Best Practices for ERISA Plan Fiduciary Governance

Answers to some common fiduciary governance questions.

By Nancy Gerrie and Joanna Kerpen

Plaintiffs' class action lawyers in fiduciary breach lawsuits, the US Department of Labor in ERISA plan audits, courts, and insurers have focused increased attention on how well ERISA plan fiduciaries follow procedural due process. Actions (or inactions) of committees and individual fiduciaries are scrutinized and judged in increasing detail, causing fiduciaries to wonder if they are up to date on all best practices for plan governance.

Following are some questions and answers that ERISA plan fiduciaries should keep in mind when considering whether they are following a prudent governance process in running their ERISA plans.

Are my delegations of authority accurate and up to date?

ERISA fiduciary authority originates with the owners/decision-makers at the sponsoring employer of the plan — which generally is the board of directors for most corporations, or a committee thereof. In most cases, the board will delegate almost all of its fiduciary authority to individuals or committees to run the ERISA plans (the board generally must retain the ERISA fiduciary duty of monitoring the activities of the individuals to whom it has delegated authority).

Fiduciary delegations of authority should be done in writing. You should make sure that your delegations of authority from the board to the next level of fiduciaries are accurate and up to date. If they need to be refreshed, it should be done via a written board resolution. Has there been a corporate reorganization, which would cause your old delegations to reflect outdated boards or information? Were individuals delegated specific authorities who are no longer in those positions, or no longer at the employer? Have position names changed? Inaccurate or outdated delegations of authority can be used by plaintiffs' attorneys in an attempt to demonstrate that the employer is asleep at the wheel.

At a larger company, there may be subcommittees or individuals who have been delegated fiduciary authority from a fiduciary committee to act on its behalf. Make sure those delegations of authority are in writing and up to date as well.

Do I need a committee charter for my ERISA fiduciary committee?

A well-crafted committee charter can be an invaluable trove of information for committee members and can protect ERISA fiduciaries from accusatory probes about how or why a committee acted the way it did in a given situation. It is a best practice for every fiduciary committee to have a charter that contains at least the following information:

- **Description of plans.** A good charter will describe the plans over which the fiduciaries have authority, which is a matter that is called into question surprisingly often, even by the fiduciaries themselves. The charter does not have to list every plan by name, although some do, but it should at least list the types of plans (e.g., retirement plans, health and welfare plans, stock plans, etc.), and in which countries the committee has jurisdiction. For a large employer with many entities, the charter should also indicate whether the committee has jurisdiction over all entities or select entities.
- **Types of duties.** The charter should describe the types of duties reserved to that committee. In most cases, plan committee duties will include both fiduciary and nonfiduciary (or "settlor") duties. Some committees want their charter to separately identify fiduciary and nonfiduciary duties, although frequently a particular duty will have both fiduciary and nonfiduciary characteristics.
- **Allocation of duties among committees.** If there is more than one fiduciary committee at the employer, it is advisable for the charter to reference the other committee(s) and generally describe the allocation of duties among them, for avoidance of doubt.
- **Committee members.** It is helpful to describe the types of members that will be on the committee and how they will be appointed or removed. How many members will be on

the committee? We generally see anywhere from 3 to as many as 15 or 20 members, although we think most employers designate between 3–5 members, and the number should be spelled out in the charter. Are retired employees allowed to serve on a committee? What characteristics should a committee member have? Describing appropriate characteristics in the charter is helpful in guiding the committee on how to choose new members, and in defending against plaintiff lawyers' complaints that members were chosen negligently or haphazardly. Will members be designated by title? If so, it would be helpful for the charter to explain in a few words why persons holding that title would be considered valuable for the committee.

- **Committee actions.** The charter should describe how often the committee is expected to meet, whether votes are required to be unanimous or majority (and what percentage constitutes a majority), how many members constitute a quorum, whether proxies can be given, if actions can be taken only at a meeting or if written consents can be submitted without a formal meeting, etc. Have the delegations of authority from the board allowed committees to appoint/remove their own members? If so, that should be documented, and the mechanism for how that is done should be described.
- **Delegation of authority.** It is important for the charter to describe how the committee can delegate its authority for various actions. Many committees will delegate a variety of lower level tasks (such as executing service provider agreements, authorizing payments, or signing plan amendments) to an individual committee member or subcommittee. In many cases materiality or dollar thresholds are established to identify actions that would materially change the cost to the employer or would cost the employer a pre-designated dollar amount as outside the individual delegate's sphere of authority. This information should be contained in the charter.

Do I have to have a committee? How many committees do I need?

There is no requirement in ERISA to have a particular number of committees. There is no requirement in ERISA to have a committee at all, although most employers find the fiduciary duties of running a plan to be too onerous to be taken on by one individual. Having a committee can also bring diversity of opinions and backgrounds that can help ensure that thoughtful decisions are made to provide the best protections for plan participants, the employer, and the fiduciaries themselves.

The answer to how many committees are needed depends largely on the size of the employer and the amount and types of benefits offered. A smaller company may only have one committee, whereas larger employers often will have two or three committees — usually an administrative committee, a plan investment committee, and a benefit appeals committee. Each committee has different roles, and typically different individuals are best suited to serve on different committees. Typically, the investment committee deals almost exclusively with retirement plans, as they generally are the plans that have assets that need to be invested and monitored. A separate plan administrative committee may oversee the majority of the health and welfare plan matters that an employer faces, in addition to non-investment retirement plan questions. In these cases, the membership of both committees is often not identical.

