

Why Attorneys Should Care About Their Clients' Retirement Plans

By Ary Rosenbaum, Esq.

A few years back when I joined a semi-prestigious Long Island law firm, I had this silly notion that I could develop a single employer ERISA practice and bring in a lot of new clients. Based on my contacts in the industry, and my ability to breakdown difficult topics in ERISA into English for advisors, accountants, and plan sponsors to understand, I thought I could do it. That and an ability to write, I thought it was a no brainer that I could bring in some business. One of the major components of developing this practice was try to cross-sell, selling my services as an ERISA attorney to the law firm's existing clientele, which comprised of many Long Island companies. It was a can't miss proposition

Well like great ideas like Crystal Pepsi and the Apple Newton, it missed. One of the bigger flops was trying to develop that cross selling. The partner in charge of the corporate department was a very unfriendly fellow who I affectionately call Mr. Personality. Whether it was Mr. Personality or the two other partners in his department, I felt there was a no understanding of what I was trying to do with the ERISA practice and the value of what an ERISA attorney does. In the 2 years and change I was at the firm and constant talks with the corporate partners, there was absolutely no traction or cross selling on my end. Mr. Personality did refer one matter to me. It was a review of a client's new prototype plan document

with a bundled provider. I reviewed the document and then I contacted Mr. Personality. I told him that since the client's plan had more than \$4 million in assets, it may be a good idea to move that plan to an unbundled provider to save on administrative expenses, which could help minimize the client's potential liability. 2 years later, I'm still waiting to hear back from Mr. Personality.

big deal is because most plan sponsors are unaware of this potential liability. Those simple mistakes like not developing an investment policy statement (IPS) or not reviewing mutual funds on a semi or annual basis are hidden liability pitfalls.

In addition, retirement plans are an attractive tax savings vehicle because employer contributions are tax deductions

for the plan sponsor plus salary deferrals are deductions for a plan participant. While a plan sponsor can use a retirement plan as a tax savings vehicle, a different plan or a different allocation of employer contributions can further maximize contributions for highly compensated employees, thereby increasing tax deductions for the employer. Too many employers have simplified employee pension (SEP) plans or 401(k) plans with a pro-rata profit sharing contributions, when a plan with a cross tested/new comparability allocation or the use of a cash balance plan can maximize contributions to the owners or highly com-

pensated employees of the plan sponsor. In addition, if a plan sponsor is failing the 401(k) discriminations tests, owners and highly compensated employees may be a getting a refund of their salary deferrals or the plan sponsor is making a corrective contribution, different plan design techniques like automatic enrollment or a safe harbor 401(k) would be able to salvage the salary deferrals of the owners and the



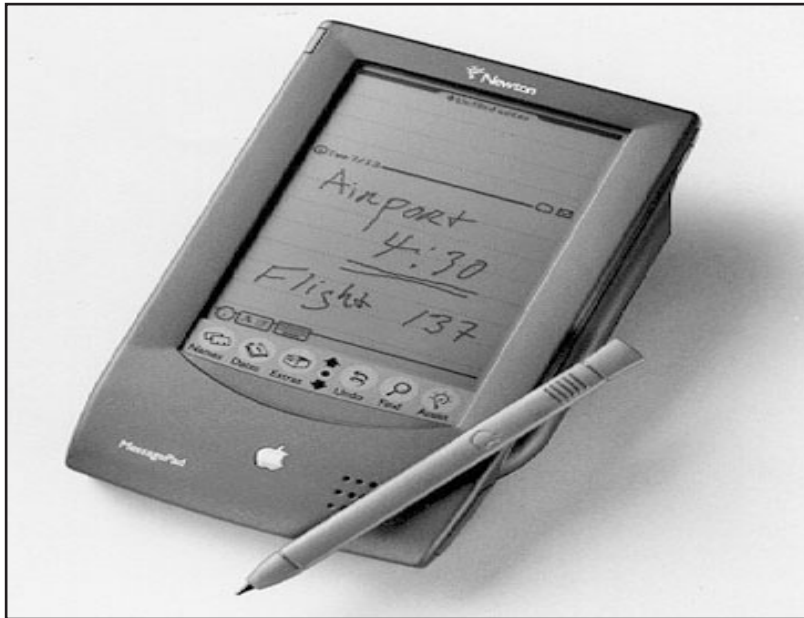
My biggest belief is that my practice can help a plan sponsor cut down on their administrative cost, improve plan design, streamline plan administration, and minimize liability. For a corporate attorney or any attorney that has business clients or individuals who sponsor retirement plan, minimizing liability as a plan sponsor is a big deal. The reason I believe that it's a

highly compensated employees. Failing to maximize contributions and tax deductions is the same as leaving money on the table. So working with a third party administrator and ERISA attorney can certainly help in that area with a design that fits the plan sponsor's needs.

