

THE
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ADVISORS ADVANTAGE

A Publication for Retirement Plan Professionals

Straight Talk for Retirement Plan Providers.

Just like it is.



When I had the idea of starting a National ERISA practice 8 years ago, I knew I would have a tough time in getting clients especially when the law firm I was at had partners that weren't interested in selling my services to their clients. So I figured an easy way to market myself and network with other providers around the country is to provide content. You help a plan provider with articles that they can help themselves or market their services; they're going to remember you when they have retirement plan clients that need an ERISA attorney. I also had and still have an open door policy for providers to just give me a call without a

bill due. It's straight talk and this article is also straight talk about some of the challenges in being a retirement plan provider.

To read the article, please click [here](#).

DOL slightly opens the door for Open MEPS.

It's slightly open.

I was always a fan of "open" multiple employer plans (MEPs) because it allowed smaller companies to get better pricing on plan expenses and choice of investments and providers by aggregating with smaller, similar plans.

The Department of Labor (DOL) in its "wisdom" put a kibosh on almost all open MEPS in May 2012 by stating that there needed to be a nexus or connection between the participating employers of the plan in order to be considered a single plan for Form 5500 and one 5500 for a MEP was a strong selling point for plan sponsors who no longer wanted the responsibility of filing one.

We expected to hear some guidance from the DOL other than the advisory opinion that was guidance for one particular MEP that had high fees and a questionable structure since the plan sponsor was just a shell of the service provider.



3 and half years later, it seems that we have some guidance. A few weeks back, the DOL unveiled an interpretive bulletin that will allow states to start a payroll deduction Individual Retirement Account Program for employers and not subject to that plan to ERISA especially when they may require employers that don't offer a retirement plan to join it. In addition, Phyllis Borzi from the DOL opined that she might be open to regional MEPs where regional states may offer a plan to employers that don't have a plan.

What does this mean? The DOL maybe more receptive to MEPs especially since it will increase retirement plan coverage, but we wouldn't have been in this conundrum if we had guidance on what would constitute an open MEP that would be a single plan more than 3 ½ years ago. Government action on retirement plans are slow, heck fee disclosure regulations were talked about for 10 years before they were implemented, so we're 6 ½ years early if you look at it as a glass that's half full.

How to Deal with Employees.

It's hard because I was an employee too.



I always say that the main reason that I don't want to have employees is because I was an employee once too. The union lawyers I worked with just didn't understand the whole dynamic of the employer-employee relationship. They only understood the employee side of things, they only understood that their clients were underpaid and being abused even though they were making decent money and getting great benefits. They never understood the employer side of things because they

have no empathy and they don't care. Having been an employee and having my own business, I understand the relationship far better than I did when I was fighting with a TPA I worked for, for those raises all those years ago.

An employee wants to get paid as much as possible and the employer wants to pay as little as possible. I have yet to find the employee who says they make too much money and I have yet to find the employer that says they pay their employees too little. So the fight over salary will likely be somewhere in the middle, no party is usually going to get their way. I'm all in favor of collective bargaining, heck I used to always say that a missed opportunity was to unionize the employees at my old TPA. It could have helped when they changed the health insurance or more importantly, when they got rid of the free milk for coffee. As far as unions go, I always mock union law firm partners because if they are so pro-union, why don't they unionize their office staff and associate attorneys? Well, it's that same lack of empathy because they treat their employees so well, at least that's what they think. I have quite a few bosses over the years and union law firm partners don't make such great bosses.

Any organization that wants to be successful needs a staff of employees that are competent and worth their salary. So for a retirement plan provider, that usually means having a good staff of loyal, well trained employees. Due to the nature of the business, there are so many retirement professionals that aren't very good especially because they never got the proper training. If you have a great team of well-trained professionals, you need to make sure they stick together. It's no different than a professional sports team, you can't afford to lose great people through free agency and unlike pro sports, there are no guaranteed contracts in the retirement plan industry. Keeping good employees isn't just about pay. Sometimes it's the little things that get employees upset like again, getting rid of the free milk for coffee. So aside from paying employees far more than they are probably worth, here are some ideas on how to keep good employees

1. Don't cheap out on the benefits. People won't feel as bad that they aren't well paid like other similarly situated professionals if they have decent benefits. Again, when I worked at that TPA,

we had some of the worst benefits possible and we were in the benefits business. Every time the health insurance plan was up for renewal, we got another plan that was worse. Having great benefits is a great way to deflect pay that isn't considered generous and gets people thinking about not moving across the street to work for the competitor if they think their benefits are better than what across the street has.

2. Have a good 401(k) Plan. The TPA had a great plan until they decided to move the plan from Fidelity to Nationwide because they wanted to preserve their pricing under Nationwide. They will deny this that was the reason to this day, but we all know the truth. Having a great retirement plan goes a long way with employee retention, it's just that most employers forget that the whole purpose of setting up a retirement plan is to serve as an employee benefit. The TPA had a 7 year vesting schedule for a 3% new comparability contribution. My old law firm had a 5% fully vested contribution. Which plan do you think was better?

