The Problems Of 401(k) Plan Provider Contracts

By Ary Rosenbaum, Esq.

One of the best things to happen to 401(k) plan sponsors was the implementation of fee disclosure rules by the Department of Labor in 2012. Plan sponsors had a fiduciary duty to pay only reasonable plan expenses for services provided and that was an impossibility when they had no idea what their third-party administrator (TPA), financial advisor, and any other plan provider was charging. While plan sponsors now know the price of plan administration, one problem remains and that's because the Department of Labor (DOL) hasn't figured this out to be a priority, but they will eventually. The problem is the plan provider contract and so many disputes surround the contract and without some guidance, 401(k) plan sponsors like you may be forced to turn over plan assets or money from your pocket needlessly to a soon to be former plan provider because you don't have the knowledge to contest. The problem with paying plan assets needlessly to a former plan provider is that a breach of fiduciary duty of its own kind. This article is all about plan provider contracts and what you need to know to avoid a mess.

There is no set form of plan provider agreements

Like with fee disclosure forms, the DOL has no set model agreement that a plan provider should use in offering services. Different types of plan providers have different types of agreements (the services are different). Even amongst the same type of plan provider, there is no uniformity.

It's a contract, have an ERISA attorney to review it

Plan provider contracts are legally binding agreements for services with consequences for you as a plan provider that can get you in trouble with the DOL and with the plan provider if you or they breach. Despite all the legal consequences that come with the agreement, so few 401(k) plan sponsors have a lawyer to review the agreement. Not only should you have an attorney to review the contract, you should get an ERISA attorney. The reason you should get an ERISA attorney is that a general corporate attorney has no idea what plan providers should offer and what kind of contract gimmicks that some of these plan providers are known for. There are so many issues dealing with plan provider contracts and the gimmicks that come with, you do yourself a disservice by signing the plan provider contract without having an ERISA attorney review it. I assure you, some ERISA attorneys aren't that expensive (I charge a flat fee), you're not going to have a $10,000 legal bill from an ERISA attorney to review a contract.

Make sure the promises are in the agreement

Many plan providers are very good at marketing and selling, nothing else. These providers are known for promising the moon and under-delivering. Promises are great in terms of service made by a plan provider, but it makes no difference if it isn't in the actual contract. If a TPA or an ERISA §3(16) administrator is making a promise on a service that they will provide and it's not in a contract, it's going to be hard to prove that you relied on statements and writings outside of a contract. If an advisor promises to provide investment education to plan participants and it's in the contract, it's going to be way easier to allege breach of contract. When dealing with plan providers serving in some sort of fiduciary capacity (such as a financial advisor or ERISA §3(16) administrator), there are varying degrees of services they can offer and you want to make sure that

you have the most liability protection you should be getting by hiring a provider serving in a fiduciary capacity. What's the point of hiring an ERISA §3(16) administrator if you're the one on the hook for many aspects of day-to-day plan administration? Any plan provider agreement should be clear on what services that the plan provider is providing and what fiduciary role they will be playing (if any).

Know that termination provision

When people get married, they rarely think of divorce. However, for almost 15% of these well-intended marriages, divorce happens. Hiring a plan provider isn't the same as getting married, but you are making a legal agreement with someone with the hopes of a long-term relationship. While you expect a long-term relationship with the plan provider, eventually it will end in one form or another. Rather than waiting until it's time to change plan providers, identify the termination provision in the agreement and the notice requirement you need to advise them of a change (or vice versa if they're going to terminate you). There is nothing worse than having to postpone a plan provider search just because you failed to notify the plan provider timely as required by the contract.

Identify any surrender charges or termination fees

In addition to the termination provision, you need to identify any costs related to terminating a plan provider. If the plan provider is an insurance company, you need to identify any surrender charges you may face if you terminate their services early. If you fire a TPA, they may charge you for what they call deconversion as you move to another TPA. When it comes to deconversion fees, I have some problems with them. The TPA seems to be the only plan provider that charges them, I don't charge a client for anything if they fire me. Some TPAs have vague contracts that they rely on to provide the basis for charging deconversion fees. Also, most TPAs don't have a formula or rational basis on what these deconversion fees may be. Some contracts are very vague, but they do have some language that states that such fees must be agreed to by the parties. Whatever the contract, identify the costs of getting out of a plan provider agreement if that is what you need to do.

That 5500 and valuation

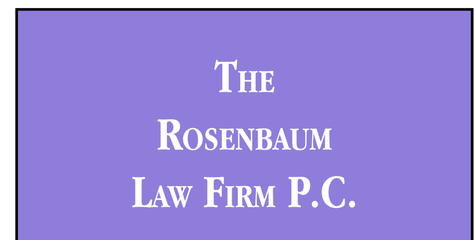
One of the biggest disputes that 401(k) plan sponsors have with a former TPA is regarding the preparation of that final Form 5500 and valuation before administration is transferred to another TPA. I know this problem firsthand. I sponsor a 401(k) plan and the TPA promised as part of their annual fee, a Form 5500, and valuation. I terminated the TPA on February 28, 2021, and the TPA claimed that they wouldn't complete the 2020 Form 5500 and valuation because the time to do them was past February 28, 2021, even though they were paid through the entire 2020 Plan Year. The TPA (not realizing who I was) said they would complete the Form 5500 and valuation for $70,000, which was about half the entire year of plan administration. No matter the discrepancy regarding that 5500 and valuation and the timing of termination, make sure that the contract is clear as to what services that a plan provider will provide after being informed they are terminated. Even if the TPA is entitled to be paid for that 5500 and valuation, the costs have to be reasonable and in relation to the work being done.

No matter the "hustle", don't breach your fiduciary duty

No matter the bullying by a plan provider or a legitimate dispute on what the contract provides, do not breach your fiduciary duty in paying unreasonable plan expenses because you will be cutting your nose to spite your face.

You don't have to litigate, there is someone else to talk to

The TPA in the above issue claimed that there was no breach of contract by them because I didn't sue. Suing costs money and time and there is a party that may listen to you if the plan provider is unreasonable and harming your plan participants and. putting you in a situation where you are breaching your fiduciary duty. I suggest you reach out to an ERISA attorney and having them contact the local DOL Employee Benefits Security Administration (EBSA) office to make a complaint.



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