Benefit Plan Committees: From “Blah” to “Hurrah!”

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Benefit Committees administer company benefit plans and programs, but many employers do not consider what scope or structure best fits their organization. This article explores best practices and processes when deciding whether and how to establish or rejuvenate a benefit plan committee.

Most employers are advised to establish committees to administer their benefit plans and programs. But many employers do so without particular thought to what scope or structure fits their organization best. And many employers repeat their committee agendas year over year without considering whether changes might be appropriate. The result is, in many cases, committee meetings that either drone on for hours, or that look like rubber stamps of nondescript agenda items. It does not have to be this way, though. With a little attention, you can turn your company’s benefit plan committee from “blah” to “hurrah!”

WHAT’S THE PURPOSE OF A BENEFIT COMMITTEE?

It is helpful to start with the key purposes and functions of benefit plan committees. They fall generally into three categories.

First, benefit plan committees provide a mechanism for handling fiduciary processes. For benefit plans that are subject to Employee Retirement Income Security Act of 1974 (ERISA), there are several significant fiduciary functions that require regular and studious attention. While the list could be much longer, for purposes of this article, let us focus on a few key fiduciary duties:

- Monitoring 401(k) investment menu;
- Obtaining audit of plan assets for annual reporting purposes;
- Complying with mandatory reporting and disclosure requirements (summary plan description, summary annual report, Form 5500, and so forth);
- Determining which administrative expenses can be paid with plan assets; and
- Handling appeals of self-funded medical plan benefits.

If a claim is ever brought alleging that a breach of fiduciary duty occurred when one of these actions was performed, the best defense is that a consistent and thorough process was followed. Delegating fiduciary authority to a committee focuses these responsibilities in a dedicated group, helping to ensure that they are exercised and documented more thoroughly than they

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might be than if they were left to the board to accomplish. Indeed, if there is no committee appointed, these important tasks might be left to human resources staff, who might not appreciate the fiduciary importance of the role.

Second, benefit plan committees provide a streamlined process for adopting plan amendments. At a minimum, committees can be useful for adopting amendments to keep plans current with changes in the law. A recent example is the change in rules for making hardship distributions from 401(k) plans. But benefit plan committees can also handle discretionary amendments like changes in benefit levels, and even decisions to terminate or adopt plans.

Third, benefit plan committees can serve as a sounding board for compensation and benefit staff for routine benefit administration or even employee relations and morale issues. Even where a decision is not required, it might be useful for the compensation and benefits professionals to have the guidance and input of committee members on topics such as open enrollment programming, employee assistance program (EAP) utilization statistics, and payroll software selection. From the other side of the table, the benefit plan committee can provide a mechanism for oversight of the compensation and benefits group. Regardless of which perspective initiates it, this administrative oversight function can provide a valuable platform for internal communications on benefits issues.

IS A BENEFIT COMMITTEE RIGHT FOR YOUR COMPANY?

Now that we have identified the three key functions of a benefit committee, the next question is to what extent it makes sense in your organization to have those functions handled by a committee. This is fundamentally a question of how much authority and control the company's board of directors wants to keep for itself, compared with how much it wants to delegate. To the extent any of the three fundamental committee duties described above (fiduciary oversight, plan amendments, and administrative oversight) are not delegated to a committee, they will remain subject to the general governance processes of the company. Ultimately, this means that the board of directors itself will be responsible for those three fundamental functions unless it delegates them to a committee.

A starting point for discussion might be to imagine if there is no benefits committee. Is the company's board of directors comfortable handling quarterly reviews of 401(k) investment offerings? Is the board willing to act—perhaps even on short notice—to adopt an amendment to a benefit plan that is required due to a change in law? Is the board confident that the officers and other executives of the company can adequately monitor HR staff without the mechanism of regular committee meetings and agendas to drive the process? It may very well be that the answer to all of these questions is yes! In that case, a benefit plan committee would serve no purpose.

