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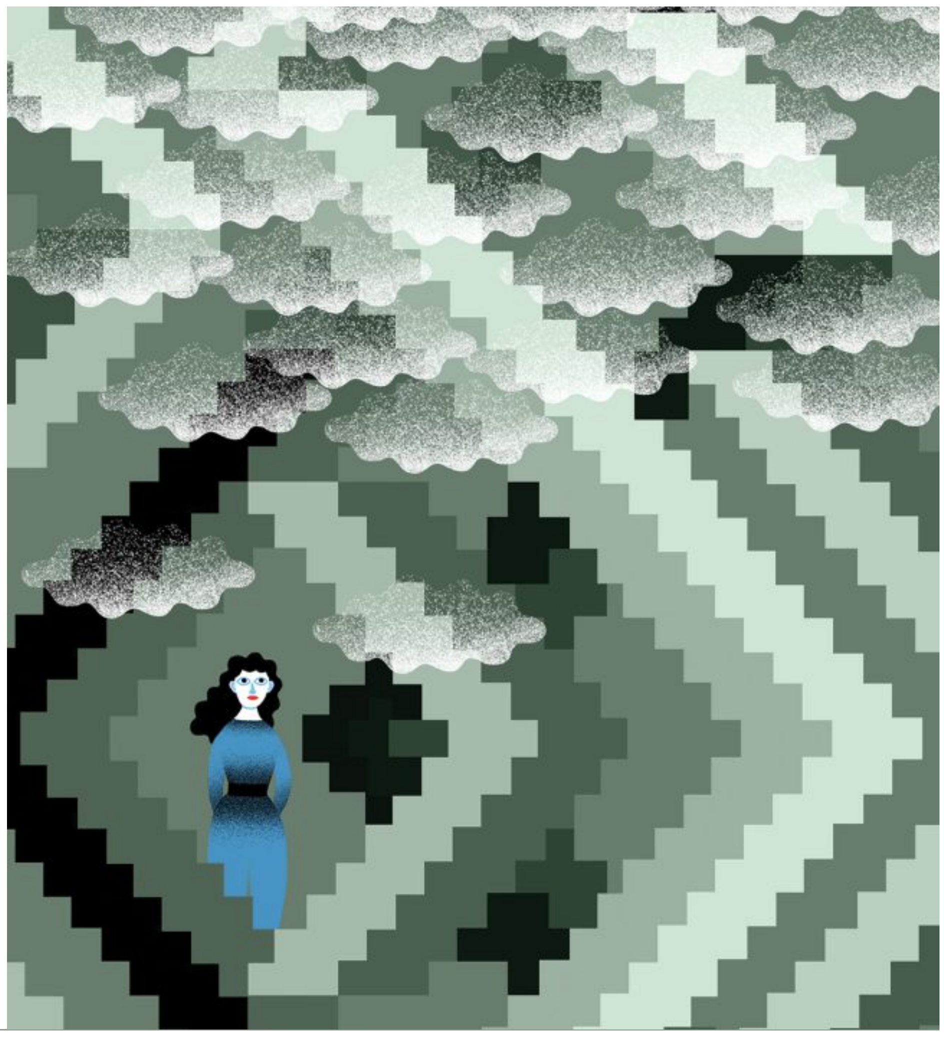

Out of the Fog

Many sponsors must get clearer on their fiduciary role, our survey finds.

Reported by DEBBIE CARLSON | *Art by* VALERIA PETRONE

Workplace savings plans are how most people save for retirement, which places responsibility on the employer to figure out how to administer the 401(k), 403(b) or other defined contribution plan—or whether to hire a professional to manage it.

Even if the company hires a third-party administrator as a fiduciary to handle the assets, it still has the duty to oversee the service provider, say retirement plan experts. Yet in the 2023 PLANSPONSOR Defined Contribution Plan Benchmarking Survey, fielded last fall, a relatively high number of plan sponsor respondents were unsure about some important fiduciary roles and responsibilities. That left these experts concerned that employees in the plan sponsor role—i.e., serving on plan committees and overseeing employee retirement benefits—may be unaware of their legal duties.

Plan sponsors should realize that there is a difference between simply having a workplace plan and running it. According to the Department of Labor, establishing or terminating a plan and determining the benefit package are business decisions, while those who have discretion over the plan's assets have a fiduciary responsibility to put plan participants' interests first. That is why many hire third-party administrators. But a plan sponsor's job does not end there.

