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"Wrong" Ways

10 things you're (probably still) doing wrong as an ERISA fiduciary

One of the most popular (and now regular) sessions at the PLANSPONSOR National Conference is one we introduced several years back titled "10 Things You're (Probably) Doing Wrong as an ERISA Fiduciary." Not because those at the conference were lax or slipshod in their endeavors—quite the contrary. Those who seek to know what they might be doing wrong are not generally the ones that need the "help." However, because the standards imposed on plan fiduciaries by the Employee Retirement Income Security Act (ERISA) are—rightfully—demanding, the potential to misstep without meaning to is ever-present.

In putting together the list that follows, I have drawn on a familiar yet different source: the Employee Benefits attorneys that participated in our annual Employee Benefits Attorneys Guide (see *PLANSPONSOR*, August 2011).

I hope you find this list informative—and that you draw insight and comfort from its contents as well as a reminder of the awesome responsibilities you have as a plan fiduciary.

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1 ***Not knowing who the plan fiduciaries are.*** "We often see confusion and lack of clarity about who the fiduciaries actually are and what their obligations are under the plan," notes Monica Calhoun, Managing Partner at Centennial, Colorado-based Giller & Calhoun LLC. That's right, a big problem for ERISA fiduciaries is that sometimes they do not even know if they are one—or who else shares that status for the plan (odds are, if you are reading this, you are one).

"It is very important to identify who the fiduciaries are and to document their actions in carrying out their duties. Everyone associated with the plan should be cognizant of whether their responsibilities create fiduciary obligations. Conversely, it is important to draft the plan carefully to designate specifically those that are responsible for fiduciary obligations."

Moreover, for those who are fiduciaries, Paul Holmes, Chair of the Benefits Group at Ungaretti & Harris LLP, cites the failure to obtain professional assistance in obtaining and negotiating for proper fiduciary insurance coverage, as well as the failure by employees who serve as plan fiduciaries to investigate, understand, and request adequate employer indemnification. After all, if you are a plan fiduciary, your liability is personal, and it can extend to the actions of other plan fiduciaries. You may be required to restore any losses to the plan or to restore any profits gained through improper use of plan assets. You can obtain insurance to protect against that personal liability—but that is probably not the fiduciary liability insurance you may already have in place, or the fidelity bond that often is carried to protect the plan against loss resulting from fraudulent or dishonest acts of those covered by the bond. If you are not sure what you have, find out—now.

2 ***Not following the plan's definition of compensation for purposes of determining contributions or benefits and nondiscrimination testing.*** "This seems simple and basic, but often an in-house administrator starts to use the wrong pay, and everyone holding that job in the future keeps doing it the same wrong way," notes Jeff Cairns, Leonard, Street and Deinard PA.

In fact, the summer edition of the Internal Revenue Service's *Employee Plans News* newsletter took up the subject, noting that a plan document may have multiple definitions of compensation, including definitions for purposes of calculating salary deferrals, matching contributions, and discretionary contributions. The use of an incorrect definition of compensation can lead to operational errors in nondiscrimination requirements, the employer's deduction for plan contributions, and the determination of highly compensated or key employees, plan limits, and top-heavy minimum benefits.

"I recommend that plan administrators go through a payroll code list and match that list to the definition of compensation in the plan with respect to each type of contribution," counsels David Joffe of Bradley Arant Boult Cummings LLP in Nashville, Tennessee. "As a related matter, plan administrators need to understand the differences in the types of compensation used for different purposes, such as nondiscrimination testing."

Bernard G. Peter, Kubasiak, Fylstra, Thorpe & Rotunno, P.C., cites "excluding or intending to exclude part-time, seasonal, and temporary employees, but not incorporating language in the plan document, which provides that part-time, seasonal, and temporary employees will be eligible to participate in the plan if they complete 1,000 hours of service in an eligibility computation period."

3 ***Not making sure that fees are reasonable.*** One of the most widely cited fiduciary failures is failing to determine whether the fees being paid by the plan for administration and for investments are reasonable. "They do not compare their fees with those that are being paid by similar plans for similar services," explains Tom Lund of Minneapolis-based Oppenheimer Wolff & Donnelly LLP. "The second most frequent fiduciary mistake is failing to document the decision-making process. This is like giving a disgruntled participant's attorney the PIN to your bank account," he notes.

