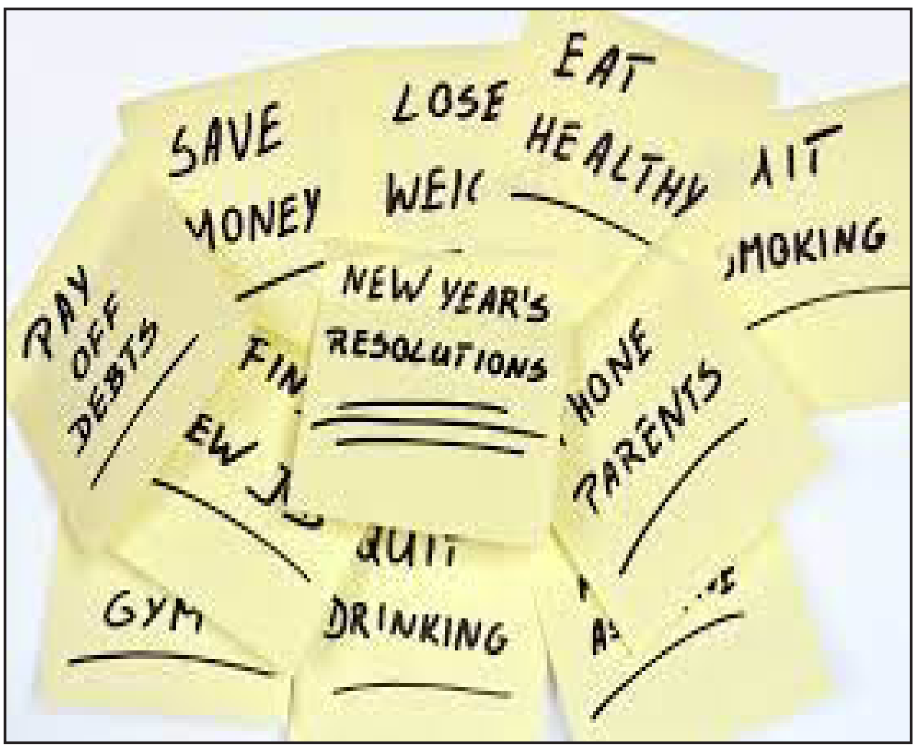
New Year's Resolutions For 401(k) Plan Sponsors

By Ary Rosenbaum, Esq.

A New Year's resolution is a promise that a person makes to achieve one or more personal goals, projects, or the reforming of a habit. The big deal about a New Year's Resolution is that it is made in anticipation of the New Year and new beginnings. Aside from losing 42 pounds on Slim-Fast in my senior year of high school, I have never kept a New Year's resolution and the only harm is to myself for not keeping a promise. Plan sponsors who intend to make New Year's resolutions aren't so lucky; their broken promises can get them in a whole lot of hot water and financial liability. So this article is about what New Year's resolutions plan sponsors should make and keep in helping them minimize their fiduciary liability.



Keep all plan documents

After 22 years in the business, I am still surprised how many plan sponsors don't have copies of all their plan documents and amendments since implementing their plan. Too many plan sponsors chuck their plan documents when they get a new one through a plan restatement, but the fact is that there are many times why a plan sponsor may need a copy of a previous plan document or amendment. This may be because the plan sponsors want to receive a favorable determination letter from the Internal Revenue Service for a new plan document or for the plan's termination or to help clarify an ambiguity about benefits or provisions in the current plan document. I remember working on a union's defined benefit plan and reviewing their 1976 plan document to review their vesting schedule in order to verify a former participant's erroneous claims that they were entitled to a greater benefit. Thanks to the world of emails and Portable Document Format (pdf), keeping records of all plan documents and amendments take a lot less paper and a lot less room. There should be no reason why a plan sponsor shouldn't have a copy of all their plan documents.

Keeping good records

My wife is an attorney and whether it's a dispute with a contractor or an employer, she is an expert in keeping good records. Keeping good records can determine whether you win or lose in litigation. That is why it's necessary for plan sponsors to keep good records when it comes to their retirement plans. It's not just about keeping plan documents, it's about "papering the process" in keeping records of all decision-making. That means memorializing all fiduciary decisions such as hiring service providers, meeting with the plan's financial advisor, changing and reviewing investment options, as well as keeping records of all employee investment advice/education meetings. Unlike memories, good records don't change and if a plan sponsor is keeping their end of the bargain as a plan sponsor, they should have the records that back it up. Too often, I have seen the Department of Labor get benefits for former participants that didn't deserve them only because the plan sponsor didn't have the records to prove that. Like taking good notes in class, a plan sponsor can become a great student of being a fiduciary by keeping good records.

