

Plan Committee Agendas III

Two special issues

In my last two columns, I suggested agendas for quarterly meetings of plan committees. This month's column discusses "special" issues that need to be considered from time to time but do not require attention on a regularly scheduled basis. While the list of such potential concerns is long, this article focuses on two important ones: participant complaints and fiduciary education.

Participant Complaints

Department of Labor (DOL) guidance says that fiduciaries should pay attention to participants' complaints. Committee members should be told about any concerns that are voiced regarding access to information; quality of participant education or investment advice; investments and expenses; biased or conflicted information; and so on.

As you might imagine, it would not look good if participants had complained about investments, expenses or services and the DOL subsequently investigated that plan, found a problem and discovered that the committee was unaware of it or knew and had failed to address it.

Participant grievances are a major cause of these investigations. If participants don't believe they are being heard, they are more likely to contact the DOL.

The first step in developing a process to deal with participant complaints is to educate your company's benefits staff about the need to handle them properly. In that regard, complaints can be divided into three categories.

- **Material complaints.** These involve significant issues, such as eligibility to participate, expense of investments and deposit of deferrals. Those complaints should be elevated to the committee for review, and a committee member should oversee the investigation with the help of an in-house or outside lawyer.

- **Easily resolved complaints.** These are objections that the staff can efficiently manage. A record of those complaints, and their resolution, should be maintained and reported to the committee, perhaps annually.

- **Complaints that cannot be easily resolved.** In other words, the initial staff investigation did not result in an answer that was accepted by the participant(s). At this point, the matter should be "kicked upstairs" to a senior manager. However, if that does not correct the problem in a reasonable time, it should be referred to the committee's attention.

It is the committee's job to make decisions about these issues. While the benefits staff can perform ministerial functions, it is not their job to exercise discretion about participation, deferrals and other matters that could affect participants' benefits.

Keep in mind that the Employee Retirement Income Security Act (ERISA) gives considerable latitude to fiduciary committees—so long as they engage in a prudent process. Where there is a dispute, it is imperative that committees do a good job of gathering the right information and evaluating it properly. Consider getting expert advice about how to do that.

Fiduciary Education

In recent years, the DOL has asked, in many of its investigations, whether the committee members have received fiduciary education. Obviously, the best answer is yes. While fiduciary education won't let committee members off the hook if there is an ERISA violation, it does indicate a culture of compliance. That sets a good foundation for a favorable resolution of a DOL investigation and, if there is a problem, for an understanding that the problem was an innocent mistake, not the result of neglected duties.

I recommend annual updates to cover the latest developments in new regulations, legislation, court decisions and DOL and Internal Revenue Service (IRS) investigatory priorities. Also, as first-time members join a committee, they should receive fiduciary training on the basics. Fiduciary education should be viewed as an ongoing process, not an event.

These are just two examples of special issues for your committee's attention. There are more. The key is that committee members must be aware of their responsibilities—and pay attention to the right things at the right time.

It may be surprising, but I have seen much more litigation about issues that never made the agenda—and, therefore, where committees made no decisions—than about "bad" decisions. The moral of that: It's what you don't do that can get you in trouble. Make sure your committee agendas cover all your responsibilities.

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