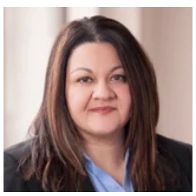
Managing Welfare Plan Risk: The Fiduciary Committee

A Practical Guidance® Article by Saghi Fattahian, Allison Fepelstein, Lindsay Goodman, and Robert Hunter, Morgan, Lewis & Bockius LLP



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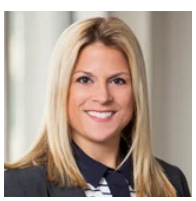

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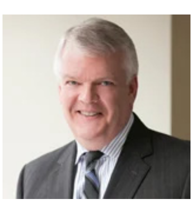

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Fiduciary committees have long been established in connection with retirement plans to manage the investment, legal compliance, and operational risks that can arise under the Employee Retirement Income Security Act of 1974, as amended (ERISA). Since the enactment of the Patient Protection and Affordable Care Act (ACA) and, more recently, the Consolidated Appropriations Act, 2021 (CAA), welfare plan fiduciaries continue to take on increasing compliance responsibilities. Given the increased legal complexity of welfare plan administration, it may be time to consider establishing an administrative committee to help mitigate the various risks involved with managing a welfare plan.

Due to newer requirements—such as price transparency, gag clause attestations, and mental health parity nonquantitative treatment limitation comparative analysis—being an enforcement priority of regulators, along with old favorites such as COBRA and HIPAA compliance, welfare plan administration has gotten more complicated and the stakes for compliance are higher than ever.

The stakes have also been raised because of the increased interest these requirements are receiving from plaintiffs' ERISA class-action firms, that, for example, have brought a number of lawsuits in the past several years challenging companies' COBRA notices as noncompliant. A recent class action lawsuit alleges fiduciary breach for failing to negotiate lower prices for prescription drugs, which allegedly cost participants significant dollars in overpayments for generic drugs.

Having a dedicated welfare plan fiduciary committee helps companies stay compliant with evolving laws and fulfill their fiduciary obligations under ERISA. The act of establishing a committee facilitates internal discussions around compliance generally and focuses attention on who is best suited to carry out those responsibilities. Not all such actions need to be undertaken by the committee, but an appropriately empowered and staffed committee will have overall oversight and monitoring roles with respect to fiduciary functions.

Below are key reasons why an established welfare plan fiduciary committee is important:

1. **Shared Responsibility.** Employers who sponsor health and welfare plans have a fiduciary responsibility to act in the best interests of their plan participants and beneficiaries. This includes prudently managing the plan assets and making decisions that benefit the participants and beneficiaries. Fiduciary committees allow for the distribution of these responsibilities among committee members. Managing employee benefit plans involves a range of tasks, from negotiating contracts for services to plan administration. Committees provide a structure for shared decision-making and accountability.
2. **Diverse Expertise.** Health and welfare plan management requires fiduciaries to be informed about industry trends, emerging practices, and regulatory developments related to health and welfare benefits. Fiduciary committees often include individuals with diverse expertise, such as finance and tax professionals, human resources specialists, and risk management personnel, as well as representatives from different business units within the company. This diversity of skills helps ensure well-rounded decision-making.
3. **Prudent Decision-Making.** Fiduciaries have a duty to act prudently and in the best interests of plan participants and beneficiaries. Committees provide a forum for discussion and deliberation, allowing members to review and assess the design of the company's health and welfare plans to ensure they align with the company's overall benefits strategy and meet the needs of participants and beneficiaries.
4. **Documentation and Transparency.** Committees can help ensure that fiduciary decisions are well-documented. Proper documentation is crucial for demonstrating compliance with legal requirements and standards. Transparency in decision-making also promotes accountability and can be valuable in the event of audits or legal inquiries, especially as we are seeing an increase in US Department of Labor audits and attempts by plaintiffs' firms to inquire about welfare benefit plans.
5. **Compliance with Legal Requirements.** Fiduciary committees play a key role in ensuring that the employee benefit plans comply with applicable laws and regulations, such as ERISA and the ACA. Remaining informed regarding legal requirements, making the necessary adjustments to the plan, and addressing compliance issues are essential functions of the committee.
6. **Risk Management.** Managing employee benefit plans involves inherent risks, whether related to investments (if applicable), plan design, or regulatory changes. Fiduciary committees are tasked with identifying and managing these risks, implementing risk mitigation strategies, and making decisions that align with the best interest of plan participants.

A more sophisticated employer may decide to establish a separate plan sponsor committee (if one is not already in place) to handle non-fiduciary activities such as plan design and plan amendments. This committee can act in the best interest of the plan sponsor without being subject to any fiduciary duty to participants under ERISA. The two-committee approach makes it abundantly clear what actions are taken by which committee and what duty of loyalty, if any, is owed to participants and beneficiaries.

In summary, plan fiduciary committees provide a structured and collaborative approach to managing employee benefit plans. By bringing together individuals with diverse skills and expertise, these committees contribute to the prudent and effective oversight of compliance with legal requirements.

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