

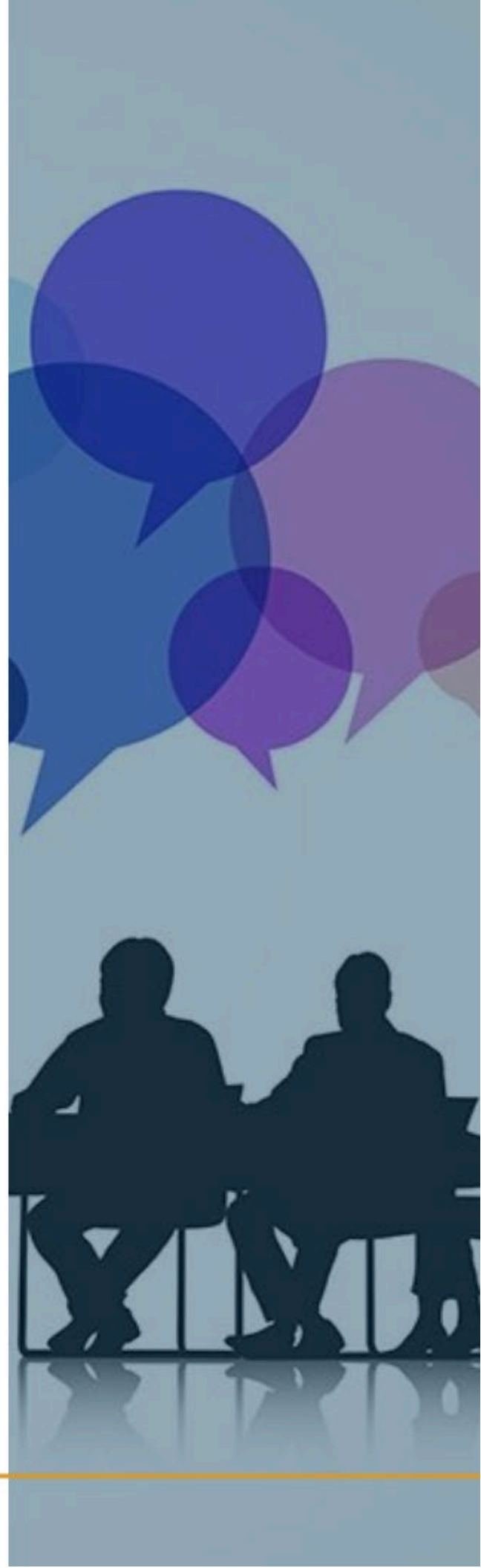
Cultivating Retirement Success: Streamlined Best Practices for Committees

A PLAN SPONSOR GUIDE



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- 02.** Forming a Retirement Plan Committee
- 03.** Adopting a Committee Charter
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The Employee Retirement Income Security Act of 1974 (ERISA) has defined the fiduciary responsibilities of retirement plan sponsors for almost 40 years. Notwithstanding its age, ERISA is not a dusty book on the bottom shelf of a dark library. Instead, the demands and events of our modern economy and society have created an impetus for ERISA's continued evolution. The depth of ERISA's reach has undoubtedly increased, rendering the compliant management of retirement plans more complex than ever.



BEST PRACTICES ROADMAP

This guide seeks to describe, in simplified terms, the practices of effective and efficient retirement plan committees. It reflects our firm's experiential and industry knowledge of how retirement plan committees can be an outstanding vehicle for the successful execution of a plan sponsor's fiduciary duties. Our goal is to provide a roadmap of best practices to remember when creating and operating a retirement plan committee.

Our courts have often referred to ERISA's standards as the highest standards to be found anywhere in American law. Despite the exacting fiduciary responsibility that ERISA creates, ERISA does not provide much input regarding how exactly to ensure effective fiduciary governance practically. As ERISA and the regulations that spring out of ERISA continue to create new obligations for plan sponsors, the importance of a formalized, well-organized fiduciary governance committee becomes clearer.

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As with any undertaking involving compliance with ERISA, we recommend seeking the advice of experts to help shape the committee's underlying philosophies, formalization, and ongoing decision making.

Overview of Fiduciary Responsibility

In general, ERISA prescribes four standards that plan fiduciaries are expected to maintain while executing their fiduciary responsibilities. If these standards are not met, fiduciaries may incur personal liability.

