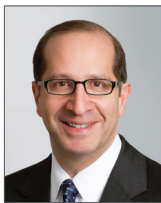


Expert Q&A on Fiduciary Training

Retirement Plans

A plan fiduciary's failure to comply with the strict fiduciary standards imposed by the Employee Retirement Income Security Act of 1974 (ERISA) may have serious consequences, including personal liability and enforcement actions by the Department of Labor (DOL). Employers should therefore educate those who oversee and administer ERISA plans about their fiduciary obligations. Practical Law Company asked Paul Hamburger of Proskauer Rose LLP to explain the primary components of an effective fiduciary training program.



Paul M. Hamburger
PARTNER
PROSKAUER ROSE LLP

Paul heads the firm's Washington, D.C. Employee Benefits, Executive Compensation and ERISA Litigation Practice Center. He advises employers on all aspects of their employee benefit programs, including matters affecting tax-qualified retirement plans, health & welfare plans and executive compensation arrangements.

What is fiduciary training?

Fiduciary training assists those responsible for overseeing employee benefit plans in understanding their fiduciary responsibilities under ERISA and how to manage the associated liabilities from both a legal and corporate compliance perspective.

Many corporate officers do not feel comfortable with their level of understanding of even basic issues regarding plan governance. Frequently, plan documents do not accurately reflect day-to-day plan administration. In both of these circumstances, corporate officers and boards of directors could be exposed to potential ERISA liability for matters over which they inadvertently exercise improper control or for which they really do not have any functional control.

By going through a good fiduciary training program, those responsible for administering and overseeing ERISA plans can gain a better understanding of the legal rules and how to manage liabilities in light of their company's particular circumstances and governance goals.

Why is fiduciary training important?

Fiduciary training decreases liability risk associated with employee benefit plans. It is a natural outgrowth of other corporate legal compliance initiatives and ensures that there are proper internal controls regarding plan investments and other fiduciary processes. Training also supports a company's commitment to, and efforts under, any broader corporate compliance program.

The most important risks associated with employee benefit plans are personal liability, litigation risk and government enforcement actions.

Violating ERISA's fiduciary duty rules can result in personal liability for fiduciaries (as well as significant civil penalties and potential excise taxes). Therefore, there can be serious consequences if an executive does not comply with his fiduciary obligations because, for example, he does not realize he is acting in a fashion that ERISA deems to be a fiduciary or does not understand the full scope of ERISA's fiduciary duties.

Plaintiffs' lawyers are increasingly bringing ERISA fiduciary class action litigation. Prevailing plaintiffs may recover attorneys' fees in ERISA cases. However, some courts have awarded fees even to non-prevailing plaintiffs to encourage the filing of fiduciary breach claims. Most likely, the already-brisk rate of ERISA fiduciary lawsuits will accelerate in the near future.

The DOL has increased its focus on fiduciary matters. For the fiscal year 2010, the DOL closed over 3,000 civil cases, 74% of which produced over \$1 billion in corrections. The DOL also launched criminal investigations resulting in indictments of 96 plan officials (97 cases closed with guilty pleas or convictions). In addition, through voluntary compliance efforts in over 30,000 cases, the DOL has negotiated over hundreds of millions of dollars in corrections involving plan fiduciaries for all types of plans. The DOL has also launched fiduciary education programs around the country to help educate fiduciaries about their responsibilities.

Who usually participates in fiduciary training?

Generally, attendees at fiduciary training include benefits and human resources professionals and in-house counsel (benefits counsel, if available, and sometimes employment law counsel). Sometimes outside service providers to the plan (for example, recordkeepers, trustees and investment advisors) may attend. Often, companies conduct fiduciary training for the board of directors where one of the goals is to identify whether the board wishes to retain fiduciary responsibility for the benefit plans.

The party conducting the training should be experienced and knowledgeable in ERISA and other applicable laws. The trainer should also have significant practical experience in evaluating and commenting on plan design and governance issues.

What should be included in the training program?

To be effective, fiduciary training must be more than just a several hour lecture by the trainer covering pure legal analysis of ERISA and the applicable rules. It should encourage dialogue among attendees about which compliance practices should be modified or abandoned and which practices should continue.

The most valuable fiduciary training addresses both retirement and health and welfare plans and covers four basic areas: understanding the legal requirements, identifying governance goals, reviewing existing documentation and implementing necessary changes to plan documents.

First, fiduciary training should provide an overview of all basic legal requirements. The individuals responsible for plan administration must understand how one becomes a fiduciary, the standard of conduct expected of a fiduciary, what potential liabilities exist and how to organize and delegate fiduciary responsibilities.

A second goal of training is to determine the best fiduciary governance structure for the company's plans. Often, plan or trust documents are written without much attempt to make the delegation of fiduciary duties match the company's intent from a fiduciary liability perspective. Alternatively, the language delegating fiduciary responsibilities may have made perfect sense when it was originally written, but through plan restatements, amendments and corporate restructuring, the plan documents have not kept pace with the plan's operations.

Typically, a company will just ask to "clean up the documents" without understanding which parts of the corporate structure will be responsible for which aspects of fiduciary responsibility. Fiduciary training helps to identify the roles that should be played by a company's board of directors, senior officers and other employees in managing or administering employee benefit plans. The company may want to decide whether there should be one fiduciary committee or multiple committees

with different jurisdictions (for example, administrative matters versus investment matters; retirement plans versus health and welfare plans).

The third part of training is to review the existing plan documentation because that is the first place any court or the DOL will look to identify plan fiduciaries. For example, suppose a 401(k) plan document provides that investment funds are selected or modified through a plan amendment adopted by the board of directors. This wording suggests that the board is responsible for overseeing the various investment funds as a fiduciary matter and for determining whether and when a poor performing fund should be replaced. Even if the reality is that the investment fund oversight is done by an internal investment committee and the board has no actual input into the decisions, the board could still be liable as a named fiduciary for the actions or inactions of that investment committee. Therefore, an important part of training involves looking at the actual documents to identify whether they are consistent with the fiduciary governance goals.

The fourth part of fiduciary training is to amend the existing plan documents to be consistent with fiduciary governance goals. For example, if a plan administration committee is established with the authority to hire service providers or investment fund managers, then any contracts with those third parties should be executed by the proper plan fiduciary committee, not the employer or plan sponsor. Once the fiduciary function is delegated properly, then all resulting actions should be taken in a manner consistent with that delegation.

What are the most significant issues to consider when deciding to conduct a training program?

There is no reason not to do some form of fiduciary training on a regular basis. The training could consist of specialized instruction in a specific subject matter area (for example, how to deal with benefit claims or how to manage health care reform mandates) or it could focus on overall structure or governance issues. Costs and readiness to commit to change can sometimes be impediments. However, fiduciaries should realize it is always better to find mistakes now instead of being educated in the errors by a plaintiff's lawyer or by the government on audit.



For more information on fiduciary duties, search [ERISA Fiduciary Duties: Overview](#) on our website.