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Employee Benefit Plan Review

Ask the Expert

By Katrina L. Berishaj

Governance Structures

Q What steps can we take to ensure that the governance structures around our retirement plans are sound?

A Ensuring robust retirement plan governance is a crucial step in safeguarding your company's financial future and maintaining a competitive benefits program to attract talented employees. By establishing robust governance structures for their employee retirement plans, building on these foundations, and implementing best practices, employers can position themselves to comply with ERISA and mitigate potential legal claims.

There are several steps that a company can take to ensure sound governance around its retirement plans.

First, it is important to clearly delineate and separate fiduciary committees (and their related actions and responsibilities) and non-fiduciary/settlor committees (and their related actions and responsibilities) and to properly authorize and document these committees.

Second, it is prudent to establish fiduciary committees that are well structured and that have appropriate procedures and membership.

Finally, committees, once established, should follow scheduled procedures and regularly be subject to review and revision to ensure continued compliance with both established procedures and newly implemented procedures.

Distinguishing Settlor and Fiduciary Functions

A very important distinction with respect to benefit plans is the difference between settlor (non-fiduciary) functions and fiduciary functions. Settlor functions include the establishment, termination, and amendment of a retirement plan. On the other hand, the administration and management of a retirement plan are fiduciary in nature, as is the implementation of plan amendments and plan terminations. It is advisable to create separate fiduciary plan administrative committees and plan sponsor committees.

Each committee should develop a formal charter outlining its purpose and responsibilities to serve as a guide and evidence of the implementation of sound governance procedures. The charter should outline the description of the plan(s) over which the committee has authority, the duties of the committee, the membership of the committee and their respective duties, and customary administrative matters such as the frequency of regular meetings and the procedures for voting by proxy and calling special meetings. To keep the lines clear, the committees should meet at different times and might have different counsel.

Accompanying the charter should be a written delegation of fiduciary authority from the company's board of directors or analogous governance entity. This delegation of authority should be kept current to reflect the scope of authority delegated to the applicable committee(s) and person(s), if applicable, and accurately reflect the membership of the committees. Any required amendments to these written delegations should be made in writing and kept in the records of the company. Maintaining accurate and up-to-date delegations will help to refute allegations that an employer has not been actively monitoring or administering its plan.

Plan Committee Structure

The administration and management of plans can be complex and cumbersome. In addition to ensuring committees are properly formed with the appropriate delegation of authority, it is important for companies to ensure that governing committees are properly structured within their membership, which includes ensuring that the right people serve on the committee. To achieve this efficiency, it is advisable to segregate plan governance by appropriately delegating responsibilities to administrative and investment committees, with considerations for how well the expertise of the committee members fits the duties of the committee.

The administrative committee is responsible for daily plan operations and administering the plan in accordance with its terms and with ERISA. Here, diverse expertise is key. Companies should appoint professionals from human resources, finance, and operations departments to facilitate comprehensive decision-making. The investment committee selects and monitors investment options in accordance with the plan and its governing documents, as well as with ERISA. This committee should be primarily comprised of individuals with backgrounds in finance or accounting.

Committees should be comprised of an odd number of members, ideally between three and seven, though larger and more complex plans may warrant larger committees and sub-committees. Notably, insiders should not serve in a fiduciary capacity for plans, particularly those plans that deal with the securities of the employer. This is because the potential for fiduciaries to have material nonpublic information can significantly complicate decision-making and can result in risk for the plan.

Plan Committee Procedures

Committees that manage plans must ensure that they are meeting all of their legal and regulatory obligations. In this regard, creating a calendar of due dates and checklists of deliverables and other action items can be helpful. For example, certain benefit plans must: file a Form 5500 with the IRS, provide required participant notices, and periodically review certain plan arrangements. Calendaring these important deliverables breeds accountability and improves the prospects of overall plan compliance.

General best practices for the review of plan arrangements entail the issuance of requests for information every three to five years, requests for proposals every five to seven years and annual reviews of invoices billed to the plan.

Committees should also report to their delegating bodies with regularity to ensure that fiduciaries at all levels are meeting their duties and obligations. For example, a plan administrative committee might report to the compensation committee of the board of directors on an annual basis to provide updates regarding the plans, including any significant investment changes, benefit determination issues, and any legal or regulatory issues.

In addition to adhering to existing policies and reviewing and updating them as necessary, committee members should be provided with comprehensive training on ERISA's fiduciary duties and obligations, with periodic updates to enhance compliance and reduce the potential for violations.

Working to complement periodic reviews is the proactive identification of changing legal requirements that may pose potential compliance risks and the creation of strategies to mitigate them. Strategies may also include periodic internal audits of plan and committee documentation and records to confirm compliance.

By adopting a robust commitment to retirement plan governance, plan providers and sponsors enhance both company protection and employee satisfaction. The combination of clear roles and authority of committees, diverse and properly structured committees, and procedures to maintain good committee health provides a blueprint that sets benefits plans on a path to success.

Katrina L. Berishaj, a counsel in the Washington, D.C., office of Stradley Ronon Stevens & Young, LLP, and co-chair of the firm's Fiduciary Governance practice, advises financial services clients, including banks, trust companies, broker-dealers, investment advisers, insurance companies and institutional investors, on issues arising under the fiduciary and prohibited transaction rules of the Employee Retirement Income Security Act and the Internal Revenue Code with respect to financial products, services and transactions. Ms. Berishaj, who is the Ask the Expert columnist for *Employee Benefit Plan Review*, may be contacted at kberishaj@stradley.com.