

ERISA Service Provider Agreements for Retirement Plans: Negotiating, Drafting and Monitoring Agreements

TUESDAY, OCTOBER 9, 2018

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

Today's faculty features:

Todd B. Castleton, Counsel, **Kilpatrick Townsend & Stockton**, Washington, D.C.

Seth Safra, Partner, **Proskauer**, 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 **1-866-570-7602** and enter your 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 F11 key on your keyboard. To exit full screen, press the F11 key again.

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 ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

ERISA Service Provider Agreements for Retirement Plans: Negotiating, Drafting and Monitoring Agreements

October 9, 2018

Speakers:

Todd B. Castleton, Counsel
Kilpatrick Townsend & Stockton LLP



Seth J. Safra, Partner
Proskauer Rose LLP



Today's Agenda

- Background Principles and Sources of Law
- The Process to Get a Negotiated Agreement
 - The Preliminary Stage
 - The Hiring Stage
 - The Negotiating Stage
 - The Employer's/Fiduciary's Perspective
 - The Service Provider's Perspective
- Other Considerations

Background Principles and Sources of Law – Prudence Standard for Plan Fiduciaries

Selecting and monitoring service providers for ERISA plans is a **fiduciary function** – ERISA § 404(a)

- Proceeding with the “care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent man 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”
- Often called the “prudent expert” standard
- Courts have endorsed a doctrine of “procedural prudence” in addition to “substantive prudence”
- Generally leaving us with - deference to non-conflicted, well-informed and experienced expert that follows a prudent decision-making process that takes into account all relevant considerations
- “. . . with an eye single to the interests of the participants and beneficiaries”

Background Principles and Sources of Law— Prohibited Transactions

ERISA § 406(a)(1)(C):

Unless an exemption applies, a plan fiduciary “shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods . . . services . . . between the plan and a party in interest”

ERISA § 408(b)(2)

Exemption for “[c]ontracting or making **reasonable arrangements** with a party in interest for office space, or legal, accounting, or other **services necessary** for the establishment or operation of the plan, if no more than **reasonable compensation** is paid therefor”

- Exemption only from 406(a), not 404 general fiduciary duties or, 406(b) prohibitions against self dealing

Background Principles and Sources of Law— Prohibited Transactions

DOL Reg. 2550.408b-2

- “necessary services” must be appropriate and helpful to carry out plan purposes
- “reasonable compensation” based on facts and circumstances
- A reasonable contract or arrangement must allow termination by the plan **without penalty** on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous
- Penalty vs. recoupment of actual costs
- Disclosure of fees and other information (Form 5500 Schedule C)

Background Principles and Sources of Law – Prohibited Transactions (cont'd)

- Is an exemption always necessary?
 - *Brock v. Gerace, 7 Empl. Benefits Cas. (BNA) 1713, 1715 (D.N.J. Apr. 17, 1986)* (“[T]he government’s position is that the plan’s initial agreement with a service provider creates the ‘party-in-interest’ status and that any subsequent agreements between the plan and these parties, even routine renewals of existing agreements, fall within the reach of Section 406(a)”)
 - *UFCW Local 56 Health & Welfare Fund v. Brandywine Operating P’ship, 36 Empl. Benefits Cas. (BNA) 1400, 1403 (D.N.J. Oct. 28, 2005)* (“To be a ‘person providing services’ under Section [3](14)(B), a party must have a relationship with the pension plan that preexists, or is independent of, the relationship created by the allegedly prohibited transaction.”)
 - Regardless of possible arguments that no exemption is necessary in some cases, the market generally looks for the 408(b)(2) exemption or another exemption

Background Principles – Prudence Standard (cont'd)

- DOL Advisory Opinion 2003-02A
 - Discussion of fees in light of industry standards
 - Appropriate uses of “float”
- DOL Pamphlet on Meeting Your Fiduciary Responsibilities
 - Practical Guidance
- DOL Report of the Working Group on Guidance in Selecting and Monitoring of Service Providers
 - Focus on documentation of the process

The Process – Getting to a Negotiated Agreement

- Preliminary Stage
 - Determine which party at plan sponsor is the contracting fiduciary
 - Check the documents
 - Define services and search parameters
 - Due diligence
- The Hiring Stage – Request for proposal
 - Thoughtful preparation of RFP questions
 - Analyze and compare competing proposals
 - Select and notify vendor
- The Negotiating Stage
 - Negotiate terms and conditions
 - Draft/revise governing documents

The Hiring Stage – The Request for Proposal

- Work back from deadline date for an executed agreement
- Plan for several phases
 - search
 - evaluation
 - interview
 - negotiation
- Outsource RFP process?
- Consider asking specific questions about how the provider would handle issues unique to plan sponsor
- Document each phase of the plan's RFP process in writing
- Ensure that issues identified in RFP are addressed in TPA contract

The Negotiating Stage – Overview

- What services will TPA provide?
 - Must be described in agreement or ancillary document
- Disclosure requirements and responsibilities
- Key “asks” from plan sponsors
- Certain operational issues
- Certain terms of the agreement
- Financial arrangements
- Indemnification and related issues
- Termination responsibilities
- Certain Other issues – governing Law, audits etc.

The Negotiating Stage – What Services will TPA provide?

