

# Fiduciary Update and Best Practices for Retirement Plan Committee Members

## Presented by:

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# Why Are We Here?

# Liability Exposure for Committee Members is Very Real

- DOL will ask – have your fiduciaries received appropriate training
- Better training and tools for auditors
- More targeted inquiries/confrontational process
- New generations of lawsuits
- Class actions are the norm
- Fiduciary claims are usually included
- Significant settlements with conditions (have already occurred)
- Today's focus on fees – What is next?

**Best Protection: Train Your  
Fiduciaries and Have a Good  
Process/  
Follow It**

# Let's Start With a Review of the Key Players

# Retirement Plans Committee Structure

- Roles and responsibilities of:
  - Board
  - CEO
  - Committee
  - Investment Consultant
  - Recordkeeper
  - Trustee
  - Outside Legal Advisor

# **Your Duties as a Committee Member – Fiduciary or Not?**

# When Are You Acting as a Fiduciary?

- You are not a fiduciary with respect to performing “settlor” functions that relate to:
  - Plan establishment decision
  - Plan design
    - Type of design
    - Level of benefits or contributions to be provided
    - Covered employee groups
    - Other plan features
  - Plan termination decision

# When Are You Acting as a Fiduciary

- On the other hand – you are a fiduciary **to the extent** you:
  - Exercise discretionary authority or control over plan management
  - Exercise authority or control over management or disposition of plan assets
  - Have authority or responsibility over plan administration
  - Provide investment advice for compensation, or have authority or responsibility to do so

# Fiduciary vs. Non-Fiduciary “Hats”

- Fiduciary status is not an “all-or-nothing” proposition
- You are only a fiduciary to the extent you are performing fiduciary functions
- For example, the Committee members are also employees of plan sponsor – therefore, you:
  - Must wear a “fiduciary hat” with respect to administrative and investment decisions
  - Wear a “non-fiduciary hat” when acting strictly in a corporate capacity, with respect to settlor functions

# Examples of the Committee's Fiduciary Responsibilities Include:

- Selecting and monitoring the performance of the 401(k)/403(b) plan recordkeeper
- Selecting and monitoring the investment options offered
- Selecting and monitoring an independent investment advisor
- Ensuring that participants in the 401(k)/403(b) plan receive the investment and fee disclosures required by ERISA

# Examples of the Committee's Fiduciary Responsibilities Include:

- Reviewing covered service providers' 408(b)(2) disclosures, and the reasonableness of the service arrangements and the providers' compensation
- Receiving regular reports regarding delegated administrative responsibilities

# **Ok, So I Am A Fiduciary – What Does That Mean?**

# Refresher: Five Basic Fiduciary Responsibilities Under ERISA

When wearing your “fiduciary hat,” you are obligated to:

1. Act solely in interests of plan participants and beneficiaries
2. Act for the exclusive purpose of providing benefits and defraying reasonable expenses
3. Act in accordance with plan documents (to the extent consistent with ERISA)
4. Perform all duties with care, skill, prudence and diligence of a prudent person acting in same capacity and with same knowledge
5. Diversify investments to avoid risk of large losses

# Potential Consequences of Breaching Fiduciary Responsibilities

- Personal liability for losses
- Additional equitable or remedial relief
- Becoming barred from future fiduciary service
- Additional 20% penalty under ERISA Section 502(I)
- IRS excise tax (Section 4975)
- The Bottom Line: Avoiding fiduciary liability requires that the Committee engage in a prudent and deliberative decision making process, and document the process thoroughly – fiduciaries are judged according to process, not ultimate results

# **Best Protection: Train Your Fiduciaries and Have a Good Process/Follow It**

# **What is Going on With Class Action Fee Litigation?**

# Tactics of Plaintiff's Law Firms

# Tactics of Plaintiff's Law Firms

- Plaintiffs' firms are "investigating" 401(k) and 403(b) plans with a view toward filing class action lawsuits
  - They are taking out advertisements in local newspapers that convey the idea to employees that their 401(k) and 403(b) provider might be charging excessive and hidden fees
  - They are targeting potential plaintiffs using social media



THE HUMAN SIDE OF HEALTHCARE

**- ATTENTION -**

**Employees and Retirees**

If you currently participate in the [redacted]  
**Employees 401(k) Plan**, we would like to speak with  
you about our investigation of the fees and investment  
options in your 401(k) plan.

