401(k) Plan Sponsor Tasks You Can't Afford To Delay

By Ary Rosenbaum, Esq.

There are so many things we try to avoid doing. It can be going to the dentist, taking time out for cleaning, or going out shopping at the supermarket. If we avoid going to the dentist and don't care about the routine exam, you may develop bigger problems that could have taken care of earlier and with less pain. There are certain functions you have as a plan sponsor that you would like to avoid, but you can't because you're responsible as a plan fiduciary to get these things done. This article is important 401(k) plan tasks that you cant delay and if you do, it's at your own peril.

Depositing salary deferrals

The most routine function of running a 401(k) plan is the consistent and timely deposit of salary deferrals. Thanks to technology, it's a whole lot easier to do thanks to ACH withdrawal and no need to send them out on checks anymore. Yet so many plan sponsors are consistently late with their deferral deposits. They are never late once, it seems that late deposits do so on a consistent basis. The problem is that guidance over the past 10 years from the Department of Labor (DOL) is that salary deferral deposits need to be made as soon as possible (usually 3 business days). The problem is that many plan sponsors are unaware of that new view. Late deferral deposits must be corrected as soon as possible and earnings need to be deposited to make up for a plan sponsor's lateness. If you are late once with salary deferrals, it's incumbent on you to develop a process that you can follow and avoid a repeat of salary deferrals. In addition, you will have to correct late deposits by depositing the deferrals and adjusted earnings, as well as filings with the DOL's Voluntary Fiduciary Compliance Program and paying a nominal excise tax for the late deposit(s) on Form 5330. You can't avoid fixing the problem and delaying because you will have to answers under penalties of perjury on Form 5500 on whether you have late deferral deposits. If you answer that you do (perjury is a crime), you will likely be contacted by the DOL for an audit or you will be contacted that they don't see an application from you for their Voluntary Fiduciary Compliance Program.

Delaying meetings with your advisor

Having a financial advisor on your 401(k) plan is important when you have employees in your plan. You're paying these advisors to assist you in the fiduciary process of your plan. They help you develop an investment policy statement (IPS), which is the basis for selecting and replacing investment options under the Plan. Even if your plan is participant-directed, you do need a prudent process in place to make investment option selections for the plan's menu. When I worked at a law firm many years ago, the human resources director told me that they didn't have a financial advisor on the plan and that the investment options weren't updated in 10 years. That is the perfect example of a 401(k) plan that was mismanaged, don't be like that. If you have a financial advisor on your plan and you're paying them to handle the plan, let them do their job. When they want to schedule their fiduciary review semi-annually or quarterly, don't treat them as if they're dentists or some other person you'd like to avoid. Fiduciary meetings aren't exciting for those with zero interest in investments, but it's a necessary function of your advisor and it's a necessary function for you as a plan fiduciary. The fiduciary process of your plan has to be managed in a prudent process. That doesn't mean your investment options in the plan have the be the best performing, it means developing a prudent and rational process and following it. You are breaching your fiduciary duty if you develop a fiduciary process and refuse to follow it, by not having meetings and not making the changes that the IPS says you have to make. I will say that having a process and not following it is worse than not having a fiduciary process at all. When your financial advisor wants to schedule a meeting, find time in your busy schedule. You're paying for it and it's your neck on the line if you don't.

Conducting enrollment/ investment education meetings

Another big portion of what a financial advisor does is conducting enrollment/education meetings. You may be under the misimpression that you are not liable for the losses incurred by a plan participant when they make the investment on their own. While you can achieve liability protection under ERISA §404(c), you actually have to develop a process that will get you liability protection. Liability protection isn't all or nothing, your liability exposure grows more dependent on how much of the process you manage prudently. One part of the process as discussed above, developing an IPS and having meetings with your financial advisor. The second prong is allowing your financial advisor to conduct enrollment and education meetings to enroll new participants and offer investment education to all participants. I'm sure you feel there are 1000 other things that you'd want to do than to have part of your day where no employees are working to hold an enrollment/education meeting, but you need to check that off your prudent fiduciary checklist. Part of your mission to limit liability under ERISA §404(c) involved providing investment education to all plan participants because §404(c) requires you to provide enough information to participants so that they can make informed decisions on the plan investments. There is nothing that specifies what information you need to provide, but your trusted financial advisor knows what would be sufficient information. I assure you that providing Morningstar profiles as the human resources director did at my old law firm isn't providing enough information. Consider the enrollment/education meeting as liability protection and have it done as frequently as your advisor suggests. I also think you should advertise the event to participants and make it at a time where most can attend. In addition, I recommend keeping an attendance sheet as well as the materials that were handed out. The enrollment/education meeting is also a great time to have participants either fill out or change their beneficiary election forms, so you avoid that soap opera that results upon a participant's death when no valid beneficiary form is found. While you may want to delay an enrollment/education meeting, it's a bad idea.

Reviewing your plan and plan providers

When talking about your plan's administration, you probably think that everything with your plan is fine. The reason that is the case is that your plan providers are probably telling you that and if there is a problem with the plan, it's possible that they don't know themselves if there are problems in the plan especially if they have committed errors as plan providers and are unaware of their own mistakes. You need an independent plan review to determine if there are any issues with the plan and any issues with the plan providers. I conduct these types of reviews and the amounts of plan sponsors who hire me for this are few and far between because they either think everything is fine or they are afraid of what might pop up. The problem with plan errors is that the longer you wait to fix them, the more costly they will be to fix them later down the line. You can certainly delay or ignore these type of reviews, but neglecting potential problems won't make them go away.

Reviewing fee disclosures

You have a fiduciary duty to only pay reasonable plan expenses for the services provided. Thankfully, the fee disclosure rules require your plan providers to reveal how much they directly and/or indirectly get paid for their services. The problem with fee disclosures is that most plan sponsors take the disclosures and never bother to review it. You don't know what a reasonable cost is unless you actually benchmark those fees against what other similar providers charge. It's important that you don't push off on fee disclosure reviews and benchmarking because you need to be consistent to determine whether the fees being charged are reasonable or not. Whether you do the benchmarking yourself by shopping the plan around or by using a benchmarking service, this is something you just can't avoid doing.

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The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
Follow us on Twitter @rosenbaumlaw