- Plan sponsor may attempt expressly to clarify TPA's duties with respect to:
 - Plan document responsibility (duty to follow)
 - Nondiscrimination and other “legal” compliance
 - Participant communications, phone line and other dealing with participants and beneficiaries
 - Dealing with Plan Administrator or staff
 - Making payments
 - Claim denials and appeal procedures (internal and external)
- TPA may seek clarification, particularly where responsibilities are shared
- TPA may seek to memorialize all decisions in a separate administration manual or document

The Negotiating Stage – Services (cont'd)

- Certain Documentation and Related Matters
 - Plan documentation and SPDs
 - Enrollment materials and various other documentation (SBC, NPP, etc.)
 - Cost of designing, printing and distributing materials
 - Electronic communications
 - Website
 - Business Associate Agreements

The Negotiating Stage – Services (cont'd)

- Other Services
 - Form 5500 Annual Reports
 - Summary Annual Reports
 - Reporting to plan sponsor, IRS
 - Nondiscrimination testing
 - ACA “Shared responsibility” determinations
 - Specialized services
 - QDROs, hardship withdrawals, etc.
 - Investment advice/education
- Subcontracting of Services
 - Allowed? Prohibited? Limits?
 - Core services
 - Notice, prior consent

The Negotiating Stage – Disclosure Requirements and Responsibilities

- Requirements for services arrangements under ERISA § 408(b)(2)
- Required participant disclosures under ERISA §§ 404(a) & (c)
- Disclosure in the plan's Form 5500, Schedule C

The Negotiation Stage – Special Considerations for Health and Welfare

- Determine scope of services: self-funded vs. fully insured
- Understand revenue to service provider
 - Direct compensation
 - Indirect compensation
(not subject to ERISA § 408(b)(2) disclosure, but still important)
 - E.g., PBM “spread” revenue

The Negotiating Stage – Key “Asks” from Plan Sponsors

- Plan sponsor might require TPA to:
 - Make good-faith compliance efforts
 - Recognize if the Plan is covered by ERISA
 - Accept fiduciary responsibilities for claim and appeal determinations
 - Limit exposure to protected health information and other participant data
 - Accept the plan administrator’s interpretations of the Plan document if the TPA disclaims fiduciary responsibility
 - Agree to express contractual limitations on the ability to rely on third-party services and information
 - Cooperate with governmental audits, plan audits, and litigation
- TPA Response?
 - Debate over fiduciary responsibility for directed trustee

The Negotiating Stage – Certain Operational Issues

Plan Sponsor Obligations

- Duty to provide timely, accurate information to TPA
- Eligibility, service, and compensation determinations
- Authorized points of contact with TPA
- Direction to TPA
- Duty to provide plan documents and amendments

The Negotiating Stage – Certain Terms of the Agreement

- Deadlines for services/implementation
- Work product/IP rights – who “owns” what?
- Source, timing and amount of payments owed
- Cure period
- Consequences of nonpayment
 - The nuclear option: terminating services
- Confidentiality and information privacy

The Negotiating Stage – Financial Arrangements

- Plan sponsor may seek to
 - Include review provision regarding timing of payments
 - Examine terms regarding the employer’s responsibility for payment
 - Understand sources of revenue to TPA
 - Avoid “floating” TPA money unless fully disclosed and considered by fiduciaries as part of overall compensation
 - Include provisions regarding responsibility for unclaimed funds and monitoring instructions
 - Typical TPA Response
- Parties should agree on whether there is TPA discretion regarding anything in the services or control of funds, and the extent of any such discretion
- ERISA spending accounts

The Negotiating Stage – Indemnification and Related Issues

- Background legal concepts
 - Exculpatory clauses for “fiduciaries” are prohibited/void against public policy
 - Is the service provider a fiduciary?
 - Indemnification from third parties (including the plan sponsor) and insurance generally permitted
- Will/should indemnification be bilateral?
- Plan sponsor may attempt to provide indemnification only if the TPA exercises good faith and acts without negligence under the terms of the Agreement; TPA may seek broader indemnification

The Negotiating Stage – Indemnification and Related Issues (cont'd)

- Allocation of organization of defense and attorneys' fees
- Will the TPA have to make the sponsor whole for overpayments?
- Will there be performance guarantees with penalties?
 - How will performance penalties be coordinated with indemnification?
- Will the TPA have limited liability?
 - Caps and other limits (e.g., based on fees)
 - Consequential/indirect damages
- Responsibility for cost of benefits
 - Whose plan is it anyway?
- Consider varying indemnity by responsibility (e.g., claims administration vs. data privacy vs. investment advice)

The Negotiating Stage – Termination Responsibilities

- Evergreen provisions
- Coordination with timing of fee increases
- Requirement for “reasonably short notice” under the circumstances
- What fees or costs may be recouped
- Define all terms (for example, material breach)
- Review which parties and what events may trigger termination of the Agreement
- Avoid one-sided termination rights or liabilities; manage time needed to replace TPA vs. ability to get out quickly when desirable

The Negotiating Stage – Termination Responsibilities (cont'd)

- Carefully consider survival provision
- Penalty clause v. recovery of start-up costs
- Post-termination cooperation
- Define and allocate costs of conversion to new service providers, including transition services
- Rights and responsibilities for documents and records

The Negotiating Stage – Certain Other Issues

- Audits, generally
 - Audit of service provider
 - Compliance audits of sponsor/fiduciary
 - Eligibility audit
- Bonding and insurance
- Subcontractors and affiliates
- Dispute resolution (e.g., arbitration, mediation)
 - Informal dispute resolution before going to arbitration, mediation, litigation?
- Governing law/venue
- Corporate transactions
 - Involving the plan sponsor
 - Involving the TPA



Todd B. Castleton, Counsel
Kilpatrick Townsend & Stockton LLP
202.508.5808
tcastleton@kilpatricktownsend.com



Seth J. Safra, Partner
Proskauer Rose LLP
202.416.5840
ssafra@proskauer.com