THE ROSENBAUM LAW FIRM P.C.

ADVISORS ADVANTAGE
A Publication for Retirement Plan Professionals

Avoiding The "Bumps" Of Being A Retirement Plan Provider.

What to look out for.

I'm a big fan of business history and every successful company that has ever been founded has had a few bumps along the way. For example, Apple almost went out of business a few times when products like the Newton didn't exactly set the world on fire. I remember being in law school where the Dean wondered why the school should buy Macs for the computer sync site because it was a dying format. Then Steve Jobs came back to Apple and the rest is history. Every business has a few bumps along the way; especially those in the retirement plan business. The third party administrator (TPA) I once knew that started from a father in law's desk also had bumps along the way. So this article is about bumps along the way of being a retire- ment plan provider and how to navigate them.

To read the article, please click here.

The Big 401(k) Issue Many Don't Focus On.

Not many consider what is the big issue.

The fixation and discussion about plan expenses usually flares up when the stock market isn't doing well. Two major corrections within a 10-year period (2000-2010) made fee disclosure regulations inevitable. With the way the market is going in 2016, we maybe headed toward another correction.

While the discussion about fees has had a positive effect on the retirement plan industry, it's still not the greatest issue that has been left unresolved. While fees have gone down since the

regulations have been implemented and plan sponsors have become cognizant of their need to pay only reasonable plan expenses, the biggest issue is still not talked about.

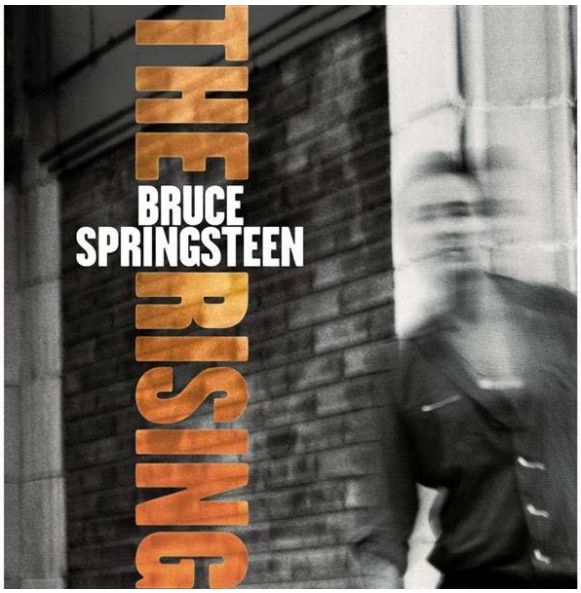
The issue? The fact that most participants in a participant directed 401(k) plan don't have the requisite knowledge and background in order to make informed investment decisions. Too many 401(k) plans don't offer plan participants enough investment education to make informed decisions and only a small amount of plans offer investment advice.

Giving plan participants the choice of investments to make and having an investment policy statement with a regular review of investment options is only half the battle to limit liability under ERISA §404(c).

Financial advisors along with plan sponsors need to make sure that plan participants have the right tools to make informed decisions. With apologies to my old law firm's h.r. director, handing out a bunch of Moriningstar profiles isn't going to do it. Plan participants at the very least, need some investment education that talks about the general rules of investing. The ideal approach is to make sure plan participants get investment advice, whether provided by the financial advisor (by abiding with the investment advice regulations) or provided by a third party (such as rj20.com). While this industry had done a decent job with lowering and disclosing plan expenses, it needs to do more to make sure that plan participants get enough information to make informed investment decisions.

Open MEPs will rise again.

Mark my words.



Multiple employer plans (MEPs) are a topic that many plan providers talk about, but don't really know what it's allowed and what's not.

A multiple employer plan is a plan where unrelated employers adopt a plan and it should be treated as one plan for purposes of filing a Form 5500.

There was something called an open MEP where the employers were unrelated to each other. Then there was something called a closed MEP, where there was a connection or nexus between all of the adopting employers, such as members of a trade group.

In 2012, an Open MEP unwisely sought guidance from the DOL on whether their MEP qualified as a single plan for purposes of Form 5500. The DOL said it did not because there was no connection between adopting employers and the Open MEP plan sponsor wasn't an employer, it was just a company created by the financial advisor to sponsor a MEP. The DOL stated that all of the adopting employers needed to file a Form 5500, which defeated one of the most important features of a MEP.

