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Fiduciary Best Practices

Navigating the waters to safeguard your plan.

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When Doug Stalter, a vice president and retirement plan consultant with Oswald Financial Inc. in Cleveland, first meets with a new sponsor client, he tries to identify any fiduciary red flags immediately by reviewing a detailed 40-to-50-point risk assessment. Call it a fiduciary checkup that will help prioritize or triage any pressing concerns.

“It starts with sitting down across from our clients and understanding what’s going on with their business and who’s handling what responsibilities,” Stalter says. “Then we go through, from top to bottom, the [retirement] plan over a period of time, to make sure everything’s been looked at, it’s been documented, and there’s an ongoing process and procedure.”

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When it comes to protecting a sponsor from litigation, there are no guarantees. But legal counsel and advisers point to a multifaceted approach that can provide guardrails—and, should a defense be needed, exhibits the sponsor’s fiduciary care.

“People get sued all the time, no matter how well they follow ERISA [Employee Retirement Income Security Act],” says David Kaleda, a principal in Groom Law Group, Chartered, in Washington. “But if they demonstrate good procedural prudence, it will be easier to extricate themselves from litigation sooner.”

Process Is Key

Kaleda stresses not only the importance of establishing a strategy but of then following it and documenting one’s progress thoroughly. This means the fiduciaries should, among other things, implement a good governance structure, regularly review the plan’s investment options and service providers, hire appropriately qualified service providers such as investment advisers to help perform fiduciary functions, and document the reasoning behind all fiduciary decisions.

“It’s really all about process,” he says, “What I mean is documenting decisions that are made by fiduciaries, so you have that as a record and documenting it well enough to show a well-thought-out reason for the decisions you made at the time.”

Kaleda has seen vulnerabilities appear when fiduciaries made a decision that likely was even well reasoned but was recorded poorly. “You obviously won’t remember what you did six years ago,” he says.

Committee Member Selection

Jodi Epstein, a partner in Ivins, Phillips & Barker, Chartered, in Washington, urges her clients to select engaged and available employees to be committee members from the outset. While this is not a legal requirement, she has seen how thoughtful planning from the start can prevent problems later. And, given that fiduciary duties involve meeting regularly, finding committee members who are focused and free to attend can help, she says.

“You want people who can make it to the meetings and who are reliable,” she says. “Sometimes, people are unreliable because they get double and triple booked. Then you lose a quorum, and your meeting falls apart.”

Based on her experience, she says, smaller committees tend to function efficiently, and having an odd number of people prevents tie votes by design. Ideally, she likes to see committees of three to five members, representing the benefits, operations and finance divisions of a company.

Rules of the Road

Establishing how the committee runs is the next step, which could involve establishing a charter or, for an individually designed plan, relying on provisions in the plan document itself. Epstein depends on these organizing documents to help outline how the committee functions—e.g., they spell out whether decisions require a majority vote or a unanimous vote. Having fiduciary training for new members, followed by annual reviews, is also key, she says.

Fiduciary Training

Percy Lee, of counsel also with Ivins, Phillips & Barker, Chartered, in Washington, agrees, urging robust fiduciary

training that covers all committee duties. One necessary piece of preparation, he says, is to separate members' business- and fiduciary-decisions.

Fiduciary training, besides covering the basics, should clarify "how fiduciary concerns differ from concerns [the members] might have in their non-committee roles at the company," Lee says. For instance, deciding whether to adopt optional features of the SECURE 2.0

[Setting Every Community Up for Retirement Enhancement] Act would be a company function, but once the decision is made, to implement it properly according to the terms of the plan and requirements of the law would be a fiduciary function.

Outsource Committee Duties

Not everyone is an expert, and the flexibility to hire experts permitted by ERISA may be beneficial for some sponsors.

"If I'm the plan sponsor, [I] want to designate people who are [or] want to be fiduciaries. But those fiduciaries can [still] hire experts and service providers to help them," Kaleda says, giving the example of an officer at a trucking company, who may lack the investment expertise needed to oversee plan investment decisions.

Split Duties When Necessary

Some large-plan sponsors that Kaleda works with find success in dividing up committee duties. A subcommittee of three to five individuals, helmed at some companies by the chief investment officer, will oversee investment decisions. In that case, the senior vice president of human resources and benefits might be tasked with the day-to-day running of the plan.

"In a smaller-plan environment, it may just be the business owner, and that's OK," Kaleda says, "but you want to have clear lines of who does what. You want to try and avoid 'accidental fiduciaries,' meaning people who are actually acting as fiduciaries and don't know it."

Mind the Minutes

According to Epstein, the intent of minutes is to document one's process. She says they should describe the topics discussed at any meetings with experts, such as investment advisers or the recordkeeper, along with recording any key decisions. But there is a fine line between being overly detailed and informative, she says.

"It shouldn't be a transcript, but it also shouldn't be the agenda," Epstein says. "If the committee is behaving as it should, it should get credit for grappling with issues."

Lee recommends that the minutes accurately reflect attentive and careful thought being put into overseeing the plan and ultimately showing that committee members are people willing to ask the right questions to get to a reasonable decision based on the available information.

"The law doesn't require fiduciaries to be the experts on plan administration and require fiduciaries to be perfect," he says. "They are expected to be diligent and make reasonable inquiries, so they ask questions or seek expert advice."

Adopt a Compliance Calendar

Stalter recognizes that, while every organization operates differently, some tasks can fall through the cracks, so he supplies a compliance calendar to clients to help keep the required steps front and center.

"That helps manage the day-to-day throughout the year, making sure everyone's doing what he's supposed to be doing from a compliance perspective," he says.

Rely on Your IPS

Stalter has watched as much of the litigation, on a national basis, has come back not necessarily to any one decision that was made but to the process and procedures.

"The investment policy statement is the user's manual for that portion of the operation," Stalter says.

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