The Disappearance of the Untrained Fiduciary

*Ronald E. Hagan**

Today, completing formal fiduciary training is nearly mandatory for those that operate a qualified employee benefit plan under ERISA. In light of the U.S. Department of Labor's ("DOL") growing treatment of fiduciary training as if it were already a legal requirement, employers increasingly are adding training to the list of credentials required for their employees involved in retirement plan management. As a result, the era of the untrained fiduciary is quickly coming to a close

FIDUCIARY TRAINING: FROM "NICE TO HAVE" TO "NEED TO PROVE"

"Have you ever had formal fiduciary training?"

This is the question recently audited organizations reportedly have been asked by the U.S. Department of Labor ("DOL") in relation to the organizations' oversight of their retirement plans. And while fiduciary issues have been percolating at the top of the retirement plan industry news circuit over the last few years, the recent emphasis on fiduciary training, specifically, as an indicator of fiduciary prudence is a somewhat surprising one. Perhaps it shouldn't be, however, since the DOL's first examination of the importance of fiduciary training began over 10 years ago.

The DOL-commissioned Working Group on Fiduciary Education and Training had its first meeting on July 17, 2002. In this meeting and in two subsequent meetings that year, the group outlined the issues they were to study, and heard from a number of speaker experts on various fiduciary topics. One of the key findings of these convenings was that "Fiduciary education can and does play an important role in compliance with ERISA." Indeed, the committee observed:

> Most fiduciaries have their hearts in the right place and want to perform well. This may not be surprising but it certainly supports the idea that education has an important role to play in fiduciary compliance: a pure heart and an educated head are the prerequisites for a high level of fiduciary performance. A Departmental initiative to expand and improve fiduciary education can make a real difference for the well-meaning but untrained fiduciary.

In response to these findings, the committee recommended

*RONALD E. HAGAN is Chairman of the Fiduciary Standards Committee of Roland|Criss, the premier fiduciary manager for retirement plan sponsors, foundations, and endowments. Ron has over 25 years of experience in the fiduciary industry, and has pioneered many of the certification, standards practices, and supply chain management strategies that are preferred by fiduciary leaders today. He can be reached at ronhagan@rolandcriss.com.

that the DOL take specific actions, including the following:

- **Make clear its commitment** to fiduciary education.
- Appoint a **national coordinator** of fiduciary education and outreach.
- Continue efforts to augment, improve, and **publicize its website** as a resource for fiduciary issues.
- Expand its **written guidance on fiduciary issues** and, particularly, develop or otherwise make available best-practice guidance.
- Encourage and **stimulate the development of educational opportunities** for fiduciaries.

So 2002, it seems, was the beginning of the end of the untrained fiduciary. With the DOL's explicit direction towards making fiduciary training a priority (and accessible to all sizes of plan sponsors), it should have been no surprise that fiduciary education would become a requisite for ERISA compliance.

The beginning of this movement, however, begs the question: What burning issues is fiduciary training trying to address?

OPENING THE FIDUCIARY FLOODGATES: THE DOL CRACKS DOWN

The Employee Benefits Security Administration ("EBSA") is a division of the DOL responsible for overseeing U.S. employee benefit plans and enforcing ERISA. In 2014, the EBSA's total monetary results were $823.2 million (which included money restored back to retirement plans as well as prohibited ERISA transactions that were corrected.) And while many people assume that improper investment performance is the most frequent reasoning for fiduciary enforcement actions, most of them have nothing to do with the investment assets themselves. Instead, many of the fiduciary actions of the last several years have originated from the *unintended mismanagement* of a plan and its assets by a fiduciary that violates prudent ERISA law.

The solution to this issue, as interpreted by recent DOL judgments, is formal executive education on fiduciary responsibility. Below is a sampling of recent cases that demonstrate how running afoul of ERISA can result not only in applicable fines and penalties, but also in requisite training:[1]

DOL settlement provided $5 million in restitution for Pennsylvania Builders' health plan and reformed plan operations. The DOL obtained a consent judgment in which the Pennsylvania Builders Association ("PBA"), its wholly-owned subsidiary Builders Services Inc. ("BSI") and its trustees agreed to restore $5 million to the fund and pay a civil penalty of $500,000. The DOL alleged that PBA received royalty payments and BSI received administrative fees under arrangements with BSI and the trust's third party administrators. The judgment also permanently barred the trustees from using plan assets to pay royalties and/or licensing fees to the association, prevented the trustees from contracting with the subsidiary for administrative services in exchange for fees, and prohibited the use of trust assets for lobbying purposes. *Training implication: The DOL audit results required ERISA plan trustees to obtain eight hours of fiduciary training annually over the next five years.*

DOL recovered $8.6 million for workers in settlement involving Agway 401(k) plan in New York. The DOL obtained a settlement restoring $8,590,000 to participants of the Agway Inc. 401(k) plan in DeWitt, New York, after alleging that 47 members of the investment committee, administration committee and the Agway board of directors violated ERISA by allowing the 401(k) plan and its participants to invest in overpriced securities of Agway. The defendants also agreed to pay a civil penalty of $859,000 plus interest to the Labor Department. *Training implication: DOL barred plan managers and board of directors from serving the plan unless they obtained fiduciary training.*

