LEGAL UPDATE

Fiduciary Obligations of a New Committee Member

Marcia S. Wagner, Esq.

One of the most important things a plan sponsor can do for the members of its retirement plan committees is to provide them with robust and periodic fiduciary training. This is an important measure in minimizing fiduciary risk. While fiduciary training is not required under ERISA, and some studies have indicated that only a minority of plan sponsors provide fiduciary training to their committees, it is a best practice, and one which we and many other law firms follow. Furthermore, in the event of a DOL audit, the investigating agent will frequently inquire about the plan's fiduciary training program. While there is no checklist of items to be covered there will generally be an overview of ERISA, a discussion of fiduciary responsibilities and potential fiduciary liability. Committee members will be advised to become familiar with the plan and its investment policy statement, and, if there is a committee charter, the responsibilities of the committee under that document.

Such training sessions are generally provided to a committee as a group, rather than individually. When a new committee member is appointed, he or she should receive the same type of training. To the extent that the practices for fiduciaries have been memorialized, he or she should receive a copy of the booklet. However, a recently decided case from the Northern District of Georgia, *Fuller v. Sun Trust Bank*, raised the question of the extent of the obligations of an incoming committee member.

The starting point for analysis is ERISA Section 409(b) which provides that no fiduciary is liable for a breach of fiduciary duty committed either before he or she became a fiduciary, or after he or she became a fiduciary. However, shortly after the enactment of ERISA, the DOL issued advisory opinions explaining the limits of that statutory language. If a fiduciary obtains knowledge of a breach committed by a prior fiduciary, the successor fiduciary has a duty to remedy that breach. Case law has followed the DOL approach, and there is also authority that a fiduciary duty may exist to review existing investments, at least within a reasonable time, and to take reasonable steps to remedy such breach. *See*, *Morrissey v. Curran*, 567 F. 2d. 546 (2d Cir. 1977); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518 (S.D.N.Y. 1983); and *Pension Benefit Guaranty Corporation v. Greene*, 570 F. Supp. 1483 (W.D. Pa. 1983). To this extent, the interpretations of ERISA Section 409(b) are consistent with the common law of trusts. The body of law imposes a duty on a successor trustee to remedy a breach of a prior trustee and imposes a liability on the successor trustee to the extent to which a loss results from the successor trustee's failure to take remedial steps.

The primary issue before the District Court was whether an obligation to remedy a breach of a fiduciary duty by a prior trustee required the successor trustee to have actual knowledge of the breach, or whether constructive knowledge was sufficient ("constructive knowledge" basically means that the person or entity clearly should have known such that it equals actual knowledge). The District Court noted that only one unreported District Court case had applied the constructive knowledge standard, and therefore followed the majority position that actual knowledge was required. Plaintiff's position was that Title I of ERISA is heavily based upon the common law of trusts, and that Restatement (Second) of Trusts takes a contrary position, *i.e.*, "A trustee is liable to the beneficiary for breach of trust if he knows or should know of a situation constituting a breach of trust committed by his predecessor and he improperly permits it to continue." The District Court was not persuaded, noting that no courts had relied upon this section of the Restatement in addressing the issue. The District Court indicated that the result might be different if plaintiffs could establish willful blindness on the part of defendants, *i.e.*, if defendants were highly suspicious of certain prior fiduciary conduct, but purposely sought to avoid looking into it. The Court further concluded that even if constructive knowledge were the appropriate standard, plaintiffs could not establish it. For example, the fact that the plan utilized proprietary funds, and that several plan sponsors had been sued for utilizing proprietary funds in their 401(k) plans, was insufficient to establish actual knowledge of a fiduciary breach. The incoming committee members had no affirmative duty under ERISA to scour prior committee members or interrogate other committee members. Furthermore, if for no other reason than the possibility of review by the DOL or a plaintiff in litigation, committee minutes generally have a positive spin to them.

Takeaway. As is frequently the case under Title I of ERISA, no bright lines are to be drawn. A new committee member should try to become as knowledgeable about the plan and its current activities as possible. If he or she becomes aware of something that seems problematic, the matter should be pursued; but he or she has no obligation to satisfy himself or herself that there have been no prior fiduciary breaches that need to be addressed.

Marcia S. Wagner *is the Managing Director of The Wagner Law Group. She can be reached at 617-357-5200 or* Marcia@WagnerLawGroup.com.