If an employee benefit plan had a driver, it would be the trustee. As part of the collective board of trustees, the trustee is charged with ensuring that the plan is providing the retirement, welfare or apprenticeship benefits for which it was created.

The driver needs a vehicle to ensure that this important work is not only done, but done in accordance with the many complex requirements of the Employee Retirement Income Security Act (ERISA). That vehicle is the all-important trustee meeting. Sometimes taken for granted, the trustee meeting is a critical element in the ERISA framework. This article provides an overview of trustee meeting components and also highlights potential pitfalls that might befall an unwary board.

Who Is a Trustee?

All assets of employee benefit plans must be held in trust by one or more trustees. Under ERISA, a trustee is a fiduciary of all participants and beneficiaries of a plan and is required to discharge his or her duties with respect to a plan solely in the interest of participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries. Multiemployer plans have specific requirements for the makeup of their boards, to ensure that requirements under the Taft-Hartley Act are met.

Trustees are charged with the highest standards and responsibilities given their fiduciary duty. Importantly, ERISA’s co-fiduciary liability provision makes a trustee liable for a fellow trustee’s breach of fiduciary responsibility in certain circumstances. Given the high level of conduct required of an ERISA plan trustee, a threshold issue that should be reviewed is attendance at meetings.

What if a trustee fails to attend meetings on a regular basis? While such failures are disappointing, the reality is that a plan may on occasion find itself dealing with an absentee trustee. The absentee trustee can make obtaining a quorum difficult. If the problem is a recurring one, it can impede the work of the board. In addition to causing ad-
ministrative difficulties, this type of situation may earn the attention of the Department of Labor (DOL) where the potential exists for a failure to discharge the trustee's fiduciary duty. All trust agreements contain language regarding the standards for removal of a trustee under certain situations. It may be advisable for boards to consider amending their trust agreement, if necessary, to add specific language that addresses the standard for removing an absentee trustee. Suggested model language is as follows:

If a trustee anticipates being absent from a board of trustees meeting, the trustee should inform the plan administrator prior to the meeting and provide an explanation. Following two consecutive absences, the trustee shall be issued a written warning and may provide the board with a reasonable explanation for the absences. Upon a third consecutive absence, the trustee shall be removed from the board. However, the board of trustees may grant exceptions to this attendance requirement in its discretion, for good cause shown.

When evaluating a plan's trustee provisions, the use of an alternate trustee may also be considered. Alternate trustees can serve important dual purposes in providing both a training ground for prospective trustees to begin to learn the intricacies of serving an ERISA-governed plan and, where allowed by a trust's language, an additional trustee to achieve a quorum. A good practice if alternate trustees are to be used is to require that the alternate trustee sign a confidentiality agreement. The agreement should make clear that the alternate trustee, as signatory, agrees that all communications about the plan, including discussions, actions, motions, documents, conference calls and e-mails, are prohibited from being disclosed because disclosure could seriously impair the plan's functioning and be adverse to its interests. Violation of the agreement would result in immediate expulsion from all plan duties and still allow the board to pursue any other appropriate remedies.

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by | Rachel R. Parisi, CEBS
It goes without saying that a plan requires trustees. Trustees are encouraged to explore ways that their role can be of maximum benefit to the plan’s operation and to further explore whether changes need to be made to the plan’s governing documents as they pertain to trustee roles and responsibilities.

**What Should Meetings Look Like?**

The meat of the board’s work is accomplished at the trustee meeting. All meetings will generally include reports by the plan’s professionals: consultants, financial advisors, auditors, actuaries and attorneys. The plan administrator typically will report on the plan’s day-to-day happenings. These reports are critical to the trustees’ ability to meet their fiduciary responsibility to the plan. The meetings will also provide a forum for informed discussion and debate of matters concerning the plan, allowing the trustees to determine actions for the plan going forward. In short, the meeting is where things get done.

**How Things Get Done**

If a real estate agent’s mantra is “location, location, location,” then a trustee’s mantra may very well be “documentation, documentation, documentation.” No trustee meeting is complete without the taking of minutes. Not just a formality, written minutes serve the vital function of documenting actions taken, decisions made, reports presented and the like.

