The Bottom Line On What Retirement Plan Sponsors Need To Do

By Ary Rosenbaum, Esq.

I worked for a third party administrator (TPA) for almost 5 years and one of my favorite things about the boss there was that he just wanted to cut to the chase. We had an actuary who developed a speech impediment when he was nervous, and when asked a question by the boss, he would either stammer or go through an actuarial tangent that no one would understand. The boss would ask the actuary what the bottom line was. Plan sponsors need to know the bottom line and this is what this article is all about when it comes to their responsibility.

Understand the responsibility of being a plan fiduciary

They say the road to hell is paved with good intentions and I'm betting the person who said that probably sponsored a retirement plan for their employees. Your good meaning in setting up a retirement plan isn't good enough; you have to consistently make sure that it's running correctly, as a plan sponsor is also a plan fiduciary because he/she is holding the retirement plan assets of your employees. Being a fiduciary of a retirement plan requires the highest duty in law and equity. So while you may treat your own money with disdain, you can't afford to do that with other people's money. You have to know that you just can't set up a retirement plan for your employees and forget it. You need to review your plan semi-annually and annually. You also need to understand that you are responsible for the choice of your retirement plan providers and you will bear the bulk of the burden when something goes wrong. If you have a third party administrator that fails to file your Form 5500 on a timely basis, you're the one who gets the penalty letter. If your advisor never shows up to review plan investments and your participants sue you for losses sustained for their account, you'll probably pick up most of the tab. Sure you can sue incompetent plan providers, but you're at fault for hiring them and because you can't fully delegate all of your responsibility as a plan fiduciary. You can't afford to be a spectator when it comes to your retirement plan; you need to be actively involved because of your role as a plan fiduciary.

Hire competent plan providers.

Unless you are in the retirement plan business, you are going to need help in the running of your retirement plan. That means hiring a TPA, a financial advisor, and some of the time, an ERISA attorney (cough, cough). You are going to have to find competent plan providers because incompetent plan providers cause a lot more headache and trouble in the long run. You need well-experienced providers so that they have the background to effectively handle your plan. A TPA that only handles cash balance plans isn't a good fit if you only have a 401(k) plan. A broker who has never handled a retirement plan and thinks all they have to do is pick funds isn't a good fit either. I'm going to get a nasty call from someone who works for one of the big payroll provider companies, but it is my recommendation that you don't hire one of these two big payroll providers as your TPA because it hasn't been shown to me in my nearly 16 years in the retirement plan business that they can effectively and properly handle the day to day administration of a 401(k) plan. 401(k) plan administration has very little to do with payroll, so you'd want a TPA whose main focus of business is being a TPA. You'd want a financial advisor whose bread and butter is offering advice to retirement plans. You need competent plan providers who provide a good service at a reasonable price, that's it.

Have the right insurance coverage

The reason to purchase is to insure against risk and there is a lot of risk in sponsoring a retirement plan. If you sponsor a retirement plan, it is imperative that you purchase fiduciary liability insurance. Fiduciary liability insurance should not be confused with an ERISA fidelity bond, which all ERISA plans are required to purchase to protect assets against theft by plan fiduciaries. Fiduciary liability insurance is optional, but I believe it is a necessity because it insures plan sponsors from litigation costs and liability that may result from being a plan fiduciary. Even if you win the case against you brought by plan participants, it's costly. I had a cli-

ent who was represented in a class action lawsuit by one of the most well-known ERISA litigation law firm. While they won the case, the litigation costs were $1 million Thanks to their fiduciary liability policy, they only were responsible for the $100,000 deductible. Don't jump without a net and don't sponsor a retirement plan without a fiduciary liability insurance policy to back you and the plan trustees.

Determine whether your fees are reasonable

Since 2012, you are required to get fee disclosures from plan providers who receive money directly or indirectly from your retirement plan. It's important since you have a fiduciary responsibility to only pay reasonable plan expenses. While the disclosure forms are nice, you can't determine whether the fees are reasonable for the services provided by just looking at them. You need to benchmark those fees against what other provides charge. While you have a duty to pay reasonable plan expenses, it's not required that you pay the lowest fees. Picking a plan provider only because they charge the lowest fees is an absolute mistake.

Review if the plan still meets your needs

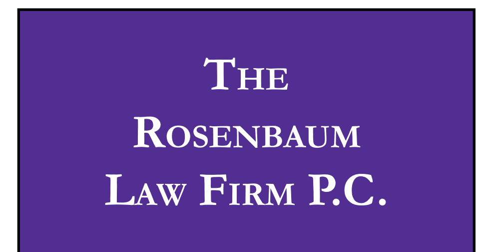
When you set up a plan initially, you set it up based on your financial status and employee demographics at that time. Over time, your wallet and size of your workforce may change in a good way or bad way. That's why it's important to have your plan design still fit your needs. If your demographics is now causing your plan to fail some of those required compliance tests, it's time to see what changes can be made to remedy that. If your company is thriving, there may be plan designs that maximize employer contributions. The fix it and forget it mentality when it comes to your plan design may leave money on the table that could have been better served by allocating it to your highly compensated employees.

Make sure employees get the investment education/advice they need

If you hire a good financial advisor for your plan, they are going to help you draft an investment policy statement (IPS) and select investment options based on that IPS. The problem with participant directed retirement plans like a 401(k) plan is that most plan sponsors assume that they are exempt from liability if participants choose their own investments. That's because that's what some retirement plan providers told them without really understanding ERISA §404(c) (the code section that is supposed to relieve plan sponsors of liability). ERISA §404(c) only relieves plan sponsors of liability if they provided participants with enough information to make investment decisions. So while a financial advisor is working on the plan investments, one thing that is often overlooked is providing participants with the information they need to make informed investment decisions. So a plan sponsor will need to make sure that plan participants get at the very least, investment education if the plan is participant directed. They also may consider having their current plan provider or an additional provider offer investment advice that is specific investment advice to a plan participants based on their financial circumstances. It may cost a few extra shekels, but better informed participants get better investment results which decreases the likelihood that plan participants will sue for losses sustained by their own choice of investments,

Review it all

A plan sponsor needs vigilance when it comes to operating a retirement plan. Over the past almost 16 years in the business, I can vouch that the biggest problems that plans suffer from are as a result of plan sponsor neglect. Plan sponsors that didn't understand their responsibility and didn't understand what their plan providers had to do are usually ones who have catastrophic plan problems. These plan sponsors are reactive when they need to be pro-active. What does it mean to be pro-active? Review the work of plan providers, review plan fees, and review the plan administration/design. Sure it takes work, but when your fiduciary responsibility requires such vigilance, you really don't have much of a choice. It's not easy, but nothing worth anything is.



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