

A RETIREMENT PLAN WHITEPAPER

CHECKING THE CHARTER

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INTRODUCTION

Retirement plans requires oversight by employers or plan sponsors. Many employers establish committees to oversee their retirement plan's investments, administration, or both. However, problems can arise when appointed committee members are not aware of, or do not know the extent of, their responsibilities over the retirement plan. This paper provides guidance about how to ensure your committee members are apprised of and understand their responsibilities.

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Any retirement plan, whether it be a 401(k) plan, a 403(b) plan, a 401(a) plan or a 457(b) plan, requires oversight by the employer or plan sponsor. Many employers establish committees to oversee the plan's investments, administration, or both. However, problems can arise when committee members are not aware of, or do not know the extent of their responsibilities over the retirement plan. Further issues arise if there has been no official delegation of authority to the committee. Note that many of these same delegation issues arise with respect to health and welfare or other types of committee(s) that may be established by an employer. Medical, dental, disability, life insurance, non-qualified deferred compensation and severance plans all require consideration in regard to delegation. Thus, much of the following discussion regarding retirement plan committee governance can be similarly applied to the committee(s) established by an employer to oversee its health and welfare plans.

An employer that adopts a retirement plan is responsible for the proper administration and investment of the plan and its assets. In the case of a for-profit entity, this responsibility sits with the board of directors of a corporation or the managing partner or managing member of a partnership or LLC. For a governmental employer, this responsibility starts with the governing body, which could be the city or town council for a municipality or town, or a board of directors for a special district.

Because boards of directors and city councils don't normally deal with the every-day workings of a retirement plan, councils and boards usually delegate their responsibilities to certain employees (such as human resources officers) and/or committees. Where an individual or a committee has been delegated administrative or investment authority over the retirement plan, that specific authority, and the duties that go along with that authority, should be clearly defined in a formal document.

In many cases, delegation was given when the retirement plan was established and is in the form of a city council or board of director resolution. However, it is possible that the retirement plan was adopted without delegating any duties over the retirement plan to any individual or committee. Below are steps you can take to ensure that your retirement plan is administered by an individual or committee with a proper delegation of authority:

- 1. Locate the original city council/board of director's resolution establishing a committee for the retirement plan or otherwise delegating authority over the plan.**

This document is usually created around the time that the retirement plan was established. Also, look for any subsequent actions by the council or board that address

the retirement plan. It is a good idea to have copies of all council or board actions that deal with retirement plan matters in a separate file or location that can be easily accessed.

If no formal action was ever taken to set up the committee for a retirement plan (note that this is not uncommon), consider taking action now.

2. Locate committee charter or other document that describes the retirement plan committee's duties.

If a committee charter or other document is located, review the charter or document to be sure that it remains relevant and correct based on the current status of the retirement plan and the committee. For example, if the committee has been approving plan amendments (without getting separate approval from city council or other governing board), but the charter only grants that committee authority over plan investments, then the charter should be updated to reflect that the committee has the authority to amend the retirement plan. The charter and/or adopting resolutions should also reflect the currently appointed and/or elected members of the committee. It is not uncommon to discover that some or all of the officially appointed committee members no longer work for the employer.

If no committee or other document governing committee actions can be found, and there is a committee or other group of employees taking actions with respect to the retirement plan, then a committee charter should be prepared that outlines the committee's duties and authorities.

It is important to ensure that all individuals who have been appointed or elected as committee members are familiar with the committee charter and their individual duties and responsibilities thereunder.

3. Check the Retirement Plan Document.

Sometimes, a delegation of authority over a retirement plan can be found in the actual formal plan document. Review your current retirement plan document to determine if that document provides for some delegation of authority to a committee or group.

Approval of New or Revised Committee Charter

Whether you are updating a committee charter or adopting a new committee charter, the charter must be approved by the city council, board of directors, or other appropriate governing body. This approval can be part of a review of the retirement plan operations and an update of the retirement plan's procedures, without expressly having to state in public documents that anything required correction or fixing. Often city or district executives are hesitant to bring a new committee resolution or charter to the city council or district board for approval for fear that it would appear that the retirement plan had been administered incorrectly in the past. This is not necessarily the case, and the advice that an up-to-date committee charter be in place results from the recommendation that the clear delegation of duties over the retirement plan to the committee be documented and kept current.

What Should a Committee Charter Include?

A good committee charter should include the following elements:

- ▶ A statement of the purpose of the committee (e.g., is it an investment committee, an administrative committee or both?)
- ▶ A list of the retirement plan(s) over which the committee has authority
- ▶ A list of the specific fiduciary and non-fiduciary responsibilities that have been delegated to the committee
- ▶ The reporting requirements for the committee related to its activities (e.g., should the committee report periodically to city council or some council committee or board?)
- ▶ The structure of the committee, including number of members (usually, an odd number to avoid tie votes), the titles of those who will serve on the committee (titles, rather than names, are recommended in order to avoid charter amendments due to employee turnover), and how committee members are selected and replaced
- ▶ The committee's operating rules, including the frequency of meetings, what constitutes a quorum, and whether votes may only take place in a meeting or can be taken by electronic or other consent

- ▶ The procedure to designate a committee chair and other committee officers, along with a list of their responsibilities
- ▶ The process for determining who will be responsible for documenting meeting activity via minutes (e.g., the committee secretary)
- ▶ The process for amending the committee charter
- ▶ The ability of the committee to further delegate some or all of its duties to individuals and/or subcommittees, except to the extent prohibited by applicable law
- ▶ The ability of the committee to execute documents, including the ability for individual members of the committee to execute and deliver documents on behalf of or in the name of the committee (if so permitted)

CONCLUSION

It is never too late to establish an authorized committee for your retirement plan activities. Following the steps above should not be too burdensome or expensive but will make for good fiduciary practices for your retirement plan.