Many plans ask their legal counsel to document the meeting through the meeting minutes. At a minimum, the plan attorney should review the minutes to ensure that they adequately capture the information that would be needed should a board action be scrutinized later. All trustees should have the opportunity to review meeting minutes before they are finalized. This will prevent any issues from arising later and having a potential conflict if trustees disagree on a particular action taken. To further enhance accuracy, minutes should be reviewed as soon as possible after the meeting. While formal approval of the previous meeting’s minutes is a common element of trustee meetings, the most meaningful review can result from draft minutes being distributed to the board within the first week or two after a meeting.

Note that ERISA’s fiduciary requirements make meeting minutes crucial. If there is ever a case where a trustee believes a proposed board action might violate ERISA, the objecting trustee should make sure that the objection and any responses are properly recorded in the minutes.\(^6\) As noted, this documentation should aid in preventing subsequent issues of trustees recalling events differently months, or even years, after the meeting has taken place.

It is often said that the devil is in the details, and trustee meetings are no exception. The common practice of providing meeting packets to all attendees could result in the inadvertent disclosure of sensitive plan information if the documents are left behind and remain unaccounted for at the end of a meeting. A board should conduct a “sweep” at the conclusion of the meeting to ensure that all documents are taken from the meeting location.

Another consideration is the use of participant-specific information when discussing appeals, which may include protected health information (PHI). A best practice when discussing appeals of this nature is to sanitize the documents to ensure that all identifying information is redacted. This process will aid in avoiding potential Health Insurance Portability and Accountability Act (HIPAA) violations, which could occur if the packets are left behind or if a guest not entitled to access to PHI for plan operations attends the meeting. Trustees should also be cautious about discussing participant-specific information when plan professionals or other guests who do not need to know this information are in the room. Such individuals should be excused from the meeting to make sure that PHI is not disclosed in violation of HIPAA safeguards.

Meetings, then, are the venue and means of carrying out a plan’s business. Trustees are cautioned not to lose sight of the actual process of conducting such business. ERISA §404(a)(1)(D) requires trustees to carry out their duties with respect to the plan in accordance with the plan’s governing documents and instruments.\(^7\) While this ad-
monitior may seem obvious, boards may sometimes become entrenched in “the way we have always done it” even where that is not the way it is supposed to be done according to the plan document and trust. As an example of how a board could be tripped up in violating ERISA §404(a)(1)(D), consider a recent case heard by the U.S. Court of Appeals for the District of Columbia.8

In Overby v. National Association of Letter Carriers, a retirement plan attempted to amend the plan to define a surviving spouse as a spouse to whom the employee was married for at least the year immediately preceding and ending on the date that retirement benefits were to commence. Under the purported change, a retired employee’s wife became ineligible for death benefits. The retiree and the wife sued, arguing that the plan’s amendment procedures, which required that the proposed amendment be submitted to the plan’s actuaries, had not been followed. The court agreed, holding that the plan’s failure to follow its own amendment procedures nullified the amendment. The court noted that the meeting minutes did not reflect the proper steps for the amendment’s passage. Overby provides an excellent reminder that attention must be paid to the plan’s governing documents. If the board opts to change the way it performs certain functions, the change must be formalized and approved via the plan’s amendment procedure.

A trustee’s responsibilities to the plan are substantial. These considerations are seldom more evident than when the trustees sit around a board table at the trustee meeting. By paying careful attention to the many details that accompany the trustee meeting, the trustee will be in the best position to fulfill his or her fiduciary responsibilities.

**When Must the Board of Trustees Meet?**

ERISA does not tell us how often a board must meet; that is left to the board’s discretion. From a compliance standpoint, the two timing touchstones are ensuring that the board’s fiduciary duties under ERISA are met and ensuring that the trust’s own frequency requirements are met.

A board must, at a minimum, meet often enough to accomplish the plan’s business, monitor its investments and perform each of its fiduciary charges as to the plan and its assets. In this regard, meetings should be held no less than quarterly to allow for timely review of financial reports. In addition, a board must satisfy any frequency of meeting requirement set forth in the establishing trust, be it quarterly or every other month or other timing standard.9

What is the recommended frequency for meetings? Many plans default to the quarterly meeting schedule, which dovetails nicely with many financial reporting periods and allows for fairly frequent meetings to keep administrative tasks to a manageable level. Other plans prefer to meet every other month, an arrangement that allows for quick action on pending issues and streamlined meetings.

Many variables go into determining how often a particular board will meet: the structure of the plan, the complexity of issues facing the plan, the makeup of the board itself, trustee availability, plan professional availability and some degree of status quo. If a plan’s meeting schedule is not working, the board should not hesitate to consider a change in frequency. The key, of course, is to ensure that the meetings are held often enough to appropriately and effectively discharge the duties of the board.

