Routine Errors You Can Avoid As A 401(k) Plan Sponsor

By Ary Rosenbaum, Esq.

Errors happen, I know that every time I write an article and someone corrects me. Unlike my grammatical mistakes, plan errors as a 401(k) plan sponsor can hurt you in the pocketbook. The problem with some of these errors is that they can easily be avoided through a little diligence on your part. Routine mistakes are more frequent than catastrophic ones, they can be early be avoided. This article is about the routine error you should avoid making.

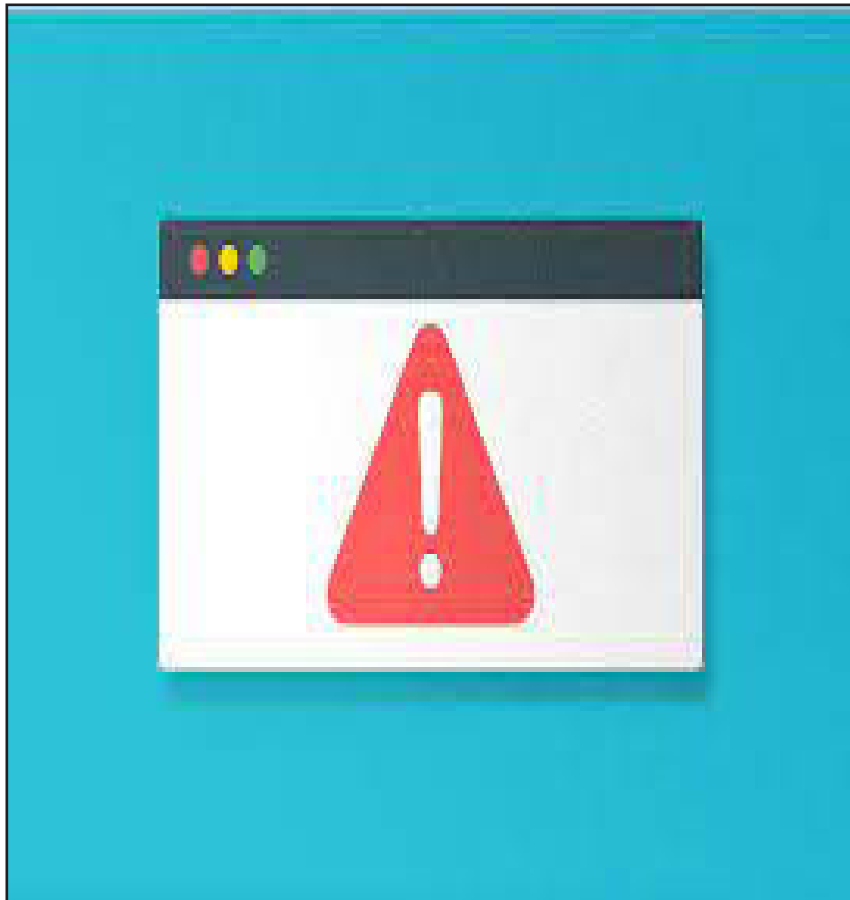
Late deposit of salary deferrals

One of the most famous scenes in the George Clooney-led Oceans 11 is when Basher played by Don Cheadle exclaims at his fellow robbers: "You had one job to do!" He said that because they failed to disable the vault alarm, which sounded off after they entered into it. Thanks to that movie, "You Had One Job" is now an expression used to call attention to perceived blunders made by individuals on the job. When it comes to running your 401(k) plan, you certainly have more than one job to do. However, the main job of running a 401(k) plan is timely depositing participant deferrals. The popularity of 401(k) plans over defined benefit plans was that it shifted the funding of the bulk of retirement savings from the employer to the employee. Even if you offer great employer contributions to the plan, it won't equal the $20,500 (the 2022 deferral limit, and don't forget those that can defer the $6,500 catchup). So when you take money out of your employee's paychecks for 401(k) salary deferrals, deposit that money as soon as possible. The reason you need to is that the Department of Labor (DOL) has been cracking down on untimely deposits of salary deferrals for the past 10 plus years. Many plan sponsors and plan providers relied on DOL guidance that the safe harbor for the deposit of salary deferrals was the

