Small Steps That Plan Sponsors Can Take To Limit Their Fiduciary Liability

By Ary Rosenbaum, Esq.

When it comes to our health, small preventative steps can help us avoid greater harm to our health later down the line. We have been told of the great health benefits of taking baby aspirin for heart health and how we can lower our cholesterol with the choices we make in what we eat. There is no greater example than flossing and brushing your teeth to avoid cavities and a root canal later from the dentist. The thought of my parents' periodontal surgery has me chugging that Listerine every morning and night. The same can be said for retirement plan sponsors and how small preventative steps can nearly eliminate all potential liability associated with establishing and maintaining a plan for the benefits of its employees. So this article is about how you can minimize your liability as a plan sponsor by taking care of the small stuff.

Keeping plan documents and reports

This may sound simple, but there are too many plan sponsors that don't have copies all their plan documents and valuation reports. The problem with not having a set of all your plan documents is when you are either seeking a favorable determination letter from the Internal Revenue Service (IRS) or under an IRS audit. If you don't have a copy of a past plan document, the IRS assumes it was never done. In addition, you should have copies of all your previous plan documents to make sure there are no discrepancies or mistakes in the current plan documents. For example, I once had to review a plan sponsor's plan document from 1976 to make sure vesting was properly credited over 30 years later. In addition, it's important to have copies of all your plan's annual valuation reports. The valuation reports are an excellent resource because it contains all your plan's discrimination testing, but more importantly it contains a census of your employees for that year. Too often, I've seen former employees coming out of nowhere proclaiming that they were entitled to some sort of your retirement benefit (usually they aren't entitled to that benefit) and the plan sponsor has no records to dispel that. In the old days, keeping copies of all your plan documents and valuation reports took up too much space in your filing cabinet. Thanks to the wonderful world of scanning and pdf files, there is no reason you should haven't these important plan records saved on your network drive. It will help you with your day-to-day plan administration, as well as for any regulatory audits and transitions to any new plan providers.

Taking good notes, documenting the processes

For me, the biggest difference between middle school and high school if the fact you actually had to take notes in class. I can attest that my A in Government Regulation of Business at Stony Brook was only because I took good notes, since nothing in the class or on our exam came from the text book. When it comes to being a plan sponsor, your test will come if you ever get sued by a former employee or when your plan is under governmental review. You need to keep good records. While keeping copies of all your plan documents and valuation reports are important, it's only one piece of the puzzle. You need keep all the necessary reports and forms, but you also need to document the process. That means memorializing all of your decision-making. That means docu-

menting the process of selecting and retaining your plan providers. It also includes reviewing all fee disclosures from your plan providers and indicating how you determined that the fees you paid are reasonable for the services provided. It means regularly scheduled plan fiduciary meetings, where decisions are made to select and replace investment options based on your investment policy statement. It can also mean something as simple as keeping the attendance sheets for any plan education meetings for plan participants. Opportunity for former plan participants in suing you or for government regulators reviewing your plan may only arise just because you didn't dots the I's and cross the T's. Taking good notes and documenting the process will help close out that opportunity for them and save you a lot of potential heartache.

Hiring a TPA

There are a lot of good ERISA attorneys out there (cough, cough) and a lot of great financial advisors. With respect to these professionals, the most important plan provider to hire is a third party administrator (TPA). The reason they are the most important plan provider is they are the most involved in the day-to-day administration of the plan. Compliance testing, plan design, and the Form 5500 preparation are intricate tasks and the difference between a good TPA and a bad TPA is errors in these tasks. I have seen too many plan sponsors have issues with their retirement plans because they hired a bad TPA. I had a client who was sued by the Department of Labor (DOL) because the TPA was so bad; the DOL thought the plan sponsor was embezzling from the plan. The problem is that the TPA's advice on paying out one of the owners was wrong and the TPA never issued an annual valuation report to the plan sponsor. It's important to hire a TPA with a strong background in plan design and the fact that being a TPA is their main business and not an ancillary outgrowth of what are their meat and potatoes such as asset management or payroll.

Hiring a Financial Advisor who knows what they are doing

If you have employees, you need to hire a financial advisor to help you with the plan. However, you need a financial advisor who knows how to handle a retirement plan. While selecting investment options is an important duty of a retirement plan financial advisor, it's only a smart of the equation. A good financial advisor helps you reduce your potential liability by helping you implement good fiduciary practices such as developing an investment policy statement, selecting investment options, and providing financial education to plan participants. Whether that person is a broker or a registered investment advisor, it's important to know their role and know that they are fulfilling that role. Identify what they are doing for your plan, the fee involved, and the level of a fiduciary role that such advisor is willing to take. Any financial advisor who only talks about selecting investments is missing the big picture and likely landing you in fiduciary liability purgatory.

Get the Insurance You Need

All retirement plans covered under ERISA need an ERISA bond to protect the plan's assets from theft. A bond will protect the theft of plan assets, but do little to protect you from potential liability. Fiduciary liability insurance is to protect you from any litigation costs derived from any alleged breaches of fiduciary duty and that's not required. Check with your property & casualty broker and buy the insurance required to protect you and plan assets, based on the size of your plan.

Delegate what you can't do

There is nothing wrong with admitting what you can't do. If you are honest with yourself as a plan sponsor and you can't handle the responsibility, consider hiring plan providers who will take on more of an ERISA fiduciary role and the liability that goes with it. A TPA who offers an ERISA §3(16) service and a financial advisor serving in an ERISA §3(21) or ERISA §3(38) fiduciary will take a load of the fiduciary duty off your hands. An ERISA §3(38) fiduciary will actually assume almost all of the liability involved with the fiduciary process of selecting plan investments. Whether hiring these fiduciaries are a good fit are dependent on what role you can actually handle as a plan sponsor.

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