

# Plan Document Mistakes a Retirement Plan Sponsor Should Avoid

By Ary Rosenbaum, Esq.

One of the major things that plan sponsors forget about their retirement plans is the plan document. ERISA (the Employee Retirement Income Security Act of 1974 for those scoring at home) requires all retirement plans to have written plan documents. A written plan document is a legal document with legal ramifications in governing a legal entity known as a retirement plan. A retirement plan document can cause many issues for a retirement plan sponsor and since most plan sponsors are wary of ERISA attorneys because of their billing practices (don't worry, I charge a flat fee) don't know. So this "free" article can help plan sponsors take count of the many problems their plan document can have on their retirement plan and what steps they should take to avoid these problems.

## Missing Plan Documents and Amendments

Not only does a retirement plan require a written plan document, that document must be amended or completely replaced from time to time. While some plan sponsors may think that the requirements to amend and replace plan documents is some Internal Revenue Service (IRS) plot to feed ERISA attorneys, the reason that the IRS requires plan documents to be consistently changed is because they want the plan document to conform to the Internal Revenue Code (IRC) and the IRC is something that is consistently being changed. It's imperative that retirement plan sponsors keep all copies of their plan documents and amendments even if they are no longer in effect. The reason is that if there are missing plan documents when the IRS reviews

the plan on a plan audit, many agents take the position that a missing plan document or amendment means it was never done. More often than just missing copies of the plan documents and amendments, plan sponsors don't have said copies because they were never done. This maybe a result of a mistake by a plan provider or an ERISA attorney who neglects to draft a required amendment for their plan sponsor client. Based on the number of required ancillary amendments over the past few years, this has happened quite a bit. Even



if a plan provider neglects their duty, it's the plan sponsor who bears the burden and responsibility of getting those amendments and documents done. Plus it's the plan sponsor's hide that pays if those documents aren't done. If a plan sponsor has some missing amendments because they weren't done, they should have them drafted and make a submission to the IRS' Voluntary Compliance Program. While there are fees for the program, it's very reasonable and less costly if this plan document error is discovered on a plan au-

dit. To save a giant headache, a plan sponsor would make sure they had copies of all their plan documents and amendments, as well as making sure all required plan documentation were drafted and signed.

## The Plan is not being operated according to the terms of the Plan document

Not only does a plan need a written document, the Plan also needs to operate according to the terms of that plan document. While that seems simple, poor plan drafting and/or administration can make that difficult. When I used to work for third party administrators (TPAs), I used to joke that if you ever wanted to hide something from an administrator, they should have placed it in a plan document file. Kidding aside, a retirement plan document is like a contract, so it needs to operate according to its terms. There are so many times that the plan document says one thing and the plan is being administered another way. It happens often with plan eligibility where the plan document may require 3 months of service for employees to become eligible and the plan

is administered as if there is immediate eligibility. The IRC and ERISA requires that plan documents are followed according to their terms, so plan administration can't be inconsistent with the provisions of the plan. So it's imperative that a plan sponsor reviews their plan document to make sure that the provisions meet their needs and actually is consistent with how the plan is being administered. If not, the plan might have to be amended to reflect future administration and a submission to the IRS' Voluntary Compliance Program

or self-correction by the Plan Sponsor through the Self Correction program may be needed.

### **The plan document says one thing and the summary plan description says another thing**

An inconsistency with the plan document can take another form other than with administration, ERISA requires all plan sponsors to hand out a summary plan description to plan participants. What is a summary plan description? An

