Compliance Watch

The Best Defense is a Good Offense

Plan sponsors can minimize fiduciary liability with adequate fiduciary education and certification.

By Ian Kopelman

In a recent column we pointed out that an in-house or named fiduciary of an ERISA plan is never completely free from fiduciary responsibility for the plan — and the potential personal liability that comes with it. The smart fiduciary takes steps to minimize that liability. As the old saying goes, the best defense is a good offense. In this case, that means that the in-house/named fiduciary of the plan has a full understanding not only of the fiduciary responsibility rules, but also the rules of ERISA and the Internal Revenue Code that govern the operation of qualified retirement plans and the investment of plan assets. The fiduciary that fully understands the plan rules is in the best position fulfill its fiduciary responsibilities *and* minimize its liability.

As previously explained, a plan's in-house/named fiduciary can delegate some or all of the day-to-day responsibility for a retirement plan, but it always retains responsibility for the following:

- Appointing the trustee;
- Appointing investment managers;
- Investing plan assets;
- Selecting plan service providers; and
- Monitoring the performance of all of the above on an ongoing basis.

Under ERISA, the in-house/named fiduciary's actions in fulfilling these responsibilities must be:

- For the exclusive benefit of plan participants and their beneficiaries and for the purpose of defraying expenses of administering the plan;
- Prudent, which means that it must be done with the care, skill, and diligence that would be exercised by a reasonably prudent person who is familiar with such matters; and
- In accordance with the plan documents, unless the documents are themselves are not in compliance with the terms of ERISA.

Meeting these responsibilities with respect to the selection of plan service providers and other plan fiduciaries may seem fairly straightforward, but a plan's in-house/named fiduciary is also responsible for monitoring the performance of the service providers and fiduciaries it selects. This means that even if the selection was prudent, the in-house/named fiduciary will have breached its ERISA fiduciary responsibility if it does not terminate the relationship with a service provider or fiduciary when a failure to perform makes continuing the relationship imprudent. Further, under ERISA's co-fiduciary liability rules, an in-house/named fiduciary that acts in good faith and complies with all ERISA requirements still may be liable for the acts or omissions of a co-fiduciary if:

- It knows that the person committing the act or omission is a fiduciary with respect to the same plan, participates knowingly in the act or omission, and knows that the act or omission is a breach of fiduciary duty;
- Its breach of ERISA's rules enabled the subsequent breach by a co-fiduciary; and
- It knows of a breach by a co-fiduciary and fails to make reasonable efforts under the circumstances to remedy the breach.

It is generally agreed that in order to manage its potential liability, a plan fiduciary needs a paper trail demonstrating that it acted prudently. However, it is difficult, if not impossible, for an in-house/named fiduciary to satisfy the responsibilities described above, meet ERISA's fiduciary standard and avoid liability if it doesn't understand the rules of ERISA and the Internal Revenue Code govern qualified retirement plans.

Once an in-house/named fiduciary understands the rules that apply to plans, it can avoid fiduciary breaches by:

- Formulating (and periodically reviewing) a formal written investment policy statement;
- Performing adequate due diligence in the selection of plan fiduciaries and other service providers;
- Periodically auditing the performance of those service providers;
- Reviewing the performance and relative expenses of plan investments;
- Terminating other plan fiduciaries and service providers when their

performance makes it imprudent to continue the relationship; and

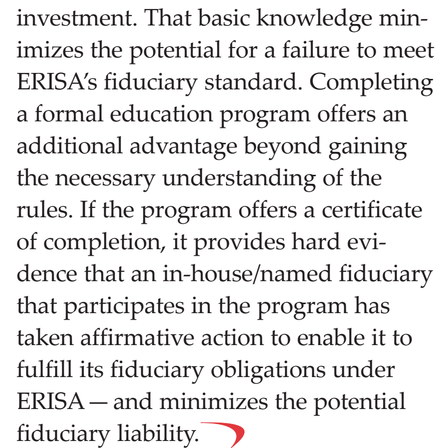
- Understanding and complying with ERISA's reporting requirements.

Fortunately, understanding the rules governing qualified retirement plans does not mean that the in-house/named fiduciary needs to become a compliance expert. That can take years. However, an understanding requires more than reading the statute or a couple of articles. The best, and most efficient, way for the in-house/named fiduciary to gain the knowledge it needs is to get help from compliance experts by taking advantage of an education program, such as those offered by the PSCA.

As discussed above and in other columns, the in-house/named fiduciary of an ERISA plan faces a difficult problem. It has significant fiduciary responsibility under ERISA, which can't be completely relieved by delegation to another fiduciary. If the actions of the in-house/named fiduciary don't meet ERISA's fiduciary standards, it faces significant liability. However, it can't be confident that its actions meet ERISA's standards without understanding the applicable rules. Further, the in-house/named fiduciary needs to be able to demonstrate that it took steps to make sure that its actions and decisions meet ERISA's fiduciary standards.

Conclusion

Fortunately, this problem can be addressed. A fiduciary education program can provide the in-house/named fiduciary with a basic knowledge of the rules of ERISA and the Internal Revenue Code with only a small time investment. That basic knowledge minimizes the potential for a failure to meet ERISA's fiduciary standard. Completing a formal education program offers an additional advantage beyond gaining the necessary understanding of the rules. If the program offers a certificate of completion, it provides hard evidence that an in-house/named fiduciary that participates in the program has taken affirmative action to enable it to fulfill its fiduciary obligations under ERISA — and minimizes the potential fiduciary liability.



See the article on page 17 for a suggestion about how 403(b) plan administrators can improve their fiduciary offense.

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