Adviser: Protect Corporate Boards From 401(k) Claims

By Brian J. Lamb

Crain's Cleveland Business (Originally published: June 30, 2018) Plaintiffs lawyers have their sights set on a portion of the more than $5 trillion in assets held in U.S. 401(k) retirement plans.

Litigation against plan fiduciaries – those responsible for investing, managing, administering and protecting 401(k) plan assets – is on the rise. The claims, which primarily arise under the Employee Retirement Income Security Act of 1974, or ERISA, challenge the prudence or diversification of plan investments or the reasonableness of fees paid by plans to third-party service providers, such as record-keepers and investment advisors.

In 2017, ERISA class action settlements, many involving plan fiduciaries, reached almost $1 billion, with individual cases settling in the tens of millions of dollars each. Increasingly, plaintiffs are including boards of directors as defendants, arguing the board members are or ought to be treated as plan fiduciaries under ERISA. For example, the board of RadioShack recently defeated such claims, while the board of BB&T Bank is currently trying to fend them off. Plaintiffs may calculate that suing the board raises the stakes and provides additional leverage for settlement, but there are ways to protect against this.

When is the board an ERISA fiduciary?

You can ask three questions to determine whether board members are fiduciaries under ERISA:

First, do the plan documents or other governance documents expressly name the board – or a committee thereof – as a fiduciary? If so, those board members will be treated as fiduciaries to the extent described therein.

Second, as a functional matter, does the board actually exercise discretionary control or authority over plan management, does it exercise discretionary authority or responsibility for plan administration, or does it provide investment advice? If so, regardless of what the applicable documents say, the board will be treated as a "functional" fiduciary to the extent of such control, authority or advice.

Third, is the board responsible for selecting and retaining plan fiduciaries? If so, it is the position of the U.S. Department of Labor – the relevant regulatory authority over 401(k) plans – and most courts since the Enron case, that this responsibility is a fiduciary power under ERISA.

Given that most boards have the ultimate appointment power within a corporation, it is safe to assume that the board will virtually always be treated as an ERISA fiduciary, even if only for the limited purpose of appointing and monitoring other fiduciaries. Some plaintiffs argue that the board should be the guarantor of the full performance of the fiduciaries it appoints, but most courts hold that the duty to monitor an appointed fiduciary's performance does not create an overarching responsibility for all its decisions; rather, the board faces liability only to the extent it fails to periodically monitor the fiduciary's performance.

Best practices concerning the board and ERISA

Most boards should not be involved in the daily management and administration of 401(k) plans. Those functions are better off in the hands of benefits committees or designated officers.

Ensure that plan documents and/or delegation documents are precise and unambiguous in allocating responsibility for plan administration and the management and investment of plan assets. Ensure that by-laws, charters, and other governance documents contain no conflicting provisions.

Recognize that the board and its individual members are always fiduciaries, at least to the limited extent they have the ability to appoint other plan fiduciaries. Thus, the board has a duty to monitor the appointed

fiduciaries. Department of Labor guidance states: “At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and circumstances relevant to the choice of procedure.”

Educate board members on the differences between their state law fiduciary duties – as board members – and, where applicable, their ERISA fiduciary duties (as plan fiduciaries). ERISA’s standards, to the extent they apply to a director, are considerably less forgiving than the usual formulations of a director’s duties of care and loyalty under state law (e.g., no “business judgment rule” protection).

Determine if proper insurance coverage is in place. Many D&O policies have an exclusion for fiduciary liability under ERISA, so consider the need for fiduciary riders or separate fiduciary policies for ERISA claims.

Brian J. Lamb is Thompson Hine’s Litigation Practice Group Leader and is based in Cleveland. He represents companies and their directors and officers in complex business disputes, including ERISA litigation, securities and shareholder litigation, corporate governance and fiduciary disputes.