRA.

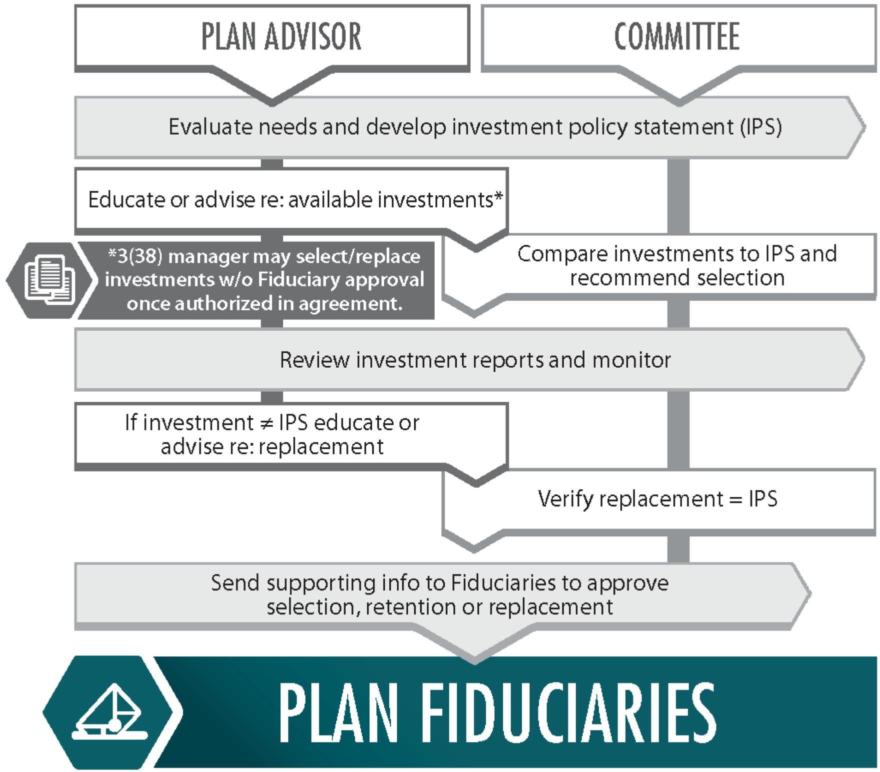
Prudent Selection/Monitoring of Investments & QDIAs

PRI

Three key risks for ERISA fiduciaries:

1. Procedural Prudence;
2. Avoidance of Prohibited Transactions; and
3. Co-Fiduciary Liability

See ERISA §404, 406(b) & 405.



PRI G-MAP at P. 4

QDIA relief is conditioned upon…

- Assets must be invested in a QDIA;
- Participants must have been given an opportunity to provide investment direction, but have not done so;
- Notice must be furnished in advance and annually thereafter; and
- The plan must offer a "broad range" of investments.

However, the regulation does not absolve fiduciaries of the duty to prudently select and monitor QDIAs.

QDIA Types

SELECT QDIA TYPE → DOCUMENT BASIS FOR DECISIONS → REVIEW PERIODICALLY

OPTION 1: GROUP-BASED INVESTMENT PRODUCT	**DESCRIPTION** A product with a mix of investments that takes into account the characteristics of the group of employees as a whole, rather than each individual. **EXAMPLE** A balanced fund.	**ADDITIONAL CONSIDERATIONS** **Option 1 may be an appropriate QDIA when:** • Employee ages and incomes are a narrower range; • Defaulted participants may be capable of determining when to allocate funds to more conservative investments over time; and • Changes to employee demographics can be readily monitored.
OPTION 2: INDIVIDUALLY-BASED INVESTMENT SERVICE	**DESCRIPTION** An investment service that allocates contributions among existing plan options to provide an asset mix that takes into account the individual's age or retirement date. **EXAMPLE** A professionally-managed account.	**ADDITIONAL CONSIDERATIONS** **Option 2 may be an appropriate QDIA when:** • Employee ages and incomes are widely dispersed; • Defaulted participant may not be allocating funds to more conservative investments over time; • Employee demographics are difficult to monitor; • Investment managers are readily available; and • Fiduciaries are equipped to prudently select and monitor an investment manager.
OPTION 3: INDIVIDUALLY-BASED INVESTMENT PRODUCT	**DESCRIPTION** A product with a mix of investments that takes into account the individual's age or anticipated retirement date. **EXAMPLE** A life-cycle or targeted-retirement date fund.	**ADDITIONAL CONSIDERATIONS** **Option 3 may be an appropriate QDIA when:** • Employee ages and incomes are widely dispersed; • Defaulted participant may not be capable of allocating funds to more conservative investments over time; • Employee demographics may be difficult to monitor; • Investment managers are limited; and • Fiduciaries are not equipped to prudently select and monitor an investment manager.

