Ten Tips for Retirement Plan Executives and Managers

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ERISA is vague about how plan fiduciaries may satisfy their role under this regulation. The lack of a standard governance, risk and compliance retirement plan management program causes many responsible plan fiduciaries to feel uncertain in their role. Some confront the tough demands imposed on them in ERISA by obtaining formal training. Many more, however, do not. Accordingly, the retirement plan industry is made up of elite fiduciaries who are well informed, capable of deciphering ERISA's cryptic rules, and savvy buyers of pension services—and others who operate on the opposite end of the competency spectrum. This article examines ten proven actions that all executives can follow to significantly and quickly improve their organizations' ERISA-related risk management programs.

THE TOP TEN

There is no doubt that employers have figured out a lot about how retirement plans should be operated, especially in the last ten years. But every time we read that a retirement plan sponsor has been fined or sued for breaches of fiduciary duty under ERISA, employers are plagued with a new onslaught of doubt about their fiduciary security. Some vendors of retirement plan services imply they have answers to the fiduciary conundrum, but now those same vendors are being broadcast in the news for their unsuccessful court battles. So who really has the solution to this fiduciary mystery?

For this article, we evaluated the causes and results of many lawsuits filed against retirement plan sponsors and their executives, examined the marketing literature published by dozens of vendors spanning all of the servicing categories, and weighed the audit results of multiple plan sponsors' fiduciary practices in order to make a "top ten" list of what plan sponsors should do now to comply with ERISA and fulfill their fiduciary duty.

Tip #1—Identify and Document the Plan's Fiduciary Team

A plan must have at least one fiduciary (a person or entity) named in the written plan, or

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through a process described in the plan, that has control over the plan's operation. The so-called "named fiduciary(s)" can be identified by office or by name. For some plans, it may be an administrative committee or a company's board of directors. In many cases, the Plan Administrator, who is an executive or manager employed by the plan sponsor, is the sole named fiduciary.

A plan's fiduciaries will ordinarily include the trustee, Plan Administrator, one or more investment advisors, all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee (if it has such a committee), and those who appoint the fiduciaries. The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan. Each fiduciary should acknowledge in writing their fiduciary relationship with the retirement plan. That is not only a best practice, but it also establishes the roster of individuals that should receive periodic fiduciary training.

Tip #2—Keep the Plan Document Up-to-Date

A basic legal requirement of all tax-deferred retirement plans is that they must be established and supported by a formal written plan document that complies with the Internal Revenue Code ("IRC"). The written plan must be updated when the tax laws affecting tax deferred plans change. The Internal Revenue Service generally establishes a firm deadline by which plan amendments that reflect tax law changes must be adopted. This applies to all IRC-qualified plans, whether active or not, as long as assets remain in the plan. Terminated plans must be updated for law changes through the date of termination.

Plan sponsors should keep the following documents to prove they have timely amended their plans:

- Original plan document
- All subsequent plan amendments or restatements
- Any adoption agreements (The adoption agreement is not the complete plan document and must be accompanied by a basic plan document, which provides details of how the plan must operate.)
- Any IRS opinion or advisory letter
- Any IRS determination letter
- Board of Director's resolutions and minutes, or similar records related to the plan

If some of the above documents are missing, or if the plan document has not been updated in some time, this may indicate that the plan sponsor has not timely updated the written plan to comply with changes in the tax law. The U.S Department of Labor ("DOL") analyzes the IRC status of plans during its randomly selected plan audits.

Tip #3—Verity That the Plan's Practices Match the Plan's Policies

Failing to follow the terms of a retirement plan's governing document is high on the list of ERISA violations issued during DOL plan audits. In order to ensure that a plan's management practices align properly with the plan's features, prudent fiduciaries maintain written policies that address the following sensitive areas:

- Participant Loans—Avoid the temptation to approve loans whose terms vary from the conditions described in the plan document. Also, be sure that the plan's vendors are enforcing participant loan repayments and are limiting aggregate loan amounts.
- Conflicts of Interest—

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ERISA does not require that retirement plans operate in a conflict-free environment. ERISA does, however, require that the Plan Administrator 1) have a method for detecting conflicts of interest and 2) determine, if and when conflicts arise, whether the conflicts are acceptable to the plan.

- Vendor Selection and Monitoring—High on the list of reasons that plan sponsors are fined by the DOL for violating ERISA is the failure to prudently select and monitor service providers. Plan sponsors must document how they evaluate the appropriateness of each vendor's fit with the retirement plan. Plan sponsors are also required to periodically evaluate the quality of vendors' services as compared to their fees. The Fiduciary Supply Management Association is a valuable, inexpensive vendor management resource for plan sponsors, which can be found at www.fiduciarysma.org.

- Investments—The DOL views a written investment policy as having the status of a "plan document." Such a policy sets forth the general investment goals and objectives of a client, and describes the strategies that the investment manager should employ to meet these objectives. Specific information on matters such as asset allocation, risk tolerance, and liquidity requirements would also be included in an investment policy, which should be reviewed at least annually and updated as appropriate.