How often should my committee meet?

Committees that oversee plan investments, particularly for plans that contain employee contributions such as 401(k) plans, must meet often enough to keep a close watch on the investment options in the plan. Most investment committees meet quarterly, although some meet twice per year. Plaintiffs' lawyers may allege that investment committees who meet less frequently than quarterly are not tracking market practices, so those who do meet less frequently should be ready to explain how they are able to closely monitor market changes between meetings.

Committees that oversee health and welfare plan benefits typically meet quarterly — they review the claims experience of the plans and monitor the performance of plan vendors and third party administrators. In addition, at these meetings the committee would prepare for, and make decisions regarding, benefit offerings for the upcoming plan year.

Should I have minutes of the committee meetings? If so, what should they contain?

Meeting minutes are very important to document significant decisions taken by the ERISA plan fiduciaries, and to demonstrate to government regulators that the committee thoughtfully carried out its deliberations and fiduciary duties. However, it is difficult to prepare good meeting minutes that highlight procedural prudence, while avoiding falling into various traps for the unwary.

Minutes can be scrutinized in great detail, by the government or a judge, possibly many years later. Drafters of minutes should make sure that no open-ended questions are asked in the minutes that are not answered in the minutes (such as, "the committee asked the investment consultant if there were alternative funds that could be considered" — without including the corresponding response from the consultant). Similarly, the drafter should check the minutes of the previous meeting to see if any issues were raised in that previous meeting that were supposed to be addressed in the subsequent meeting. If so, and if that issue was not addressed in the subsequent meeting, the drafter should note it and indicate that it will be addressed in a later meeting.

Minutes should describe votes taken by the committee overall, but each individual member's vote is not required to be documented (although some committees prefer individual vote-counting). Generally, meeting minutes should be succinct — a "he said, she said" log of every comment made is tedious and difficult to read and can sometimes get individual committee members into unnecessary trouble. However, minutes should be descriptive enough to serve as a resource for members to recall what was discussed and decided at each meeting.

Materials circulated to committee members in connection with the meeting, such as reports from third-party service providers, should be retained, and incorporated by reference into the minutes.

What is the function of an ERISA appeals committee (or subcommittee), and how should one operate?

Larger employers may have a separate committee, or subcommittee, whose sole function is to consider and decide ERISA benefit appeals. In most cases, the original ERISA benefit claim will be decided by a third-party service provider, or by benefits staff. If the claim is denied and the claimant appeals, the appeal then goes up to the appeals committee.

The appeals committee should not consist of low-level employees who are answerable to the decision-maker of the original claim. This will help avoid any allegation that the appeals committee "rubber-stamped" the decision of the original benefit decider so as to avoid adverse employment action. Similarly, if there is no appeals committee, the fiduciaries should be careful that the individual or individuals who decide the appeal are not subordinate to the individual making the original benefit claim decision.

It is also helpful to have the identity of the claimant be unknown to the appeals committee, by using a code name for the individual and redacting the file to remove identifying information. This also avoids any allegation of preferential treatment.

Similarly, if a health or welfare benefit plan is structured to offer a voluntary third level of appeal decided by the employer or its delegate, any voluntary appeals committee or decision-maker should not be subordinate to those making the initial claim determination or determination on appeal.

How does my employer's board fulfill its ERISA fiduciary duty to monitor the activities of the committees?

As mentioned above, the board of directors of an employer that sponsors an ERISA plan generally cannot avoid the fiduciary duty under ERISA to monitor the activities of the individuals or entities to which it has delegated the majority of its fiduciary duties. Consequently, it is important for those individuals or committees to report periodically back to the board or board committee on their activities.

To fulfill this duty, employers may prepare an annual report to their boards of directors summarizing the activities of the fiduciary committees. Those reports generally should contain a description of the major activities relating to the plan or plans during the year, such as any significant changes in funding options, plan mergers, terminations, spin-offs, annuitizations, or other similar activities, changes in offered health and welfare plan benefits, changes in third-party service providers or contemplated RFPs for new service providers, government audits, determinations on the tax-deferred status of the plan, etc. It may also be helpful to attach minutes of the committee meetings to the board report, so that board members can access greater detail if they wish to do so.

Should committee members get training on fiduciary duties?

Yes, absolutely, fiduciaries should receive periodic training on their fiduciary duties, at least every two or three years. New fiduciaries should receive fiduciary training prior to or shortly after assuming their role. Training not only protects the plan participants, the employer, and the fiduciaries themselves, but it also may be required by the plans' fiduciary insurer.

At a minimum, fiduciaries should understand what laws pertain to ERISA plans, what their primary fiduciary duties are (loyalty, prudence, diversification, etc.) and how those duties should impact their fiduciary decision-making. They should understand the difference between fiduciary and nonfiduciary duties, and why that difference is important.

In addition to the basic ERISA legal concepts, fiduciaries should be familiar with their charter, understand what plans fall under their jurisdiction, know who their plans' service providers are, and where to access plan documents.

Conclusion

Following best practices in delegating fiduciary authority, forming fiduciary committees, training fiduciaries, running and documenting meetings, and reporting back up to the plan sponsor's board, can provide significant protections for ERISA plan participants, plan sponsors, and the ERISA fiduciaries themselves. Reviewing and updating plan governance documents and fiduciary training every few years will provide important protections for ERISA plan fiduciaries.

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