"Because these differences can significantly affect the way a TDF performs, it is important that fiduciaries understand these differences when selecting a TDF as an investment option for their plan." Specifically, you should:

- Establish a process to select & review TDFs;
- Understand TDF allocations & changes over time;
- Review TDF fund fees and overall expenses;
- Inquire into fit of custom or non-prop alternative;
- Develop effective communications; and
- Document your findings.

Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries

U.S. Department of Labor
Employee Benefits Security Administration
February 2013

Target date retirement funds (also called target date funds or TDFs) have become an increasingly popular investment option in 401(k) plans and similar employee-directed retirement plans. The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) prepared the following general guidance to assist plan fiduciaries in selecting and monitoring TDFs and other investment options in 401(k) and similar participant-directed individual account plans. Employers and other plan fiduciaries can learn more about their fiduciary responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA) by visiting EBSA's website at www.dol.gov/ebsa/compliance_assistance.html.

Target Date Fund Basics

With the growth of 401(k) and other individual account retirement plans, many more participants are responsible for investing their retirement savings. Target date retirement funds, or TDFs, can be attractive investment options for employees who do not want to actively manage their retirement savings. TDFs automatically rebalance to become more conservative as an employee gets closer to retirement. The "target date" refers to a target retirement date, and often is part of the name of the fund. For example, you might see TDFs with names like "Portfolio 2030," "Retirement Fund 2030," or "Target 2030" that are designed for individuals who intend to retire during or near the year 2030. Because of these features, many plan sponsors decide to use TDFs as their plan's qualified default investment alternative (QDIA) under Department of Labor regulations. A QDIA is a default investment option chosen by a plan fiduciary for participants who fail to make an election regarding investment of their account balances.[1]

TDFs offer a long-term investment strategy based on holding a mix of stocks, bonds and other investments (this mix is called an asset allocation) that automatically changes over time as the participant ages. A TDF's initial asset allocation, when the target date is a number of years away, usually consists mostly of stocks or equity investments, which often have greater potential for higher returns but also can be more volatile and carry greater investment risk. As the target retirement date approaches (and often continuing after the target date), the fund's asset allocation shifts to include a higher proportion of more conservative investments, like bonds and cash instruments, which generally are less volatile and carry less investment risk than stocks. The shift in the asset allocation over time is called the TDF's "glide path." It is important to know whether a target date fund's glide path uses a "to retirement" or a "through retirement" approach. A "to" approach reduces the TDF's equity exposure over time to its most conservative point at the target date. A "through" approach reduces equity exposure through the target date so it does not reach its most conservative point until years later.

Within this general framework, however, there are considerable differences among TDFs offered by different providers, even among TDFs with the same target date. For example, TDFs may have different investment strategies, glide paths, and investment-related fees. Because these differences can significantly affect the way a TDF performs, it is important that fiduciaries understand these differences when selecting a TDF as an investment option for their plan.