DOL obtained court judgment against executive of Oklahoma aircraft manufacturer for misuse of employee benefit plan premiums. The DOL obtained a consent judgment and order permanently barring the owner of defunct Quartz Mountain Aerospace Inc. from serving in a fiduciary capacity to any employee benefit plan after alleging that he failed to remit employee premiums to the plan to segregate plan assets from those of the company, and to hold those assets in trust as required by ERISA. *Training implication: DOL barred small company owner from running an ERISA plan unless he obtained fiduciary training.*

Miami tool manufacturer agreed to restore more than $107,000 to company's pension profit sharing plan following DOL investigation. The DOL obtained a consent judgment that restored more than $107,775 to participants in the Miami-based Michigan Drill Corp. Profit Sharing Plan after alleging that the defendants caused losses to the company's pension profit sharing plan through improper activities that violated ERISA. *Training implication: DOL required eight hours of fiduciary training annually for the company owner.*

The DOL has made it clear through its working committee and recent regulatory actions that fiduciary training is a priority for executives charged with managing their retirement plans. Now that the concept of fiduciary training as a compliance metric has been established, it's important to evaluate the components of a suitable fiduciary training program.

THE DO'S AND DON'TS OF FIDUCIARY TRAINING

With high regulatory stakes, and the fate of employees' futures at the forefront, employers and retirement plan managers alike want to be sure that their fiduciary training is, in fact, bolstering their skills and safeguarding them from future regulatory risk. Below is a list of the top fiduciary training "Dos" and "Don'ts" that will help guide executives and investment committees on the right path towards fiduciary confidence and ERISA compliance.

DON'T: Just re-read the trust document. If, in response to a question about fiduciary training, an advisor recommends revisiting the trust document as a sufficient training exercise, be wary. Familiarizing oneself with the trust document is a key part of fiduciary training, but by no means is it, by itself, an adequate fulfillment of fiduciary education.

DO: Opt for online training. There are multiple online fiduciary training resources available now that are fully accredited and can be more convenient than in-person options. Enrolling in a course certified by the HR Certification Institute is a good way to ensure that a training program was designed for plan sponsors from an unbiased authentic ERISA viewpoint.

DON'T: Enlist in fiduciary training from a vendor of other plan services. Any training offered by a vendor who provides other services to the retirement plan could be tainted by bias toward that vendor. Fiduciary training needs to be objective, and should not drive additional buying behavior from the plan sponsor. For a safe and legitimate training environment, choose an independent third party provider.

DO: Think broadly when considering who should complete training. When assessing who should enlist in fiduciary training, first and foremost anyone who has the ability to influence plan operations should be included (that is often the CEO, HR Director, CFO, and/or Boards of Directors). Anyone else, however, who sits on the investment or fiduciary committee or is otherwise involved in the fiduciary decision-making process also should be encouraged to enroll. This could include other staff members in the human resources or finance departments, for example, or outside advisors to the plan.

DON'T: Focus only on investments. Many fiduciaries place disproportionate weight on the investment discipline of fiduciary duty. ERISA is clear, however, that executives that oversee retirement plans need to be informed in all four areas of fiduciary duty, including: Governance, Administration, Investments, and Controls. Be sure any fiduciary training curriculum addresses all four of these skill areas.

DON'T: Believe that proper fiduciary training must be a long, burdensome process. Successful and impactful fiduciary training does not have to be a dreaded, drawn-out exercise. In fact, some of the leading fiduciary training offerings in the market right now only take 3 hours of time, and include a comprehensive curriculum with practical guidance in all four areas of fiduciary duty. In a relatively short amount of time, fiduciary training can provide executives and plan managers with much-needed peace of mind about the safekeeping of their participants' assets and reduction of regulatory risk.

Fiduciary training increasingly is becoming plan sponsors' first step on the path to ERISA compliance and risk management. Best practice dictates that training is required for new hires in the employee benefits space. Indeed, the risk associated with fiduciary missteps is becoming greater and the penalties are growing more intense. Untrained fiduciaries not only place themselves at risk, but their plan participants, and their corporation as a whole. As plan sponsors look for new and better ways to stay compliant amidst a changing regulatory landscape, a simple step of fiduciary training will continue to be a key to staying on track.

ADDITIONAL RESOURCES:

DOL Report from Working Group on Fiduciary Education and Training: http://www.dol.gov/ebsa/publications/AC_1108b02_report.html

Kutak Rock's Explanation of Increase in Fiduciary Training: http://www.kutakrock.com/dol-raises-fiduciary-training-in-plan-audits/

DOL Fiduciary Education Campaign: http://www.savingmatters.dol.gov/ebsa/fiduciaryeducation.html

"The Excellent Fiduciary" Online Fiduciary Training for Plan Sponsor Executives: http://rolandcriss.com/register-for-training

NOTES:

[1]Summaries provided by Department of Labor website, www.dol.gov.