



Straightforward Contract Pointers for Plan Fiduciaries Retaining Service Providers

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If you are a fiduciary of a qualified plan, such as an ERISA plan, and you anticipate entering or renewing a service agreement with a service provider, here are a few straightforward contract pointers for you (and your professional advisers) to consider during the review process.

- Confirm the appropriate signatory for the service agreement. For example, if a fiduciary committee seeks to retain a service provider, on behalf of a plan, that will provide services to the plan, we would generally expect the *committee* to be the signatory to the service agreement, *not* the plan sponsor. Plan sponsors generally delegate fiduciary responsibility as a form of risk management; thus, it would be counterproductive from a risk standpoint to use the plan sponsor as the signatory.
- Confirm whether the service provider will make the plan whole for losses caused by the service provider's errors (e.g., trading errors or errors made in following participant instructions, *including* errors made in good faith); confirm the service provider's insurance coverage and policy limits (e.g., fiduciary liability and errors and omissions insurance); and request a certificate of insurance for the insurance policies, as well as prompt notice of any adverse change to the policies.
- Discuss the schedule of services with your professional adviser or other plan representative to confirm that all the services set forth in the service agreement conform to your expectations. Generally, we recommend including more, rather than less, detail in the schedule of services so that clear lines of responsibility can be established by the parties.
- If your plan is relying on ERISA's 408(b)(2) prohibited transaction exemption (i.e., the service provider exemption) in order to enter into the service agreement, compare the draft fee schedule in the service agreement against the 408(b)(2)-related fee disclosure provided by the service provider (outlining the direct and indirect fees receivable by the service provider, its affiliates and subcontractors in connection with the agreement), and clarify and correct any discrepancies between the fee schedule and the fee disclosure before executing the service agreement.

These are examples of basic actions that, as a matter of prudence, plan fiduciaries should take in advance of entering or renewing service agreements that, surprisingly, are often not addressed.

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