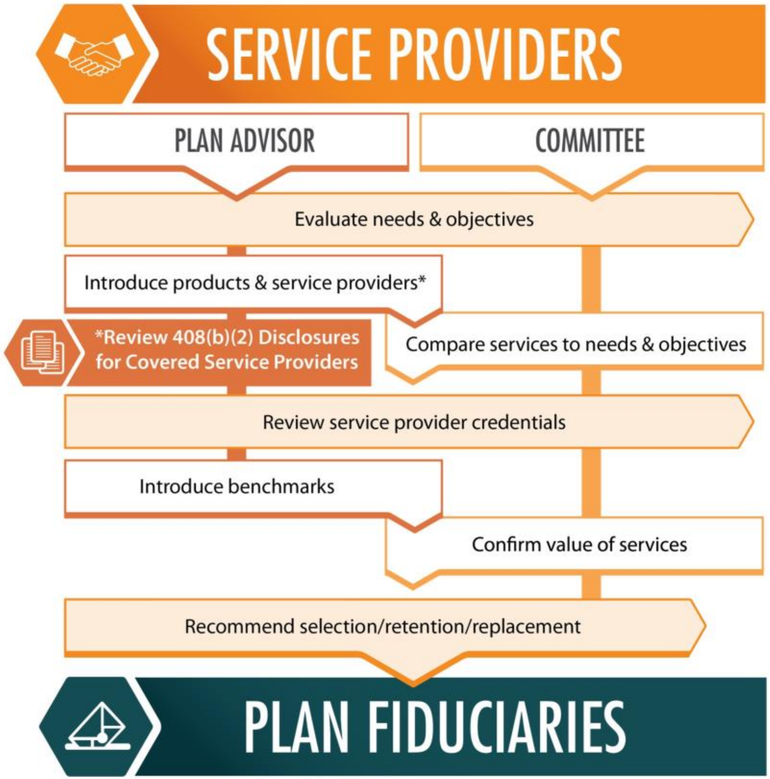
[1] More information on QDIAs is available in the Department's publication "Automatic Enrollment 401(k) Plans for Small Businesses" (available at http://www.dol.gov/ebsa/pdf/automaticenrollment401kplans.pdf).

Selection & Monitoring of Service Providers

Most plan fiduciaries require some degree of support in the service provider selection/ monitoring process.

The flowchart on the right shows how an experienced retirement plan advisor can help.

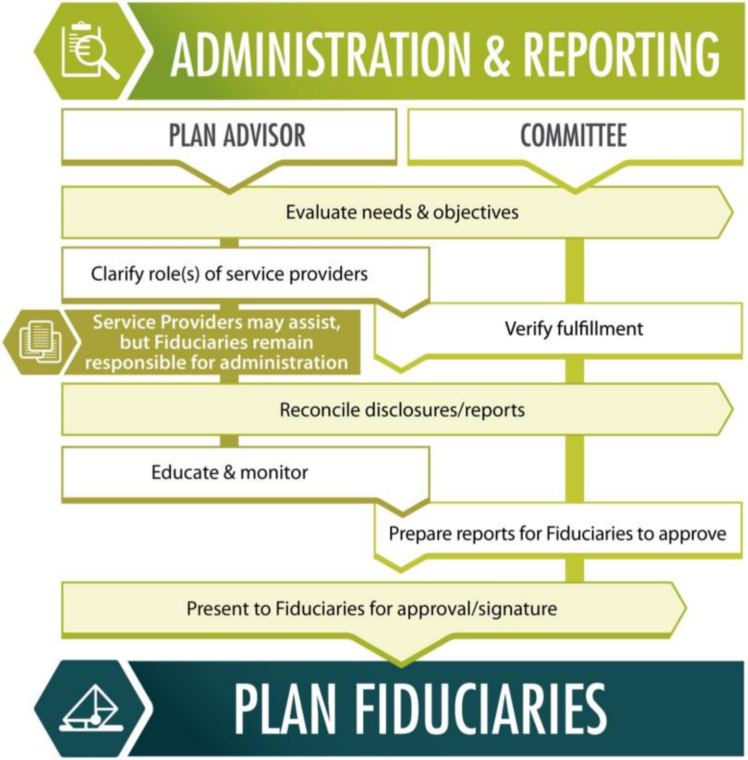
Note: Plan fiduciaries remain responsible for selecting, monitoring and replacing service providers.



Most plan fiduciaries require some degree of support in meeting the administration and reporting requirements.

The flowchart on the right shows how an experienced retirement plan advisor can help.

Note: Plan fiduciaries remain responsible for ensuring the plan is properly administered and all required notices/filings have been sent.



