# New Year's Resolutions For 401(k) Plan Sponsors

## By Ary Rosenbaum, Esq.

A New Year's resolution is a tradition in which a person resolves to change and undesired trait or behavior to either improve their life or to accomplish a personal goal. Gym memberships, cleaning supplies, and organizational tools probably have large sale increases in January. The problem with most resolutions is that people quickly give up on them. For plan sponsors, they should have New Year's resolutions to improve their plan because they are fiduciaries by being responsible for the retirement plan assets over their employees. This article is about New Year's resolutions that plan sponsors should make and keep alleviating some of the potential liability they face as plan fiduciaries.

**Reviewing plan fees**

In the old days, plan sponsors were in a Catch-22. While they had a fiduciary responsibility to only pay reasonable plan expenses, most of the plan providers (especially third party administrators (TPAs) and brokers) didn't have to tell their plan sponsor how much they made on the plan through direct or indirect fees. So plan sponsors could be breaching their fiduciary duty by no paying reasonable plan expenses without even knowing how much they paid. Thanks to the fee disclosure regulations implemented in 2012, that anomaly no longer exists as plan providers directly or indirectly making $1,000 from plan assets must provide annual fee disclosure to plan sponsors. The problem that I find with fee disclosure is that most plan sponsors take their fee disclosure and either file it away or throw it in the garbage. Most plan sponsors don't do what they're supposed to, which is fulfilling their fiduciary duty by determining whether the fees that are being charged are reasonable or not. They can't do that by putting their fee disclosure in the back of a drawer. They can only determine whether their plan fees are reasonable or not by shopping the plan around to other providers or using a benchmarking service. Of course, as stated before, the fees have to be reasonable; they don't have to be the cheapest. That's an important concept because picking plan providers just because they're cheap is another classic big mistake. Reviewing plan fees is a good habit, just like flossing because it's preventative care. Most importantly, Department of Labor (DOL) often ask for the fee disclosures during a plan audit and ask plan sponsors how plan providers are selected. So it's a good idea and a great New Year's resolution for plan sponsors to review their fee disclosures and benchmark their fees to determine whether they are reasonable for the services provided.

**Reviewing plan providers**

It's not enough for plan sponsors to review the fees being charged by their plan providers, they also need to review their plan providers and the work they do. Too often, mistakes by plan providers are only discovered on a DOL or Internal revenue Service (IRS) audit or when there is a change of plan providers. The problems are that discovering problems and errors in a plan later down the line mean it will be costlier than if they were discovered right around the time they occurred. I've seen too many plan sponsors learn the hard way that their long-time plan providers didn't do the competent job that they're promised. The problem here is plan sponsors with displaced loyalty can't believe a long-time plan provider could have been so bad. However, when you don't review the work that plan providers do, it really shouldn't come as a great shock. The greatest plan providers make mistakes; the not so great plan providers make many mistakes. Without a check and balance on the plan providers, errors will go undetected for many years and usually occurs on audit or when the plan provider in question is replaced. I will also point out the longtime defined benefit plan sponsors that couldn't understand that the actuary they used for 20+ years didn't prepare the valuation reports they needed and gave poor advice on how the owner could use their retirement benefit. That poor work and poor

advice led the plan sponsor to be sued by the DOL. The problem with blindly trusting plan providers is that while it might be errors that they caused, it's the plan sponsor that is always going to be on the hook for liability even if the plan provider is serving in an ERISA fiduciary capacity where the plan provider has discretionary control (such as a plan provider serving in an ERISA §3(16) or ERISA §3(38) capacity. A good New Year's resolution that a plan sponsor can't afford not to keep is reviewing their plan providers.

**Reviewing salary deferral deposits**

One of the most frequent 401(k) mistakes and the most avoidable one is the late deposit of participant salary deferrals. The reason why it's one of the most common errors is that plan sponsors are unaware that it has been the goal of the DOL to make sure that plan sponsors deposit salary deferrals as quickly as they can. In the good old days, plan sponsors could rely on this long DOL safe harbor by getting those salary deferrals deposited into the plan by the 15th day of the following month. Several years ago the DOL said that the real deadline for depositing salary deferrals is as quickly as possible. Depending on the employer, that quickly as possible could be just a matter of 3 days. The problem with depositing salary deferrals is the DOL's concentration on the salary deferral deposit process. The DOL will content that if a plan sponsor can reasonably segregate salary deferrals within 3 days and does so on a regular basis, one week or several weeks of depositing within 5 days is considered late. That is why as part of any New Year's resolution, the plan sponsor should review the payroll cycle and how quickly they deposit salary deferrals, they may catch on their own whether they were late or not and whether they have to submit to the DOL's voluntary fiduciary compliance program. A plan sponsor that reviews their deferral deposit cycles and procedures can go a long way in eliminating a possible frequent 401(k) plan error.

**Reviewing compensation**

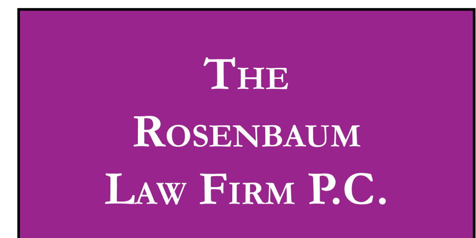
Another frequent error is compensation and how it relates to the plan's terms and how it actually the plan is administered. Too often, a plan will not allow a plan will not recognize a form of compensation (such as a bonus or paid time off) for purposes of making employer contributions and allowing participants to defer it even though the plan document says they should. The problem is that it's a major compliance error for a 401(k) plan sponsor not operating a plan according to its terms (the plan document) and they may owe a contribution for the late employer contributions on that compensation and a contribution for that missed deferral opportunity for not allowing the participant to defer it. It's important for the plan sponsor to review the compensation they pay to their participants, what they recognize for contributions for administration purposes, and what the plan document says. Plan sponsors need to make sure that there is a consistency between practice and what the plan document says.

**The employee census**

Plan sponsors need to review their census of employees to make sure those that need to be participants per the eligibility requirement are actually participants. Allowing plan participant in too early or too late per the plan document is a problem and it's certainly a problem if they're using an eligibility period in the day to day plan administration that is not consistent with the terms of the plan document. Bringing in employees to early as participants may require the removal of deferrals from the plan and bringing them in too late will require the plan sponsor to make a corrective contribution for the late deferral opportunity Regardless, these are plan errors that a good review of the plan employee census could be nipped in the bud.

**Reviewing active plan participation**

Plan sponsors think that the employees that are plan participants are those that actively defer. Actually, an employee that meets the eligibility requirements and meets the entry date is a participant even if they never defer. Whether participants actively participant and defer in the 401(k) plan is an important statistic because it will show whether this employee benefit is utilized and a low deferral rate could be seen as a problem for the plan. It's important for the plan sponsor to understand the percentage of participants that defer because a low number may be a sign that one or many of the plan providers could do a better job in communication with plan participants. A plan sponsor started a 401(k) plan as an employee benefit and any benefit is a mechanism to recruit and retain employees and a 401(k) plan with a low deferral rate may be a sign that the plan isn't much of a benefit. A low deferral rate may also be a problem for some of the compliance test that may require a corrective employer contribution or a refund of salary deferrals to highly compensated employees. Reviewing the deferral rate may also get the plan sponsor to consider features such as automatic enrollment or a safe harbor contribution. For any plan sponsor New Year's resolution, reviewing active plan participation is a must.

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