

Managing Retirement Plan Fiduciary Risk

Lessons Learned from ERISA Litigation

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**“A pure heart and an empty
head are not enough.”**

Donovan v. Cunningham (5th Cir. 1983)

Core Fiduciary Duties

- Loyalty - Act solely in the participants' / beneficiaries' interest.
- Care – Use the care, skill, prudence and diligence of a prudent expert in the prevailing circumstances.
- Diversify Plan Investments – Diversify unless it's clearly imprudent or the plan is covered by an exception, such as for ESOPs.
- Follow Plan Documents – Adhere to the written terms unless they are inconsistent with ERISA.

Core Fiduciary Duties cont'd

- The key to fulfilling most fiduciary duties under ERISA lies in adhering to a **prudent process** and **documenting** it.
 - Establish a governance structure that works for your plan(s) and organization.
 - Form fiduciary committee(s).
 - Keep good meeting minutes.
 - Confirm fiduciary insurance and indemnification for committee members and others.

Fiduciary duties are the same regardless of the size of the plan, type of plan or sophistication of the employer!

Prudent Oversight of Plan Assets

- Maintain an investment policy statement for each plan.
 - Invest the plan in accordance with the policy.
 - Update the statement promptly if the policy changes.
- Monitor investment performance.
 - Use outside experts.
 - Apply appropriate benchmarks.
 - Keep a “watch list” of underperformers under policy criteria.
- Monitor fees and expenses.
 - Stay aware of lower-cost share classes and pooled investment vehicles that become available as plan assets grow.

Fiduciary Duties & Litigation

- Litigation highlights practices that may expose employers and plans to claims of fiduciary breach involving plan assets.
 - In 401(k) (and 403(b)) plans, lawsuits challenge fund selection, fund performance and high investment or administrative fees.
 - Within the last several months, several cases have challenged actuarial conversion factors in traditional defined benefit pension plans.
- Lawsuits can be high profile and high risk.
 - Class certification frequently is granted early on.

Fiduciary Duties & Litigation

- Defendants in fiduciary litigation include prominent names – but also many much smaller employers.
 - Some defendants have settled, others have succeeded in defeating claims, and many more continue to litigate.

The results in these cases underscore the importance of fiduciary vigilance – but they also confirm that perfection is not required.

Fiduciary Duties & Litigation – cont'd

- Key takeaways from 401(k)/403(b) plan litigation:
 - There is no such thing as a “set it and forget it” investment platform.
 - A high level of oversight activity is expected.
 - Class certification is not hard to establish in this context.
 - Courts really will focus on process rather than outcomes.
 - Fiduciary governance structure of plan sponsor
 - Engagement of committee members
 - Role of independent advisors
 - Manner in which funds are selected and deselected
 - Manner in which recordkeepers are selected
 - Consistent habit of monitoring investment performance and fees

Fiduciary Duties & Litigation – cont'd

- A sound overall structure and process can overcome isolated bad facts and outcomes.
- Consider some facts that emerged in the class action involving fiduciary management of plan assets in NYU's 403(b) plan. (*Sacerdote v. NYU* (S.D.N.Y. 2018))

Sarcedote v. NYU

“Since the [NYU Retirement Plan] Committee’s inception, Meagher has been one of its two co-chairs.... Meagher’s testimony was concerning. She made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics; she displayed a surprising lack of in-depth knowledge concerning the financial aspects of managing a multi-billion-dollar pension portfolio and a lack of true appreciation for the significance of her role as a fiduciary.... She bluntly testified that ‘[i]t’s not my job to determine whether the fees are appropriate[.]’”

Sarcedote v. NYU

“Sanchez, also a Committee member, was similarly unfamiliar with basic concepts relating to the Plans, such as who fulfilled the role of administrator for the Faculty Plan. When asked about her inability to remember Plan details, Sanchez responded that she has a ‘big job’ (referring to her human resources role, not her Committee membership) and that her role on the Committee is one of many responsibilities she has.... When asked who the plan administrator was, she responded, ‘I don’t review the plan documents. That’s what I have staff for[.]’”

Sarcedote v. NYU

“Martin Dorph, a Committee member until July 2017, testified that he did not even know whether he was, at the time of trial (in April 2018), still a member of the Committee[.]”

NYU defeated all claims at trial – why?

Sarcedote v. NYU

“In contrast, Tina Surh, who served as NYU’s Chief Investment Officer (‘CIO’) and a Committee member from 2010-2014 ... testified that she ‘questioned [their investment advisor] and discussed ... the basis for their views’ Outside committee meetings, Surh read plan material prospectuses and met with portfolio managers She also met with [investment advisor] team members to discuss general market trends and investment options as well as specifics around NYU’s [investment policy statement].”

Sarcedote v. NYU

“While the Court finds the level of involvement and seriousness with which several committee members treated their fiduciary duty troubling, it does not find that this rose to a level of failure to fulfill fiduciary obligations. Between [their investment advisor’s] advice and the guidance of the more well-equipped Committee members (such as Surh), the Court is persuaded that the Committee performed its role adequately[.]”

Fiduciary Best Practices Checklist

- Identify plan fiduciaries and review their responsibilities.
- Establish a retirement plan committee and adopt a charter.
- Develop and follow an Investment Policy Statement (IPS), which sets forth general principles and investment goals and establishes a baseline against which investments can be selected and monitored.
- Ensure that meeting minutes and other records for the previous year are in good order.
- Review the terms of all plan documents and administrative practices with legal counsel.
- Use RFP process from time to time to assure competitive fees and quality service from vendors.
- Document all material legal compliance activities of the committee in meeting minutes (with all hand outs and reports attached as exhibits) – documentation is the best evidence of the prudent process.

Best Practices Checklist – cont'd

- ❑ Understand and monitor the fees and expenses that are being paid by each plan and plan participants.
- ❑ Compare investment fees and expense ratios against appropriate benchmarks – higher fees should be linked to above-average service and performance.
- ❑ Do the same with respect to administrative fees paid to plan record keepers and others.
- ❑ Be cognizant of the size of your plan(s) as larger plans may be eligible for lower-cost share classes and may negotiate lower recordkeeping fees.
- ❑ Engage independent consultants as needed to assist with fund performance analysis and fee benchmarking and remove funds that fail to meet the criteria specified by the IPS.