When *recommending* a rollover…

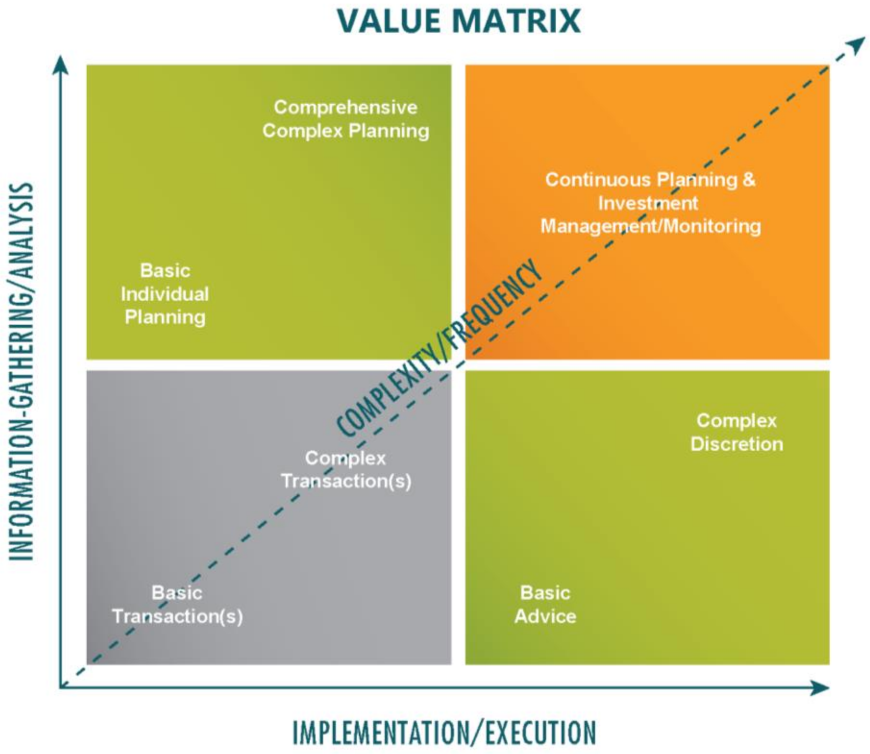
- Document and confirm (via attestation) client's goals;
- Consider whether goals can be met in current or new plan;
- If not, document specific reasons why IRA is in client's best interest, including:
  - all expenses associated w/ both the plan and IRA;
  - whether the employer pays any administrative expenses in plan;
  - different levels of service and investments available in plan vs. IRA vis-à-vis client's written goals; and
  - basis upon which you determined your compensation to be reasonable in light of the value of services provided.