The four guiding principles are:

- **Exclusive Benefit Rule** - The exclusive benefit rule requires plan fiduciaries to act solely in the best interests of participants and their beneficiaries. In practice, this standard requires plan fiduciaries to set aside their aspirations in favor of the well-being of the overall participant population. ERISA clearly sets forth a list of prohibited transactions that plan fiduciaries must take appropriate steps to avoid. In summary, any decisions or actions that create or have the potential to create a conflict of interest will beget fiduciary liability.


- **Prudent Person Rule** - A plan's fiduciaries are not required or expected to be retirement plan experts, but ERISA does require them to act with the care, prudence, skill, and diligence that a knowledgeable person would use in a similar situation. Compliance with this rule often requires the engagement of experts to aid in making decisions with or on behalf of the plan.
- **Adherence to the Plan Document** - The plan document is somewhat of a contract between the plan sponsor and its participants. It serves as the plan sponsor's manual for operating and administering the plan. The plan document must be kept in compliance with ERISA, the Internal Revenue Code, and applicable regulations. The plan document's provisions, even in the most sympathetic cases, must be consistently applied.
- **Diversification of Available Investment Options** - Lastly, plan fiduciaries must constantly evaluate the investment options available under the plan and offer a diverse range of investment options to participants. Diversification may be accomplished by offering investments with materially different risk and return characteristics and investment objectives.

Other, more specific, fiduciary duties are born from these standards. For example, experts such as recordkeeping vendors must be hired and monitored, fees charged to the plan and participants must be ensured to be reasonable, participants must be enrolled in accordance with the plan document's eligibility requirements, available investment options must be evaluated carefully, deferrals must be deposited into participant accounts in a timely manner, benefit distribution requests must be approved and processed, and the plan document must be updated in the event of changes to governing law. This is by no means an exhaustive list. In virtually all instances, sponsoring a retirement plan creates work for employers. Deciding how to allocate and discharge the tasks that arise out of plan sponsorship is foundational to the successful and compliant operation of the plan. Creating an effective retirement plan committee that is devoted to the prudent management of the plan will usually help plan sponsors ensure that their fiduciary obligations are discharged appropriately.

Forming a Retirement Plan Committee

Most often, a plan sponsor's Board of Trustees, Directors, or Regents is ultimately responsible for fiduciary obligations associated with plan sponsorship. Delegation of responsibilities to a retirement plan committee alone does not discharge those obligations, so the Board needs to establish a process for selecting committee members carefully and ensure a mechanism for periodic reporting of committee endeavors to the Board or its designated officers.

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The retirement plan committee's size and structure often reflect the plan's size and complexity. Larger, more complex plans may require more committee members to facilitate plan business, while smaller plans may require fewer committee members. In some instances, larger organizations may even create subcommittees that are charged with administrative, regulatory compliance or investment responsibilities.

The retirement plan committee's membership might include representatives from the institution's human resources, finance, business affairs, and legal departments, though the committee's membership may expand to other departments as well. The Board's committee member nomination should include an explanation of the fiduciary obligations and liabilities that are implicit in the acceptance of committee appointment. Since committee members become plan fiduciaries under their committee membership, the Board may choose to indemnify committee members from the personal liability that often emerges in the event of a breach of fiduciary responsibility. In any event, committee members should always accept and acknowledge their fiduciary roles in writing. Committee appointments may be permanent or for a specific term, and the term of appointment should be long enough to allow for continuity of plan oversight. If necessary, appointed committee members may resign from the committee, or be otherwise replaced if the situation warrants. The committee's structure should be clearly documented in the committee Charter discussed below.

Adopting a Committee Charter

In conjunction with the committee membership selection process, a prudent Board will fashion a committee Charter that provides the foundation for the committee's establishment, ongoing governance and allocation of the fiduciary responsibilities that are implicit in operating a retirement plan. The Charter should clearly reflect the committee's structure (consistent with the committee formation best practices described above), as well as the committee's objectives and responsibilities.

The Charter should set forth the plan's fiduciary objectives consistently with ERISA's guiding principles: maintain the plan for the exclusive benefit of participants and their beneficiaries, exercise prudence in all respects while executing fiduciary responsibilities, diversify available investment options, and ensure conformity of the plan's operations to the

A fiduciary best practice is to create a Committee Charter to articulate the rules and expectations for the Committee.