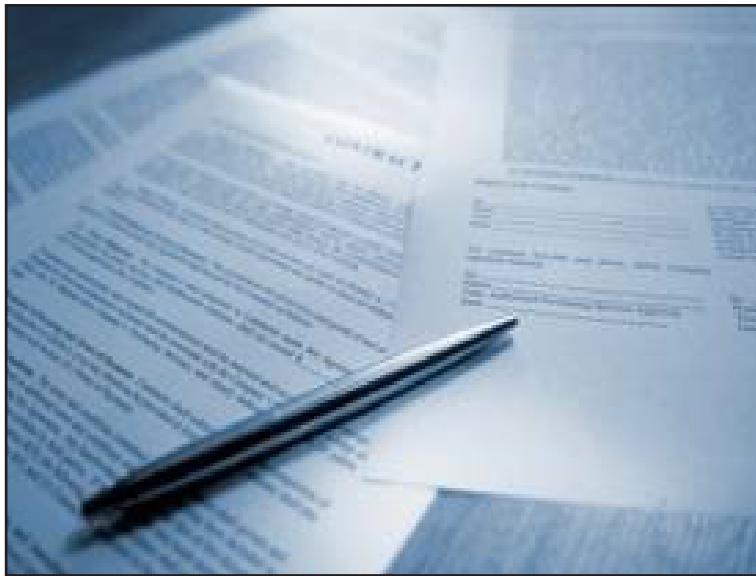
SPD is what it is, a summary description of the plan document. One of the major plan errors out there, which have resulted in much litigation, is when the SPD says one thing about participant's rights and benefits under the Plan, while the plan document says something else. An SPD may state that a plan participant may get a benefit that the plan document did not award such as lesser eligibility requirements, better vesting, or less employment requirements to receive an employer contributions. Having a discrepancy between a plan documents

and an SPD offers spurs litigation. Prior cases held that if there were a discrepancy between the two, the SPD would control because that was the document that the participant was provided and relied on. However, the tide has turned in the view, so the SPD is no longer controlling in any discrepancy with the Plan. The Supreme Court in *Cigna Corp. v. Amara* ruled that SPDs are not as legally binding as a plan document. "To make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers," Justice Stephen Breyer wrote in the opinion for the court. "Consider the difference between a will and the summary of a will or between a property deed and its summary. . . . None of this is to say that plan administrators can avoid providing complete and accurate summaries of plan terms in the manner required by ERISA and its implementing regulations." In English, plan sponsors aren't off the hook for providing inaccurate SPDs, but the plan document is the legally binding document. So to avoid any confusion as to

what should be the plan provisions and to avoid any potential litigation, plan documents and SPDs should be reviewed to confirm their consistency and they are not creating benefits, rights, and features that should not exist or conflict.

### **The plan document was not drafted to facilitate plan administration, but to impede it.**

Years ago, as a TPA attorney, I reviewed an amendment that changed the matching provision in a 401(k)'s plan that was



drafted by another ERISA attorney. It took me about three separate readings of the amendment to fully understand what the ERISA attorney was trying to do, but I wished him luck in trying to have it administered correctly by my TPA. While plan documents should be drafted to meet the needs of the plan sponsor, it should also be drafted in a way that will help TPAs administer the plans correctly. This may be accomplished just by drafting provisions in a language that is easy to understand as well as avoiding plan provisions that often lead to administrative errors. There are just administrative provisions that are absolute bad ideas. Such troublesome plan provisions could be a loan provision that allows for unlimited plan loans (more loans outstanding lead to repayment errors and omissions) or a stated match formula that may inadvertently require a matching contribution that an employer could no longer afford or a matching formula that matches on a different pay period than when the employer actually makes the contribution. A plan document should be reviewed for any ambiguous or difficult provisions to under-

stand so that the administration of the plan can go smoother.

### **The plan document no longer fits the plan sponsor's needs.**

Retirement plans should be tailored like suits; they should be tailored to fit the plan sponsor's needs. Of course over time, a company's needs do change either through expansion or contraction. So a plan document needs to be updated if the plan sponsor can make more employer contributions or less or if their discrimination

testing is now starting to fail. It is advisable that the plan sponsor should work with their TPA to see if the type of plan and its provisions still fits the needs of the plan sponsor. If not, then the TPA should work with the plan sponsor in either amending the current plan document or perhaps terminating it in favor of another qualified plan or no plan at all. Plan sponsors may discover that certain plan provisions were drafted for a mistaken reason or assumption many years ago. Plan documents that have provisions that no longer meet the plan sponsor's needs may require

employer contributions that are inefficient or wasteful or aren't used to maximize the savings of highly compensated employees. Annual plan document reviews will have the effect of having the Plan become the right fit for the employer sponsoring it.

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**The Rosenbaum Law Firm P.C.**  
**734 Franklin Avenue, Suite 302**  
**Garden City, New York 11530**  
**(516) 594-1557**

<http://www.therosenbaumlawfirm.com>  
Follow us on Twitter @rosenbaumlaw