The To-Do List For 401(k) Plans Now: 2016-2017 Edition

By Ary Rosenbaum, Esq.

Being a retirement plan sponsor is a tremendous responsibility and the problem is that most plan sponsors don't understand that. Plan sponsors often act passive because they hire retirement plan providers to help them. The problem is that fiduciary responsibility doesn't allow plan sponsors the luxury to be passive when the buck stops with them. So that means you need to be active. With the new fiduciary rule and constant concerns with rampant 401(k) litigation, there is a list for you to do now.

Understand there is a new fiduciary rule

ERISA was established in 1974 and become effective in 1976 and there is a fiduciary rule that has been effective ever since. You remember 1974? The time of Watergate and the end of the Vietnam War, disco wasn't even in style yet. That time didn't make the fiduciary rule obsolete like a rotary phone that Ma Bell wouldn't let you own. When ERISA was first implemented, defined benefit plans were the retirement plans of choice especially when 401(k) plans weren't added to the Internal Revenue Code until 1978. The fiduciary rule from 1974 didn't foresee the 401(k) world we live in today, as it clearly exempted stockbrokers who didn't provide investment advice for a fee. Brokers served as retirement plan advisors where they weren't a plan fiduciary while registered investment advisors serving in that same role had no choice since they had to be a fiduciary. The exemption of stockbrokers from the fiduciary rule created an inherent conflict of interest when brokers were pushing plan investments for plan sponsors that netted them a better trail of commissions. The investments were more expensive or they were the proprietary product of the broker-dealer that the broker worked for. That's the opposite of a fiduciary rule that requires a plan fiduciary such as a plan's registered investment advisor to put the interests of the plan before themselves. A broker never had to do that; they could just sell the plan investments that netted them the most money. Trying to change the landscape of a 401(k) industry that lacked transparency and had pervasive conflicts of interest, the Department of Labor (DOL) instituted fee disclosure regulations and then implemented a new Fiduciary Rule that will go into effect in April 2017.

If you have a broker, find out their plan

If you have a broker as your retirement plan advisor, you need to find out if they have a plan to comply with the fiduciary rule. They need one, since they have no choice but to comply with it. If they don't want to serve in a fiduciary capacity, your broker has to team up with someone who will serve as a fiduciary or leave the world of retirement plans. Whether brokers will still collect a commission or get paid another way, they will have to make sure that the investments they present to a plan sponsor are in the best interest of the plan sponsor. April isn't that far off, so I'd suggest you contact your broker to see what their plan is in handling retirement plans. If the broker is going to exit the business because they don't want to be a fiduciary, then you'll have time to find someone who will.

Confirm The Non-Fiduciary Status of Your Employees

One of the caveats of the current fiduciary rule is that some of your employees might be considered a fiduciary because of the role they have in assisting with the retirement plan. While a plan trustee or someone serving on your company's retirement committee is certainly a fiduciary, someone with some control over the retirement plan like the human resources director may also be a fiduciary. Thankfully the new fiduciary rule clears up who in your company is a fiduciary and who is not. Under the final rule the people who should be fiduciaries are the company as the plan administrator and a specified committee as the "named fiduciary" responsible for the investment matters. Those who are not fiduciaries are

the employees who support those functions. However, the following employees will be treated as fiduciaries: in-house investment staff that provide investment recommendations and would receive a fee in addition to their normal pay, and human resources employees who provide investment advice as part of their job description and are licensed to sell insurance or securities and charge a fee. So your support staff that helps the people running the plan won't be considered a fiduciary as long as they don't get paid for helping their plan beyond what you normally pay them for your work.

Review Your Plan Expenses

Fee disclosure regulations implemented in 2012 require your plan providers that charge $1,000 or more from your retirement plan (directly or indirectly) to hand you paperwork detailing the fees they charge. Most plan sponsor have taken these fee disclosures and put them in some drawer, never to be seen again. Don't be like most plan sponsors. Review the fee disclosures and benchmark the fees your plan providers charge against what other providers charge for similar services. It should be noted that you don't have to pay the lowest plan expenses: you only need to pay reasonable expenses for the services provided. So you can certainly pay plan providers more than what other providers charge as long as you get more in services.

Understand there is an uptick in 401(k) litigation and plan oversight

Like they did in those old westerns, you need to keep your ear to the ground. While you won't hear horses, you may hear the chatter surrounding 401(k) plans and the uptick in litigation and oversight from the government. Every day, retirement plans are being sued. Most cases involve high plan expenses and some involve employer stock offered as a plan investment when the stock implodes. While most of the lawsuits are targeting the larger 401(k) plans out there, smaller plans have seen an increase in litigation. A lawsuit was brought against a $9 million 401(k) plan has since dropped, and an eye doctor's 401(k) plan that only had $300,000 was sued because the doctor who directed plan investments put the bulk of the money in one stock. Regardless of how small or large your plan is, you need to understand that litigation is always a risk, no matter how remote. Litigation might be a small risk if you have a small plan, but audits from the Internal Revenue Service (IRS) and the Department of Labor (DOL) are a much greater risk to you as a plan fiduciary. Plan errors in plan administration can be detected on an IRS audit. The DOL audits are looking into the rights of plan participants, but mostly looking into a plan sponsor exercising a fiduciary responsibility in a prudent manner. If your plan gets in trouble on a plan audit, you're the one who is going to have to foot the bill.

Be careful about share classes, revenue sharing, and proprietary funds

The litigation against 401(k) plans is mostly about fees. Concerns over high fees aren't just about the direct fees charged against your plan by your plan providers; it's also a concern about the cost of the investment in the plan. One big issue is improper share classes because you will violate your duty of prudence if a more expensive retail share class of a mutual fund is being used in your plan when a less expensive share class of the very same fund is available for a plan of your size. In addition, a big problem is if you select mutual funds in your plan mainly because they make a revenue sharing payment back to your third party administrator (TPA) to help defray administration expenses. Selecting investments as a plan fiduciary is all about what's best for the retirement savings of plan participants and not about defraying plan expenses. Revenue sharing funds tend to be more expensive than those funds that don't pay revenue sharing. Another hot topic of litigation against 401(k) plans is the use of proprietary mutual funds that are distributed by the bundled provider TPA. Again, mutual funds selected for your plan should be done because they are best for plan participants and not just because they happen to belong to the bundled provider you use for plan administration. Everything you do as a retirement plan sponsor needs to be above reproach because your duty is to the plan participants and not your own pecuniary gain.

Get your plan reviewed

You can't afford just to rely on your retirement plan providers; you need an independent review to determine that you're doing your job and that your providers are doing the job they promised to do. To avoid any headaches or unwanted surprises on an IRS or DOL audit, it's a smart idea to get an independent plan review. You can hire an independent retirement consultant or you can hire an independent ERISA attorney such as myself. For example, I offer a Retirement Plan Tune-Up that reviews all aspect of retirement plan administration and the fiduciary process to ensure proper compliance The Tune-Up is only $750 and can be paid from plan assets. Regardless if you use me or someone else, I recommend a plan review no matter what. You can't afford to take your plan provider's word that your plan is in good shape.

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