

# Get Over The Fear Of Hiring An ERISA Attorney

By Ary Rosenbaum, Esq.

As an attorney, I've heard a lot of lawyer jokes and some of them are amusing. I once said at law school that I now know why lawyers have terrible reputations because I met some of these lawyers at law school. While lawyers don't have the greatest reputation in terms of occupations, that shouldn't deter a plan sponsor from hiring one. We don't bite; at least most of us don't. Seriously, plan sponsors should get over their phobia over lawyers and hire an ERISA attorney when they need to. This article is when and why retirement plan sponsors should hire an ERISA attorney.

## What's an ERISA attorney?

One of my wife's running jokes is that after 13 years of marriage, she still doesn't know what I do. I used to think that was a joke until people had no idea what an ERISA attorney does. ERISA stands for The Employee Retirement Income Security Act of 1974, which is the landmark federal law that set minimum standards for most voluntarily established pension and health plans in the private sector to provide protection for individuals in these plans. In English, an ERISA attorney is a retirement plan attorney.

## Every ERISA attorney is an attorney, not every attorney is an ERISA attorney

While working at a semi-prestigious law firm, one of the named partners once asked me what I did. When I told him I was an

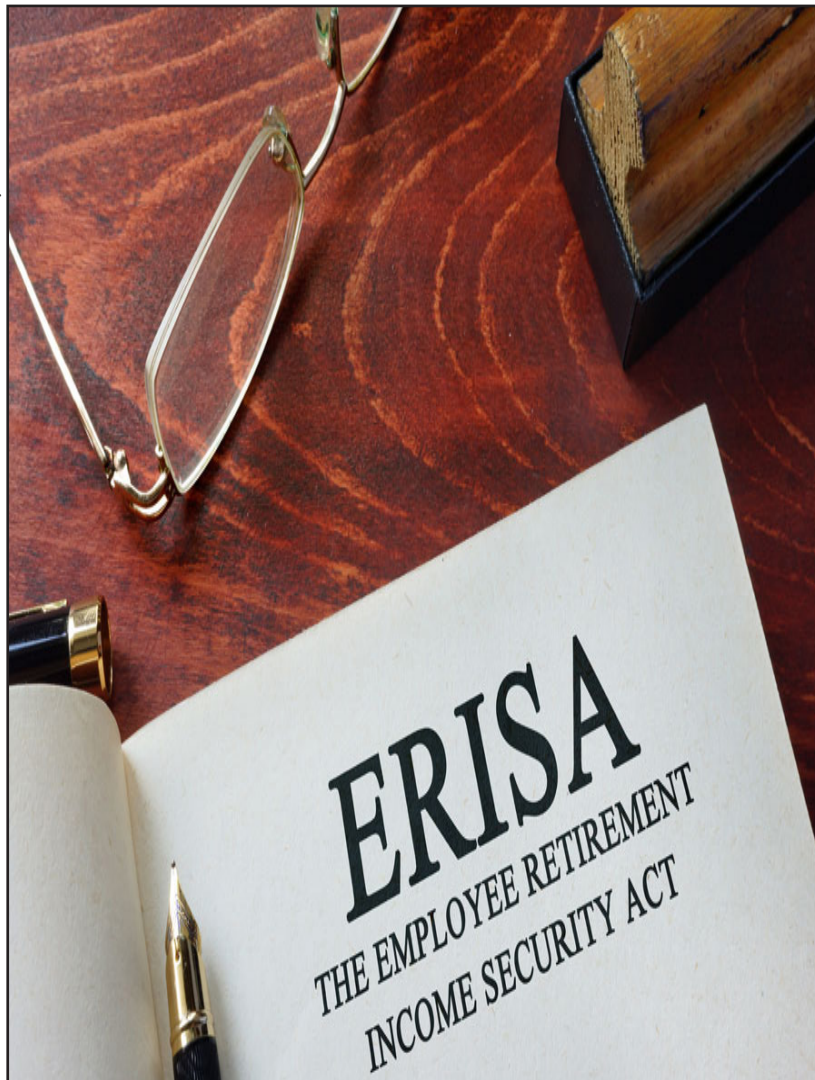
ERISA attorney, he said he didn't know anything about that and walked away. While the interaction was funny, he was right. While every ERISA attorney is an attorney, not every attorney is an ERISA

in it, so non-ERISA attorneys shouldn't be tabbed to handle ERISA matters.

