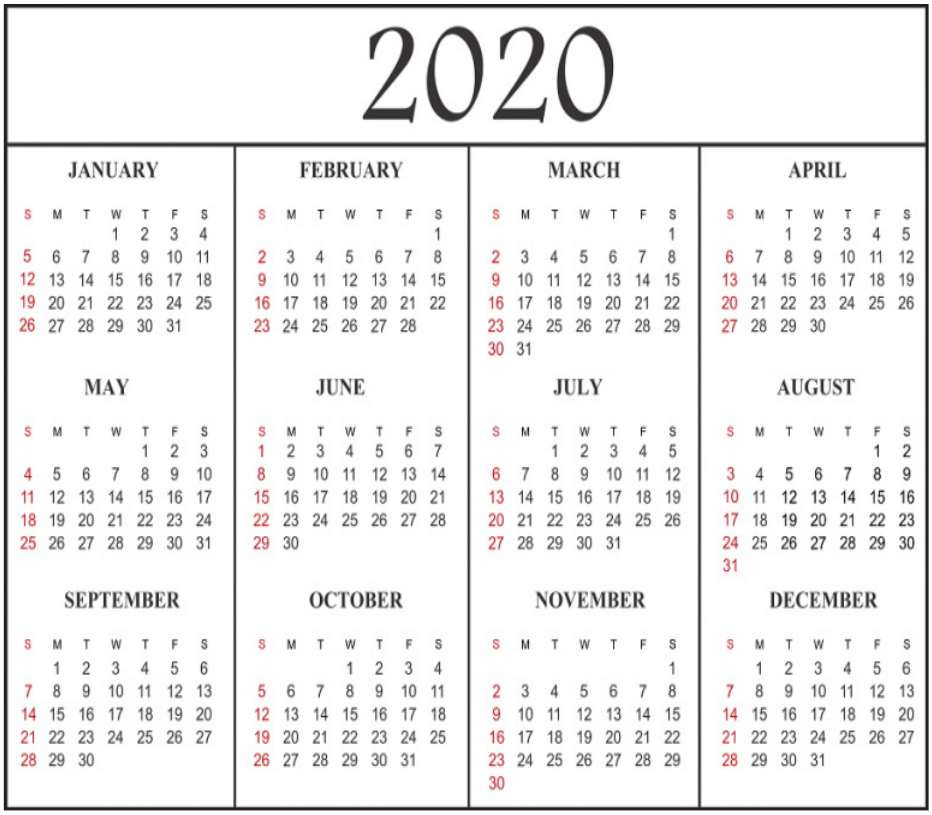
Important 401(k) Plan Sponsors Concerns For 2020

By Ary Rosenbaum, Esq.

Every year in the retirement plan business brings its challenges and its concerns. As a 401(k) plan sponsor, you need to understand what some of the concerns are because you're a plan fiduciary. If you're prepared for some of the challenges and focus points out there, it will make your job easier. So this article is all about what you should be expecting for 2020 as a 401(k) plan sponsor.

The SECURE Act

A new law was signed by President Trump that was unexpected and will produce a fundamental change for retirement plans including yours. While many retirement plan experts focused on the changes that will now allow open multiple employer plans with no commonality starting in 2021, there are more changes for you in your day to day role as a 401(k) plan sponsor. One major change is that long term, part-time employees may now have an opportunity to defer. If these part-time employees complete 500 hours of service or more in 3 consecutive years, they will be eligible. There are substantive changes to safe harbor plans including the opportunity to add a non-elective contribution later in the plan year and also eliminates the notice requirement for non-elective contributions. You would have the opportunity to add a safe harbor contribution after the end of the plan year if the contribution will be a profit-sharing contribution of 4%. The cap on automatic enrollment deferrals has been extended to 15% of pay and the required minimum distribution age has been extended to 72 from 70 ½. There are several other changes in the law, but the problem is that most provisions will become effective in 2020.



