



Fiduciary Training

The guidance and tools needed to succeed

Has your committee received fiduciary training? Hopefully the answer is yes. While there is no fiduciary training requirement under the Employee Retirement Income Security Act (ERISA), this is a question the Department of Labor (DOL) asks during its investigations. If the answer is no, there is no penalty or violation, but we expect that the DOL may look closer at how the committee operates in order to determine whether a fiduciary breach has occurred. Further, plan fiduciaries are often required to receive fiduciary training pursuant to litigation settlements and DOL enforcement actions.

In addition to being able to give the DOL the right answer during an investigation, fiduciary training is vital to making sure committee members understand their duties and responsibilities. Let's face it—not all of ERISA is intuitive, and most committee members are not ERISA experts. It's only right to give them guidance and the tools they need in order to be successful.

When should committee members receive training? At a minimum, new members should be trained as soon as possible. But it's a lot of information, and it doesn't always stick the first time. Annual or periodic refresher sessions going over fiduciary roles, rules and responsibilities can help committee members stay out of trouble. Including a regular fiduciary/legal update on the agenda for each quarterly meeting also helps. You can invite your friendly attorneys to attend and present (wouldn't it be fun to see us on a more regular basis?). There are a lot of 401(k) and 403(b) fiduciary litigation cases going on right now, and committee members should know what the issues are and what those mean for their plan.

What should fiduciary training cover? Two key ERISA fiduciary concepts should be highlighted as part of the training. First, when making fiduciary decisions, committee members must act solely in the interest of the plan participants and beneficiaries. Second, process, process, process. Did we mention process? The committee must go through a good process, gathering and considering all the relevant information for purposes of making

fiduciary decisions. These two key concepts should be intertwined with the following specific topics:

- **Understanding the fiduciary role.** This covers, specifically, when the committee members are acting as fiduciaries vs. when they are acting as the employer/settlor of the plan, without a fiduciary responsibility.

- **Fiduciary governance.** Part of the training should explain the flow of fiduciary responsibilities and who has which ones. For example, the board of directors may delegate plan administration authority to the committee. This means the committee must report back to the board periodically so the latter can monitor its fiduciary delegation.

- **Monitoring fees and service providers.** In addition to selecting the plan's service providers, the committee has an ongoing duty to monitor those providers and their fees for reasonableness. Training can be a good way to drive home the importance of this duty as well as to highlight, for example, what can and cannot be paid by the plan.

- **Plan documentation.** Often overlooked is the obligation to follow the plan's governing documents—e.g., plan document, investment policy statement (IPS), etc.

- **Fiduciary liability, including co-fiduciary liability.** During training is the time to explain the personal liability that attaches to a fiduciary's breach, as well as to a co-fiduciary's breach if the fiduciary is aware of an issue and takes no steps to remedy it.

- **Prohibited transactions.** ERISA prohibits transactions between the plan and "parties in interest" as well as self-dealing. We will address this subject in a future column, so for now suffice it to say this is another set of rules the committee must follow.

Explaining steps the committee members can take to be good fiduciaries protects the plan and helps the committee if or when it comes time to face the DOL or a plaintiff.

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