These Things You Can't Afford To Neglect About Your 401(k) Plan

By Ary Rosenbaum, Esq.

We all know from your health, that if you neglect certain things, it will hurt you later down the line. Whether it's your heart or your teeth, neglecting important health issues is only going to make the situation worse. The same can be said about being a 401(k) plan sponsor, there are certain things you might be neglecting that will negatively impact your plan and may cause you some pecuniary liability. This article is all about planning tasks that you're probably ignoring.

Reviewing your fee disclosures

We live in some unique times because there was a time (before 2012) when plan sponsors like you didn't know how much their 401(k) plan was being charged in administrative expenses. That was a problem because as a 401(k) plan sponsor, you have a fiduciary duty to pay reasonable plan expenses, and had you not known what you were being charged, you could have breached that fiduciary duty without knowing it. We now live in a time where you get disclosures from all your plan providers on how much they charge the plan. So what do most plan sponsors do with their fee disclosure? They either do nothing, throw it in the garbage, or do anything but review them. While it's nice that plan providers are spending their time to let you know how much they're charging your plan. The problem here is that if you don't shop your plan around to other providers or benchmark the fees being charged, you have no idea whether the fees being charged to your plan are reasonable or not. Fee disclosures are meant to be reviewed and compared. Putting fee disclosures in the back of the drawer does nothing for you, actually, it harms you because it shows that you're not prudently exercising your fiduciary duty and you have no idea whether the fees being charged to your plan are reasonable or not. There are quite a few plan sponsors out there that have been sued because they never bothered to review their fee disclosures.

Reviewing your annual valuation reports

Every year, your third-party administrator (TPA) provides you with an annual valuation report which includes all the nuts and bolts of your 401(k) plan. You will see census information, account balances, and testing information. Unless dealing with a larger 401(k) plan sponsor, I know of no plan sponsors that review it. I know a lot more plan sponsors who don't even bother to keep it and just throw it in the trash. So many of the mistakes dealing with your 401(k) plan occur within plan administration. Whether it's testing data, eligibility and hire dates, or whether someone is a highly compensated employee, I recommend reviewing your valuation reports to see any glaring mistakes or omissions. Something as simple as someone not being identified as a highly compensated or key employee can go a long way in causing plan errors that will require you to dip into your pocket to pay thousands of dollars in corrective contributions and compliance fees. If you want to even be more proactive, consider having your valuation report reviewed by an ERISA attorney (cough, cough) or an independent retirement plan expert.

Not reviewing your salary deferral procedure

As I've said repeatedly for the last few years, the most frequent plan error out there is the late deposit of salary deferrals. In the old days under the Department of Labor (DOL) rules, you had until the 15th of the following month to deposit salary deferrals. However thanks to quick ACH deposits and technology, the DOL reinterpreted their rule and said you need to deposit salary deferrals as soon as possible. The problem with this reinterpretation is that so many 401(k) plan sponsors have absolutely no idea and they only find out when it's too late (such as an IRS or DOL audit). I have been working so long in this business when 401(k) plan sponsors would mail checks to their TPA for the salary deferral deposits. Thanks to ACH and the Internet, those days are gone and so are the excuses as to why they're not deposited into the plan as quickly as possible. The problem with

late deferral deposits is that if you're late once, you will be late again. I've never met a 401(k) plan sponsor who has only been late with depositing deferrals once. Since it's a frequent 401(k) plan error that can be easily avoided, I recommend that you develop a procedure to make sure that deferrals are deposited as quickly as possible. If you have one person in charge of depositing salary deferrals, make sure that there is a backup in case one person is on vacation or gets hit by a bus. You need a system of checks and balances to ensure that the most basic task of 401(k) plans, the deposit of participant salary deferral is done as expeditiously as possible. It's a routine task that you can't afford to neglect. Any late deferral deposits will require you to pull money out of your pocket to adjust earnings for holding on to participants' money, as well as thousands of dollars in compliance and legal fees.

Not reviewing your plan investments

Regardless of the type of financial advisors you hire or the role they serve, you can't dismiss meeting them the way we avoid scheduling an appointment with a dentist. Like with the deposit of salary deferrals, you need a process in place to avoid allegations that you're not prudently exercising your fiduciary duty and you need to follow it. That means developing a fiduciary process with your advisors where an investment policy statement (IPS) is developed which is the basis for selecting and replacing investment options for the plan, as well as reviewing the investment to see if they still meet the investment parameters of the statement. I've seen too many 401(k) plan sponsors that just try to avoid these meetings and they shouldn't. If you're paying a financial advisor to help you minimize your liability as a fiduciary, you need to make sure they're doing their job. So that means you have to sit with them quarterly or semi-annually (depending on the plan size) review your plan investments and make any changes if the IPS requires it. It's not enough to have a process in place for plan investments, you need to follow it because having a process that you're not following is worse than not having one.

Blowing off plan enrollment/education meetings

Too many plan sponsors treat their plan enrollment/education meeting like it was a robo-phone call. Sure, you're busy, I get it. However, as a 401(k) plan sponsor, you need to regularly schedule plan enrollment/education meetings. The whole purpose of setting up your 401(k) plan as a participant-directed plan is that by shifting the direction of investments to participants, you're supposed to be limited from liability from losses in their retirement account. If you don't schedule plan enrollment/education meetings, you're not going to get that liability protection. ERISA §404(c) governs participant-directed plans and most plan sponsors don't understand that the liability protection offered can be limited. If you don't give enough information to plan participants so that they can make informed investment decisions, you're not likely to get any liability protection under ERISA §404(c). While you may see plan enrollment/education meetings as a waste of time that costs you money, they go a long way in limiting your liability as a plan sponsor. You need to let your advisor conduct these meetings not only to educate plan participants but also to enroll newly eligible employees. Not allowing people to participate and defer when eligible may cause compliance headaches and corrective contributions. Enrollment/education meetings should be conducted coincident with your plan's entry dates so that no participant goes without the information they need to participate in your 401(k) plan.

Not keeping good records

The problem with not having good records is that the IRS and the DOL don't think you ever had what's missing. Whether it's a required plan amendment or promissory notes for participant loans, the government won't believe that you ever had what you claim is lost. It's important to keep good records which include all plan documents, plan valuation reports, distribution records, and tax returns. It makes it easier if you have all the necessary records when the plan gets audited by the IRS or DOL.

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