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Best Interest and Best Practices #8: Fiduciary Training - The Need for Basics

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This is the 8TH of a new series of articles titled "The Bests." The series focuses on Best Interest and Best Practices. Those topics give me flexibility to discuss a range of subjects that affect both service providers, including advisors, and plan sponsors, including 401(k) and 403(b) committees.

In three earlier posts—**Bests #4**, **#5**, and **#6**—about the **Sacerdote v. New York University** decision, I discussed the good and the bad of the NYU plan committee and made several suggestions about best practices for improving committee performance. This article focuses on one of those suggestions—fiduciary education for committee members.

As a starting point, there is not a legal requirement that committee members receive fiduciary training. Instead, it's a best practice and good risk management.

But, what should the fiduciary education cover? Based on my analysis of court decisions on fiduciary responsibility, I am worried that fiduciaries may not be adequately educated about their basic responsibilities and particularly their administrative oversight duties. If you look at decisions, such as the NYU case, the issues are basic. For example, one of the defendants did not know if he was still a member of the committee. Another committee member didn't believe that she was a fiduciary or that she had legal responsibility for the decisions made by the committee. Instead, she thought her role was ministerial, in terms of setting up the meetings and distributing information.

With that in mind, here are my thoughts about fiduciary education:

- Review the summary plan description.

One of the techniques used by plaintiffs' attorneys is to ask committee members about the provisions in the plan. What does the plan say about the responsibilities of the plan committee? Who appoints the plan committee? Who monitors the plan committee? What are the areas of responsibility for the committee members for oversight of the investments, the service providers, and the plan expenses?

Those questions and answers are basic to understanding the duties of a committee member. For example, committees are typically responsible for making sure that eligible employees are properly included in the plan, that compensation is calculated properly for determining contributions and benefits, that participant loans and hardship withdrawals are properly approved, and so on. While committee members are not responsible for doing the ministerial work related to those activities, they are responsible for overseeing that the work is done competently.

One approach—an easy one—is to review the summary plan description. I suggest that be done each year.

Also, it is helpful if the employees who are responsible for those activities, as well as representatives of the service providers, attend the meeting. They could explain how the responsibilities for plan administration are being fulfilled.

- Investment Policy Statement.

Plaintiff's attorneys will allege that the failure to follow the terms of an investment policy statement is a fiduciary breach. As a result, a plan's adviser should review the investment policy statement with the committee members at least once a year. The committee members should ask questions about the concepts and terminology, so that they fully understand their responsibilities.

Here, again, plaintiff's attorneys like to ask committee members about the investment line-up and about the type and purpose of the investments in the plan. Their goal is to show that the committee members didn't understand what they were doing.

- Hot topics for DOL investigations.

Obviously, committee members should know the areas of greatest concern for the Department of Labor. For many years now, the #1 issue for DOL investigations has been the late deposit of deferrals. Committee members should understand those rules, so that they can ensure that the company is properly forwarding deferrals.

A new DOL "hot topic" is whether plan fiduciaries are keeping track of missing participants. In some cases, DOL investigators are asserting fiduciary breaches due to the failure to make earnest and ongoing efforts to locate missing participants. That problem becomes particularly acute when missing participants reach age 70½ and must be paid their required minimum distributions. (Note that relief from disqualification and penalties is provided where committee members, as fiduciaries, have made diligent and good faith efforts to fund missing participants and to pay the required minimum distributions. That will be the subject of a future post.)

- Plan expenses.

It shouldn't come as any surprise that most fiduciary litigation is based on overly expensive investments and on excessive compensation to recordkeepers.

In other words, almost all ERISA fiduciary breach litigation—once you take out company stock and proprietary investments—is quantitative, rather than qualitative. By "quantitative," I am referring to the amount of money that is paid as expense ratios for mutual funds, and the amount of money that is paid, directly or indirectly, to plan recordkeepers.

Regarding expense ratios of plan investments, one type of claim is that the plan should have chosen a less expense share class. Essentially, that was the issue in *Tibble v. Edison*. In that case, even though the prospectuses had minimums for certain share classes, the expert witnesses testified that, if requested, retirement plans would be allowed to invest in a less expensive, institutional share class. In effect, the court created a "duty to ask."

In some cases, though, the issue is more simple . . . the allegation is that the committee selected investments that were too expensive, even if the right share class was picked.

In both cases, the solution is to work with an adviser that is knowledgeable about share classes available to plans of different sizes and that has information about what expense ratios are too high. It's possible that committee members could investigate on their own, but that's a risky proposition, since most committee members lack the fundamental knowledge to properly apply general information to their specific circumstances.

With regard to excessive costs and compensation for recordkeepers, plan committees should consider using benchmarking services. Recordkeeping expenses can vary dramatically depending on the assets in a plan and the number of participants. Benchmarking services provide a cost-efficient way to obtain the necessary data. On the other hand, requests for proposals and requests for information are also good ways to get information about costs, particularly if the requests are sent to recordkeepers who focus on plans that are similar to the plan sponsors. However, RFPs and RFIs are expensive and time consuming. As a result, most plan committees and advisers opt to use benchmarking services.

How often should a plan be benchmarked? A general rule of thumb is every three years, unless there's been a significant change in the interim, for example, a plan merger. However, it is a good practice to do it every year or two to keep the issue in front of the plan committee and to make sure that there is an ongoing discussion about the importance of monitoring fees and expenses.

Those are some of the key issues that should be covered in fiduciary education. I suspect that some of my suggestions are different than what is commonly done. However, based on my review of ERISA litigation and DOL investigations, the topics in this article should be at or near the top of the list.

The views expressed in this article are the views of Fred Reish, and do not necessarily reflect the views of Drinker Biddle & Reath.

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