Part of the high "unsure" response rate may be an unfamiliarity with industry terms and other jargon that comes with retirement plan administration, but it also is not an excuse, says Jodi Epstein, a partner in law firm Ivins Phillips Barker in Washington. If plan sponsors do not realize they have this responsibility, they can get sued, she adds.

Jim Scheinberg, managing partner in North Pier, a fiduciary management firm in Marina del Rey, California, who has served as an expert witness in lawsuits regarding workplace plans, concurs. Plan sponsors neglecting to understand their service providers' roles, offerings and fees "is central to almost every litigation," he notes.

Not Sure About Certain Roles

Scheinberg says it is not unusual that plan sponsors are fuzzy about their oversight responsibilities, key plan features and the contract terms with trusted service providers, but the extent of not knowing can vary.

He says the higher-than-expected uncertainty in this year's survey may be a result of the "great resignation" that occurred a few years ago, when spates of workers left their job. For instance, 17.6% said they were unsure about fiduciary training; 24.6% said they were unsure of whether they had an investment policy statement. Of those that did have one, 24% did not know whether it covered their target-date fund. Additionally, 15% were unsure of whether they use a 3(16) adviser, and 18% were unsure of whether that person had any fiduciary training. These poor numbers could reflect extensive turnover on retirement plan committees, he says.

18% of plan sponsors didn't know whether they or their retirement plan committee members have had any formal fiduciary training since 2020.

Source: 2023 PLANSPONSOR DC Plan Benchmarking Survey

"A lot of institutional knowledge gets washed away when [a significant turnover] happens," Scheinberg says, noting that a change in management is one of the top reasons North Pier gets brought in to do workplace retirement plan evaluations or to conduct a search for new providers.

Turnover likely is a common thread in all of these unsure responses, he adds. "You've got a lot of folks who are just kind of jumping in, and it's like, 'OK, Marjorie, you're on the committee,'" he says.

Getting Back to Basics

Fiduciary status is not just a title; it is based on the functions performed for a plan, according to a publication from the DOL's Employee Benefits Security Administration. When someone has discretion over the plans' assets and/or provides fee-based investment advice, this also makes that person or entity a fiduciary, the publication says.

Fiduciary responsibilities include protecting the interests of plan participants, prudently carrying out duties, following plan documents, diversifying the plan's investments and keeping fees reasonable, the publication states.

Even if plan sponsors outsource their administration to a third party, Scheinberg says, "Whether it's once every three years or once every five years, organizations and fiduciaries really do need to take a pause, look at the whole team and assess providers."

Is Jargon a Problem?

The retirement plan industry is full of legal jargon and terms uncommon for most non-investment professionals, making it tough for them to figure out what is what, and who is who, in workplace plans, Epstein says. Given that retirement plan committees meet, at most, only a few times a year, committee members may have forgotten what the terms mean.

The survey showed that 28% were unsure of whether their plan has a written investment policy statement. For those whose plan has an IPS, 19% were unsure of whether it specifically covers target-date funds. The biggest group of such respondents had plans ranging from $1 million through $50 million in assets under management.

28% of plan sponsors didn't know whether they have a written investment policy statement for their DC plan.

Source: 2023 PLANSPONSOR DC Plan Benchmarking Survey

Epstein says she prepares her clients ahead of committee meetings with highlights about the plan. For instance, she explains whether it is a safe-harbor plan and whether it has automatic enrollment; she gives members a cheat sheet listing who is who and each person's role. She originally created these quick guides for herself, but now she shares them with clients as tools to keep track of what is going on.

"All the people on the committee have regular, day-to-day jobs; that's 98% of their time. Then they jump into this committee role," she says.

As the meeting begins, she suggests that someone, whether it be the plan sponsor, legal counsel, consultant or another knowledgeable person, explain any new developments concerning workplace plans since the last meeting or offer a little fiduciary training as a level set. The opening could be as simple as introducing who is about to speak and why they are giving a report.

During the meeting, she explains jargon to clear up any confusion or misunderstanding. Epstein likens industry terminology to shorthand. “If you don’t know what the shorthand is, you’re lost, but if you do, it’s not that hard,” she says.

When she hears investment-industry speak being thrown around at meetings, she says, “you can almost see people just shut down because they don’t understand anything after that.”

Scheinberg was not surprised that the very smallest firms had no IPS, but he “found it alarming” that sponsors at larger firms were unfamiliar with their IPS and what it says. Workplace plans with more than $100 million in AUM are the most likely to be sued if problems are found, he observes.