"In our experience, there are a number of plans that have not conducted competitive bids for recordkeeping services in many years. Plan fiduciaries will want to make sure that consideration of a competitive bid is at the top of their list—and that the consideration of the bid process is captured in the official fiduciary review process for 2012," observes Judith Boyette, Head of the Employee Benefits Practice Group at Hanson Bridgett LLP, San Francisco. Frank Palmieri, of Palmieri & Eisenberg, notes that another common issue is the "failure to document and understand expenses that may be charged to the popular ERISA accounts used to ensure vendors do not receive in excess of reasonable compensation."

A related shortcoming is failing to document your efforts in ascertaining the reasonableness of fees and services provided to the plan.

4 ***Failure to read the plan document.*** The plan document serves as the foundation for plan operations; it is, quite simply, the operating manual for your program. Sometimes, particularly if you are relying on a document that has been prepared by a third-party service provider, certain "gaps" can emerge between what the document allows and how the plan actually is administered. As a result, it is a good idea to conduct a document/process "audit" every couple of years—do not assume that "the way we've always done things" is supported by the legal document governing your plan.

"Even after 20-some (very happy) years in this business, I am still surprised by clients who have never read their plan document

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and who attempt to administer the plan solely by referring to the Summary Plan Description," notes Kathleen Odle, Manager of the Tax Department at Sherman & Howard L.L.C., in Denver. "This is the problem with the IRS's ever-increasing demands that plan documents follow the LRM language, which is barely comprehensible even to those of us who do this for a living… clients can't understand their plan and so don't even try to refer to the plan document when a question comes up."

There is, of course, the related issue of having language in the plan document that does not match the language in the Summary Plan Description. "This could be a potential problem for the employer under the *Cigna v. Amara* case, which states that the plan document governs unless the participant is impacted adversely by the SPD language," notes Peter.

Another related issue, the "failure to amend plan documents on a timely basis, is a big problem, given the increasing complexity of the rules," notes Robert B. Jones, CEO, Innovative Compensation and Benefits Concepts, LLC, in Bryn Mawr, Pennsylvania.

Remember as well that one of the primary duties of an ERISA fiduciary is to follow the terms of the plan document—a responsibility all the more challenging to fulfill if you have not read it.

5 *Not depositing contributions on a timely basis.*

"Lateness of contributions being applied to participants' accounts has increased throughout the recession," notes Jones.

The legal requirements for depositing contributions to the plan are perhaps the most widely misunderstood elements of plan administration, and a delay in contribution deposits is also one of the most common flags that an employer is in financial trouble—and that the Department of Labor is likely to investigate. Note that the law requires that participant contributions be deposited in the plan as soon as it is reasonably possible to segregate them from the company's assets, but no later than the 15th business day of the month following the payday. If employers can reasonably make the deposits sooner, they need to do so. Many have read the worst-case situation (the 15th business day of the month following) to be the legal requirement. It is not.

6 *Not monitoring funds on a regular basis.*

"Generally, there is a process for review and evaluation of funding vehicles at the time that they are selected. However, we frequently see that plans do not regularly monitor the performance and fees for the investment providers and funding vehicles that they have selected," observes Calhoun.

A related item is the failure to have an investment policy statement in place for the plan. ERISA does not require such a document, of course, though most find it easier to operate the way the law requires if they have that written "road map." It can help by outlining how the plan will achieve its investment goals and objectives—and it can serve as a template for reviewing those choices over time and making changes. Recall that one of the primary duties of an ERISA fiduciary is to "diversify plan investments."

Another related item is the failure to document when you do act to monitor and/or remove options from the fund menu.

7 *Not minding the "forest" as well as the trees.*

Over the years, our industry has been focused on the protections of ERISA 404(c), a provision that, if certain informational and transactional conditions are adhered to, purports to provide a litigation shield for plan fiduciaries from a participant that comes to regret his/her investment decision. The provisions necessary to earn that 404(c) shield are numerous and, by some accounts anyway, rarely achieved. However, as ERISA attorneys are prone to remind us, while 404(c) can be a good defensive strategy, there is a higher aspiration.

