10 THINGS YOU'RE (PROBABLY) DOING WRONG

OR NOT DOING RIGHT AS A PLAN FIDUCIARY

A couple of disclaimers up front: First, if you're taking the time to read this, odds are you probably are doing a better-than-average job as a plan fiduciary. Second, you may well be able to identify things that are not on this list. This is a list compiled based on three decades of experience working with retirement plans; numerous conversations with providers, plan sponsors, regulators, and advisers; as well as a review of documented compliance shortfalls. Note, however, that there is frequently a difference between doing all that the law requires and doing everything that you can do. This listing is a combination of the things that you must do, and things that you do not have to do—but that, if done, would keep you and your plan(s) in good stead. I hope you find this list informative—and that you draw insight and comfort from its contents, as well as a reminder of the awesome responsibilities you have as a plan fiduciary.

1. Not having a plan/plan investment committee

ERISA only requires that the named fiduciary (and there must be one of those) make decisions regarding the plan that are in the best interests of plan participants and beneficiaries, and that are the types of decisions that a prudent expert would make about such matters. ERISA does not require that you make those decisions by yourself—and, in fact, requires that, if you lack the requisite expertise, you enlist the support of those who have it.

You may well possess the requisite expertise to make those decisions—and then again, you may not. However, even if you do, why forgo the assistance of other perspectives?

However, having a committee for the sake of having a committee not only can hinder your decision(s), but also can result in bad decisions. Make sure your committee members add value to the process (hint: once they discover that ERISA has a personal liability clause, casual participants generally drop out quickly).

2. Not *having* committee meetings

Having a committee and not having committee meetings is potentially worse than not having a committee at all. In the latter case, at least you ostensibly know who is supposed to be making the decisions. However, if there is a group charged with overseeing the activities of the plan and that group does not convene, then one might well assume that the plan is not being managed properly, or that the plan's activities and providers are not managed and monitored prudently, as the law requires.

3. Not keeping minutes of committee meetings

There is an old ERISA adage that says "prudence is process." However, an updated version of that adage might be "prudence is process—but only if you can prove it." To that end, a written record of the activities of your plan committee(s) is an essential ingredient in validating not only the results, but also the thought process behind those deliberations.

More significantly, those minutes can provide committee members—both past and future—with a sense of the environment at the time decisions were made, the alternatives presented, and the rationale offered for each, as well as what those decisions were. They also can be an invaluable tool in reassessing those decisions at the appropriate time and making adjustments as warranted—properly documented, of course.

4. Not having an investment policy statement (IPS)

While plan advisers and consultants routinely counsel on the need for, and importance of, an IPS, the reality is that the law does not require one and, thus, many plan sponsors—sometimes at the direction of legal counsel—choose not to put one in place. Of course, if the law does not specifically require a written IPS—think of it as investment guidelines for the plan—ERISA nonetheless basically anticipates that plan fiduciaries will conduct themselves as though they had one in place. Generally speaking, you should find it easier to conduct the plan's investment business in accordance with a set of established, prudent standards if those standards are in writing, and not crafted at a point in time when you are desperately trying to make sense of the markets. In sum, you want an IPS in place before you need an IPS in place.

It is worth noting that, though it is not legally required, Labor Department auditors routinely ask for a copy of the plan's IPS as one of their first requests. Therein lies the rationale behind the counsel of some in the legal profession to forgo having a formal IPS because, if there is one thing worse than not having an IPS, it is having an IPS—in writing—that is not followed.

5. Not removing "bad" funds from your plan menu

Whether or not you have an official IPS, you are expected to conduct a review of the plan's investment options as though you do. Sooner or later that review will turn up a fund (or two) that no longer meets the criteria established for the plan. That's when you will find the