Never Use Your Payroll Provider As Your 401(k) TPA

By Ary Rosenbaum, Esq.

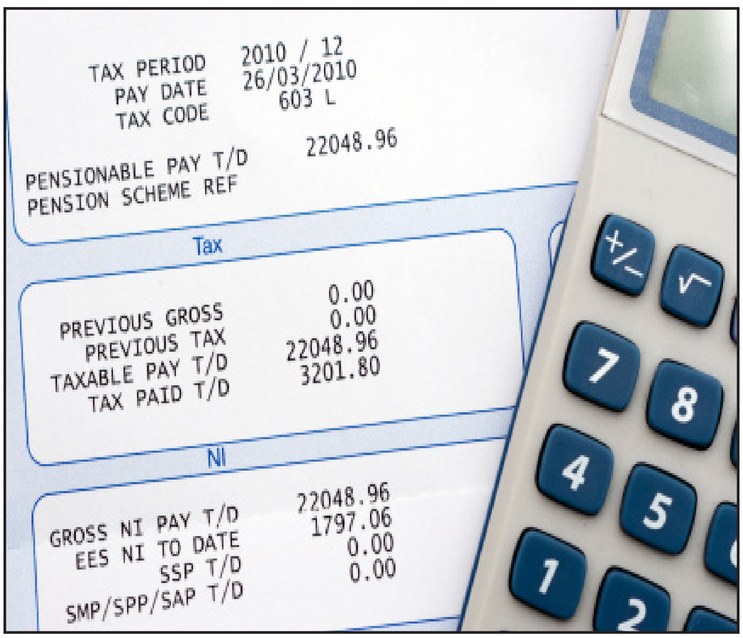
I have been in my own practice for 5 years and for 5 years, I've made enemies with two of the largest payroll providers in this country because I have issues with payroll providers being third party administrators (TPAs) for 401(k) plans. While it may look good on paper to hire a payroll provider as a 401(k) TPA, it's actually a terrible idea, and this article will tell you why.

Payroll has very little to do with 401(k) plans.

Many TPAs add ancillary lines of businesses that are connected with retirement plan administration, such as offering investment advisory services, insurance, and legal document services. With these producing TPAs, there is a natural nexus between these additional plan services and the administration of retirement plans. However, 401(k) plan administration has very little to do with payroll. Other than salary deferrals and W-2 compensation, 401(k) plan administration has absolutely nothing to do with payroll.

Competence of your TPA is more important than perceived ease

Payroll provider TPAs have a lot of 401(k) plans to administer because most plan sponsors don't understand what a TPA does. That's why payroll provider TPAs are popular: plan sponsors think they are getting a bargain by using their payroll provider as a one-stop shop for payroll and retirement plan administration. The problem is that retirement plans must abide by highly technical rules set forth by the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 ("ERISA"), the federal law applicable to qualified retirement plans. They must undergo complicated testing for participation and contributions in order to avoid discriminating in favor of highly compensated employees. In addition they have reporting requirements such as the annual Form 5500 and Form 1099 for plan distributions to participants. They must have up-to-date plan documents and they must be administered according to their stated terms. In addition, if the retirement plan is a participant-directed 401(k) plan, there are deposits made from payroll to the plan's trust through electronic transfer (or by check) as well as daily trades of mutual funds or exchange-traded funds. After the trades are made, assets must be distributed to participant accounts, which also must be updated with any gains, losses, dividends, and/or capital gains. Since retirement plans have so many moving parts, plan sponsors need to find competent TPAs who are competent at plan administration. Errors in the administration of a retirement plan can lead to the imposition of penalties resulting from an audit by the Internal Revenue Service or by the United States Department of Labor or in extreme circumstances, plan disqualification. The problem is that with any TPA errors, it's the plan sponsor ultimately on the hook. This is why plan sponsors should carefully select a TPA, as opposed to choosing their payroll provider.



Unlike other TPAs, payroll providers won't hold hands and expect too much from clients

