

ADR and ERISA

Since the many (and complex) legal relationships that exist amongst those involved in the establishment, maintenance and administration of employee benefit plans can trigger unhappy surprises and generate a significant amount of conflict, litigation is an ever-present risk for plan fiduciaries, including administrators, sponsors, trustees, investment managers and possibly non-fiduciary third party service providers. These relationships are far too numerous and interrelated to recount here; Mr. Koss's article: *Potential Areas of Conflict in the Qualified Plan Environment* suggests some but certainly not all areas of risk.

Alternative Dispute Resolution ("ADR") would seem to be of great utility in many employee benefits conflicts. Two areas come to mind: Conflict Resolution and Conflict Management:

Conflict Resolution

1. **Litigation, both external and internal;**
2. **Claims and appeals, usually initiated by the participant or beneficiary;**
3. **Ancillary (but critical) areas including COBRA (particularly notification), Qualified Domestic Relations Orders (QDROs), Qualified Medical Child Support Orders (QMCSOs) and Qualified Joint and Survivor Annuity (spousal/beneficiary) issue; and**
4. **Disputes between plan administrators/sponsors (usually employers) and third party service providers: actuarial consulting firms, law firms, third party administrators ("TPAs"), financial organizations, accounting firms, recordkeepers (particularly with respect to 401(k) plans and ESOPs).**

Conflict Management

1. **Inclusion of arbitration/mediation clauses in service provider agreements**
2. **Use of dispute resolution initiatives at the IRS and the DOL**
3. **Use of Retirement Plan Correction Programs offered by regulatory authorities:**
 - **IRS: Employee Plans Compliance Resolution System 2003 (Rev. Proc. 2003-44).**
 - **DOL: Voluntary Fiduciary Correction Program (VFCP) and Delinquent Filer Voluntary Compliance Program (DFVCP).**

Of these two areas, Conflict Resolution is perhaps the most obvious but least amenable to ADR, except with respect to disputes arising from a circumstance where negotiation is traditionally the method of resolution, *e.g.*, QDROs, contract disputes (particularly third party service providers and investment managers) and conflicts that are generally outside the scope of the terms of the benefit plan.

Disputes arising out of benefit entitlement and related matters are usually regarded as the exclusive province of the plan administrator (typically a committee or board of trustees) since the interpretation of plan provisions is rarely (voluntarily) delegated to a third party.

Accordingly, I suggest emphasis on Conflict Management. This is a prophylactic approach and requires that the plan administrator, with the guidance of counsel and perhaps others, undertake a self-audit in order to identify areas of plan administration that might result in conflict, either participant/beneficiary or regulatory agencies such as the IRS and DOL.

An outline that sets forth potential areas of conflict in the Qualified Plan environment is detailed in Mr. Koss's article: *Potential Areas of Conflict in the Qualified Plan Environment*.

A step by step description of the process of conducting a plan administration audit is described in Mr. Koss's article: *Risk Management: Reviewing Qualified Plan Administration*.