

ADDRESSING INHERENT RISKS IN MANAGING BENEFIT PLANS

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The market for labor, talent and human capital remains highly competitive as companies seek to hire and also to retain skilled individuals. As part of their hiring and retention efforts, many employers offer, sponsor, and/or provide a variety of employee benefits including medical, disability, retirement, and/or profit-sharing plans. One of the challenges for an organization is the management risks associated with these benefit offerings.

In particular, administering and managing various types of benefits plans may require the employer to act in a fiduciary capacity exposing the employer to risks both within and beyond the Employee Retirement Income Security Act (ERISA).

Increased risks are highlighted by recent litigation that focuses on fiduciary obligations owed to benefit plans and their beneficiaries. Lawsuits have alleged that plans incurred excessive/unreasonable fees, included imprudent and high-cost investments, and engaged in prohibited transactions. While lawsuit headlines have involved well-known entities such as Anthem, BB&T Corporation & Northwestern University, plan sponsors, fiduciaries and decision-makers at most businesses are not immune to similar claims. Therefore, evaluating exposures and potential liabilities is essential regardless of plan size & scope.

Importantly, if your company provides employee benefit plans, significant duties of care may be imposed upon plan sponsors as well as the individuals who oversee plans and related assets. Individuals are typically designated in plan documents by name, title & role (trustee, administrator, etc.) as part of committees, while others are separately authorized to make discretionary decisions. It is best to start with the general requirements of the latter fiduciary type roles in order to understand the various exposures.

EXPOSURES & BROAD LIABILITY

Core duties of a fiduciary, as typically outlined in plan summary documents, include maintaining accurate records, appropriately structuring and offering a menu of investments, selecting advisors, properly detailing the rights and eligibility of participants, and engaging in clear communications. Fiduciaries should be cognizant of the obligations imposed upon them by ERISA as well as their duty in prudently fulfilling their roles in the sole and best interests of the plans & beneficiaries.

These responsibilities present exposure. For example, fiduciaries may be held personally liable for breach of their duties, which could result in a lawsuit against them individually. Using third-party service providers or a bank does not diminish the fiduciaries' ongoing duties and obligations to the plans or the fiduciaries' potential for personal liability.

BEST PRACTICES

Strategically, there are several effective techniques to mitigate risks involving fiduciary responsibilities.

1 OBTAIN FIDUCIARY LIABILITY INSURANCE COVERAGE

A crucial first step for employers to consider is transferring risk from plan sponsors and individuals to insurance carriers via fiduciary liability insurance. This transfer can establish a more affordable and quantifiable approach to risk, particularly when it comes to unpredictable expenses including defense costs. Policies should include insuring agreements specifically covering fiduciary and settlor capacities, including personal indemnities arising from errors or breaches, and cover both ERISA and non-qualified benefits plans.

Even though plan sponsors & individuals may believe they are covered by other types of insurance, this is not always the reality. Specifically, directors and officers liability (D&O), commercial general liability, employee benefits liability and ERISA bonds (address fraud or dishonesty by bonded individuals) may all have gaps or exclusions presenting employers and individuals with additional uninsured liabilities. Instead, plan sponsors should strongly consider fiduciary liability insurance as a layer of comprehensive, dedicated protection.

Finally, plan sponsors should also note that extensions are available with fiduciary liability insurance for inquiry expenses, voluntary settlements and certain regulatory fines and penalties under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Affordable Care Act and the Pension Protection Act.

2 MAINTAIN COMPLIANCE AND CONSISTENCY IN PLAN DOCUMENTS

In addition to transferring risk to an insurance carrier, employers and sponsors should ensure that their plan documents are both compliant & consistent. This includes providing complete and accurate information, particularly around eligibility criteria and available benefits. Sponsors should attempt to use concise, straightforward, and well-organized language and terms throughout documents and within communications to employees. Summary plan descriptions should be distributed in a timely manner and include an outline of the terms and conditions of the plan.

Plan sponsors should also engage legal counsel in reviewing plan documents to verify ERISA compliance, especially when changes are under consideration.

3 PERIODICALLY EVALUATE PLAN OPERATIONS, INVESTMENTS AND VENDORS

One final key consideration for oversight of plan administration is forming an effectively structured employee benefits plan committee. A well-functioning committee should:

- meet a sufficient number of times annually;
- thoroughly document topics discussed and actions taken; and
- routinely rotate members

The committee should also thoroughly examine enrollment procedures, investment options and share classes. Additionally, committee members should assess and evaluate third-party administrators and vendors with a close scrutiny of performance and expenses.

EFFECTIVELY MITIGATING RISK IN EMPLOYEE BENEFITS PLANS IS CRUCIAL

Employers and individuals monitoring employee benefits face a high duty of care to carry out fiduciary responsibilities and comply with ERISA regulations. Failing to do so creates considerable liabilities and exposures. By obtaining adequate fiduciary liability coverage, effectively maintaining plans, and regularly evaluating key elements of the plans, organizations and individuals can proactively reduce their risk and exposure to potential liabilities.

To discuss your specific concerns and exposures and to review your current fiduciary liability policy:

Please contact a Conner Strong & Buckelew representative

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