This may seem sacrilegious to suggest, since many service providers or benefits professionals implement benefit plan committees automatically in all situations. But not all organizations are good candidates for a benefit plan committee. If the board members are generally involved with the routine business of the organization, and if their meeting agendas are willing to accommodate the time and attention to tasks such as reviewing retirement plan investment menus, then a committee is not necessary. Indeed, implementing a committee in that kind of corporate culture could be counterproductive to good fiduciary governance and benefits administration. In that situation,

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the committee's decisions are susceptible to being undercut by the board, and documentation of fiduciary matters could be inconsistently split between the board and the committee. The resulting process would likely be erratic. This would defeat the purpose of positioning the committee to defend breach of fiduciary duty claims, which fundamentally requires that a reliable and thorough process has been followed in the exercise of fiduciary duties.

In reality, most boards lack the interest and capacity to handle all three of the functions identified earlier. To some extent, most boards of directors will want to delegate fiduciary administration, plan amendments, and human resources oversight to a committee. Usually, the fiduciary function is delegated without reservation. But with respect to plan amendments, boards are often reluctant to delegate broad authority. The board may only be comfortable delegating authority to amend to the extent required by changes in the law, or to the extent changes are unlikely to result in a significant increase in cost to the company. Likewise, in the third function identified above, boards of directors do not usually explicitly task the committee with human resources oversight responsibilities. Instead, the board of directors generally relies on the methods of oversight that it employs for all branches of the company organizational chart. The result is probably the most common benefit committee profile: full responsibility for all fiduciary functions, limited plan amendment authority, and unspecified relationship to human resources professionals.

Finally, at the far end of the spectrum, is a committee with full power and authority to manage all three of the committee functions we have identified (fiduciary, plan amendment, and administrative oversight). This variety of committee is probably the least common. In most cases the board will at least retain authority for plan mergers, asset transfers and terminations. In most cases the human resources oversight/sounding board function is not addressed and is instead left to be worked out organically by the affected persons. But the possibility of a committee explicitly given these broad duties is a possibility worth considering.

CREATE A BENEFIT COMMITTEE CHARTER

At this point, you have determined that a benefit committee makes sense for your organization. Your board of directors has agreed on the extent to which it will retain and the extent to which it will delegate the three committee functions we identified. The best way for the board of directors to memorialize its decisions is to adopt resolutions establishing the benefit committee and establishing governance rules for the benefit committee—commonly set out in a charter. The charter should address certain specific issues of committee governance, including committee membership, structure, and rules of operation.

Committee Size

Let us start with the size of the benefit committee. The goal is to have a number of members large enough to bring sufficient diversity of opinion and knowledge, but small enough so that members do not feel disengaged. At a minimum, this is probably three. In most organizations, the maximum number is probably 10. The ultimate number will depend in large part on the functions of the benefit committee the board of directors has decided to assign to the committee. If the benefit committee has the narrow function of reviewing investment alternatives and handling fiduciary reporting and disclosure obligations, a small group of very knowledgeable and committed members is probably appropriate. But, if the board

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of directors instead has allowed the benefit committee to have full authority to adopt all plan amendments, and also expects the benefit committee to have oversight over HR administration, then a larger number of benefit committee members may be appropriate.

A quick note about odd versus even numbers—it is commonly said that all committees should have an odd number in the event of a tie vote. Do not agonize over this. Even if you manage to keep an odd number of members, you could very well end up with an even number in attendance at a meeting. The simple solution is to make sure that the benefit committee's charter includes a rule for how to resolve tie votes. Options include that the action will automatically fail in the event of a tie vote, or that the benefit committee chair may cast an additional vote to break the tie.

Who Should Serve?

Benefit committee demographics is probably the most hotly debated topic of benefit committee governance. Some argue that benefit committees should have seats dedicated to each branch of the company's organizational chart or each business unit. That may make sense if the benefit committee has a significant role in human resources oversight or is expected to serve as a sounding board for compensation and benefits issues. Additionally, it might make sense if the benefit committee frequently considers discretionary plan amendments and would benefit from a diverse set of voices on the benefit committee to discuss how the amendments might impact various interest groups within the organization. But if the benefit committee has only basic fiduciary duties and only limited amendment authority (say, mandatory amendments only), it is probably not necessary to insist that benefit committee membership mirror company demographics. Instead, a smaller select group is probably appropriate.

