Beware of Gifts

Prohibited transactions and conflicts of interest

AS A MEMBER of your plan's committee, you are a fiduciary under ERISA. You are held to a high standard of care (the "Prudent Man Rule"), a duty of loyalty to the participants, and a requirement to put retirement benefits first, including a duty to avoid prohibited transactions by benefitting yourself or others who are related to the plan.

It is clear to most people, both morally and legally, that, if a fiduciary is paid by a provider (either directly in cash or indirectly through gifts) in exchange for favoring that provider, the fiduciary has misbehaved. However, in some cases, it is less obvious.

The less obvious category is described in the Fiduciary Investigations Program of the Employee Benefits Security Administration (EBSA) of the Department of Labor (DoL). This program is not official guidance to plan sponsors and fiduciaries but, instead, is the description of practices and policies applied by DoL investigators as a part of the EBSA enforcement programs. So, while it is not "the law," it is a good indication of what the DoL will examine.

Section 12 of that program instructs its investigators to look at "consideration" such as meals, gifts, entertainment, or expenses associated with educational conferences that are paid by a provider. The investigators are told to determine whether those payments or gifts are consideration for the fiduciary's personal account and received in connection with the plan. With that in mind, how should committee members conduct themselves?

Generally, they should not accept any payments, reimbursements, gifts, etc. from any plan service provider. That includes payments or reimbursements for serving on advisory boards, participating on panels, consulting with the service provider, and so on.

In appropriate circumstances, exceptions may be made, including :

- Gifts, payments, and reimbursements where the total annual aggregate amount is less than $250.

- Reimbursement to the plan for payments properly made by the plan. For example, if the plan pays for a fiduciary to attend a conference and the payments were "reasonable," the reimbursement of those amounts to the plan by a provider may be acceptable. For an expense to be reasonable, it should be a proper plan expense, be reasonable in amount, be consistent with a written plan provision or policy designed to protect the plan, and provide an equivalent benefit to the plan.

It also seems to me that, where a committee member is assisting a provider in developing investments and services that will potentially improve the fiduciary's plan or the outcomes for those participants (through, e.g., serving on an advisory council), the direct payment of reasonable expenses by the provider should be acceptable. However, this is a difficult line to draw. For that reason, I recommend that the plan committee formally approve the arrangement (without the participation of the affected person); travel reimbursement be for coach only; the meeting should occur at a business (as opposed to a resort) hotel near the national headquarters or a regional headquarters of the provider; the days should be filled with business meetings with a written agenda and with substantive responsibilities; the evening entertainment functions (if any) should be of moderate cost—for example, a baseball game (but not a World Series game); and there should be a report of the activities prepared by the provider.

It is both fortunate and unfortunate that the guidelines are not clearer. It is unfortunate because it leaves fiduciaries with unanswered questions; it is fortunate because it means that a rule of reasonableness applies.

Forewarned is forearmed. Don't fall into the trap of taking payments from a provider—including reimbursements for travel or conferences—without thinking it through. Make sure that it passes the "smell test," but also get legal advice.

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