3. Have a real H.R. Director. I'm not talking about using the boss' wife, who showed up every now and then. Have a human resources director who will not be related to the folks who run the place. A human resources director can be an effective tool to keep employees happy if they think the h.r. director can be an effective sounding board. Plus human resources director typically have enough people skills to make sure that some employee discipline or termination of employment can be handled in a way to avoid litigation. My TPA was sued by three different employees when I was there for about 4 ½ years. Having a human resources director instead of dealing with the guy in charge would have gone a long way in deflating issues that became the basis for litigation.

4. Don't confuse loyalty with longevity. At that TPA, some of the most well treated employees were employees who worked there for many years. The bosses there had way too much loyalty in these employees, more so than for employees who were important cogs in their machine. The problem with having loyalty in employees just because they were there that long is that you may forget why certain employees work at a specific place for so long. Some employees have many years of service working at a place because they love it and some people stay working at a place because they couldn't get a job anywhere else. Unfortunately for my old TPA bosses, many of their long standing employees couldn't get a job anywhere else and that was the reason they were long standing employees.

5. Add benefits that don't really cost anything. There are enough discounting groups or organizations that an employer could join and offer benefits to employees that doesn't really cost anything. Negotiating with a gym for an employee discount or allowing employees to join a credit union go a long way

6. Provide training. In order to have a competent business, you need competent workers and good training goes a long way. Too many TPAs give training a short shrift and it shows. Good training goes a long way in nipping issues in the bud because if you're offering a competent service, that is one less issue clients will leave you over.

7. Give real feedback. When I was at a law firm in Boston, they were telling this paralegal how good she was and then terminated her a few weeks later. This isn't the game of Survivor, there is no need for blindsides. Be frank and honest with employees how they are doing. If they need to improve their job performance, tell them. It will help them and help you.

8. Don't take away the free milk. At my old TPA, the employees said nothing when I left, when my friend Rich Laurita left, and when a whole bunch of other people left under murky circumstances. They did scream in protest when they did get rid of the free milk for coffee. So never take away the free milk from those coffee lovers, it may start a riot!

Safe Harbor 401(k) Plans and Non-Safe Harbor Contributions.

The things you need to know.

The safe harbor notice deadline for calendar year 401(k) plans just passed on December 1. This notice requirement is one of the requirements for a plan to be a safe harbor, in addition to the fully vested contribution that gives 401(k) plans a free pass in the ADP test (for deferrals), the ACP test (for matching), and Top Heavy



test. The notice in a sense is a proactive solution since you have to give the notice before the plan year starts (and you won't be certain 100% that you failed until after the plan year ended), but most times, it is reactive because it is usually done in response to previous bad testing results.

I think one of the differences between a good third party administrator (TPA) and a bad TPA is how they handle safe harbor. Once again, a safe harbor option whether it's the 3% non-elective, 4% match, or the automatic deferrals QACA match, it's not for every plan. A plan that easily passes testing doesn't need it and some plans can't afford it. However, I have seen TPAs administer plans where the plan sponsor is already making a fully 100% vested contribution to plan participants that exceeds the contribution needed for safe harbor. For example, I just came across a plan where the TPA is telling the client that they will likely fail the Top Heavy tests even though they make a fully vested, 7.5% matching contribution. So even though they make a contribution that could have satisfied safe harbor, it doesn't, so the plan sponsor has to make another 3% contribution to non-key employees. So if a company is consistently making a fully vested contribution that exceeds safe harbor, there is no harm for making it a safe harbor, it can be a pro-active solution to make sure the demographics of the plan don't eventually one day cause the plan to fail one or more of the discrimination tests.

Plan design is like a game of chess, it is based on strategy and finding the right moves to achieve the maximum contributions and avoiding unnecessary harm like compliance testing issues. The good TPA is going to be pro-active and have a plan formula of contribution that will maximize contributions and avoid unnecessary contributions.

Beware of sending gifts to Plan Sponsors.

It can be a mistake.



I have been a New York Giants football fan since the days of Ray Perkins, Brad Van Pelt, and Joe Danelo. 4 Super Bowl victories have been far more rewarding than my time as a Mets fan (except this year).

Thinking about football reminded me of a client my employer, a third party administrator was trying to smooth out a relationship with the new benefits manager of a law firm with \$25-30 million of assets in their 401(k) plan.

Without any prodding by our firm, this benefits manager said he was a Jets fan and he circled out from a schedule of games of the ones he would like to attend. That was the benefit manager's message that he wanted my TPA to buy him Jets tickets and the TPA got the message by buying these tickets. Needless to say, that law firm was still a client for many years after.

Like Don Fanucci in Godfather Part II, there will always be plan sponsor representatives that would like their beak wet. This type of bribery is something that will always be available in the retirement plan marketplace, but it's up to the plan sponsor and its

providers to make sure that any gifts are de minimis to avoid any prohibited transactions and under the board conduct that could put the plan sponsor in danger.

As a plan sponsor, you need to make sure that there are checks and balances. Having one person making all the decisions is likelier to be prone to bribery and kickbacks than a situation where a committee makes the decisions. Any guidelines that restricts what gifts can be made and requirements of plan providers to report these transactions (just like labor unions and their providers must do annually) will go a long way to make sure that the selection and retention of plan providers is above board.

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If you are a plan sponsor or a plan provider looking for an inexpensive plan restatement, then look no further than The Rosenbaum Law Firm P.C. If you are a third party administrator with too many restatements to do and too little help to get the job done by April, we're here as well.

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