People thought this was the death of Open MEPs. It was in the sense that there is no more Open and Closed MEPs, there are just MEPs that will qualify as a single plan and MEPs that won't. Most importantly, the DOL never provided any further guidance on MEPs which means that the advisory opinion issued in that

Open MEP case was only applicable to that Open MEP in question. It gave the DOL's thinking on MEPs and a blueprint for MEP operators to develop a MEP that could be considered a single plan for 5500 purposes.

Three year later, there is still no guidance and there are plan providers who are spreading stories about MEPs and what qualifies as a single plan and what does not. In the end, it's just opinion without real DOL guidance.

Congress and the White House support the idea of MEPs. Thanks to some cajoling from President Obama, the DOL is considering allowing individual states to operate MEPs and prepare guidance that will allow them to operate MEPs that will likely be considered a single plan for purposes of a Form 5500. What does this all mean? While states may or may not want to be in the MEP business, I believe that this will actually allow Open MEPs again to be considered a single plan again. Why? I don't think court scrutiny would allow the DOL to allow what is essentially an Open MEP operated by states and not allow Open MEPs by plan providers with the experience in knowing how these plans run. Maybe I'm off base, but I think the DOL will have no choice but to allow Open MEPs to breathe again if they are allowing states the same opportunity in running them because having adopting employers all from the state isn't a sufficient connection/nexus as outline in that 3-year-old advisory opinion. What's good for the state should be good for plan providers. That's just my opinion, but you heard it here first.

New Great West case and Revenue Sharing.

Another big provider sued.

Add Great West under their Empower Retirement brand name as the latest bundled provider being sued. Great West is being sued for revenue sharing fees from mutual funds as part of their program.

Great West is being sued by a participant from the TPS Parking Management LLC 401(k) plan and the suit seeks class action status. Why class action? Well it seems TPS Marketing has $7 million in assets and Empower covers 32,000 plans, 7 million participants, and administers more than $416 billion in assets. Even if you learned common core math, you can figure it out.
I love the term "kickback" being thrown around in the complaint to describe revenue sharing because I often labeled revenue sharing payment as a "kickback", "pay to play", or "payola" years before it became popular.

While I don't care for revenue sharing and it inadvertently exposes plan sponsors to liability, I think this lawsuit is going to get tossed because I think it's going to be hard to treat Great West as a fiduciary unless they did something overt to make them a fiduciary. Great West is only going to be on the hook if they are treated as a fiduciary and Great West has a smart team of lawyers that try to make sure that Great West's contracts and policies avoid them becoming fiduciaries.
While we often hear about the headlines of some of these big settlement ERISA cases, I'm sure many of you don't realize that providers like Principal, American United Life, and John Hancock heave beaten back lawsuits that have tried to place them on the hook for investment selection because they were not considered fiduciaries.

The lesson here is that even if Great West wins their case like the others, litigation is costly and that's the cost of using revenue sharing whether you win the case or lose. So is using revenue sharing funds worth the headache? I think revenue sharing is a dying practice and we'll shake our heads within 10 years and remember that this silly practice once existed.

A 401(k) with Vanguard funds is sued, read beyond the headline.

More to the headline.

Headlines are great, but you need to read the entire article to get the full picture.
There is a new class-action lawsuit that is pitting participants in the Anthem Inc. 401(k) plan, with more than $5 billion in assets, against plan fiduciaries for an alleged fiduciary breach due to excessive investment management and administrative fees for a plan that has many Vanguard index funds in the lineup.

I'm sure people are scratching their heads on this one because Vanguard index funds charge some of the lowest management fees in the 401(k) plan business. The problem is the headlines don't tell the whole story.

First off, this $5.1 billion 401(k) plan offered more expensive share classes of Vanguard funds when less expensive share classes of the very same fund were available to this Plan. For example, as noted in the complaint the Vanguard Total Bond Market Index charged 20 basis points when another share class of the very same fund (with the symbol VBMPX) only charges 5 basis points. The same can be said for the Institutional Index Fund, the Extended Market fund, and many of the other Vanguard funds in the investment lineup.

Secondly, Vanguard was also the recordkeeper of the Plan and it was alleged that the Plan was charged excess fees. For example, from 2010 to 2013, the plan paid approximately $80-$94 per participant for record keeping, both through hard-dollar and revenue-sharing fees. In September 2013, the expense was lowered to a flat annual $42 fee per participant. According to the complaint, the limit of a reasonable fee for the plan would have been $30 per head.

What does this all mean? It means that a plan sponsor must be vigilant and prudent in the selection of plan investments and providers. A plan sponsors needs to be aware of the cost of investment options and must always ask their financial advisor whether there are less expensive share classes available based on the size of their plan.

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