Review of ERISA bond and fiduciary liability insurance

They tell you to check your air filter when every season starts and to check your fire/ carbon monoxide alarms every six months to avoid greater harm later. When it comes to being a retirement plan sponsor, the greater harm usually involves plan asset theft or litigation from aggrieved plan participants. As you should know, all retirement plans covered under ERISA must have an ERISA bond to protect assets from theft. Make sure you have one in place. If not, contact your property & casualty broker. If you have a policy, make sure it's for the right amount. The value of the bond must be equal to at least 10% of the total dollar amount of funds handled in the preceding plan year but in all events not less than $1,000 and not more than $1 million. While an ERISA bond is required, fiduciary liability insurance is not. Fiduciary liability insurance is actually optional; it offers plan fiduciaries protection in case of litigation because fiduciaries like individual plan trustees may be personally liable otherwise. So while it is an option, it is something that all plans covered by ERISA should have, just in case. Speaking as a lawyer who doesn't litigate, litigation costs a heck of an amount of money. Being sued doesn't mean you did anything wrong and a lot of innocent plan sponsors have had to pay through the nose to defend them. I had a client who had $1 million in litigation expenses and won their case on summary judgment; thankfully they had a fiduciary liability policy that bore $900,000 of that amount. If you don't have a current policy in place, check your property & casualty broker for details.

Review Plan Expenses

My house is a money pit and it was a money pit before Hurricane Sandy destroyed half of it. Throughout the 17 years, I've owned the house, I have used primarily two contractors on some major and minor projects. The problem is that I assumed I was paying a reasonable fee for those projects, only to learn I was overpaying by comparing what other contractors charge. As a plan sponsor, plan sponsors have a lot more to lose in paying unreasonable plan expenses. Plan sponsors have a fiduciary responsibility to pay reasonable plan expenses. Plan sponsors need to review the expenses charged to their plan and determine whether they are reasonable or not, depending on the fees paid for the services provided. With fee disclosure regulations finally implemented, plan sponsors should have received fee disclosures from their plan provider. If a plan sponsor hasn't, they should contact their plan provider immediately because they are on the hook for any disclosures not provided to the plan sponsor as well as to plan participants. If the plan sponsor did receive the disclosures sent to them, they need to review them and benchmark those fees (based on plans of similar size) by using a benchmarking service or by comparing fees to what other providers are charging by asking for price quotes from competing providers. While plan sponsors never have to pick a plan provider who is the cheapest, they need to make sure that the fees being charged to the plan are reasonable in light of the services being provided to them and to the plan participants.

Review Plan Providers

The problem with hiring plan providers is that even though they may be responsible for their errors, plan sponsors are responsible for those errors as well As a retirement plan sponsor, employers need to know how their plan providers are doing. The reason they need to know is that they are on the hook for their errors, it's their fiduciary responsibility to make sure they are doing the job they should be doing. That's why plan sponsors need to resolve to review the work of their providers to make sure they are doing the work promised. Does the plan sponsor have a financial advisor who never offers investment education to plan participants or hasn't shown up in years to review plan investments? Do they have a TPA who has trouble with compliance testing? Do they have an ERISA attorney who can't spell 401(k)? Seriously, plan sponsors need to have their plan providers reviewed for competence. Plan sponsors should review their plan providers by either doing the work themselves or by hiring an independent ERISA attorney or pension consultant to review. I have seen too many plan sponsors being on the hook for the errors of their plan providers. While you may say that it's unfair, ERISA and the Internal Revenue Code create great responsibility for the plan sponsor to comply with, it's up to the plan sponsor to determine whether they are serious or not in their duties as a plan fiduciary. Looking over their shoulders and the shoulders of their plan providers is a major step in fulfilling their role diligently.

Outsource What They Can't Handle

A plan sponsor should look in the "mirror" and determine what functions of a plan sponsor they should and can outsource. A plan sponsor that wants no part of the fiduciary process of selecting investment options should hire an ERISA §3(38) fiduciary who will assume the bulk of the liability. The same can be said of a plan sponsor that wants nothing to do with the day-to-day plan administration of their retirement plan and should consider hiring an ERISA §3(16) administrator who will assume the bulk of the liability of plan administration. The plan sponsor who is honest with their limitations will avoid liability more than the plan sponsor who claims they can handle all the work of being a plan fiduciary but can't.

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