



COUNSEL TO GREAT COMPANIES

Everett School Employee Benefit Trust

Trust and Employee Benefit Plan Governance

March 15, 2017

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Agenda

- The Basics: What Governs the Everett School Employee Benefit Trust (“ESEB Trust”)?
- Trustee Responsibilities
- Tips for Success – Improve Plan and Reduce Risk
- Questions

ESEB Trust

- **What Laws Currently Govern the ESEB Trust?**
 - Trust Agreement Governing the ESEB Trust, restated December 2005
 - Federal Law
 - Internal Revenue Code Section 501(c)(9)
 - Laws Governing Group Health Plans (e.g., HIPAA, COBRA)
 - Open Public Meetings Act, Title 42, Chapter 30 Revised Code of Washington (“RCW”)

ESEB Trust (cont.)

■ What Laws Do Not Apply?

- Employee Retirement Income Security Act of 1974, (“ERISA”)
 - Does not apply to plans maintained by governmental entities
- Title 48, Chapter 62 RCW (“Local Government Insurance Transactions”)
- Title 48, Chapter 125 RCW (“Self-Funded Multiple Employer Welfare Arrangement” – Washington’s MEWA Statute)

Trustee Responsibilities

- Benefit Plan Governance
- Who is a Fiduciary?
- Trustee/Fiduciary Responsibilities
- Fiduciary Breach
- How to Improve Your Plan and Reduce Risk

Benefit Plan and Trust Governance

- The Process of Administering a Trust and its Benefit Plans Involves:
 - Identifying the Players
 - Who is a fiduciary and who is not?
 - Understanding Trustee/Fiduciary Duties
 - Developing and Following Administrative Procedures

Who is a Fiduciary?

- **Named Fiduciaries**

- Trustees under ESEB Trust document (“Trust Agreement”)
- Functional Fiduciaries
 - ESEB Trust Administrative Staff?
 - Certain Everett School District Employees?
 - Those Entities Performing Functions Delegated to them by Trustees?
 - Investment Manager?
 - Do You Have Discretion or Control Over Plan Operations, Assets?
 - Those Entities Performing Ministerial Functions? (Probably Not)

Trustee Responsibilities

- **Under Trust Agreement**
 - Receive Contributions and Administer Benefit Plans
 - Comply with the Internal Revenue Code (“IRC”)
 - Section 501(c)(9)
 - ESEB Trust received a favorable determination from the IRS in 1988 that the trust was qualified as a Voluntary Employees Beneficiary Association (“VEBA”)
 - ESEB Trust must file a Form 990 each year
 - ESEB Trust must comply with VEBA rules
 - Comply with Title 48, Chapter 62 RCW (“Local Government Insurance Transactions”) (if self-insured)
 - ESEB Trust was approved as a individual self-insurance program in 1999 by the State Risk Manager, but Title 48, Chapter 62 RCW no longer applicable

Trustee Responsibilities (cont.)

- **Under Trust Agreement (cont.)**
 - Determine Basis of Payments from ESEB Trust
 - Meet Fiduciary Standards
 - Ensure ESEB Trust Assets are Used for Exclusive Benefit of Providing Benefits to Participants and Beneficiaries (Duty of Loyalty)
 - Can Defray Reasonable Expenses of Plan Administration
 - In Carrying Out Duties, must act “solely in a fiduciary capacity consistent with and in furtherance of the purpose of the trust...” (Duty of Prudence)

Trustee Responsibilities (cont.)

- Under Trust Agreement (cont.)
 - Management of the ESEB Trust Fund
 - Investments (Specifically Permitted Investments)
 - Maintain Title of Assets in Name of ESEB Trust
 - Fidelity Bond
 - Records
 - Reports

Trustee Responsibilities (cont.)

- Under Trust Agreement (cont.)
 - Determination of Rights
 - Delegation
 - Expenses
 - Interpretation
 - Claims Procedures

Trustee Responsibilities (cont.)

