

Mid-2021 401(k) Update For Plan Sponsors

By Ary Rosenbaum, Esq.

Being a 401(k) plan sponsor is a little different than other employee benefits that you provide. There is very little you have to do with the Keurig machine or the discount gym membership. Being a retirement plan sponsor means being a plan fiduciary, which requires you to provide the highest duty of care in dealing with the retirement assets of your employees. One of the problems with being a fiduciary is that the law and regulations concerning 401(k) plans constantly change and you need to be aware of it. So without further ado, here are some of the important issues impacting 401(k) plans in Mid-Year 2021.

The plan restatement process has started

I had a bankruptcy law professor who used to joke that the Bankruptcy Code gets updated every few years to help give bankruptcy attorneys work. I'm sure that there are plan sponsors that think that plan amendments and restatements are mandated by the Internal Revenue Service (IRS) to feed ERISA attorneys like me, but that's not true. Qualified plans such as a 401(k) plan must operate according to the terms of a written plan document to meet IRS qualification requirements. These documents must be fully rewritten (or "restated") every six years to reflect recent law changes. The last 6-year restatement cycle for your 401(k) plan was called "PPA" after the Pension Protection Act of 2006, which had a deadline of April 30, 2016. So that means we are going through a new restatement process. Since we haven't had a major overhaul of retirement laws since PPA, the new process is called Cycle 3. This Cycle 3 restatement process means that all qualified

pre-approved 401(k) plan documents will need to be amended, certified by the IRS, and adopted by the plan sponsor by the deadline of July 31, 2022. This is a mandatory IRS requirement with penalties for non-compliance. Note that if you have a defined benefit plan or a 403(b) plan, there will be a separate restatement cycle applicable to them. During this restatement process, we've had a few new laws, including the SECURE Act and the CARES Act that have impacted the operation of 401(k) plans. The funny part is Cycle 3 plan docu-

administrator (TPA) handle your restatement or you can have an ERISA attorney like me to handle it for you. Since you have no choice, but to restate, this would be a great time to determine whether any other plan provision changes should be made since you can add the new change into a restatement and not incur an additional charge for a separate amendment.

Cybersecurity

I started work in the retirement plan business in 1998 as an ERISA attorney, affiliated with a Long Island TPA. Cybersecurity wasn't much of an issue since we didn't have a website and any investment decisions were made by paperwork or telephone. In 2000, we had a website that just gave you an account balance and change of investment election, that was it. Now a 401(k) plan's website can do almost everything including requesting loans or distributions. The easier use of 401(k) online services on a website, the easier it is for cybercriminals to steal retirement plan assets belonging to your employees. While you may think that any loss of participant assets belongs to a TPA, I assure you that they may not be the case. While you may not be liable, it won't stop you from being sued. As a 401(k) plan sponsor, you have a fiduciary duty to secure and keep confidential the personally identifiable information of plan participants, as well as their retirement assets. Although you delegate cybersecurity responsibility to your TPA, you have a fiduciary duty to make sure that your TPA has some sort of cybersecurity program/protocol. You also need to make sure that your TPA has any insurance poli-



cies that would cover losses caused by cybersecurity and identify theft breaches (including breaches caused by internal threats, such as misconduct by the TPA's own employees or contractors, and breaches caused by external threats, such as a third-party hijacking a plan participant's account). You may be liable if a participant shows that you failed to maintain a prudent process to safeguard plan assets and plan data. As you can see just by the scam emails that you get daily that look legitimate, you need to



use some common sense and make sure you and your plan are protected by cybersecurity procedures by all your plan providers and that includes a TPA, financial advisors, and plan custodian.

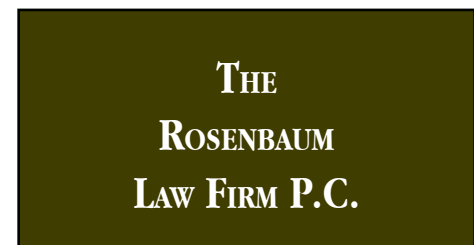
Missing Participants

Too often, 401(k) plans have a set it and forget it mentality. They never review their plan providers, they never review the fees they pay, and they don't pay attention to details. Much like the to-do list that my wife hands to me, there are a few things that fall through the cracks. One of the major cracks is dealing with former participants who keep money in your 401(k) plan after they terminate. The problem with former participants who still have an account balance in the Plan is that you eventually lose track of them. The problem here is that you're a fiduciary for all the assets, including the assets belonging to your former employees. If they're missing, they don't get their required notices and they don't have the opportunity to direct the investment of their account balance. So that means you're breaching your fiduciary duty if former participants can't be located. One additional wrinkle is that it's 2021, so finding former participants who moved is easier through Internet searches. I started in this business in 1998 and finding a missing participant was a lot more difficult in the day, you needed to deal with the IRS in this slow-moving letter-forwarding program where they would play the role of the mailman and find missing participants for

you. In those days, no one bothered with missing participants, they only dealt with the situation when the plan terminated and assets had to be distributed quickly to avoid having to file another Form 5500 if they weren't distributed before January 1. If participants couldn't be found, we would just withhold 100% of their account balance for tax payment to the IRS. The DOL has been concerned with missing participants. About 15 years ago, they told us we couldn't do 100% withholding anymore and needed to find providers who would set up Individual Retirement Accounts for missing participants. Outside of that, the DOL didn't offer much guidance on what to do with missing participants and so those accounts languished and these former employees were being hurt in the process. The DOL stated a few years back that missing participants would become a priority for them. In 2020, the DOL helped missing and non-responsive participants recover over \$1.4 billion in benefits. It got so bad, that the Government Accounting Office asked the DOL to develop policies and procedures and they did. The DOL has developed sound practices and policies that you need to follow. According to the DOL, you have a missing participant problem if: 1) You have more than a small number of missing or non-responsive participants; 2) You have more than a small number of terminated vested participants who have reached normal retirement age but have not started receiving their pension benefits; 3) Missing, inaccurate, or incomplete contact infor-

mation, census data, or both (e.g., incorrect or out-of-date mail, email, and other contact information, partial social security numbers, missing birthdates, missing spousal information, or placeholder entries); 4) Absence of sound policies and procedures for handling mail returned marked "return to sender," "wrong address," "addressee unknown," or otherwise, and undeliverable email; 5) Absence of sound policies and procedures for handling uncashed checks (as reflected for example, by the absence of an accounting journal

or similar record of uncashed checks, a substantial number of stale uncashed distribution checks, or failure to reclaim stale uncashed check funds in distribution accounts). As with anything in retirement plans, you need a plan and a way how to handle missing participants. But before you can, you need to know you have a missing participant problem. Even before detecting you have a problem, I suggest developing policies and procedures to deal with former employees and their 401(k) account balance when they leave, as well as following up with them if they decide to keep money in their account (as if their right if their account balance is \$5,000 or more).



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