A new fiduciary rule

The Department of Labor (DOL) will once again attempt to impose a new fiduciary rule, that will treat all financial advisors as fiduciaries. This will be the third time for the DOL to impose a new rule and the hope is that the third time is a charm. The fiduciary rule hasn't been updated since ERISA went into effect in 1976, which predates 401(k) plans and mutual funds. If you' re using a registered investment advisor (RIA) for your plan, any change will have a negligible effect as RIAs are already considered fiduciaries. If you're using a stockbroker, any change will certainly affect their role in working with you. What the DOL will propose will take some time to go into affect and with presidential elections soon, it's always possible that any proposed changed by the DOL will be foiled again (as it was in 2016). What the DOL will propose as a new rule is still being considered, but I will imagine that it will have something to do with the Securities and Exchange Commission's proposed fiduciary rule. All I know for sure is that no one in the financial industry will like it and any implementation will take at least 12-18 months if it gets implemented at all.

Late salary deferral deposits

I sound like a broken record, but the biggest and most consistent plan error these days is the late deposit of salary deferrals. In terms of referrals made by plan providers to me to correct plan problems, about half these days concern the late deposit of salary deferral contributions. For years and years, all of us relied on DOL guidance that there was a safe harbor for 401(k) plan sponsors on deposits of salary deferral contributions if they made by the 15th day of the following month. A few years back, it feels that the DOL "rebooted" the rule by stating that 401(k) sponsors need to get those salary deferrals in as soon as possible. The problem is that so many 401(k) plan sponsors who maybe took their time to the next payroll to make the deposit weren't

told by their plan providers about this change. The DOL also revised Form 5500 that asked plan sponsors under penalties of perjury on whether they were late in making these salary deferral deposits. Plan sponsors who never thought they were late before discovered that they had a lot of plan errors that required corrective earnings adjustment for the late deposits, as well as filing a Form 5330 to pay an excise tax and to make an application to the DOL's Voluntary Fiduciary Compliance Program. Otherwise, they would be prone to a government audit. The problem with late salary deferral deposits is that almost all plan sponsors never just are late on one payroll, they are usually late on many payrolls before corrective action is taken. Being late on salary deferral deposits is an unnecessary plan error that could make you prone to getting audited by the IRS and/or DOL because you have to state under penalties of perjury on Form, 5500 whether you're late or not.

Consolidation in the retirement plan business

Thanks to a very competitive marketplace, there has been a huge upswing in the consolidation of the retirement plan business. Third-party administrators (TPAs), RIA firms, and brokerage firms are merging or being bought out. If a plan provider you're working with is merging or is being bought out, there are going to be concerned regarding service and pricing. While most transactions will have no bearing on these issues, it's always a concern and a fiduciary duty to determine whether you're receiving the same level of service at the same level of cost. If you're not, it might be time to change.

Missing former participants

It's very easy to lose touch with former employees, easier than losing touch with friends and former classmates. The problem is if these former employees are participants in your 401(k) plan with a balance that is more than the plan's cash-out rule. If a former employee's account balance is less than the cash-out rule, you can eventually send them a check or move their money to an individual retirement account (depending on the terms of the plan). If their account balance is above the cash-out rule, you'd need their consent for distribution and that's a problem to get if you don't know where they are. The problem is that former employees who are participants in your 401(k) plan have certain rights especially as it pertains to information and it's hard to give notice to people you can't locate. Former participants are a headache when missing and it's a potential liability. The DOL has decided that missing participants is a topic they need to focus on. That means in case of a plan audit, the DOL will focus on missing participants and what procedures the plan being audited has put in place to find these missing participants. It's your fiduciary duty to try6 to locate missing participants and contact them, the old days of just ignoring the problem is unacceptable because the DOL is now on the case. Thanks to technology, there are just so many ways you can try to locate missing participants, so I suggest you develop a policy and procedure to locate them.

Plan education

The one part of your problem that most 401(k) plan sponsors ignore is the plan education/enrollment meetings. You need to stop treating these meetings like it's a checkup at the dentist. These meetings are essential to limiting your liability as a 401(k) plan sponsor when participants are given the right to direct investments. Sitting down with your financial advisor to select plan investments isn't enough. You have to provide enough information for plan participants to make informed investment decisions, otherwise, you might be liable for their losses in their plan investments. You need to schedule frequent meetings so that current and new participants get the information they need. When contacted by your financial advisors to hold these meetings, it's important that you schedule them, advertise them, and kept attendance of those participants that showed up. While these meetings are beneficial for your employees to use this important benefit, they're part of the process you need to follow to limit your liability as a plan sponsor.

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