

## It's Time For Your Fiduciary Check-Up!

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Due to the recent surge in ERISA litigation against employers and executives alleging, among other things, that they breached their fiduciary duties to plans and participants by allowing service providers to charge excessive fees, some fiduciary liability insurers have reportedly revamped their processes for evaluating applications for fiduciary liability coverage. These changes may impact an employer's ability to obtain adequate fiduciary liability coverage, thereby increasing the exposure to plan sponsors and their executives.

Periodic fiduciary check-ups are always a good idea, but in light of these developments, it is perhaps more important than ever that plan sponsors conduct periodic internal reviews to ensure they continue to meet their fiduciary duties to their plans and participants. Among other things, responsible plan fiduciaries should:

- Determine whether the committee (or committees) responsible for administering the plan and overseeing plan investments meets regularly and properly documents its meetings, including information on not just *what* decisions were made, but that a prudent process was followed in making them.
- Review any plan committee charter to ensure the plan committee is operating in accordance with the charter. Consider whether any changes or updates are needed to the committee charter. If there is not a committee charter in place, consider adopting a committee charter outlining the plan committee's roles and responsibilities.
- Review the plan's investment options. Determine whether the plan offers the least expensive share class available for each fund, and if not, why. Determine whether the plan uses any proprietary funds of an affiliate of the recordkeeper or investment consultant, and if so, document the process undertaken for ensuring such investment options were independently evaluated. Determine whether the investment options in the plan, including any brokerage window, comply with the DOL's recent guidance regarding plan investments in cryptocurrencies.
- Review the plan's fees and expenses. Determine when the plan administrator last conducted an independent fee benchmarking analysis to determine the reasonableness and competitiveness of service provider fees (including fees for plan recordkeepers and investment consultants). If the benchmarking analysis shows a deviation from market rates for a service provider, consider conducting a new request for proposal ("**RFP**"). All RFPs and benchmarking studies should be documented.
- Review the plan's investment policy statement ("**IPS**") and consider whether updates are needed. If there have been any deviations from the standards set forth in the IPS, ensure they are properly documented.
- Conduct fiduciary training for all plan fiduciaries. It is recommended that this be conducted at least annually.
- Review the plan document and determine whether it is up-to-date for any legal and plan-design changes. If the plan has recently been amended, review other relevant documents, such as the summary plan description, any plan administration manual, participant notices, and election forms, as applicable, to ensure they have been updated to reflect the changes made by the amendment.

- Review service provider agreements to ensure they comply with the DOL's recent guidance regarding cybersecurity best practices.
- Maintain a plan compliance calendar.

Fiduciary litigation is always a risk, but conducting periodic fiduciary check-ups should help limit the exposure of plan sponsors and their executives.