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**THE  
ROSENBAUM  
LAW FIRM P.C.**

# THE LAW FIRM REVIEW

A Publication for Plan Sponsors and Retirement Plan Professionals

## The Future Is Now For 401(k) Plan Sponsors.

The future is here.



When I was the head ERISA attorney at a New York based third party administrator (TPA), I left because I saw the future of the retirement plan business and I didn't think this TPA was a part of it. I had issues with undisclosed fees, conflicts of interest, and revenue sharing. Several employees of that TPA thought my problems were silly because these issues were actually lawful. I left that TPA in 2007 and within two years, it was dead (for a variety of reasons).

Now I only wished that I could

have predicted the future of the credit crisis of 2008 and next week's Power Ball numbers. For retirement plan sponsors, the future of retirement plans is actually here and they need to know about the existing issues of their plan that could increase the potential for liability.

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

## Don't Use Your Payroll Provider As Your 401(k) TPA.

The annual warning from me is back for its 6th edition.

I've been writing articles for the past 6 years and the ones that are remembered the most are the ones about how it's a bad idea for plan sponsors to use payroll providers as the third party administrators (TPAs) of their 401(k) plans. There has been much change in the retirement plan business



Emp No.	Salary
Emp No.164	\$20,289
Emp No.165	\$18,555
Emp No.166	\$56,703
Emp No.171	\$44,565
Emp No.172	\$567,366
Emp No.173	\$56,703
Emp No.174	\$366

over the last 6 years including law changes, fee disclosure, and a new definition of fiduciary rule. What hasn't changed is that it's still a bad idea to use your payroll provider as a TPA.

For the article, click [here](#).

## ERISA Fiduciaries: What The Numbers Really Mean.

What it all means.



In the Golden Age of Boxing, there was one world champion. Whether it was Joe Louis or Rocky Marciano as the heavyweight kingpin or Sugar Ray Robinson as middleweight crown holder, you knew who was champion. There was one sanctioning organization called the National Boxing Association (NBA), so there was one champion for each

weight class. The NBA became the World Boxing Association (WBA). Then the World Boxing Council (WBC) was formed with its own champions. Years later, the International Boxing Federation (IBF) and the World Boxing Organization (WBO) had their own champions as well. Apparently there is also the IBU, IBA, and WBF. It's starting to become an alphabet soup of boxing champions. I'm sure plan sponsors feel the same way of plan providers offering their services as independent ERISA fiduciaries. Most plan sponsors don't know the difference between an ERISA §3(16), ERISA §3(21), and ERISA §3(38) fiduciary; it becomes a number soup of its own. So this article is going to break down what a fiduciary is and what these fiduciary numbers actually mean.

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



# DOL Sued Over Fiduciary Rule.

**Interesting development.**

One of the questions that I am repeatedly asked is whether the Department of Labor overreached their rulemaking capability by applying their new fiduciary rule to Individual Retirement Accounts (IRAs). I always tell people that will be for the courts to decide. Now, it looks like they will.

The Chamber of Commerce, its affiliates, and security trade groups filed a lawsuit against the Department of Labor's attempt to stretch their definition of a fiduciary to IRAs in a Texas district court. The argument of course is that IRAs aren't covered by the Employee Retirement Income Security Act of 1974 (ERISA).



Every plaintiff who thinks they are aggrieved are entitled to their day in court, but challenging an administrative agency in its rulemaking has a high burden. From my limited knowledge of administrative law, I know that the plaintiffs will have to show that the DOL was arbitrary and capricious in applying the fiduciary definition to IRAs. I believe there is enough leeway within the framework of ERISA to apply a fiduciary definition to IRAs since there is a tangential relationship between IRAs and employer sponsored retirement plans (rollovers, anyone?). In addition, the rulemaking process to change the fiduciary definition has taken 6 years, so it's hard to show that the DOL's lengthy rulemaking process is arbitrary and capricious when the public and these industry groups had enough time to challenge the rule.

I won't say that the arguments against applying the rule are weak because District Courts are a funny thing when it comes to decisions. There is an obvious reason why the case was filed in Texas rather than let's say, New York. The plaintiffs went forum shopping to get a District judge that will apply a strict reading of the rule and the DOL's relationship to guidance over IRAs. This litigation process will take some time.

## 401(k) Providers and their Plans .

**It says a lot.**



I love Clint Eastwood movies and one favorite is "In The Line of Fire". John Malkovich is playing a wannabe Presidential assassin named Leary and Clint is playing Frank Horrigan, the Secret Service agent who is trying to catch him. For me, my favorite scene is when Clint and John Malkovich are on the phone and John calls Clint's character a friend.

Frank Horrigan: I know who you are - Leary.  
Mitch Leary: I'm glad, Frank. Friends should be able to call each other by name.  
Frank Horrigan: We're not friends.  
Mitch Leary: Sure we are.  
Frank Horrigan: I've seen what you do to friends.  
Mitch Leary: What's that supposed to mean?  
Frank Horrigan: You slit your friend's throat.

While not the same thing as slitting a friend's throat, it is amazing to me how large 401(k) providers handle the 401(k) plans of their employees. I can attest that as someone who worked for a third party administrator once, I can tell you that our 401(k) plan wasn't very good. It's kind of like the old adage about the cobbler's children having no shoes.

Mass Mutual just settled a class action lawsuit on their own 401(k) plan. Mass Mutual is forking over \$30.9 million as well. In addition to the payment, MassMutual also agreed to keep the plan's annual record-keeping fees no higher than \$35 per participant for the next four years. The agreement includes a four-year ban on calculating record-keeping fees as a percentage of plan assets.

If Mass Mutual overcharges their own employees, does that mean they do it for their "real" clients? That's not for me to say, that's for an independent review to find out.

## Plan Sponsors Are Seeking ERISA Services.

Yes, they are.

When I was in law school at American University and we moved into a new building (20 years later, they are now in another new building) a few blocks away from the main campus. The computer sync site at the new building had a number of Apple Macs and the former law school Dean didn't understand why we would spend money on what he called the Betamax of computers and in 1995,

Apple was on its last legs. Thanks to the return of Steve Jobs, Apple made one of the greatest comebacks in business history. However, it took some time for Apple to get its mojo back and it probably could be traced to the Introduction of the iTunes Store in 2000 and the iPod in 2001. Apple didn't become one of the most successful companies again, overnight.



When the proliferation of financial advisors that started offering §3(38), I heard a lot of their competitors claim that plan sponsors weren't really asking for it. I heard the same thing when plan providers (including yours truly) started offering §3(16) administration services. Over time, I have heard more and more plan sponsors asking for these services. I know firsthand because I have had a lot more opportunities and meetings with plan sponsors wanting to delegate their duty as plan administrator.

Cable TV, VCRs, Wi-Fi Internet, smart phones, and tablets. These are just some products out there that took time to get popular. Any new product or service needs time to develop and get enough traction that consumers become aware of it. It takes time and interest, but products and services that offer a value proposition will gain traction if people know about it.

So the lesson here is that plan sponsors will further educate themselves on these ERISA fiduciary solutions and they will start demanding them. It just takes time and information.

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