- **In Addition to Those Under Trust Agreement:**
 - Comply with Applicable Federal Law (in addition to IRC) and State Law (if any)
 - COBRA, HIPAA, WA Benefit Mandates (applies to insurance carriers)
 - Follow Benefit Plan Terms (unless inconsistent with law)

Fiduciary Breach - Common Claims

- Failure to Prudently and Loyally Manage Plan Assets
- Failure to Monitor
- Failure to Disclose
- Negligent Administration
- Failure to Follow Trust/Plan Terms
- Consequences?

Tips for Success – Improve Plan and Reduce Risk

- Where We Are Today
- “The Best Defense is a Good Offense”
 - Establish a Good Governance System
 - Right People with Clear Duties
 - Establish Clear Policies and Procedures
 - Monitor Performance and Strive to Improve
 - Document All Actions

Tips for Success – Improve Plan and Reduce Risk (cont.)

■ Loyalty:

- Document Basis for Decision
- Detail How Decisions Benefit Participants and Beneficiaries
- Consistently Apply Plan Terms
- Full Disclosure (complete, accurate, timely, no misleading information)

Tips for Success – Improve Plan and Reduce Risk (cont.)

■ Prudence:

- Document the Decision Process
- Obtain Expert Advice
- Choose Advisors Carefully
- Monitor Advisor Performance
- Document Advice from Service Providers
- Process is More Important than Result

Tips for Success – Improve Plan and Reduce Risk (cont.)

- **Follow Benefit Plan and ESEB Trust Terms:**
 - Know the Terms of Your Benefit Plans and the Trust Agreement
 - Document Applicable Plan and/or ESEB Trust Terms When Making Decisions
 - Eliminate All Inconsistencies Between the Plan and/or ESEB Trust Terms and Plan Administration

Tips for Success – Improve Plan and Reduce Risk (cont.)

- **Trust Expenses:**
 - Services Must be Necessary
 - Costs Must be Reasonable
 - Cheaper is Not Always Better
 - Monitor Services Provided

Tips for Success – Improve Plan and Reduce Risk (cont.)

- **Make Sure Insurance is Adequate**
 - Fidelity Bond – Required
 - Fiduciary Liability Insurance
 - Employee Plan Liability Insurance (EPL)
 - Equivalent of Directors' and Officers' Insurance (D&O)

Tips for Success – Improve Plan and Reduce Risk (cont.)

■ Clearly Allocate/Delegate Duties

- Clearly Identify Responsibility for Specific Duties
- Delegation/Acceptance Should be in Writing
- Delegating Party Remains Responsible for Selecting and Retaining Delegate
- Monitor Performance of Delegate
 - Examples:
 - Investment Advisor
 - Claims Administrator

Tips for Success – Improve Plan and Reduce Risk (cont.)

- Establish Clear Administrative Policies and Procedures
 - Document Trust/Benefit Plan Policies and Procedures
 - Document Implementation
 - Periodically Review and Revise Policies and Procedures
 - Document Interpretations of the Trust and Benefit Plans to Ensure Consistent Treatment of Participants and Beneficiaries

Tips for Success – Improve Plan and Reduce Risk (cont.)

■ Examples of Policies and Procedures:

- Investment
- Funding
- Administration (insource v. outsource)
- Compliance with Federal and State Law
- Communications
- Plan Expense
- Performance Monitoring

Tips for Success – Improve Plan and Reduce Risk (cont.)

- **Service Providers – Selection**
 - Establish Selection Criteria
 - Obtain Proposals and Evaluate Against Criteria
 - Understand Fee Structure and Know the Market

Tips for Success – Improve Plan and Reduce Risk (cont.)

- **Service Providers – Monitor Performance**
 - Review Performance Against Established Measures
 - Read All Reports
 - Check Fees
 - Ask About Their Internal Policies and Procedures
 - Follow-up on Participant Complaints

Tips for Success – Improve Plan and Reduce Risk (cont.)

- Document
- Document
- Document!

QUESTIONS?

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