## Not every ERISA attorney offers an attorney-client relationship

I always say there are two types of ERISA attorneys: those who speak English (like yours truly) and those who speak ERISAese. It always gets a good laugh, but it's true. However, there is one major difference between ERISA attorneys that most plan sponsors aren't aware of and I think it's important for them to understand. There are ERISA attorneys who work for third party administrators (TPAs) and there are ERISA attorneys who work in their own practice or their own law firm. I can speak to the experience of both types since I worked for TPAs for 9 years and I've worked for law firms and my own practice for 9 years as well. There are many wonderful ERISA attorneys who work for TPAs that do terrific work. Like me, they prepare plan documents, amendments, plan terminations, and handle plan audits in a cost effective manner like I do. The biggest difference is that since they work for a TPA and not a law firm,

they can't represent plan sponsors in an attorney-client relationship. The hallmark of an attorney-client relationship is confidential communication between plan sponsor and their ERISA attorney. These ERISA attorneys who work for a TPA have a duty of loyalty to the TPA and not the plan sponsor client. They can't offer the



same relationship that I can, so communication with them isn't protected under the attorney-client privilege of confidential communication. When I was a TPA attorney, a good part of my job was correcting the errors caused by our administrators. My job was protecting the TPA I was working for because that was who was paying me. As an ERISA attorney working for my own firm, my plan sponsor clients always come first and my loyalty is to them. So instead of trying to fix errors of plan administrators as a TPA ERISA attorney, I'm now the one discovering errors caused by the TPA's plan administrators. A plan sponsor in need of an ERISA attorney needs one that will always be in their corner and that can never be an ERISA attorney who works for a TPA.

#### **An ERISA attorney is needed for an IRS and DOL audit**

Thanks to the Internet, we can handle things ourselves that we used to need to hire someone for. Look at Home Depot; their business is predicated on homeowners doing home improvement themselves. There are some things that plan sponsors shouldn't handle themselves and one of those things is representing themselves when they are contacted by the Internal Revenue Service (IRS) and/or the Department of Labor (DOL) for an audit. They often say that an attorney representing themselves has a fool for a client and I think a plan sponsor is a fool for trying to handle an audit on their own. Why? They have no knowledge of how retirement plans work and what the IRS and/or the DOL agents are looking for. The plan sponsor may answer more than they should when questioned by the IRS and/or the DOL. Volunteering is great for charitable purposes, it's not so great when plan sponsors volunteer information in an audit. Months ago, I was contacted by a financial advisor that had a plan sponsor client contacted for a DOL audit. The audit request was interesting because it further validated my views that the DOL is ramping up audits to make sure plan sponsors abide by ERISA. So the advisor was kind to recommend me. The plan sponsor didn't want to hire me because they thought that hiring an ERISA attorney would send the wrong message to the DOL agent. They wanted a collaborative relationship with



the DOL agent, but an audit isn't a collaborative relationship. An audit by its nature is an adversarial relationship. It's the job of an IRS or DOL agent to review the plan in an audit to ensure compliance. I've known of too many plan sponsors who were hit hard by penalties just because they decided to go it alone on a plan audit. It's my opinion that IRS and DOL agents treat audits differently when they know an ERISA attorney is representing a plan sponsor. There is too much at stake in an audit for plan sponsors to handle it themselves.

#### **The independent plan review**

Thanks to fee disclosure regulations and litigation by participants against plan sponsors, it's necessary for a plan sponsor to make sure their plan is in compliance. How can they do that? A thorough plan review goes a long way in ensuring that the plan is in compliance and only paying reasonable plan expenses. Any plan review has to be independent because a TPA or a financial advisor is going to be self serving and always positive in reviewing themselves. Hiring an independent ERISA attorney to conduct a plan review is a great way to make sure the plan is in compliance and paying reasonable plan expenses. A plan review can help discover compliance errors before it becomes cost prohibitive to correct and more importantly, before an IRS or DOL agent discovers it.

#### **Plan restatements and amendments**

There are many TPAs that have their own legal staff and there are many that don't. Retirement plan documents are legal documents dealing with laws and regulations. A plan sponsor may want to make sure it's an ERISA attorney who is drafting their plan documents rather than someone

with no formal legal training.

#### **Don't fear the fee**

I always think that when plan sponsors get the recommendation from one of their plan providers that it maybe time to contact an ERISA attorney, they grab their wallet. People are afraid of legal bills and having spent a couple of years working at a semi-prestigious law firm, I can tell them that those fears are justified. Chief Justice John Marshall once said that the power to tax is the power to destroy, I think billing clients by the hour is the power to destroy, I worked

for that law firm and I found out that billing was the most important thing. So that's why when I started my own law practice, I billed like I did when working for a TPA: I flat fee bill everything except representing a client before the IRS and/or DOL. Like a plan audit, litigation is something that most law firms can't predict the cost. Everything else like a plan document or termination paperwork has some cost certainty. So when hiring an ERISA attorney, hire someone like me who charges a flat fee or get some estimate from an ERISA attorney who bills by the hour how much they think something costs. I recently won a lawsuit against a TPA client who stiffed me out of tens of thousands of dollars and there is nothing worse than the sticker shock you get when you get the monthly billing from a law firm. Plan sponsors should also remember that most legal expenses can be paid from plan assets.

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**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