**Please call:**

Law Offices of  
**SCHLICHTER BOGARD & DENTON, LLP**

**(800) 873-5297**

*(Missouri Licensed Attorneys)*

**100 South 4<sup>th</sup> Street  
St. Louis, MO 63102**

The choice of a lawyer is an important decision and  
should not be based solely upon advertisement

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# Tactics of Plaintiffs' Law Firms

- Plaintiffs' law firms have amassed a war chest from contingency fees and now seem to have their cases (and settlements) down pat
- Discovery from prior cases has given Plaintiffs' law firms knowledge of industry practices and which plans investment brokers are serving
- How they work
  - Plan administrator receives letter from law firm representing a participant
  - Letter requests that the plan administrator produce documents relating to the plan within 30-days or face \$110/day penalty pursuant to ERISA 104(b)(4)
  - Document requests are typically extensive and seek documents beyond those required to be produced under ERISA
- Large plans have been targeted so far
- Mid-size and smaller plans are likely next
  - Other plaintiff's firms are seeing success of Schlichter firm
  - Plaintiff's lawyers are winning without even going to court

# Hot Topics – Fee Litigation

- Many new cases filed in last 8 months:
  - Bell v. Anthem (Dec. 2015)
  - Pledger v. Reliance Trust Co. (Dec. 2015)
  - Troutt v. Oracle Corp. (Jan. 2016)
  - Krikorian v. Great-West (Jan. 2016)
  - White v. Chevron Corp. (Jan. 2016)
  - Damberg v. LaMettry's Collision, Inc. (May 2016) - **small plan with only \$9M in assets**
  - Johnson v Fujitsu Tech. & Bus. Of Am., Inc. (July 2016)

# University ERISA Class-Action Lawsuits

- Recent cases filed against: NYU, USC, Cornell, Yale, Vanderbilt, Columbia, Duke, MIT, U Penn, Johns Hopkins, Emory, Northwestern
- Filed by: Schlichter, Bogard & Denton (St. Louis plaintiffs' firm)
- Plaintiffs include current and former participants in 401(k) and 403(b) plans
- Defendants include sponsor entities and individual fiduciaries

# Fee Lawsuits – Allegations

The Plan Allegedly Had . . .	The Plan Should Have Had . . .
<ol style="list-style-type: none"><li>1. Multiple recordkeepers resulting in higher fees for participants.</li><li>2. Traditional annuity with severe restrictions and penalties for withdrawal.</li><li>3. Various variable annuities had multiple expenses:<ol style="list-style-type: none"><li>a. “administrative expense” charge (24 bps);</li><li>b. “distribution expense” charge (9.5 bps);</li><li>c. “mortality and expense risk” charge (0.5 bps); and</li><li>d. “investment advisory expense” charge (ranging from 4 to 12.5 bps)</li></ol></li></ol>	<p>Plan could use its leverage better when all participants have one recordkeeper. Fees should be flat fee per participant, not based on amount of assets</p> <p>Options without restrictions and penalties</p> <p>Variable annuities without multiple layers of fees</p>

# Fee Lawsuits – Allegations

The Plan Allegedly Had . . .	The Plan Should Have Had . . .
4. Real Estate Account had multiple expenses: a. “administrative expense” charge (26.5 bps); b. “distribution expense” charge (8 bps); c. “mortality and expense risk” charge (0.5 bps); d. “liquidity guarantee” (18 bps); and e. “investment management expense” charge (36.5 bps).	Options without multiple expenses.
5. Mutual funds that charged varying amounts for investment management, distribution, marketing, and other expenses.	Options without multiple expenses.