In virtually all of its permutations, the benefit committee will be responsible for monitoring the company's retirement plan investments. Do not fall into the "stereotype" trap of appointing the chief financial officer (CFO) or person from the finance department to the committee for that singular purpose. While each person on the benefit committee will have their strengths and individual interests, proper exercise of one's fiduciary duties under ERISA requires that each person on the benefit committee will be held equally responsible for every action taken by the benefit committee. Benefit committee members who lack a financial aptitude should not "tune out" during the investment review or simply defer to the CFO's opinions. Instead, ERISA requires that all fiduciaries exercise their duties prudently—and significantly with an obligation to make informed and educated decisions:

> [A fiduciary shall discharge his duties] with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1)(B) (emphasis added). Having a CFO or other financial expert on the benefit committee does not absolve the other benefit committee members of responsibility for any financial matters that come before the benefit committee. Rather, it provides a source of expertise and information that the other benefit committee members can draw upon and learn from so that they may also make prudent decisions on behalf of the plan.

To repeat the point just made in a broader context—the purpose of populating the benefit plan committee with persons of diverse skillsets is not so they primarily will be responsible for benefit committee actions and decisions within their particular skillsets. Instead, the

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purpose is to provide a readily available source of knowledge and information to be shared with the benefit committee. If that knowledge is not available on the benefit committee (say, perhaps, the CFO does not have time to serve on the benefit committee), then the benefit committee members should consult experts, get training, or otherwise educate themselves so that they can make prudent decisions.

CFOs and Section 16 Officers

Speaking of the CFO . . . some companies may have been advised that they should not allow their Section 16 officers to serve on their benefit plan committees if they have company stock in their retirement plans. Company stock—like all other investment alternatives—must be continually monitored to make sure that it remains a prudent investment. One of the common themes in ERISA litigation in recent years is "stock drop" cases, where the company stock fund suffers a decline in value, and plaintiffs argue that the fiduciaries of the plan should have previously realized the stock was an inappropriate investment and removed it. The U.S. Supreme Court held in the *Dudenhoeffer*[1] case that it was possible for a stock-drop case to be brought when fiduciaries had insider information that, if known to the public, would negatively impact the value of the company stock, and that the fiduciaries should have acted on that insider information to protect plan participants. To avoid this type of claim, many public companies purged their fiduciary committees of Section 16 officers.

As it turns out, though, many companies stayed the course and did *not* remove officers from their benefit committees, perhaps recognizing that their knowledge and experience was more important to the benefit committee than the slim chance of litigation. That calculation has proved to be true. The cases decided post-*Dudenhoeffer* have almost overwhelmingly sided with the defendant fiduciaries. The courts have acknowledged that stock-drop claims can be made based on non-public information, but only if, as the court in *Dudenhoeffer* explained, "a prudent fiduciary in the defendant's position could not have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund."[2] This standard has proved very difficult to surmount. Virtually every case has resulted in the conclusion that there was no other alternative available to the fiduciary that would not have done more harm than good. This trend may change, as cases continue to wind their way through the courts. Probably the most watched of those cases is *Retirement Plans Committee of IMB v. Jander*. In that case, plaintiff participants complained that the plan fiduciaries had insider information that they should have disclosed to the plan. The Second Circuit agreed with the plaintiffs in a ruling issued in 2018.[3] The Supreme Court heard arguments, but on January 14, 2020, declined to rule on the merits and punted the case back to the Second Circuit for more proceedings.[4] Until that case or others provide any clarity on the topic, the practical reality remains that a committee should not necessarily be deprived of the contributions of Section 16 officers without a more thoughtful balancing of the risk of liability in a stock-drop case.

Employee Members

Should rank-and-file employees serve on benefit plan committees? Usually this is not effective. An employee who is not an executive and who has no familiarity or expertise with respect to benefit plan matters is not likely to be comfortable with having the responsibility

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to speak and vote equally with persons who do. The exception, perhaps, might be found in an ESOP-owned company. An ESOP (employee stock ownership plan) is a retirement plan that is designed to invest primarily in stock of the employer. ESOP-owned companies will often have a unique culture of employee empowerment and involvement. Some ESOP-owned companies will reserve seats on their benefit plan committee for employees. More common, however, is for employees in ESOP-owned companies to have an active role on what is commonly called an "ESOP communications committee." This committee does not have fiduciary responsibilities, but instead is tasked with employee relations and providing education and information on how ESOPs work.

