Get 401(k) Plan Providers That Will "Hold" Your Hand

By Ary Rosenbaum, Esq.

When we were younger, we needed all the help we could get. We needed that guiding light to show us the difference between right and wrong, and to learn about life. That could have been a parent, a grandparent, or an older sibling. We needed that person to hold our hand when we needed them. As a 401(k) plan sponsor, you still need a helping hand, you need a 401(k) plan provider to hold your hand and lead you the way, away from costly liability.

The nature of fiduciary liability

Sponsoring a 401(k) plan is a lot different than sponsoring a company softball team or providing free milk for the Keurig machine (in addition to the Keurig machine). Sponsoring a 401(k) plan makes you a plan fiduciary. That is a pretty serious job. Being a plan fiduciary requires you to provide the highest duty of care in equity and law. From what I recall, sponsoring a softball team and providing coffee takes a whole lot less. Being a 401(k) plan sponsor means you're responsible for the retirement savings of your plan's participants. You can be reckless with your money if that's what you want, but you need to safeguard the retirement money of their employees. Safeguarding their money isn't just about making sure it isn't stolen; it's taking a consistent look at the inner workings of the 401(k) plan dealing with its providers and making sure the plan is running correctly.

Competence and a helping hand

You can never fully eliminate your liability as a 401(k) plan sponsor. Even if you hire a plan provider and delegate all the fiduciary liability to them, you're still on the hook for liability for hiring them. Too often, I'm contacted by plan sponsors who are on the hook for thousands and thousands in penalties or corrective contributions, and their lament is about the Third Party Administrator (TPA) or financial advisor, who didn't help them along the way. The best way to minimize your fiduciary liability and any other liability that goes with it is to hire a plan provider who knows what they're doing. Don't hire someone just because they're cheaper, just because they're doing your payroll, or you met them on the golf links, or they may increase your line of credit. Hire plan providers who will do a competent job in limiting your liability. As a 401(k) plan sponsor, you don't need to be an ERISA retirement experts. What you do need is to hire ERISA retirement experts to help you run your 401(k) plan.

Bad providers won't do their job

Years ago, I was contacted by a medical practice over their 401(k) plan. They wanted me to do the "Retirement Plan Tune-Up," my legal review for $750 (cheap plug here). I discovered that on a $14 million 401(k) plan they were paying the broker on the plan 60 basis points (0.60%). My basic math skills figured out the broker was making $84,000 a year on the plan. The problem was that the advisor never bothered to show up at the medical practice's offices to help them manage the fiduciary process of the plan or educate plan participants. The broker was doing nothing to limit the 401(k) plan sponsor's liability and making $84,000 for no work. Needless to say, the 401(k) plan sponsors terminated the broker and hired a financial advisor to be an ERISA §3(38) fiduciary who assumed all the liability for the fiduciary component of the plan for just 25 basis points (.25% or $35,000 annually). As a plan sponsor, you can't afford to pay providers who won't do their job. Not only is it wrong, but you'd also be violating your duty of prudence.

A good provider won't leave you to die

"I needed you, you weren't there, I no longer need you." That is part of a conversation in my head in dealing with people

who should have been there for me and weren't there. A good 401(k) plan provider is there to help you guide you through the difficult maze of being a plan sponsor. If they're not there when you need them, then you should hire their competitors to replace them. If they can't return a call or they never complete the work after you provided all the information, it's time to get rid of them. I knew a plan sponsor whose advisor was no longer returning phone calls because his advice subjugated the 401(k) plan to a $75,000 market value adjustment because they took his advice in the stable value fund. I have known of TPAs who no longer returned calls because of the mistakes that caused the plan sponsor to be in hot water during an Internal Revenue Service (IRS) audit.

The compliance testing paperwork

Annually, your TPA will ask you for a census of your staff and there will be a questionnaire. This is in connection with the annual compliance testing of your 401(k) plan. Your 401(k) plan goes through some compliance test to make sure that your 401(k) plan doesn't discriminate in providing benefits in favor of Highly Compensated Employees. This paperwork requested by your TPA must be completed accurately and timely. They will ask for the census of employees, as well as identify any other businesses you own or are affiliated with. If the census and questionnaire information is filled incorrectly, the compliance testing will likely end up being incorrect. It's what I call: garbage in, garbage out. Filling out the questionnaire can be a huge issue if the forms don't advise you how to properly fill out the form. That is where handholding can come in, from a good TPA. If you don't understand how to complete the work on your end as a 401(k) plan sponsor in filling out these forms, call the TPA and let them hold your hands to avoid potential problems by filling out those forms correctly.

Good practices will keep the plan in good shape

There was a medical report out there that dental plaque could cause heart disease. I thought it was some sort of dental conspiracy to increase revenue as fluoridated water and other dental hygiene products have had to hurt the dentists' bottom line. Despite my cynicism, good oral health is important because many health problems are derived from poor oral hygiene. While some people only see a dentist when something in their mouth hurts them, many visit the dentist for annual or semi-annual checkups as preventative care, to avoid dental problems later. Brushing, flossing, and checkups help avoid root canals, caps, and dentures. When it comes to your 401(k) plan, good providers will go a long way in keeping your plan in great shape through good practices. That means the advisor who shows up regularly for meetings with you on the fiduciary component of the plan, develops an Investment Policy Statement (IPS), educates participants on the investments in the plan, and helps you maintain or replace investment options based on the IPS will keep your plan in good shape; The same can be said of the TPA and/or ERISA attorney who will review your plan, plan administration, and plan documents to make sure everything is consistent. There is nothing worse than when you find out that you thought one part of compensation was excluded for purposes of salary deferrals and employer contributions when they were included in the plan document. That problem may result in corrective employer contributions for missed employer contributions and a missed deferral opportunity. Good practices from good plan providers will go a long way in limiting your liability.

A plan provider that will grow with you

What happens today may be good, it might not be tomorrow. Years ago, I worked on a Defined Benefit Plan that had some issues with investing all that money with a financial advisor by the name of Bernie Madoff. I got them out of that situation, but the TPA never discussed with them that even forgetting the Madoff situation, the Defined Benefit Plan set up when there were 6 employees was no longer a good fit when they had 24 employees. Your demographics may change, your budget for contributions may change, and you need to hire a TPA and advisor who will grow with your firm, and advise you when things need to change.

THE ROSENBAUM LAW FIRM P.C.

The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
Follow us on Twitter @rosenbaumlaw