Tip #4—Offer Effective Employee Retirement Plan Education

Traditional employee communication programs have been more about administration than education. Motivating employees to enroll in a retirement plan and to save appropriately requires more than helping them complete an enrollment form. Four key elements of an effective employee retirement plan education program will include:

1. How retirement plan investing should work;
2. Service providers' fees and their impact on retirement savings;
3. Social Security benefits and election options; and
4. Barriers for lower income employees to participate in a defined contribution plan.

Plan sponsors should check with their plan's recordkeeper for help in raising the plan's education program to the next level.

Tip #5—Distribute Participant Notifications as Required by ERISA

Employers are required to send notifications to their retirement plans' participants. The notifications depend on fee disclosure provisions in ERISA and the types of features offered in the retirement plan. Examples of required notifications include: participant fee disclosure reports [ERISA Section 404(a)], notifications regarding Qualified Default Investment Alternative ("QDIA"), automatic enrollment, and safe harbor deferrals. A highly efficient retirement plan management system will contain a calendar of participant notification events, along with a method for recording dates when the notifications are released.

Tip #6—Inspect Your Fee Disclosure File

Compliance with ERISA changed dramatically when the DOL released Regulation 408(b)(2). The so-called "Fee Disclosure" rule offers a safe harbor exemption from breach of fiduciary duty, but obtaining it is not automatic. What must plan sponsors do to obtain it?

In order to earn the safe har-

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bor exemption, ERISA plan sponsors are required by the Regulation to prove they have followed three steps:

1. Received fee disclosures from vendors;
2. Examined the disclosures for adequacy; and
3. Proved that fees are reasonable (assessment and opinion).

Plan sponsors must verify that vendors have disclosed their fees and services in a way that plan sponsors can understand them. If the plan sponsor cannot make sense of what vendors have provided, they must insist on clarification. ERISA puts plan sponsors' necks on the line, holding plan sponsors accountable for any excess fees, not their vendors.

Tip #7—Analyze Service Providers' Arrangements and Contracts

Arrangements with vendors that contain bias or conflicts of interest lay a trap for plan sponsors. In some cases, changes in a vendor's business model can introduce a bias or conflict that was absent at the service provider's initial engagement. For that reason, it is important to periodically evaluate existing contracts with a plan's vendors in order to verify that a change in the way they do business has not jeopardized the sponsor's legal status. Situations like this that can arise include the following:

- Due to the growth in value of a plan's assets, combined with asset-based pricing, compensation for the plan's vendors has become excessive.
- A service provider that delivers more than one category of service to a plan (a type of vendor that the U.S. Supreme Court warns fiduciaries is a "multiple hat" vendor) provides biased or self-serving advice, yet labels it to be a fiduciary service.

Tip #8—Check Executive Insurance for Fiduciary Liability Coverage

Many executives and managers that are appointed to be retirement plan fiduciaries lack an important protection offered by fiduciary liability insurance. If fiduciaries are not sure whether the plan is covered by this type of insurance, they may ask their employer for a status report. Fiduciary liability insurance is among the least expensive of the various executive liability protection programs. While the insurance file is open, plan sponsors should also check their ERISA fidelity bond coverage to be sure the retirement plan is covered for the adequate amount.

Tip #9—Conduct an Assessment of Fiduciary Procedures

Achieving fiduciary excellence and legal compliance begins with a deep understanding of the trends in regulatory dynamics and vendor strategies, and the recognition of how those trends are altering the fiduciary landscape and reshaping best practices.

Many retirement plan sponsors use an in-house rather than an outsourcing approach to manage their ERISA fiduciary role. The in-house approach imposes on the executive class the burden of complying competently with all four disciplines of fiduciary duty: governance, administration, investments, and controls. For those who choose not to outsource their ERISA 3(16) Plan Administrator role, an independent review can test their management approach for its conformance to ERISA's fiduciary rules and industry best practices. It is best to select an expert for the review that does not also sell the services that will be subject to the review.

Tip #10—Install a Governance, Risk, and Compliance System

Current litigation and regulatory trends place a premium on having the best fiduciary governance, risk, and compliance ("GRC") management system.

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Just as the Sarbanes-Oxley Act imposed tough new disclosure rules on public companies after the Enron retirement plan debacle, so now do the laws that govern retirement plans demand a GRC approach from the executives that manage them. Providers of GRC systems for retirement plan sponsors offer descriptions of their services online—but plan sponsors should be careful to select one that is independent, experienced, and accredited.

CONCLUSION

While fiduciary duty can often seem overwhelming and complex, following these “top ten” guidelines for fiduciary conduct can be a great start to a solid retirement plan management strategy. What plan sponsor executives must always keep in mind is that they were not specifically trained or educated on how to be a fiduciary—they have been focused on building leadership experience that is critical to ensuring the success of their organization. And so, executive fiduciaries must implement easy-to-follow steps that they can continue to fall back on when doubt or questions about their fiduciary security arise. A documented retirement plan management process is the best way to ensure all fiduciaries of the plan are on the same page with regard to their specific responsibilities and overall plan expectations. If plan sponsors still feel overburdened, they always have the option of outsourcing their primary fiduciary role to a professional 3(16) Plan Administrator, which significantly reduces their daily burden and legal risk.

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