If you are already a fiduciary…

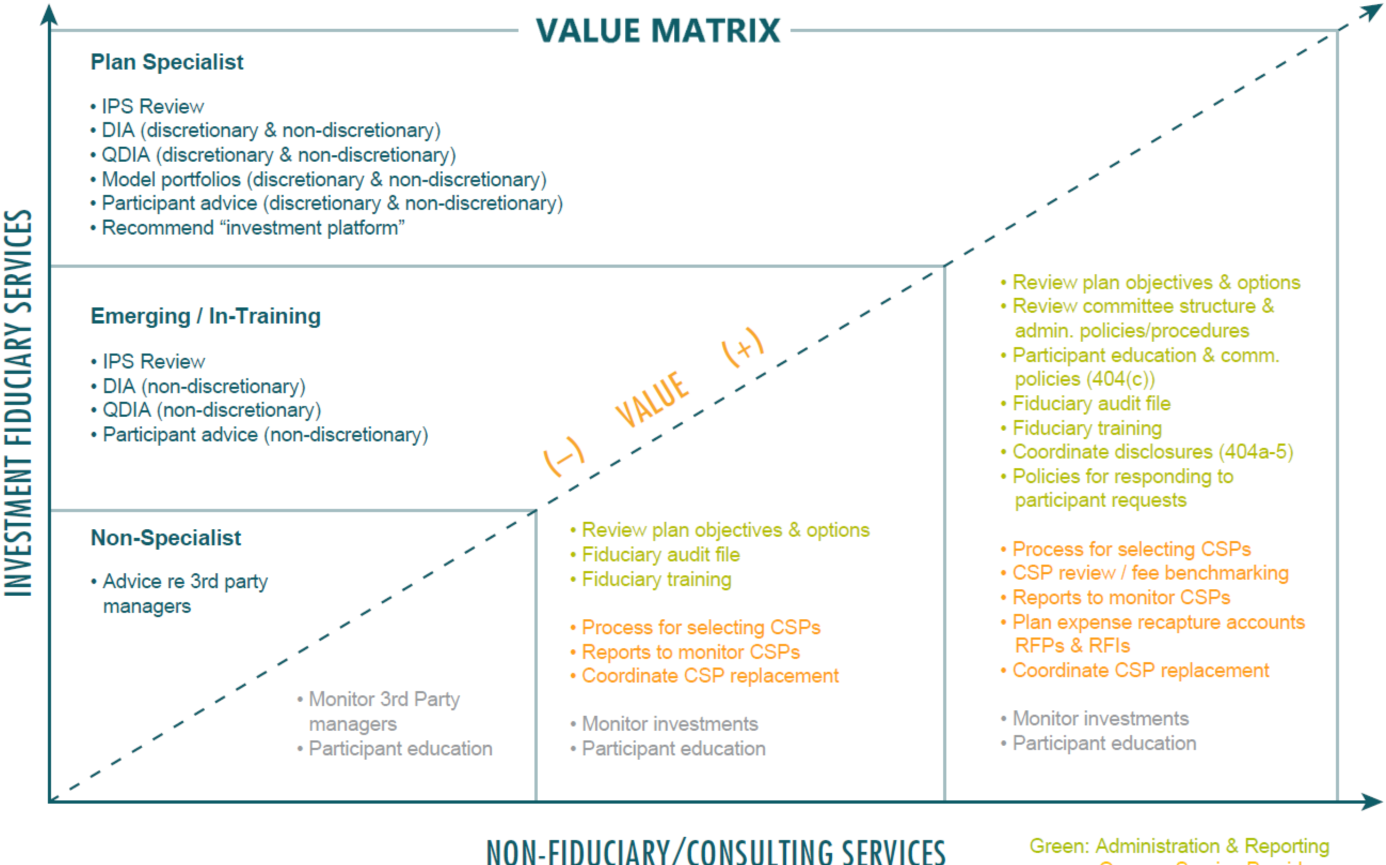
- Consider adopting an education-only approach; or
- If rollover advice is allowed by your supervisor, then focus on demonstrating that:
  - You didn't "use the authority that makes you a fiduciary" to "cause" a participant to take a distribution from his/her ERISA-covered plan (e.g., distinguish between plan-level fiduciary services and participant-level "one-time" recommendation to roll over);
  - The participant had independently elected to take a distribution;
  - Conflicts were fully disclosed;
  - Recommendation was prudent and in participant's best interest; and
  - Compensation is reasonable in light of the value of services provided.

Reasonable compensation =

- Value of services provided in alignment with the needs of the client;
- "value" is based upon the nature, scope and frequency of services provided; and
- background, experience and credentials of the fiduciary.


VALUE MATRIX
Comprehensive Complex Planning
Continuous Planning & Investment Management/Monitoring
Basic Individual Planning
COMPLEXITY/FREQUENCY
Complex Discretion
Complex Transaction(s)
Basic Transaction(s)
Basic Advice
INFORMATION-GATHERING/ANALYSIS
IMPLEMENTATION/EXECUTION

Best Practices for Best Interest™



Green: Administration & Reporting
Orange: Service Providers
Grey: Investments

Best Practices for Best Interest™

- Fiduciaries and committee members are educated and understand their roles and responsibilities;
- The plan is administered and operated in accordance with the Plan Document;
- Services provided to the plan are necessary;
- Expenses are properly paid from plan assets and CSP disclosures are current;
- CSPs are delivering services in accordance with the terms of their arrangements, and fees paid to CSPs continue to be reasonable in light of the value received;
- All notices and required disclosures and reports are timely and accurately delivered;
- Compliance documentation is retained and current;
- Investments are selected, monitored and replaced in accordance with the IPS; and
- Participants receive sufficient information from which to direct the investment of their individual accounts.

FOR MORE INFORMATION:

PRI
PENSION RESOURCE INSTITUTE

PENSION-RESOURCES.COM

@PensionResource

RLG RETIREMENT LAW GROUP

RETIREMENTLAWGROUP.COM

@RetirementLaw