

Risk Management for Taft-Hartley Trustees: Developing Written Fund Policies

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Trustees of Taft-Hartley benefit plans are well-advised to find ways to minimize the risk of personal liability that accompanies trusteeship. Purchasing insurance is *not* all there is to it. One often overlooked risk management tool is the written policy. Trustees who operate without written policies to guide them are inviting trouble; those who develop *and follow* written fund policies greatly enhance their chances of proving that they acted as the law requires.

Fund trustees have fiduciary duties imposed by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA requires trustees to act according to written plan documents. Trustees must act solely in the interests of plan participants, with the exclusive purpose of providing benefits and minimizing expenses. ERISA imposes a duty of undivided loyalty upon the trustees. If challenged, trustees must demonstrate that their actions and decisions were those of a prudent, knowledgeable expert. Failure to meet this standard may result in *personal* liability for trustees.

Trustees are rarely experts in benefit plan administration, yet that is exactly what the law expects them to be. To meet this very high standard, trustees must show that they engaged in a prudent decision making process. The best way to demonstrate a prudent process is with documentation--documenting the procedures the fund adopted and documenting that the trustees followed those procedures. Written fund policies help provide that documentation -- a roadmap to be followed by trustees and others to whom the trustees delegate responsibility.

Types of Policies

The types of policies to be committed to writing depend upon the type of benefits the trust fund provides. Some mandatory written policies are common to *all* funds such as:

investment policies and policies regarding the collection of delinquent employer contributions. Other generally recommended written policies include: policies regarding the use of fund assets to pay service providers and to reimburse trustees; document retention and destruction policies; and policies governing employer payroll audits, which may be combined with the fund's collection policy.

Pension funds must maintain written procedures for the payment of benefits pursuant to a qualified domestic relations order, that apply in the event of a plan participant's divorce. *Health* funds need written policies relating to implementation of qualified medical child support orders that determine which parent will provide health coverage for a child after a divorce.

Each written policy should reflect the governing legal standards, as well as decisions of the trustees on optional items. Each should reflect current procedures of the trustees, as well as those of fund staff and service providers. The policies should specify a "tie-breaking" procedure to be used when trustees disagree.

Payment of Expenses from Plan Assets

For example, ERISA governs the use of plan assets to pay expenses, either to reimburse trustees or to pay third parties for services. Trustees may use plan assets for services provided to the fund if the services are *necessary* to establish or operate the fund and are furnished under a contract or arrangement that is *reasonable*, and if no more than *reasonable compensation* is paid.

The Department of Labor (DOL) has applied these standards to trustee reimbursements, creating parameters for using plan assets to reimburse trustees for travel, lodging, seminars, meals, and supplies, among other things. Each fund should adopt clear written guidelines identifying exactly what is reimbursable to trustees. A clear expense reimbursement policy is

even more critical now that the DOL's Office of Labor Management Standards requires detailed reporting by union trustees and trust funds (on the forms LM-30 and LM-10, respectively) of any payments or reimbursements to trustees from plan assets or service providers.

DOL guidance also limits use of plan assets to pay service providers. Detailed written policies should identify what services are necessary and what amount of compensation will be reasonable. Areas to address include wages, salaries and benefits for fund employees, rent, utilities, postage, printing, and office supplies, to name a few. Trustees should execute written contracts with all service providers that are consistent with the fund's policies. To the extent that payments are made to a party-in-interest (such as a contributing employer or sponsoring union), the fund should not negotiate the terms of the contract or purchase price with anyone who has a conflict of interests.

Although the DOL has permitted payments to certain parties-in-interest, a fund must satisfy detailed criteria to qualify for such permission. For example, if the fund has an office in the sponsoring union's hall, the fund is prohibited from using that space for free because that would be an unlawful "gift" to the trust from an interested party. However, because a sponsoring union is a party-in-interest with respect to a fund, payments to the union out of plan assets also are generally prohibited. An exemption would permit the payment of rent to the union, but only if an independent third party expert establishes the amount of the rent and the if terms are reflected in a written lease. The written lease also must permit the trust fund to terminate the lease upon short notice, and any trustee who is a union officer may not be involved in the negotiation of the lease.

Collecting Delinquent Contributions

An example of a policy required by ERISA is one that addresses collection of delinquent employer contributions. ERISA's fiduciary duties require trustees to pursue the employer contributions that are called for under collective bargaining agreements. To meet that duty, the trustees must establish and follow written collection policies. The best policies will set forth clear objective criteria, and include progressive disciplinary measures (such as increasing penalties based upon the duration of the delinquency) to give the trustees leverage.

At the same time, a good collection policy will grant the trustees some flexibility to enter into payment agreements with companies that may not have sufficient cash flow to pay their obligations but are not out of business or bankrupt. The policy must be consistent with the plan documents and the bargaining agreements and should be shared with all contributing employers so they know exactly what is expected of them and what penalties they may incur. A clear written policy regarding delinquencies will alleviate the conflict an employer trustee may experience if his or her own company, or that of another association member, is delinquent and seeking some relief from payment. The employer trustee's fiduciary duties require loyalty to fund participants in that situation, and the collection policy will dictate the procedure for the trustee to follow.

Investment Policy

One policy that is garnering an increasing amount of attention is the investment policy. Under ERISA, the trustees of a Taft-Hartley fund are responsible for investing the plan assets and are held to the standard of an *investment expert*. If the trustees do not have investment expertise, they are well-advised to hire independent investment experts to advise them as to investment decisions and even to manage plan assets.

An investment policy statement is the roadmap that dictates how plan assets are to be invested. It describes the fund's investment goals as well as the criteria for selecting (and retaining) an investment. If the fund's investment professionals agree contractually to follow the fund's investment policy statement, the trustees will have objective criteria to measure the performance of those experts and to measure the performance of the actual investment.

For example, a health plan that pays out \$10 million in benefit claims annually will have significant cash needs. The investment policy statement will quantify those liquidity needs in light of incoming contribution levels. The policy will instruct the investment experts as to the fund's liquidity needs and give the trustees an objective basis to monitor whether those needs are being met.

The investment policy may also designate that an investment be placed on a "watch list" if its performance falls below that of a designated "benchmark." If the investment expert fails to recommend putting the underperforming fund on a "watch list" despite clear criteria in the investment policy statement for doing so, the trustees will have a basis to conclude that the expert is not providing the service for which the trustees have contracted.

Conclusion

Trustees who administer plans without written policies are tempting fate. If anything goes wrong or their actions are challenged, the trustees have no way to show what they relied upon to guide their actions.

Having detailed written policies as described above can minimize the legal risks to trustees but only if the policies accurately reflect the practices that the trustees intend to follow, and only if those practices comply with the applicable legal standards. Of course, even the best policies will help reduce risk to the trustees *only* if the trustees adhere consistently to the written

policies. Following a well-written policy that is based on the law will provide a defense to a claim that the trustees breached their fiduciary duties by acting imprudently under the circumstances.

Prior to their next trustees' meeting, employer trustees should request a copy of any fund policies from the fund's administrative staff. At that next meeting, trustees should suggest a review of all current policies. Trustees will want to consider conducting an annual review and update of all written policies, as well as a self-audit of behavior to make sure the fund's policies are more than merely words on the page. Such actions would be pro-active risk management.