“If you don’t know what the IPS says, then you certainly don’t know whether your investments are being run in accordance with it,” he says. “This is where we run into problems and litigation: if there’s malalignment between practice and governance documents.”

Both large and small plans may lack specific language in the IPS about the way target-date funds are selected and overseen, based on the funds within them, he adds. Because TDFs are often the plan’s qualified default investment alternative, these funds will likely cover a meaningful percentage of the plan’s participants. “Not having really strong oversight and selection criteria [regarding] that can be really problematic and can lead to a substantial amount of liability,” he says.

Biggest Surprises in the Survey Findings

he large number of overall unsure responses to plan oversight and administration queries is noteworthy, but the experts saw uncertain answers to a few specific questions as more troublesome than others, jargon aside.

Phyllis Borzi, former assistant secretary of labor at the DOL’s EBSA and now retired in Hyattsville, Maryland, was most surprised by the high number of unsure responses to the question, “Does your plan employ a third party (third-party administrator, adviser, recordkeeper, etc.) as a 3(16) fiduciary?”

Overall, 16% of respondents did not know whether they had a third party as a 3(16). The smallest plans, those with less than $1 million in assets, were the most likely to not know, at 29.3%. The outsized unsure response to this question by the smallest plans skewed the overall total. Otherwise, roughly about 12% of plan sponsors in any category said they did not know whether they had an outside 3(16) fiduciary.

Still, Borzi found it puzzling that plan sponsors were unable to distinguish whether they had hired an outside group to run the plan. “I think, for me, that’s a basic business question,” she says. “Forget the ERISA [Employee Retirement Income Security Act] question. It’s a basic business question. Are you paying somebody to provide services with respect to your plan or not? And if you’re not, well, then you have bigger problems, because then you’re responsible for the compliance yourself.”

Epstein was surprised that 18% of overall survey respondents did not recall whether they have taken part in any formal fiduciary training since 2020. The biggest “unsure” response to this question came from plan sponsors that oversee plans in the $5 million to $10 million asset range, at 27.7%. But a surprisingly high unsure response rate—18.9%—came from plan sponsors that administer plans with AUM of $200 million through $500 million. Only much smaller plans—the less than $1 million and the $25 million to $50 million categories—had higher unsure responses, around 20%.

When it comes to fiduciary training, Epstein says, “You should have that, and you should know that you have had it.”

There is no official regulation stating how often committee members should complete regulatory training, she says. She does official fiduciary training for any new committee member, and then at least once a year she will do a fiduciary update for each of her clients so it appears in their meeting minutes. Even if she only gets 10 minutes, Epstein says, she can run through dos and don’ts.

Borzi, too, was baffled at the number of respondents who did not know whether they had attended fiduciary training. She points out that there are many ways for plan sponsors to receive fiduciary training, such as to attend conferences, bring in outside consultants or use online resources.

Professional management is critical for plans with assets greater than $20 million, which Scheinberg considers institutionally sized, from his days as an ERISA consultant.

"You can make a good argument when you're talking about a $3 million plan or a $300,000 plan that [the sponsor spending] three hours a year working on it [can be enough], but anything above that, I don't think you can make that argument," he says.

A good time to do an objective evaluation of the plan, including fiduciary education, is if the committee team had substantial turnover and most of the new members did not make the decisions to hire the recordkeeper or the adviser who put the investment policy in place. It is a way to ensure that everyone is aligned with, and looking forward with, the plan sponsor and is understanding who is doing what, Scheinberg says.

He warns, however, that many advisers will offer to do free plan reviews in hopes of finding any weakness in a current plan. "Having objectivity is a really important thing," he says, adding that ERISA attorneys can offer some unbiased help, though they may lack specific expertise about IPSs or investments. "If you're going to have somebody come in and do that interpretation, … make sure they don't have a horse in the race."

Ways to Improve

The experts say that, while advisers and consultants need to give plan sponsors more basic information about how a workplace retirement plan is structured and need to use jargon-free terms, plan sponsors should be more proactive as well.

Scheinberg says sponsors can create a fiduciary calendar that spells out the topics they need to cover quarterly, annually and over a few years. Fiduciary training is one of those topics, he says. Having a checklist of what they think are a vendor's services and getting that validated will clear up an organization's roles. "Service offerings change over time," he says.

Tags ERISA fiduciary duties, ERISA fiduciary responsibilities, Plan Administration, Retirement plan committee, third-party administrator

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