# Fee Lawsuits – Allegations

The Plan Allegedly Had . . .	The Plan Should Have Had . . .
6. Revenue sharing arrangements that led to excessive fees to service providers or as “kickbacks” to the sponsor company	Reasonable revenue sharing arrangements
7. Actively managed funds with no performance benefit but higher fees	Passively managed funds with same historical returns as actively managed funds but lower fees
8. Duplicative investment options (multiple options with same target index) that were confusing	One fund per index target with lowest fees
9. Options that historically underperformed	Underperforming funds removed as options
10. No competitive-bidding process for third-party service providers	A competitive-bidding process every two years or so

# Fee Lawsuits – Allegations

The Plan Allegedly Had . . .	The Plan Should Have Had . . .
11. Too many total investment options so participants became confused	Fewer investment options
12. Investment advisor with some alleged financial connection to University (case alleges advisor contributed to University), selected because of its financial contribution to the University	Independent investment advisor chosen in best interests of participants
13. Retail share classes with higher fees	Institutional share classes with lower fees, which large plans have leverage to obtain
14. Index funds with higher fees than similar index funds	Comparable index funds with lower fees

# **What Should a Plan Committee Do Now?**

# What Should a Plan Committee Do Now?

- Good fiduciary process remains critical
  - Allegations in complaints question decisions made/results
  - A Committee's best defense is the process it follows
- Don't overreact to issues raised in cases filed – but make sure the Committee's process has addressed key issues
  - RFP/review of all service providers paid by plan
  - Revenue Sharing
  - Cheaper non-mutual fund options available?
  - Stable value v. money market
  - Recordkeeping fees (percent of assets v. fixed fee)
  - Actively managed v. passive
  - Target date fund review/deep dive
  - Process to monitor internal plan fiduciaries (including Committee)
  - Written plan documents (plan, charter, IPS) being followed?

# What Should a Plan Committee Do Now?

- Good meetings don't just happen – they are carefully planned
  - Committee chair should make sure meetings happen
  - Develop agenda based on Committee's work plan
  - Review materials in advance from service providers
  - Provide materials in advance to Committee Members
- Understand who is providing investment education and advice to participants – develop process to monitor these service providers

# What Should a Plan Committee Do Now?

- There is a clear public dimension to all that you do/expect all decisions to be second guessed
  - DOL may review
  - Plaintiffs' counsel may review
  - Unions may have access
- Committee's process is only as good as the written record of the steps taken, the documents reviewed and the advice received
  - Minutes
  - Record retention

# What Should a Plan Committee Do Now?

- A good process must be applied on a consistent basis
  - Know and understand which fiduciary duties have been delegated and whether the delegation is to appropriate people/committees/institutions
  - Follow and update as appropriate the Investment Policy Statement for the Plan
  - Develop and follow annual work plan of issues to cover during each year
- Seek and follow the advice of a qualified independent investment advisor
  - Make sure advisor is also fiduciary
  - Regularly review and monitor performance
- Engage other expert service providers (like recordkeeper)
  - Regularly review and monitor performance
  - Understand how they are paid

# What Should a Plan Committee Do Now?

- Pay continued attention to fees
  - How much are fees?
  - Are fees based on percentage of assets or fixed?
  - If fees are paid by participants – how are they allocated?
  - Consider fee allocations among multiple plans
- Transparency to participants is essential
- Know the terms of the indemnification and fiduciary insurance coverage provided to you
- Report regularly from the Committee up to the Board
- Help your clients choose and retain effective committee members

# What Should a Plan Committee Do Now?

- Regular committee fiduciary training is essential in light of the high frequency of regulatory and industry changes
- Follow your own fiduciary process rules
  - Know your charter and plan documents
- Don't delay decisions that should be made today

# QUESTIONS???

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