

Strafford

Presenting a live 90-minute webinar with interactive Q&A

ERISA Plan Investment Committee Governance: Avoiding Breach of Fiduciary Duty Claims

Evaluating Fiduciary Risks and Avoiding Claims of Breaches by Investment Committee Members

WEDNESDAY, JUNE 10, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Emily Seymour Costin, Partner, **Alston & Bird**, Washington, D.C.

Rhonda Prussack, Head of Fiduciary and Employment Practices Liability,
Berkshire Hathaway Specialty Insurance, Washington, D.C.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

ERISA Plan Investment Committee Governance: Avoiding Breach of Fiduciary Duty Claims

Emily Seymour Costin
Partner - Alston & Bird LLP
emily.costin@alston.com

Rhonda Prussack
SVP and Head of Fiduciary and Employment
Practices Liability – Berkshire Hathaway Specialty
Insurance
rhonda.prussack@bhspecialty.com

Description

One of the best techniques a plan sponsor can implement to mitigate fiduciary risk is the installation of an effective investment committee. Sponsors must take care in establishing protocols to ensure committees operate within strict ERISA standards and employ robust fiduciary practices.

Attendees will benefit from a discussion of risk mitigation approaches that have the potential to help avoid breach of fiduciary duty allegations. This program will also address effective litigation-avoidance strategies and the importance of fiduciary liability insurance coverage.

Listen as our authoritative panel discusses the importance of appropriate and effective investment committee governance. Our panel will review some of the best practices for training and selection of committee members, litigation avoidance, the relationship between investment committee governance and ERISA fiduciary liability insurance coverage.

SPEAKER BIOS

Emily Seymour Costin, Esq.



- Emily Seymour Costin is a partner in the Washington, D.C. office of Alston & Bird LLP, where she primarily represents employers, plan sponsors, insurers, and fiduciaries in employee benefit disputes and advises on litigation avoidance strategies. Emily has experience defending individual, mass action, and class action claims for benefits and breach of fiduciary duty under ERISA. She has experience litigating various types of benefit plan disputes, including those involving investments, excessive fees, employer stock, actuarial factors, benefit termination, and health care matters.
- Emily is the former chair of the American Bar Association’s Joint Committee on Employee Benefits (JCEB), a member of the editorial advisory board of the *Benefits Law Journal*, and a contributing author to the BNA treatise *ERISA Litigation*. Emily was one of five lawyers named a “Rising Star” by *Law360* in the field of employee benefits in 2018, and was most recently recognized by *The Best Lawyers in America*© in Litigation - ERISA.

Rhonda Prussack



Rhonda Prussack is Senior Vice President and Head of Fiduciary and Employment Practices Liability at Berkshire Hathaway Specialty Insurance. She has been in the insurance industry 27 years, and has developed and brought to market cutting edge fiduciary liability policies and coverages for corporations, organized labor, municipalities, and not-for-profits. Rhonda has recently added employment practices liability insurance to her portfolio, and has rolled out state-of-the-art coverages for public and private companies and non-profit organizations.

Early in her career Rhonda had roles at Dean Witter, Johnson & Higgins, and the New York City Employees' Retirement System. She has written articles for and been quoted in many publications, and is a frequent speaker at ERISA and executive liability seminars throughout the U.S. and Canada.

Rhonda received her B.A. from Brooklyn College.

Reach Rhonda at rhonda.prussack@bhspecialty.com or 917-960-2449.

ERISA FIDUCIARY DUTIES

Who is a fiduciary?

- Fiduciaries - any individual:
 - Named in the plan document as a fiduciary
 - Exercises any discretionary authority or control over the plan, its assets, management, or disposition of assets
 - Has any discretionary authority or responsibility for plan administration

What are fiduciary duties?

- Four basic fiduciary rules under ERISA Section 404(a) that an ERISA fiduciary must comply with:
 - Exclusive Purpose Rule
 - Prudence Rule
 - Diversification Rule
 - Plan Document Rule

What are fiduciary duties?

- “Exclusive Purpose” Rule
 - Fiduciary must discharge his/her duties for the *exclusive* purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plans
 - “Two hat” rule
 - Cannot consider company interests or personal interests

What are fiduciary duties?

- “Prudent Person” Rule
 - A fiduciary must perform his/her duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims”

What are fiduciary duties?

- “Diversification” Rule
 - A fiduciary must diversify plan investments to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so

What are fiduciary duties?

- “Plan Documents” Rule
 - A fiduciary must follow the terms of the plan (and trust) to the extent they are consistent with ERISA
 - If the plan (or trust) terms are not consistent with ERISA, fiduciary must disregard the terms of the plan (or trust) to the extent necessary to comply with ERISA

What are the types of liability?

- Breach of fiduciary responsibilities (direct)
 - Fiduciary is not aware of his/her duties
 - Fiduciary does not carry out his/her duties
 - Fiduciary does not obtain necessary advice
- Breach of co-fiduciary responsibilities (indirect)
 - Most commonly occurs where there is a failure to remedy a known breach by another fiduciary

Why is all of this so important?

- A fiduciary who breaches his/her duties:
 - Is personally liable for the losses sustained by the plan
 - Must repay the plan any profits earned by the fiduciary through the use of plan assets
 - May face other civil and criminal penalties

Who is the fiduciary decision maker?

