The Pet Peeves About Being A 401(k) Plan Sponsor And What You Can Do About It

By Ary Rosenbaum, Esq.

Being a 401(k) plan sponsor isn't easy. Unlike most other employee benefits like health insurance and transit reimbursement, it's something that could land you in a whole host of trouble. Like with Larry David on Curb Your Enthusiasm, you may find a lot of pet peeves that you need to understand as a 401(k) plan sponsor and deal with. This article is a cheat sheet on how you can deal with the annoying parts and pet peeves of being a 401(k) plan sponsor.

Being a plan fiduciary

As they say in every Spiderman movie: "with great power, comes great responsibility." I assure you, Steve Ditko and Stan Lee were not 401(k) plan sponsors, but that saying written by them, could hold for 401(k) plan sponsors. As a plan sponsor, you wear at least two hats. Not only are you a plan sponsor, but you're also a plan fiduciary. Being a fiduciary means you must provide the highest duty of care in law and equity because you are entrusted with the retirement plan assets of your employees. Harry Truman may have stated that "the buck stops with you." The problem with being a fiduciary is the liability that comes with it. While you. can never fully and completely eliminate your fiduciary liability, you can take some major steps in minimizing it. The first step is purchasing fiduciary liability insurance, to protect in the very unlikely circumstance of litigation since being a fiduciary may involve personal liability. Unlike an ERISA bond, fiduciary liability insurance isn't legally required, so I recommend purchasing it. Another problem with being a fiduciary is that hiring a third-party administrator (TPA) and a financial advisor (even if they serve as a co-fiduciary) doesn't do much in minimizing liability because the TPA isn't a fiduciary and an advisor serving in a normal fiduciary capacity just creates another target for litigation while you're still on the hook. You can hire a plan provider that will serve as an ERISA §3(16) administrator and/or an advisor as ERISA §3(38) fiduciary. These ERISA numbered sections (since they have the ERISA section in their job title) fiduciaries will assume the liability for a portion of the plan by you delegating them that role. An ERISA §3(16) administrator will assume the day-to-day role as plan administrator, which is a role that is filled by a TPA or an independent party. An ERISA §3(38) fiduciary is a financial advisor that assumes the liability for the financial component of the plan, such as picking investments and educating plan participants. Again, you can delegate the liability of components of the plan to these fiduciaries, but you're still on the hook for hiring them. So when the principals of a TPA called Vantage Benefits, who also served as ERISA §3(16) administrators stole millions from clients, the plan sponsors who hired them, could still have been held liable for that poor choice of fiduciary. The last great option of minimizing liability is foregoing being a single plan sponsor and agreeing to be an adopting employer of a Pooled Employer Plan (PEP). A PEP is a new multiple employer plan that will allow companies that have no connection with each other, to pool plan assets and have the plan run by a Pooled Plan Provider (PPP). The PPP is essentially an ERISA §3(16) administrator and will assume the liability of the day-to-day control of the plan in conjunction with an ERISA §3(38) fiduciary, who assumes the liability of being the fiduciary in complete control over the financial component of the plan. As a PEP adopting employer, you're ceding a lot of control, but ceding a whole lot of liability that goes with it. While PEPs have been more prevalent in the small plan space, a lot of medium-sized employers have seen the attractiveness of it because of the delegation of liability. Joining a PEP still doesn't absolve you of the liability of deciding to join a specific PEP. So if the PEP is too expensive for similar plans and/or the plan providers embezzle your money, you're still on the hook for liability for hiring the PEP providers.

The participant enrollment/education meeting

One of the biggest misnomers about 401(k) plans is the concept that you will not be liable for the losses sustained by a participant who directs their account balance. The problem is that isn't true if you don't fulfill your duties as a participant-directed 401(k) plan trying to fit with the liability limitation under ERISA §404(c). ERISA §404(c)requires a prudent process of reviewing and replacing plan investments and providing enough information to participants so they can make informed investment decisions. I once worked at a law firm where they didn't have an advisor, didn't select and replace funds for 10 years, and didn't provide education to participants. If a participant decided to sue the plan for losses sustained in 2008 before I fixed the plan, there would have been zero liability protection for the firm under ERISA §404(c). ERISA §404(c) offers a measuring stick of protection, the more you comply, the greater protection you get. That's why even though you're busy, don't pass up the meeting with advisors and don't pass up the participant enrollment/education meeting. They may sound like a waste of time, but I assure you that this process that minimizes your liability is no waste.

Dealing with former employees

Former employees are a greater threat to you than current employees because current employees are gainfully employed and don't want to rock the boat if something is wrong. With the 401(k) plan. Every major Department of Labor (DOL) investigation that I have been a part of, has been the result of a complaint from a former, aggrieved employee. I knew an aggrieved employee who caused a six-month DOL investigation simply because the former employer sent a check to a rollover IRA company for lost participants, rather than the former employee, even though they knew where that former employee lived. So a DOL investigation was conducted for six months over a $30 fee collected by this rollover IRA company. The 401(k) plan sponsor wasn't fined, but I assure you that they are on the DOL's radar for a future audit. I often say that I won't hire employees because I was an employee too. I was also an aggrieved former employee. While litigation for you is unlikely (unless your plan had at least a hundred million dollars in assets), the biggest headache aside from a government audit is dealing with former employees. Aggrieved former employees want their pound of flesh and a 401(k) plan that isn't in optimal shape will be a target for them. In addition to running a tip-top plan, make it a concern of contacting former employee participants who still have assets. In your plan. If their account balance is above the involuntary cash-out limit under your plan ($1,000 or $5,000), you would need their consent to pay out their account balance. The problem with that is that too many plans never bother to contact former participants when they send out the distribution forms and never hear back. You need to consistently follow up with these former employee participants, mainly because they have the same ERISA rights to notices as current employee participants. If you forget to follow up with these former employees and. you can't locate, that creates another problem that the DOL is very concerned about. If their account balance is below the limit, pay them in cash or via the forced-out rollover IRA (if your plan cash-out limit is $5,000). Former employees can only be a headache, I know as a former employee (wink, wink).

The solicitation from other plan providers

Your 401(k) plan's Form 5500 is readily available online through the DOL and commercial plan provider databases. Believe me, as a plan sponsor, I'm not a huge fan of solicitation from plan providers that want my business. However, like bounty hunting in The Outlaw Josey Wales, being a plan provider is a living. While the direct solicitation and "free" investment review offers can be annoying, they are a necessary evil. It's a necessary evil since you have the fiduciary duty to review your plan providers for both cost and competence. Knowing competing plan providers as a benchmark for fees and quality of service is a stick you need as a 401(k) plan sponsor.

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