5 **Plan Committee Missteps**

There is frequently a difference between doing what the law requires and doing everything that you could do as a plan fiduciary. That said, there are things that plan fiduciaries must do – and things that, while not required, can keep the plan, and plan fiduciaries out of trouble.

Let's get started.

1. Not having a plan/plan investment committee

ERISA only requires that the named fiduciary (and there must be one of those) make decisions regarding the plan that are in the best interests of plan participants and beneficiaries, and that are the types of decisions that a prudent expert would make about such matters. ERISA does not require that you make those decisions by yourself—and, in fact, requires that, if you lack the requisite expertise, you enlist the support of those who do have it.

You may well possess the requisite expertise to make those decisions—and then again, you may not. But even if you do, why forego the assistance of other perspectives?

However, having a committee for having a committee's sake can not only hinder your decisions— it can result in bad decisions. Make sure your committee members add value to the process. (Hint: Once they discover that ERISA has a personal liability clause, casual participants generally drop out quickly.)

2. Not HAVING committee meetings

Having a committee and not having committee meetings is potentially worse than not having a committee at all. In the latter case, at least you ostensibly know who is supposed to be making the decisions. But if there is a group charged with overseeing the activities of the plan, and that group doesn't convene, then one might well assume that the plan is not being properly managed, or that the plan's activities and providers are not prudently managed and monitored, as the law requires.

3. Not keeping minutes of committee meetings

There is an old ERISA adage that says "prudence is process." However, an updated version of that adage might be "prudence is process—but only if you can prove it." To that end, a written record of the activities of your plan committee(s) is an essential ingredient in validating not only the results, but also the thought process behind those deliberations.

More significantly, those minutes can provide committee members—both past and future—with a sense of the environment at the time decisions were made, the alternatives presented, and the rationale offered for each, as well as what those decisions were. They also can be an invaluable tool in reassessing those decisions at the appropriate time and making adjustments as warranted—properly documented, of course.

4. Not having an investment policy statement

While plan advisers and consultants routinely counsel on the need for, and importance of, an investment policy statement, the reality is that the law does not require one, and thus, many plan sponsors—sometimes at direction of legal counsel—choose not to put one in place. Of course, if the law does not specifically require a written investment policy statement (IPS)—think of it as investment guidelines for the plan—ERISA nonetheless basically anticipates that plan fiduciaries will conduct themselves as though they had one in place. And, generally speaking, you should find it easier to conduct the plan's investment business in accordance with a set of established, prudent standards if those standards are in writing, and not crafted at a point in time when you are desperately trying to make sense of the markets. In sum, you want an IPS in place before you need an IPS in place.

It is worth noting that, though it is not legally required, Labor Department auditors routinely ask for a copy of the plan's IPS as one of their first requests. And therein lies the rationale behind the counsel of some in the legal profession to forego having a formal IPS; because if there is one thing worse than not having an investment policy statement, it is having an investment policy statement—in writing—that is not followed.

5. Not removing "bad" funds from your plan menu.

Whether or not you have an official IPS, you are expected to conduct a review of the plan's investment options as though you do. Sooner or later, that review will turn up a fund (or two) that no longer meets the criteria established for the plan. That's when you will find the true "mettle" of your investment policy; do you have the discipline to do the right thing and drop the fund(s), or will you succumb to the very human temptation to leave it on the menu (though perhaps discouraging or even preventing future investment)? Oh, and make no mistake—there will be someone with a balance in that fund. Still, how can leaving an inappropriate fund on your menu—and allowing participants to invest in it—be a good thing?

Being a plan fiduciary is a tough job—and one that, it's probably fair to say—is underappreciated, if not undercompensated. Despite that, in my experience, most who find themselves in that role I think do an admirable job of living up to the spirit, if not the letter, of their responsibilities.

If you're taking the time to read this, odds are you are probably doing a better-than-average job as a plan fiduciary (or at least the person who shared it with you is). 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 of an ERISA plan fiduciary.

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