As with everything, there are always exceptions. In today’s economic and compliance-heavy environment, pressing issues invariably arise. These issues do not always correspond with the scheduled meeting rotation, yet cannot wait for resolution. A board may call a special meeting to deal with specific issues.10 Although the agenda might be truncated for such a meeting, full attention and due care must still be given to all meeting formalities and requirements, such as quorum, minutes, gathering of information, discussion and debate.

The electronic age has left no one behind, not even the employee benefit plan. When even a special meeting will not suffice to respond to time-critical issues facing a board, many plans have made use of an e-mail vote. The plan administrator or other plan professional may pose the issue to the board

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trustee meetings

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via e-mail and poll for votes. While this method is very efficient, boards must be cautious to ensure that the required due diligence, discussion where warranted, information gathering and discharge of the required fiduciary duties is accomplished even when voting via e-mail. The manner of the decision made may seem informal, but none of the requirements imposed by ERISA is relaxed. At the next scheduled board meeting, the e-mail vote and result should be recorded in the minutes, along with any other details that would aid in understanding the action taken outside of a regular meeting. Documentation, again, will be key and the e-mail vote results must be retained.

Regardless of how often a board meets, adherence to the standards set by ERISA remains paramount. That is true whether at a regular trustee meeting, a special meeting or via an e-mail vote. However, flexibility in determining the best system for a particular plan remains an option and should be exercised as needed. From a compliance standpoint, it bears mention that during the typical DOL audit, the investigator will spend substantial time examining a board’s procedures, policies, meeting minutes and the like. Regular meetings, deliberative debate and solid policies that are consistently applied provide a significant defense to allegations of a fiduciary breach.

Where Must the Board of Trustees Meet?

The important business of a board of trustees is accomplished at a meeting—but where must the meetings be held? ERISA does not require that meetings take place at any particular location; however, reasonableness is the gold standard. While it would be pleasant for the trustees to meet in Tahiti every quarter to discuss plan performance and direction, this would not be a reasonable nor prudent use of plan assets. Conversely, trustees are not expected to “brown-bag-it” at meetings. Again, reasonableness is key. In addition, meeting expenses should be properly documented. Quite often, DOL is willing to defer to a board of trustees on questionable expenses if the minutes reflect careful and deliberate consideration of the expense by the plan fiduciaries.

In that same vein, trustee expenses, as with all plan expenses, must meet the reasonableness standard. Trustee expenses come to the fore in the meeting context with respect to lost pay. Under ERISA, it is prohibited for trustees of employee benefit funds, who are also full-time employees of either the participating employer or union, to receive compensation from the funds. Funds may reimburse such trustees only for actual expenses incurred.

It goes without saying that careful attention to plan and trustee expenses is not only mandated by ERISA’s fiduciary standard, but is also a function of the turbulent economic times we live in. Common sense and reasonableness should help to guide a board in this sometimes sensitive area.

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But Why, Mom?

Because ERISA says so, that’s why. Simply put, ERISA’s fiduciary responsibilities, which are imposed upon trustees by statute, require trustees to function in a certain way with respect to the management, administration and investment of plan assets, maintenance of records, safeguarding of specific information and avoiding conflicts of interests.14 These tasks cannot be accomplished without regular trustee meetings that are conducted with all of the gravitas that the responsibility for an ERISA plan demands. Dutiful trustees and the plan professionals that advise them recognize, respect and value the role of the trustee meeting in the overall implementation of an employee benefit plan.

Endnotes

1. 29 C.F.R. §2550.403a-1(a).
4. The Department of Labor has stated that a trustee will always be a fiduciary, by definition, because of his authority or control over plan assets. DOL Field Assistance Bulletin 2008-01 (February 1, 2008), at 3.
5. ERISA §405(a), 29 U.S.C. §1105(a). A plan fiduciary may be liable for another plan fiduciary’s breach if: (1) he knowingly participates or knowingly undertakes to conceal the other fiduciary’s breach; (2) his own breach enables another fiduciary to commit a breach; or (3) he has knowledge of another fiduciary’s breach and fails to make reasonable efforts to remedy the breach. Id.
10. Some trusts may make provision for such meetings.
11. Note that, among other fiduciary responsibilities, ERISA requires trustees exercise the “same care, skill, prudence and diligence . . . that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.” ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B).