"We regularly meet new ERISA-governed clients with participant-directed defined contribution plans that are doing a good job with the mechanical requirements of the 404(c) regs but that are forgetting the overarching ERISA fiduciary rule that requires the fiduciaries of such a plan to select the plan's investment options the way a prudent expert would select retirement plan investment options, by utilizing the services of a prudently selected and monitored investment professional to find 'best-in-class' options in each category," observes Henry Smith, Smith & Downey, Baltimore

8 *Not paying attention to what your vendors are doing.*

Busy plan sponsors are hard-pressed to keep up with every piece of paper that crosses their desks, and plan administration requires a *lot* of paper. Having taken the time to carefully select and monitor capable providers to support their plan's administration, one can understand a tendency to rely on the experience and expertise of those providers. However, Holmes cites several areas where that trust can be dangerous, including the failure to read the fine print of vendor service agreements to see that no vendor takes responsibility for tax or legal compliance regarding a qualified retirement plan. Additionally, Holmes cites the failure to review, modify, and take responsibility for the content of quarterly participant statements prepared by recordkeepers, "many of which contain messages and other content developed by the recordkeeper, which may increase the fiduciary exposure of the plan committee." A failure to review carefully the content of "distribution/rollover" services to confirm the vendor is not selling investment products—which the plan committee may be held responsible for if they perform poorly—is another area, as is the failure to review accuracy of data input provided to the vendor for annual compliance testing, an issue that Holmes says is "compounded by failure to carefully review test results, which are the responsibility of the plan committee, not the vendor."

"I think the top problem is that fiduciaries fail to review or request legal review of plan communications drafted by prototype vendors or other third-party service providers who maintain that they are not themselves functioning as fiduciaries," notes Carol Buckmann, Counsel, Osler Hoskin & Harcourt LLP in New York. "The plan's fiduciaries remain responsible for the legal compliance of these documents and for the penalties for failure to comply, yet many simply distribute whatever the vendor provides."

9 ***Not fixing things that should be fixed.*** Employers and administrators consistently fail to take advantage of opportunities to identify and correct things they are doing wrong when they upgrade or convert employee benefits administration systems, human resources information systems, and/or payroll systems, observes Daniel J. Wintz of Fraser Stryker PC LLO, in Omaha, Nebraska. "These are the perfect opportunities to review employee benefit plan provisions and to properly program systems' rules for eligibility, years of service, compensation, benefit accrual, and other definitions and functions," he notes. "Failure to have a legal compliance review and integration at the time of an upgrade or conversion is simply 'paving the cow path,'" Wintz says, explaining that that means that, after the upgrade or conversion, the same mistakes will be made, but faster.

10 ***Not seeking the help of experts.*** ERISA imposes a duty of prudence on plan fiduciaries that often is referred to as one of the highest duties known to law—and for good reason. Those fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." The "familiar with such matters" is the sticking point for those who might otherwise be inclined simply to adopt a "do unto others as you would have others do unto you" approach. Similarly, those who might be naturally predisposed toward a kind of Hippocratic "first, do no harm" stance are afforded no such discretion under ERISA's strictures.

Albert Feuer of the Law Offices of Albert Feuer in Forest Hills, New York, cautions not only of the failure to have governing plan documents properly executed, but also the "failure to ask any outside counsel, who need not be a lawyer, to perform regular compliance checks of the plan governing documents and the plan practices." To state the obvious perhaps, Feuer notes that the failure to follow legal counsel's advice can be problematic, as well as the failure "to inform legal counsel promptly of such failure."

Simply stated, if you lack the skill, prudence, and diligence of an expert in such matters, you are expected to get help.

Note Nancy Lapera and George Kasper of the Employee Benefits Practice Group of Pullman & Comley, LLC, in Bridgeport, Connecticut, "The old adage of 'penny wise and pound foolish' is often proven true where fiduciaries who are reluctant to seek the advice of experts as to day-to-day administration of their plans are later faced with a significant plan event such as an IRS or DoL audit, a corporate transaction, or a plan termination."

—Nevin E. Adams, JD

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