How to Name Committee Members

Should the committee members be named by person, or by title? Often, the charter will list the benefit committee members by title. Persons who succeed to the named roles will automatically become benefit committee members. This may seem efficient, but it can actually have the opposite effect. For one thing, companies frequently change executive or professional titles, so you may find that you are amending the charter frequently anyway. And, it might lead to members serving through inertia, rather than a genuine interest or because they have knowledge or experience to contribute. As a result, if the charter names members by title rather than by name, benefit committee membership should be periodically refreshed, and members should be reminded that benefit committee membership is neither a burden nor an entitlement.

Who should determine whether a change in benefit committee members is appropriate, if the charter designates members by title? And if the charter designates members by name, who appoints their successors? One alternative is for the charter to permit the benefit committee itself to make these changes. Retaining this power might be one way for the board of directors to assure itself that it will retain sufficient oversight over the committee, if desired.

Meetings and Reports

Another common feature of a benefit plan committee charter is the requirement that the benefit committee provide regular reports to a designated executive or to the board itself. Again, this is a feature a board of directors may wish to enhance in the charter if it wishes to exercise strong oversight. The board of directors could, for example, require quarterly or annual reports from the benefit committee chair, or could require that minutes of the benefit committee meetings be provided to the board of directors. Alternatively, the charter could give the benefit committee more autonomy by stating that reports are only required upon request from the board of directors.

The frequency of benefit committee meetings should also be set out in the charter. Typically, benefit plan committees meet at least quarterly to review investment returns. But depending on the scope of the benefit committee's authority, more frequent or additional meetings might be appropriate. The charter should provide sufficient flexibility that the benefit committee will not be in violation of its charter if it should miss a meeting, and to allow ad hoc meetings as circumstances may dictate.

Committee Chair

The charter should specify who will chair the benefit committee's meetings. The chair role is largely organizational. The chair will control the agenda of the meetings, which will require close coordination with the compensation and

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benefits professionals. The chair will need their input to know which fiduciary tasks need attention and whether any plan amendments are under consideration. Most importantly, however, the chair will need to coordinate with human resources personnel on the third benefit committee function—administrative oversight. Whether the benefit committee is affirmatively assigned this role or whether the HR group itself desires a sounding board, this section of the agenda is important and should not be overlooked.

Committee Secretary

In addition to a chair, the benefit committee typically has a secretary. This person may or may not physically take minutes of the meetings (if not, a recording secretary is perfectly acceptable). The secretary's primary function is to maintain committee records. Having an accessible and reasonably complete history of the benefit committee's actions will be crucial in the event of litigation or an agency audit and will be valuable as an internal archive of facts, such as medical plan premium structures from year to year.

CONCLUSION

Whether you are starting a new benefit plan committee or looking for ways to rejuvenate an existing one, start with a basic assessment of how much autonomy the benefit plan committee will have in each of the three main areas identified above—fiduciary compliance, plan amendments, and HR oversight. Then make sure your committee charter reflects that intent. Your benefit committee chair and your HR staff will then be armed with the tools they need to turn your benefit committee's meetings from "blah" to "hurrah!" in no time!

NOTES:

[1]Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 134 S. Ct. 2459, 189 L. Ed. 2d 457, 58 Employee Benefits Cas. (BNA) 1405 (2014).

[2]Dudenhoeffer, 134 S. Ct. at 2473.

[3]Jander v. Retirement Plans Committee of IBM, 910 F.3d 620, 2018 Employee Benefits Cas. (BNA) 455190 (2d Cir. 2018), cert. granted, 139 S. Ct. 2667, 204 L. Ed. 2d 1068 (2019) and vacated and remanded, 2020 Employee Benefits Cas. (BNA) 11880, 2020 WL 201024 (U.S. 2020).

[4]Retirement Plans Committee of IBM v. Jander, 2020 Employee Benefits Cas. (BNA) 11880, 2020 WL 201024 (U.S. 2020).

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