Avoiding The Rule That Will Cause You Trouble As A 401(k) Plan Sponsor

By Ary Rosenbaum, Esq.

I'm a big fan of movies and I'm a big fan of the Coen brothers ever since I watched Raising Arizona almost 30 years ago. One of their greatest movies was the Best Picture Oscar-winning No Country for Old Men. The movie had a few great lines, but one that stands out because it's a line that has much meaning in life. Javier Bardem's character, Anton Chigurh said: "If the rule you followed brought you to this, of what use was the rule?" So much of what happens to a 401(k) plan sponsor that is a negative result, usually results from a path that the sponsor took. There are so many pitfalls that a plan sponsor needs to avoid so there are certain rules that plan sponsors need to avoid following if they want to avoid potential liability as a fiduciary. This article is going to let you the plan sponsor know which paths and rules you need to avoid if you want to stay out of trouble over your 401(k) plan.

Not vetting plan providers

One of the biggest mistakes that you can make as a plan sponsor without realizing is not properly vetting a plan provider you're considering hiring. Many years ago I had water raising from my basement floor anytime it rained. So I hired a waterproofing company. The experience with this waterproofing company was a complete disaster because there were issues with the French drain unit they put in as well as household items that their employees broke during the installation of the French drain. A simple Google search by me would have yielded numerous complaints about the company as well as the fact that the owner of the company was a former doctor who lost his license over Medicare fraud. In the retirement plan business, any person can claim to be a third-party administrator (TPA) because there is no legally required license such as bar admission for attorneys and securities license for financial advisors. Not only as a plan sponsor do you need to vet the TPA, you need to vet the financial advisor and the ERISA attorney. An online review could show whether the financial advisor has ever been sanctioned or other issues in connec¬tion with their securities license. An online search of an ERISA attorney may yield any suspensions from the practice of law or admonishments. A review of the provider may also determine whether the advisor or the attorney has the license they needed. Let's just say many years ago, I referred a certified public accountant (CPA) to a client for 401(k) plan audits and it was a little embarrassing when I found out the CPA wasn't exactly a CPA because they failed to complete their registration. You might think it's simple advice for you as a plan sponsor to check out that the plan provider you're considering hiring, but surprisingly, most plan sponsors don't do that because they usually hire a plan provider on a referral. This is one of the simplest tasks that you can take as a plan sponsor, so do it.

Not reviewing the work of your plan providers

It's not enough to vet your plan provider before you hire them, you also need to review the work they do. That's especially true with the TPA you hire. The TPA does so much work and if they don't do it properly, you're the one who has the fiduciary duty and re¬sponsibility to fix it. The problem with TPA errors is that they're usually only detected when there is a change of TPAs or on a government audit years after the fact. By discovering errors years after they were created stops the plan sponsors from certain more cost-effective corrections as well as possibly subject to penalty if discovered on an audit. I have seen way too many plan sponsors have compliance nightmares based on simple mistakes the TPA made that the sponsor could have detected just by reading the compliance test summary such as misidentifying employees as non-key employees and/or non-highly compensated employees. The same can be said about other plan providers that you didn't review. For example, a financial advisor not doing their job could unwittingly subject you to liability. If you have an advisor who you don't regularly meet with or doesn't follow the terms of the investment policy statement (IPS) that they created, or didn't do one at all, it potentially puts you in a harm's way. There are ERISA attorneys out there that also cause havoc for their plan sponsor clients, such as not telling them about the need to restate the plan document or giving bad ad-

vice. The way for you to avoid a lot of potential headaches is by reviewing your plan providers on an annual basis on your own or engaging with independent retirement plan consultants to review the work of your plan providers. You can also hire an ERISA §3(16) plan administrator who can serve as the named plan administrator and have the task of reviewing plan providers. In addition, I offer a Retirement Plan Tune-Up plan review for $750 where I review all components of the plan that can put you at risk. It's a cost-effective legal review that could be paid from plan assets. Regardless of what you do, understand that the best way to detect errors is to review the plan providers that might be creating them subject you to liability. If you have an advisor with who you don't regularly meet with or doesn't follow the terms of the investment policy statement (IPS) that they created, or didn't do one at all, it potentially puts you in harm's way. There are ERISA attorneys out there that also cause havoc for their plan sponsor clients, such as not telling them about the need to restate the plan docu¬ment or giving bad advice. The way for you to avoid a lot of potential headaches is reviewing your plan providers on an annual basis on your own or engaging with independent retirement plan consultants to review the work of your plan providers. You can also hire an ERISA §3(16) plan administrator who can serve as the named plan administrator and have the task of reviewing plan providers. In addition, I offer a Retirement Plan Tune-Up plan review for $750 where I review all components of the plan that can put you at risk. It's a cost-effective legal review that could be paid from plan assets. Regardless of what you do, understand that the best way to detect errors is to review the plan providers that might be creating them.

Not reviewing plan provider contracts

There are many plan providers out there that are very good in the marketing department, but not good in the plan services market. They might tout a robust level of service that they will offer, but never again mention that broad menu when you sign up with them. You might be led to hiring a plan provider offering a wide range of services that aren't listed in the contract and therefore are not going to be offered. It's important when hiring a plan provider, that the promised services are reflected in the contract for services. Otherwise, you may be in for a rude shock when services aren't performed be¬cause they weren't contracted for. So make sure that all plan provider contracts are reviewed, preferably by an ERISA attorney.

Picking providers for the wrong reason

The reason you should pick a retirement plan provider is that they will provide a good service at a reasonable cost. Any other reason is a bad idea. Don't pick a plan provider because they're cheap, don't pick a plan provider just because they also do your payroll. Don't pick a provider because they're related to you or someone else in your company and doesn't hire a plan provider because you have a banking relationship with them. Any choice of plan providers must have rational reasons behind it and needs to be done through a fair and documented process.

Not understanding plan specs

Every retirement plan must be written and every plan including your 401(k) plan has plan provisions that vary by employer. While you may require 1,000 hours within 12 consecutive months of employment for eligibility, some employers may just require immediate eligibility. Some employers may not recognize certain parts of compensation for purposes of employer contribution, while you may recognize everything. Whatever provisions (also known as plan specs) your plan has, make sure you know what they are and that they're consistent with what you do in practice. The reasons why a plan document says one thing and you're doing another is either because you're wrong about what your plan says or your last document was drafted incorrectly. Whatever the issue is, it needs to be corrected as quickly as possible. Provisions related to eligibility, benefit accrual, and vesting are problematic because they may bestow a benefit on a group of participants that you never intended to do. So that's why it's extremely important that you understand plan specs and that's consistent with what you're doing.

Not depositing deferrals into the Plan as quickly as possible

Years ago, plan sponsors followed a Department of Labor (DOL) safe harbor that they were fine with the de-posit of employee salary deferrals into the 401(k) plan as long as it was done by the 15th business day of the following month. The only problem is that DOL reinterpreted the safe harbor and essentially said that you need to deposit salary deferrals as quickly as possible. So you must understand that you have to get your deferrals into the plan's trust as soon as possible, essentially just a few days after taking out the deferrals through payroll. The reason you need to deposit the deferrals as quickly as possible is that late deferral deposits are a question on Form 5500, so any late deposits must be corrected using the DOL's voluntary compliance program unless you want the DOL to audit you based on your yes answer to the late deposits. It is one of the easiest and most frequent plan errors, so depositing deferrals late is a rule you shouldn't follow.

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