15th day of the following month. The DOL reinterpreted that guidance, by suggesting that it was as soon as possible. Technology through ACH and web transactions make it easier for deferrals to be deposited as soon as possible, instead of the old days of the mailed paper checks to the 401(k) plan's custodian. Late deferral deposits are the most frequent 401(k) plan error. The problem with that error is I have never met a 401(k) plan sponsor that only had one late deposit, it's always multiple payrolls. It's become a huge problem that the DOL added a question to Form 5500 on whether you have late deferral deposits. If you do and you don't apply through the DOL's Voluntary Fiduciary Compliance Program (VFCP), I assure you that you may hear from the DOL in a year or so as to why they don't have a copy of your VFCP application. In addition, answering that you have a late deposit of salary deferrals (under penalties of perjury, pal) will make you a target for an Internal Revenue Service (IRS) or DOL audit. These aren't fun things to be involved with and I'm saying that as an ERISA attorney that charges by the hour to assist plan sponsors on these audits. You need procedures in place and to follow, that will make it simple to deposit salary deferrals as quickly as possible on a consistent, payroll by payroll basis. If you do foul up, correct it by adding earnings as a qualified non-elective contribution and hire your third-party administrator (TPA) or an ERISA attorney (cough, cough) to help you with a DOL DFVCP application. Then you need to follow those salary deposit procedures (develop them if you don't have them) to make sure that you're never late again. Depositing salary deferrals is the most frequent task as a 401(k) plan sponsor, so make sure they are done frequently and on time.

Not reviewing fee disclosures

I have worked in the retirement plan business since 1998. The strange thing is that from 1998 to 2012, a 401(k) plan sponsor wasn't provided disclosures that disclosed the direct and indirect fees that their plan providers collected off the plan. The problem is that as a 401(k) plan sponsor, you have a fiduciary duty to pay only reasonable plan expenses and it's hard to determine if they're reasonable if you had no idea what you were being charged in the first place. With the fee disclosure regulations, you do know how much your plan providers are charging for the plan. The problem is that most 401(k) plan sponsors do nothing with these fee disclosures, they usually end up in the trash. You do have a fiduciary duty to determine whether the fees you are being charged are reasonable and the only way to do that is to review the fee disclosures and benchmark them against what other providers are charging for similar services. It's such an easy mistake that too many plan sponsors make by ignoring these fee disclosures, you can't afford to make such a silly error by following that same path.



Not having an ERISA bond in place

While fiduciary liability insurance is optional, an ERISA bond is not. Since your plan.is covered by ERISA, you must have a bond for your plan. If you answer on Form 5500 that you don't have an ERISA bond for the plan (under penalties of perjury), your plan will be a likely target for that dreaded DOL audit. ERISA requires that you carry bond coverage valued that is at least 10 percent of the plan assets that are handled, and a minimum of $1,000, and a maximum of $500,000 (or $1 million for retirement plans that hold company stock).

Not managing the fiduciary process

Until the end of time, I will remind people that my old law firm's 401(k) plan didn't have a financial advisor, review the investment options for 10 years, and provided no investment education to plan participants before I reviewed the plan. I bring that up to show you how bad plan sponsors can be in managing their plan and I'm still ticked off that Pat, the human resources director then ignored my advice on which advisor to hire and didn't consult me when they hired a new TPA because Pat was a plan trustee and responsible for the mess. Don't be like Pat and have a plan that has a fiduciary component that is a hot mess. As long as you hire a financial advisor that knows how to help manage a 401(k) plan, you should be fine. A good advisor, unlike Pat, that participants directing their investment won't limit your liability by itself. Participants need to have enough information to make informed investment decisions through education and investment options need to be reviewed now and then, using set criteria.

Not providing correct answers on the annual census request

Annual compliance testing by your TPA requires you to fill out an information and census request. Since that request is the basis for annual compliance testing, the information and census request must be correct. Otherwise, the results for your compliance testing may be wrong and these can't afford to be wrong. With the information you provide, if it's garbage in, it's garbage out. The problem with incorrect compliance testing is that it's usually not detected when made and it's costly when discovered many years later, especially if caught by the IRS or DOL agent reviewing the plan in an audit. Make sure the information you provide is correct and if there is a question on your end on what is asked, make sure you contact your TPA for advice on how to answer what they asked for.

Not reviewing plan providers

Ultimately, your plan is only as good as your plan providers, especially a TPA. So much of the time, the difference between a great 401(k) plan and a terrible plan is. the TPA. A good TPA goes a long way in minimizing errors. However, unless you review your plan providers frequently, how will you know they're doing a good job? As a plan fiduciary, you can't afford to take your plan providers' word that they're doing a good job. I can't tell you how many times I'd use a provider and not realize how bad they were until I met a competing provider that did a better job.

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