CAPTRUST

Managing Fiduciary Responsibility

Competitive wages and benefits are key to attracting and retaining talent. That's become increasingly clear to employers as record-low unemployment and a shortage of skilled workers make it difficult to fill openings. Along with health benefits, retirement savings vehicles have long been the most valued employer-sponsored perks. Administering such plans requires strict governance and oversight, however, and organizations face significant financial risk if they run afoul of their fiduciary responsibilities.

A fiduciary is anyone with decision-making power over the creation, management, or administration of an employee benefit plan. This could be the company itself, its directors and officers, plan administrators, and trustees. The Employee Retiree Income Security Act of 1974 (ERISA) created fiduciary liability for employers that offer employee benefits plans, leading to widespread availability of fiduciary liability insurance coverage in the mid-1970s. Such coverage protects the company and individuals against fiduciary-related claims of negligence, mismanagement, or other actions deemed not in the best interest of plan participants.

ERISA Litigation

The number of ERISA lawsuits doubled from 2018 to 2020, according to *Forbes*. Such litigation began around 2005 and has been running rampant ever since, says Phyllis Klein, a senior director of retirement services for CAPTRUST. Fiduciary liability insurance is crucial not only because of the sheer number of lawsuits, but also because of the cost of litigation, which has been growing astronomically, Klein says.

According to *Bloomberg Law*, lawsuits alleging fiduciary breaches have garnered more than $430 million in settlements in recent years. Most of the suits have targeted plans in excess of $1 billion in assets and are related to excessive fees. And the settlements are meaningful:

- In July, Koch Industries agreed to pay $4 million to settle a lawsuit alleging the company allowed excessive recordkeeping fees to be charged to participants in its defined contribution plans.
- In 2020, Oracle Corp. settled a 401(k) lawsuit for $12 million. The suit alleged that Oracle breached its fiduciary duty to plan participants by including three investment options in the 401(k) plan that underperformed their benchmarks and charged excessive fees.
- In 2021 Cerner Corp. agreed to pay $4.1 million to settle allegations that the plan fiduciaries violated their ERISA duties by retaining poor-performing investments and charging excessive fees.

Rising Premiums

As litigation costs and settlements continue to rise, fiduciary insurance premiums are also increasing significantly. Double-digit increases are common, with some insurers charging double or triple their previous premiums. According to *Pension & Investments,* employers can expect even higher premium increases in 2022. And as Klein explains, costlier premiums may not be the only challenge companies face going forward.

“Because the insurers have paid out so much money to settle these cases, they are becoming selective in, not only the cost of the insurance, but how much they are willing to insure,” Klein says. “An employer may have been insured for $25 million, but now, they can’t find a single insurer willing to insure them for $25 million, so they have to look to multiple companies to build up to the level they are comfortable with.”

Regardless of the cost or the challenge of securing adequate coverage, Klein says fiduciary liability insurance is a must-have. Unfortunately, it may soon become difficult to obtain coverage at all, as some insurers may decide they don’t want to be in the fiduciary liability insurance business anymore because the risk of large settlements is just too great.

“We may start to see insurers just not want to insure anymore because it’s a constant payout,” says Klein. “Some of the settlements have been in the tens of millions of dollars, and insurers are asking whether the premiums are worth the risk.”

Managing Risk

In determining whether to offer coverage, insurers are increasingly asking probing questions to determine whether a company’s fiduciaries are practicing good governance. Do you meet regularly? Do you keep meeting minutes? Are you benchmarking your plan on a regular basis? Do you review your fees regularly? Do you have an investment advisor? Do you have company stock in the plan? Such questions are becoming commonplace, as insurers seek to determine the likelihood of a client being targeted for a class action suit.

Herein may lie the silver lining, as fiduciaries become more judicious about practicing good governance to satisfy insurance carriers and reduce the risk of facing a class action ERISA suit.

“Anyone can sue you, but if you have good governance and good processes in place, that will go a long way in helping to manage the risk,” says Klein. “You’re never going to get rid of the risk, but if you embrace your role as fiduciary, ask the right questions, and stay engaged, it will become more manageable.”