While plan sponsors, financial advisors, and accountants should know about the potential pitfalls of plan sponsor liability or the need to have a plan design that fits the plan sponsor's needs, I am amazed that many attorneys show little interest in their client's retirement plans. It's not malpractice on their part if they have not been retained in conjunction with their plans, but it's a sign of neglect. Non-ERISA attorneys don't have to be ERISA experts, but I think they should be aware of what retirement plans that their clients have and if there are any potential problems with them. They should always ask their clients whether their plan has undergone a review of their practices and plan documents to ensure that there are not any lurking liability issues.

For a corporate attorney, corporate acquisitions and corporate mergers certainly bring up interesting issues if the company being acquired or merged with the client has a retirement plan. There is nothing worse than for the client to discover that the company they acquired or joined forces with has a retirement plan with liability or funding issues. I recently had a client who bought an electrical contracting firm from his former boss. The problem is that he later discovered that the company's defined benefit plan was underfunded and his former boss received a lump sum distribution, which violated the Internal Revenue Code because of its underfunding. So not only was the client saddled with an underfunded defined benefit plan where he had to fund, he also had the unenviable task of seeking a refund of distributions made to his former boss. For any company acquisitions or mergers, it would be wise for a corporate attorney to engage the services of an ERISA attorney.

For an estate planning attorney, working with a client who is a sole proprietor or an owner of a business brings up some retirement plan issues since retirement benefits can be a major testamentary or non-testamentary asset that is an essential piece to an estate plan. I will certainly never forget working with the estate attorney for a law firm partner who passed away. While his children were his beneficiaries and his second wife renounced her rights to his 401(k) account balance in their pre-nuptial



agreement, the Internal Revenue Code said otherwise. According to the Code, a wife has a right to her husband's death benefit unless she waived it and a pre-nuptial is not a valid waiver. In addition, there are estate planning issues when the sole proprietor decedent had a defined benefit plan that was overfunded. That was the situation I once had a deal with on the estate of a former United States Senator since the third party administration firm he used always had their sole proprietor clients have overfunded plans.

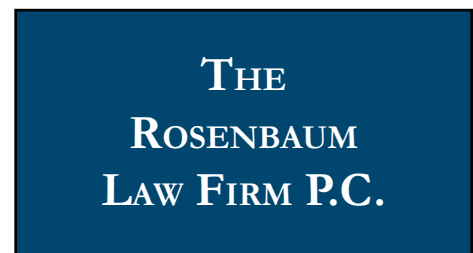
Not only should lawyers concentrate on their clients' retirement plans, they should also check on their own plans. Law firms tend to either have some of the best or some of the worst retirement plans out there. If Mr. Personality wasn't busy in turning down business, he might have realized that prior to my arrival at the law firm, our 401(k) plan has no financial advisor, no review of the mutual funds in the Plan for 10 years, and no education offered to plan participants.

As discussed, non-ERISA attorneys

don't need to become ERISA attorneys. They should simply know what types of plans that their clients have and suggest that their plans be reviewed on an annual basis by an outside retirement plan consultant or an ERISA attorney. An annual review would certainly uncover any important plan issues like high administrative expenses, poor fiduciary practices, and issues that are affecting participants' retirement savings. By just suggesting an annual review, non-ERISA attorneys are doing something substantive that will only help them and their clients in ensuring that the clients' retirement plans are running up to par.

With my distaste of my old law firm's corporate department (they had a knack for turning down business) and my hope to educate other attorneys about the hidden pitfalls of plan retirement sponsorship, I have been certified as a sponsor of continuing legal education course in New York and have an on-line course available in other states.

Educating other attorneys will ensure that there are less corporate attorneys like Mr. Personality who have no care that their client's retirement plan could be an inefficient tax savings vehicle or an unmitigated disaster and huge liability pitfall.



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