The deduction of 401(k) salary deferrals from payroll is a small part of 401(k) plan administration and while errors in the processing of payroll for 401(k) salary deferral contributions can and do occur, such errors have become far less common since payroll has been computerized and automated. Unlike payroll, plan discrimination testing is not automated. While plan discrimination testing does require computerized payroll reports, it is heavily dependent on data collected from the plan sponsor. After the end of the plan year (for most 401(k) plans, it's the calendar year), the TPA will send a data request form to the plan sponsor. The data request form will ask for the census of all of the plan sponsor's employees, their dates of hire, their dates of birth, hours of service, and, for employees who have separated from service, their dates of termination. In addition, the data request form will also ask the plan sponsor to specify the ownership of the employer, whether the employer affiliated with any other entities (through ownership or affiliated service) and to identify the employer's officers. Since plan administration is so dependent on the information provided by the plan sponsor in the data request form, the information in that form must be correct in order for the discrimination testing to be accurate. Since many of the questions asked on a data request form can be highly technical, a competent TPA will work closely with their clients in order to ensure that the data provided is accurate. Payroll providers, on the other hand routinely expect plan sponsors to independently, and without any support or guidance, complete a data request form. The problem is that if the plan sponsor provides inaccurate or incorrect information on the data request form, the payroll provider TPA will run the test using the faulty data and obtain faulty testing results.

There never seems to be one person to talk to

Most TPAs offer plan sponsors a dedicated administrative representative that a plan sponsor can directly talk to, to get information. For payroll provider TPAs, only their larger plans gets a dedicated representative, so they offer the team approach to most of their plans. From experience with clients with payroll provider TPAs, it is very difficult to track someone who actually physically worked on that plan. It is far easier to work with one plan contact than multiple contacts because, from experience, the team approach leads to a lot of dropped balls.

They tend to offer plain vanilla plans, no exotic flavors

The payroll provider TPAs also tend to be unsophisticated for plan design, as well as not being pro-active when a 401(k) plan has testing issues. One major component of setting up a retirement plan is to maximize retirement plan savings for the plan participants. This can be done through a proper choice of among many different plan types and plan designs. Payroll providers tend to only administer straight vanilla 401(k) plans, so they will not likely discuss the merits of new comparability, floor-offset arrangements, or cash balance plans. I have had clients that would fail their discrimination tests for years before being approached by their payroll provider TPA in considering adding a safe harbor contribution to avoid testing. I once reviewed an employer who was forced by one of the payroll provider TPAs to set up a second 401(k) plan because they would not handle a 401(k) plan with existing brokerage accounts, so this employer was forced to create a new plan, merge the assets from the old one into the new one, and file two Form 5500s for two plans (even though the payroll provider disclaimed any responsibility for filing a 5500 for the first plan which is now delinquent). While I understand that payroll provider TPAs now handle new comparability/cross tested plan designs, they will not handle any administration or discussion of combination plan design with a defined benefit or cash balance.

They may offer fund lineups, but payroll provider TPAs are not fiduciaries and do not give investment advice

Too many plan sponsors that utilize the payroll provider TPAs don't have a financial advisor, which is dangerous for any 401(k) plan that is participant-directed. While payroll provider TPAs are more than willing to offer a choice of investment options on their mutual fund menus that they offer to their clients, they are not fiduciaries and so they are not liable for any losses suffered by plan participants nor are they responsible for picking mutual funds that pay a lot of revenue sharing back to themselves. While a financial representative from a payroll provider TPA may suggest what mutual funds to select, they are not considered as giving investment advice, they are not a fiduciary, and so they are not legally culpable for their fund lineup suggestions. This leaves the plan sponsor and the other fiduciaries being exposed to liability and holding the bag.

If you fire them as TPA, they will likely fire you as a payroll client

I have met quite a few plan sponsors that have regretted hiring one of the two largest payroll providers as TPA. While they were happy with the payroll service, they were not happy with the payroll provider's TPA service. When they decided to terminate the payroll provider as a TPA, they were told by the payroll provider to take their payroll business elsewhere. It's not personal, it's business, but often the payroll providers don't see it that way and take it personally by firing a payroll client because they were fired as a TPA.

The turnover rate for the payroll provider is high

Many financial advisors who are critical of payroll provider TPAs maintain that a payroll provider TPA's salesperson is only concerned with a sale. That's because that is all they are paid for and, since the turnover rate for their TPA salespeople is high, they are less likely to be around when the plan sponsors come to regret hiring that payroll provider as TPA. The two top payroll providers have been successful in the amount of plans that they administer as a TPA and they will gladly tell potential clients that they are a couple of the top TPA firms in the country. Popularity doesn't necessarily equate with competence. A look behind the numbers suggests that, while payroll provider TPAs have many clients, they have a high churn rate, which means that they gain as many plans as they lose. Good TPAs have very little turnover, suggesting that their clients stay with them because satisfied clients rarely leave.

Payroll/TPA Integration is not so important

The two largest payroll providers will tell potential clients that integration of their payroll services with TPA services is very important since it's seamless. If it's so important, why do these payroll providers offer integration of their payroll services to their competition, some of the very large mutual fund companies who serve as bundled TPAs? Anything important in business is not something you share with your competition.

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