The Mission Impossible Of Being A 401(k) Plan Sponsor

By Ary Rosenbaum, Esq.

When I was a kid in Brooklyn, our area wasn't wired for cable television until I was 17. So being reduced to around 7 UHF channels, there were times when there wasn't much to watch on television. Late Saturday afternoons, Channel 5 (now a Fox channel) used to show reruns of Mission Impossible. As a kid, other than the self-detonating message, the show bored the heck out of me. The film series that Tom Cruise started in 1996 that continues to this day with the sixth film that bowed out this summer stands on its own. However, for some reason, Mission Impossible and the Impossible Mission Force remind me of the responsibilities that you have as a 401(k) plan sponsor. This article will not self-detonate in 5 seconds.

Your mission should you choose to accept it

In the movies, Ethan Hunt is given a message from IMF and he's offered a mission that he's asked whether he will accept it or not. After being told the details of the mission, the recording of the message self-destructs. As an employer, you have a choice of offering a 401(k) plan or not. Offering a 401(k) plan is its own mission. Should you choose to accept that mission, it can be sometimes as dangerous as an IMF mission. Not only will you be a plan sponsor, you'll also be a plan fiduciary. With that title, comes a lot of responsibility because being a plan fiduciary requires the highest duty of care in law and equity because you're responsible for the retirement assets of your employees. That's why extremely import for you as a plan sponsor to be vigilant in your role as a retirement plan sponsor. Too many employers have a set it and forget it attitude with their plans and the problem with this laidback attitude, a plan sponsor ends up to clean up a mess after the fact. If you choose that mission to be a plan sponsor, you need to be proactive rather than reactive because being proactive allows you to clean up problems with the plan that quickly get out of hand.

Should you or any of your Force be caught or killed, the Secretary will disavow any knowledge of your actions

As part of any Mission Impossible, the team leader is told that if any member of the IMF is caught or killed, they will be disavowed. If you're a plan sponsor, there is no disavow list if you don't do a good enough job. You just end up with a whole host of problems that can involve liability as well as personal liability for some of the fiduciaries involved with the plan. The issues may involve a lawsuit by plan participants dealing with issues regarding plan costs. The problems can be with administrative and compliance issues that are discovered and required correction action and additional contributions. The problems can also be errors that are only discovered by an Internal Revenue Service (IRS) and Department of Labor (DOL) audits. Whatever the issue or problem is, just know that being a plan sponsor can raise a whole host

of problems that you're not likely to have the background to understand, follow, or prevent.

Assembling the IMF Team

As with any Mission Impossible episode or movie, part of the missing is assembling the IMF team for the mission leader. Just like that, it's necessary for you as a plan sponsor to assemble a team to help you run your plan. Unless you have a background as a third party administrator (TPA) and a financial advisor, you're going to have to hire plan providers to assist you. The problem with plan sponsors is that they really don't understand what a TPA does, so they usually hire one just based on price or something else that has nothing to do with competent plan administration, such as payroll integration. Hiring a TPA should be based on what's the best fit for the plan sponsor and to hire one that can do a good job in the day to day administration of the Plan. A good TPA will do a good job in administration and avoid the compliance headaches associated with poor administration such as incorrect compliance testing. A good TPA is also experienced in plan design which can increase contributions to highly compensated employees, provide minimum contributions to the rank and file, or avoid some compliance testing that the Plan would fail otherwise. The biggest problem with hiring a bad TPA is that as plan sponsor, you're still on the hook and liable for any plan errors that a TPA causes. You would also need to hire a financial advisor and there are many pitfalls there. Too many financial advisors are fixated on picking investment options for the plan. Picking investment options is a part of being a 401(k) financial advisor, but anyone who can read a Morningstar profile could fill out a basic lineup of mutual funds for a 401(k) plan. A good 401(k) financial advisor understand that their role is to minimize a plan sponsor's fiduciary liability in the fiduciary process of the plan. A good financial advisor will help or assume (which is what an ERISA §3(38) advisor does) a plan sponsor's responsibility of running a plan with participant direction of investments under ERISA §404(c). An ERISA §404(c) plan will hold that a plan sponsor is not liable for any losses sustained by a participant when they direct their own investments as long as the plan sponsor fulfills their duty under ERISA §404(c). Their duty involves a prudent selection of plan investments, which should be based on criteria set forth in an investment policy statement. It also requires providing enough information to plan participants so they can make informed investment education. That requires the plan sponsor to offer something such as investment education and/or advice. When it comes to developing a team of trusted plan providers, plan sponsors don't have to pick the biggest, the smallest, the cheapest, or the most expensive. As a plan sponsor, you have a fiduciary duty to pick competent plan providers who charge a reasonable for the services provided.

Red Light, Green Light

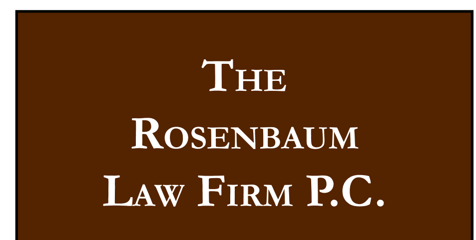
Unlike explosive gum that explodes when red and green of the gum stick are mixed together, a plan sponsor may have some explosions going off in their plan that they don't realize. Too often, plan errors are often discovered on an IRS or DOL audit or when there is a change of TPAs. What's the problem? Errors discovered on a plan audit can cost thousands of dollars in corrections and penalties. Errors discovered many years later when there is a change of TPAs may require corrective contributions and may be too late in the game to make corrections that are less costly. Also errors may mean there is likely to be legal expenses out there and if they don't hire an attorney who bills on a flat fee (like yours truly), they're going to pay a lot in lawyer bills.

The syndicate is real

Like the IMF who had to deal with a rogue group of secret agents in Mission Impossible: Rogue Nation, plan sponsors need to avoid a rogue group of plan providers. The biggest problem in dealing with TPAs is that anyone can say they are one. In addition, there are financial advisors out there that may not have the proper licenses or background to be involved in providing financial advice to plan sponsors. It's important that you vet any plan provider that you're considering to hire.

You don't need a rabbit's foot

Luck in running a 401(k) plan doesn't exist. What you need as a plan sponsor in running a 401(k) plan is vigilance and surrounding yourself with the best team out there. No matter what you think, there are no shortcuts in running a plan. You need to remember that a retirement plan is an employee benefit and you can't treat running the plan lightly because of its importance as a plan benefit and your role as a plan fiduciary.



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