Why Some Law Firms Have Lousy 401(k) Plans

By Ary Rosenbaum, Esq.

My father is an electrician and my mother always joked that whenever we needed electrical work done in the house, we need to hire an electrician. The story is similar to the tale of the shoemaker's children that needs shoes. So it should not be surprising that many law firm sponsored 401(k) plans have major issues concerning potential fiduciary liability on the part of the firm and the trustless of the plan. Despite the legal implications of being plan fiduciaries, law firm plan sponsors may be too busy or unaware that their action or inaction can put themselves not as counsel, but as defendants in a lawsuit for a breach in fiduciary duty brought forth by plan participants.

My friends at Brightscope, the leading 401(k) plan reviewing website has shown that for many large cities, the best 401(k) plans come from law firms. It should be noted that their ratings are not an anomaly because the law firms they list are typically large law firms that could afford to hire the top retirement plan consultants and advisors to implement a top 401(k) plan and additional retirement plans. In addition, Brightscope's ratings also include a component based on employer contributions and larger law firms do have very generous contributions that they make to their employees who are plan participants. While these large law firms do very well in Brightscope's city ranks, not one law firm made their list of the Top 30 401(k) plans (nationally) for 2010. While large law firms tend to have very good 401(k) plans, this has no bearing on small to medium size law firms since they, not large law firms are the bulk of the law firm industry.

People expect law firms to have the best 401(k) plans out there because 401(k) plans are legal entities and have plan documents that are legal documents that have legal consequences. While the Employee Retirement Income Security Act of 1974

(ERISA) and the Internal Revenue Code are federal laws that govern retirement plans, very few law firms have ERISA practices in-house so there may be no one on staff that can guide them through the fiduciary requirements of sponsoring a retirement plan. Just because someone is an attorney doesn't make them an ERISA attorney or an expert on retirement plans. A law firm without an ERISA practice has the same lack of background as other companies on the consequences of sponsoring a 401(k) plans such as an auto body shop, a dentist, or an amusement park. If their TPA is making compliance mistakes and their ERISA attorney hasn't updated their plan documents as required, then these law firms are like any other plan sponsor with issues that may affect their plan's tax qualification. So a law firm with no ERISA attorneys on staff is at the mercy of their service providers and their 401(k) plans are only as good as those service providers they have selected. Just being a lawyer doesn't make you an expert on all laws, just hopefully the laws in the areas that these lawyers practice in. After passing three different state bar exams, I still don't understand the rules of evidence and thankfully that never comes up in my practice as an ERISA attorney.

Even if a law firm has an ERISA practice, it still doesn't guarantee that their 401(k) plan is in order because many ERISA practices that law firms have are geared towards multiemployer (union) pension plans. Having worked for a couple of law firms that specialized in union plans, they are in a completely different world as 401(k) plans maintained by a single employer, such as a law firm. I once worked for one of the most brilliant ERISA attorneys out there and since she was only experienced with union plans, she actually had no idea what revenue sharing was and that some mutual funds in 401(k) plans pay that to the third party administration (TPA) firm. Needless to say, having ERISA attorneys on staff with no background in 401(k) plans is of little assistance to the law firm's sponsorship of a 401(k) plan.

Even if a law firm has an ERISA practice that has experience in single employer 401(k) plans doesn't guarantee that their

401(k) plan is in order because of the politics and bureaucracy of law firms. Common sense would dictate that law firms with a 401(k) ERISA practice would have their ERISA attorneys in charge of the law firm's 401(k) plan. I worked at a semi-prestigious law firm on Long Island a few years back and their bureaucracy would put Washington D.C. to shame. If you wanted something to wither and die, the Managing Partner would assign a committee of partners to handle it. So it should be no surprise that there were no ERISA attorneys on the 401(k) committee. I was asked by the Managing Partner to consult with this committee. The committee was comprised of the director of human resources and a property tax attorney. Our 401(k) plan had some excellent provisions such as only having a three month wait for employees to join the plan and a 5% of compensation, fully vested, profit sharing contribution. During a meeting reviewing our 401(k) plan, I asked the committee of two for the mutual fund lineup. I reviewed the funds and some of the funds looked like stellar funds from the late 1990's. The committee advised me that the funds were selected by an ERISA partner about 10 years earlier. I asked them who the financial advisor was and they told me that the 401(k) plan had no financial advisor and they offered no financial education to plan participants other than handing out Morningstar profiles. I advised this committee that the firm and the committee as plan trustees were breaching their fiduciary duty. Even though the plan offered participant directed investments, to achieve liability protection for such plans under ERISA §404(c), plan fiduciaries had to comply with ERISA §404(c). Compliance under ERISA §404(c) requires the development of an investment policy statement, monitoring of plan investments, and offering financial education to plan participants. Since the 401(k) committee took none of these steps to protect the law firm, the sponsor of a $25 million 401(k) plan from the risk of litigation from plan participants. Thanks to my advice, the 401(k) committee hired a financial advisor who overhauled the plan's mutual fund lineup and offered financial education to plan participants at semi-annual enrollment meetings. Having served as the Director of ERISA Legal Services for a certain TPA, I can attest that we administered 401(k) plans of some very large law firms that were paying too much in administration fees (that was the hallmark of this TPA since they also served as the firms' financial advisor) that was a breach of fiduciary duty, but since the role of

running the plans were left with the human resources department, these plans suffered. So many law firms delegate the management of their 401(k) plan to their law firm administrator or their human resources department. Unless they have certification as employee benefit specialist, these non-ERISA attorney professionals do not have the background to assure that they will properly run a 401(k) plan.

Whether law firms have ERISA attorneys on staff or not, law firms tend to have a highly stressful and hardworking environment. With such high overhead, bills to produce, and associate attorneys to manage, a law firm's management always seems to have something more important to do than managing the firm's 401(k) plan. So whether the law firm's managements has delegated the authority to run the 401(k) plan to the human resources staff or decided to keep it within a 401(k) committee, the 401(k) plan usually languishes because the law firm's management tends not to oversee the work done by those they delegate to. So if the human resources staff or the 401(k) committee doesn't take their role seriously, the 401(k) plan will have enough liability issues to put the plan, law firm, and fiduciaries at risk.

Law firms are no different than any other 401(k) plan sponsor. They need to annually review their retirement plans for a review of cost, review of their plan providers, and a review of plan provisions. They also need to engage the services of a financial advisor who will assist them in the implementation of an investment policy statement, review of plan investments, and offering investment education to plan participants. Law firms need to be aware of their responsibility as plan fiduciaries and the potential liability that goes with it. While law firms without ERISA practices don't have to be ERISA and retirement plan experts, they still have to then hire those providers that are. That means hiring the financial advisor, TPA, and ERISA attorney to assist and protect them in their role as plan sponsors and fiduciaries. Since law firms are in the business of providing legal services to their client including limiting their liability, law firms should limit their own liability by getting their 401(k) plans in shape.

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