The Charter is a way to:

- **Allocate responsibilities and liabilities from the Board to and among committee members**
- **Ensure that committee members understand their respective roles on the committee**



plan document and applicable law. After all, these principles are woven into the committee's fabric and will steer its decisions in all respects. Keeping these objectives at the forefront of all committee activities will help to keep the plan on ERISA's good side.

The committee charter should describe the Board's authority to delegate fiduciary responsibility to the committee, and it should also authorize the committee to delegate its responsibilities further. It

is important to recognize from the outset of the committee's formation that no one person or group of people can do all that needs to be done in support of the successful management of a retirement plan. Delegation helps to ensure the full and timely discharge of all duties that result from plan sponsorship. For example, administrative responsibilities are often delegated to the committee's human resources representative and their staff, but those folks will require the assistance of a recordkeeping vendor and a payroll provider to execute their responsibilities. Similarly, the selection and monitoring of investment options available under the plan are often delegated to the finance department's committee representative, but the assistance of an investment advisor in fulfilling those important duties may be critically necessary. The committee charter should carefully list all of the responsibilities associated with plan sponsorship, and the role of each committee member and/or their delegates in executing those responsibilities should be clearly delineated in the Charter.

The committee Charter should also prescribe the frequency with which the committee will meet to discuss and review plan operations. Depending on the complexity of administrative and investment issues, a committee may need to meet more or less frequently than quarterly; however, quarterly committee meetings are most typical. In addition to regularly scheduled meetings, the committee should have the authority to hold ad hoc meetings when necessary, such as in the event of extraordinary economic market circumstances or organizational activities. A committee chairperson is typically appointed to preside over committee meetings and ensure that all committee members regularly attend meetings. Once drafted and reviewed by counsel, the committee charter is typically adopted by resolution of the Board.

Documenting Decisions, Strategies, and Actions

Each retirement plan committee meeting should be documented with minutes that are reviewed and approved by the committee. The minutes do not need to transcribe every word spoken during the committee meeting copiously. Rather, meeting minutes should create a record of who attended the meeting, summarize the issues discussed, and explain any decisions that were made by the committee and the actions that will be taken as a result of those decisions. Minutes should be kept in the committee's due diligence file for at least seven years.

Why is documentation of committee activities so important? Courts, litigants, and governmental regulatory authorities often examine committee meeting minutes and other documents to investigate and assess whether a breach of fiduciary responsibility occurred. Diligent documentation of committee business demonstrates procedural diligence, which may be an important evidentiary factor in proving prudent fiduciary practices if necessary.

While not required by law, documenting the plan's overall investment strategy in a written investment



A committee meeting without documentation is like no meeting at all. The most common form of documentation for committees is through meeting minutes.

The purpose of meeting minutes is to:

- **Demonstrate the prudent process as the committee fulfills its fiduciary duty**
- **Create a record of the decisions made by the committee**
- **Document the review process and discussion a committee followed in reaching a decision**

policy statement is another best practice that will allow the committee to defend assertions of imprudence should they arise. The investment policy statement defines the process by which plan investment options are selected, monitored and terminated, if necessary. It sets forth fund selection and deselection criteria and metrics. ERISA allows retirement plan committees the latitude to use their discretion in choosing the plan's investment options, but it does provide guidelines to which committees should adhere, such as proper diversification and ensuring that the portfolio of investments available under the plan affords an appropriate level of risk and return. The investment policy statement should exemplify the plan's commitment to those guidelines. Of course, veering away from the methodologies documented in the investment policy statement should be avoided wherever possible. Committees should review the investment policy statement annually to ensure that it meets the plan's objectives and that the underlying investment strategy meets the needs of plan participants and their beneficiaries.

Conclusion

Understanding and successfully executing fiduciary obligations can be a daunting enterprise. Plan sponsors have many responsibilities that they must ensure are prudently discharged, or they will face ERISA's music. A well-formed and governed retirement plan committee can substantially alleviate an employer's fiduciary burdens that inescapably result from the sponsorship of any retirement plan that is subject to ERISA. The Multnomah Group offers a variety of tools and consulting services to help our clients create retirement plan committees in accordance with the best practices outlined in this paper.