Will 2020 Be a Banner Year for 401(k) Litigation? How Fiduciaries Can Protect Themselves

A Practical Guidance® Article by Carol I. Buckmann, Cohen & Buckmann, P.C.

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If you are a 401(k) or 403(b) plan fiduciary and you have the impression that ERISA litigation has increased in 2020, you are correct. Recent analysis indicates that there have already been five times more lawsuits filed in 2020 than in 2019. Most of these were filed after March, perhaps at least partially due to the coronavirus pandemic. Since participants have more time to look into and worry about their plans, and litigators are looking for work, we can expect this trend to continue.

Improving Defense of 401(k)/403(b) Lawsuits

No steps can guarantee that 401(k) or 403(b) fiduciaries won't join the list of lawsuit defendants, but it is never too late to take steps to increase the likelihood of successfully defending one of these lawsuits. Defendants can prevail if they demonstrate good fiduciary practices, as evidenced by this decision involving American Century Investments. Wildman v. Am. Century Servs., LLC, 362 F. Supp. 3d 685 (W.D. Mo. 2019). Following are 10 steps for fiduciaries to take to reduce their risk and help demonstrate that they have fulfilled their plan responsibilities.

Meet Regularly and Keep Good Minutes

Cancelling previously scheduled meetings can make it appear as if the Committee has dropped the ball. Meetings should be formal, with an opportunity for real discussion, even if they have to be on Zoom video. Don't just exchange e-mails with other Committee members.

Document in the minutes the reasons for any decisions made. Minutes need to be more comprehensive than simply stating that an adviser recommended a particular action. However, they shouldn't be a verbatim record of the discussion. Think of them as incorporating the important points you would want to make if a decision is challenged.

Review and Update Your Investment Policy Statement

Surveys show that the majority of plans have an investment policy statement (IPS). However, these are not fungible and there are big differences in quality in the IPS documents that I am asked to review. Make sure the IPS doesn't lock fiduciaries into actions based on the outcome of a rigid formula or simply parrot what your adviser is reporting on investments. An IPS needs flexibility to cover situations such as the replacement of a fund manager and should work even if you change advisers. An IPS should also have specific provisions on selecting qualified default investment alternatives (QDIAs) and target date funds, regardless of whether the target date funds will be the QDIA. Target date funds vary greatly in performance, risk profile, glide path and management style, and are becoming a more frequent focus of litigation. Failure to include a section on target date fund selection and review is a common deficiency in the investment policies that come across my desk. If you don't have a separate fee policy, your IPS should also have provisions on reviewing plan fees.

Have an Outside Investment Fiduciary

Don't rely on vendor employees for investment advice. Unless they have outsourced responsibility to a Section 3(38) manager, company fiduciaries need advice from an adviser who is subject to ERISA's fiduciary responsibilities and isn't conflicted. Insist on a written acknowledgment of fiduciary status from your adviser.

Understand the Limits of Your Recordkeeper's Responsibilities

Your recordkeeper's service agreement will state somewhere that the recordkeeper is not the fiduciary administrator of your plan. The plan sponsor is still responsible for seeing that all administrative responsibilities are satisfied, even if the recordkeeper is doing the work. Put another way, the plan sponsor is responsible for the recordkeeper's mistakes. Review what your recordkeepers are doing, including the required notices they prepare, with the help of ERISA counsel, if necessary.

Review Your Providers Regularly

A request for proposal (RFP) is one way to compare services and fees with those available elsewhere in the market. There are also services that can help you evaluate your investment adviser's performance, something many company fiduciaries often don't know how to do.

Review Your Investment Choices Regularly

New investment funds and products come on the market all the time. Managers change. If your original fund choices still make sense, document why. Otherwise, replace underperforming funds. If you didn't consider alternatives such as index funds, collective trusts, ETFs and managed accounts, now is a good time to do so.

Communicate with Participants and Timely Answer Complaints/Claims

This is admittedly harder now when so many people are at home, but it is very important to keep participants informed about any plan changes and to respond to participants when they ask questions or complain. Participants may consider filing a lawsuit even if things are being handled well because the employees who received the complaints didn't explain the rules or were dismissive and, if an administrative issue is involved, failed to follow regulations on plan claims. Even if a disgruntled participant doesn't sue, one of the ways the Department of Labor targets plans for audits is receipt of participant complaints about a plan. No one wants to invite an audit.

Consider Outsourcing More

Professional fiduciaries can take over much of the responsibilities of running a plan. An ERISA Section 3(38) investment manager can assume responsibility for selecting the investment menu and a 3(16) fiduciary plan administrator can take over much of the administration, testing, and reporting and disclosure responsibility. A new kind of fiduciary called a pooled plan provider (PPP) will be able to assume administrative and investment selection responsibilities for pooled employer plans, also known as PEPs, beginning in 2021. Like target date funds, these providers are not fungible. Do an RFP and read and compare qualifications and responsibilities assumed in their services agreements before hiring one. Some providers will assume more responsibilities than others, but the plan sponsor cannot delegate away its responsibilities for prudent selection and overall supervision of plan providers.

Consider Mandatory Arbitration and Class Action Waivers

As a result of two Supreme Court decisions, it appears that claims against the plan can be made subject to mandatory arbitration and that rights to pursue a class action can be waived. See, e.g., Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018). This means that claims would have to be pursued in individual arbitrations. There are pros and cons to choosing mandatory arbitration over litigation, including the inability to appeal arbitrated decisions, but if you want to avoid the courts and class actions, consult ERISA counsel to determine the best way to proceed.

Get Fiduciary Training

You can't fulfill your fiduciary responsibilities properly if you don't know what they are.

All company fiduciaries can benefit from regular fiduciary education. The law keeps changing, and so does the case law. Recently, there has been an increase in lawsuits challenging target date fund selection and asking fiduciaries and recordkeepers to make up for assets lost due to cyberfraud. See, e.g., Bilello v. Estee Lauder Inc. (S.D.N.Y., filed 6/23/2020); Garthwait v. Eversource Energy Company (D. Conn., filed June 30, 2020); and Leventhal v. MandMarblestone Grp. LLC, 2020 U.S. Dist. LEXIS 92059 (E.D. Pa. 2020). The law may be developing in these areas. See Are your Target Date Funds a Lawsuit Waiting to Happen (Cohen & Buckmann, 6/12/19).

Since no procedures can make a plan litigation proof, it is also important for fiduciaries to maintain adequate fiduciary liability insurance. However, insurance, no matter how comprehensive, should not be viewed as a substitute for good fiduciary practices.

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Carol is a co-founding partner of Cohen & Buckmann. With a career that spans more than 35 years, Carol has become one of the foremost employee benefits and ERISA attorneys in the country. She is widely known for her in-depth understanding of issues related to ERISA, including pension plan compliance, fiduciary responsibilities and investment fund formation. Her clients – global and U.S. companies – and attorneys rely on her for advice related to complex pension law and fiduciary problems. She also is experienced at advising global employers on U.S. and cross-border employee benefit matters.

Carol writes for the firm's blog, Insights, and contributes regularly to the "Ask the Lawyer" column on 401kTV. In addition to opining about new developments in the benefits industry, Carol also speaks frequently at industry and client events.

Prior to founding Cohen & Buckmann, Carol was Counsel in the New York Office of Osler, Hoskin & Harcourt LLP and spent 23 years as specialist and ERISA Counsel at Sullivan & Cromwell.

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