- Board of Directors
- Committee
- Investment advisor 3(21)
- Investment manager 3(38)

Litigation Trends

- Failure to monitor/prudently manage investment fees
- Failure to monitor/prudently manage recordkeeping fees
- Inclusion of and failure to monitor imprudent investment options
- Failure to adhere to investment policy statement
- Failure to monitor fiduciaries
- Inadequate Process
- Lack of diligence regarding investment options/performance
- Poor investment structure
- Self-Interested conduct

Settlements

- Plaintiffs have achieved substantial settlements.
- Settlements ranged from the low millions to over \$60 million.
- Non-monetary relief.

MITIGATING RISK

Selection of Committee Members

- Take advantage of expertise within the company
- Individual experience, tenure, and knowledge of the company
- Time commitment required
- Certain individuals may want to be avoided
- Consider potential for litigation and assumption of that risk

Documentation of Membership

- Document individual acceptance and acknowledgment of Committee membership and fiduciary status
- Employee departures, retirements and turnover can often result in individuals unknowingly becoming members of a Committee
- If there is not a regular rotation of Committee members, the Committee Chair or Board should renew appointments periodically

Fiduciary Training

- Often performed by outside counsel, in-house counsel, or consultants
- Once at the initial formation of the Committee
- Individualized training as new Committee members are added
- Periodic refresh to the entire Committee
- Legal updates as needed with changes in the law or new litigation trends

Expertise

- Fiduciaries are measured against a hypothetical, knowledgeable, and skillful person and the decision that person would make under similar circumstances
- Fiduciaries who lack expertise on the subject have a duty to seek the advice of knowledgeable advisers
- If circumstances warrant, reach out to financial and/or legal experts to help decide whether it is appropriate to take the particular action
- There is no such thing as “too much” information!

Privilege Issues

- Committee should understand legal privilege before engaging counsel
- Exception to the attorney-client privilege when counsel is providing advice to a client who is a fiduciary and it concerns the exercise of those fiduciary duties
 - True “client” is the plan participants
- Attorney-client privilege may not apply to advice offered to the Committee and could be discoverable

Documentation of Process

- ERISA fiduciaries are not guarantors of favorable performance as long as they follow a prudent process
- Cannot judge fiduciary action in “hindsight”
- Courts will likely not second-guess fiduciary decisions made pursuant to a prudent decision-making process if the rationale for a particular decision is clearly and reasonably documented to be in the “best interest of the participants”

Documentation of Process

- “Who, what, where, and when” regarding the meeting, with salient issues discussed
- Sufficient details demonstrating that the Committee gave appropriate consideration to each issue
- Completely and accurately reflect the Committee’s rationale for selecting certain investment options, consideration of reports from third-party experts, voting records of Committee members, and discussion of risk

Documentation of Process

- Document “why” each decision is in the “best interest of participants”
- Document actions and decisions made based on adviser’s recommendation
- Does not need to document every word spoken

Questions

- Who is on the committee?
- Is there an investment committee chairperson? If so, how is that person selected? How is that person evaluated and by whom?
- How often are investment committee meetings held?
- Are written minutes taken? If so, are they archived? Who is able to review them?
- When was the last fiduciary training?
- Are the names and bios of investment committee members made known to participants?
- When are external advisors invited to present to the investment committee?
- How does the investment committee liaise with other plan sponsor employees who have involvement with the management of an ERISA plan(s)?

ERISA FIDUCIARY LIABILITY INSURANCE

Coverage Under the Policy

- What were fiduciary liability policies designed to cover?
 - Personal liability of plan fiduciaries
- Insuring Agreement
 - The Insurer shall pay **Loss** as a result of a **Claim** made against an **Insured** for a **Wrongful Act**

Coverage Under the Policy

- **Loss**
 - Amounts an Insured is legally obligated to pay as a result of a Claim, including:
 - Damages
 - Settlements and judgments
 - Defense costs

Coverage Under the Policy

- **Claim**
 - Demand against the Insured for monetary or non-monetary relief
 - A civil or criminal proceeding
 - Investigations

Coverage Under the Policy

- **Insured**
 - Insured Persons
 - Directors, officers, employees, trustees in their capacity as fiduciaries of sponsored Plans or in their Administration of such Plans
 - Plan Sponsor
 - Including subsidiaries
 - Plans
 - Pension and welfare plans, fringe benefits
 - Plans created during the Policy Period
 - Plans under consideration or development

Coverage Under the Policy

- **Wrongful Act**
 - Breaches of fiduciary duty under Employee Benefit Law
 - Administrative errors and omissions

Not Covered

- Benefits
- Typical Exclusions
 - Conduct
 - Prior notice
 - Pending or prior litigation
 - Prior acts
 - Discrimination
 - Failure to fund
 - Pollution
- Other Insurance

Defense Provision

- Duty to Defend
- Non-Duty to Defend
- Combination

Indemnification

- ERISA Section 410 - Exculpatory Provisions
 - “...any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.”
- DOL Interpretive bulletin ERISA IB 75-4
 - “The Department of Labor interprets this section to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under part 4 of title I. Indemnification provisions which leave the fiduciary fully responsible and liable, but merely permit another party to satisfy any liability incurred by the fiduciary in the same manner as insurance purchased under section 410(b)(3), are therefore not void under section 410(a).”

Indemnification

- Is indemnification available?
- *Johnson v. Couturier* (9th Cir. July 27, 2009)
- Presumptive indemnification

Demonstrating That You Are A Low-Risk Insured

- Prudent processes
- Written investment policy statement
- Composition of plan investment committee
- Advice of experts
- Training