Good Bets By A 401(k) Plan Sponsor That Will Limit Their Liability

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I'm not much of a betting man because I hate to lose. Some will say that playing the stock market is gambling, but shrewd, informed investment decisions usually do well in the end. Retirement plan sponsors can make bets that will pay off in limiting liability by making informed, smart decisions that will pay off in the long run. This article is about good decisions that are sure bets that will help a plan sponsor limit their liability.

Hiring a good TPA

With apologies to financial advisors, ERISA attorneys, and auditors, the most important plan provider that a retirement plan sponsor can hire is a third party administrator (TPA). I don't say that because they refer me work or market with people because most TPAs aren't very good at marketing. I say that with peace and love because it's the truth. Retirement plans require a lot of good recordkeeping and precision compliance testing to see if the retirement plan can remain qualified under the Internal Revenue Code and compliant under the Employee Retirement Income Security Act of 1974 (ERISA). While many large 401(k) plans might be a target of class action lawsuits by participants for high fees, the larger threat to small to medium sized plans is poor administration and compliance. Too many plan sponsors scoff at the selection of a TPA because they really don't understand what a TPA does and what the value is of a good TPA. Most plan sponsors don't know what a bad TPA does until it's too late and there are compliance issues because it was found during an Internal Revenue Service or Department of Labor audit or because they switched TPAs and the new TPA discovered all the "bodies" in compliance errors. A plan sponsor can place a bet on the health of their 401(k) plan by selecting a TPA that is known for good administration with an emphasis on training their staff and avoiding plan errors for their plan clients. How to find a good TPA? Probably by word of mouth. TPAs that are championed only because they are cheap or because they happen to handle payroll too is a good recipe for disaster.

Hiring a good financial advisor

Many plan sponsors think that a financial advisor only picks mutual funds and than any chimpanzee can do their job. A financial advisor is much more than selecting investment and quite honestly, it's not their most important role. The most important role that a plan sponsor has is minimizing the fiduciary liability of their 401(k) plan sponsor client. Protecting a plan sponsor isn't about getting the best investment options or how well plan participants earn in their retirement savings. It's not about results; it's about a process. What a good retirement plan advisor is making sure the fiduciary process is being run correctly The process for a participant directed 401(k) plan is putting the plan participant in a good position to make informed investment decisions. That means providing investment education and/or advice to plan participants on investment options that were selected based on a criteria set by the plan sponsor and/or financial advisor. Using an investment policy statement (IPS) to select plan investments and even providing general investment education to plan participants isn't legally required, but it's paramount to avoiding potential liability. I always say that happy plan participants never leave and plan participants who make money in their 401(k) plan aren't likely to sue. A process that outs plan participants in a spot where they can make informed investment decisions will avoid liability than a process that does not. It also makes sense to hire a financial advisor who has a broad experience in helping manage 401(k) plans, not a financial advi-

sor who needs training wheels and using your plan as a learning experience. A good bet for a 401(k) plan sponsor is to hire a financial advisor with the experience to handle a retirement plan and understand the fiduciary process that need to help manage.

Communicating with plan participants

About 90% of the time in my life that I have had a falling out with someone was because of a lack of communication. Either I wasn't effective in getting my point across or the other person wasn't good at conveying their thoughts. When it comes to dealing with people, communication is key. When it comes to having a retirement plan, I would say that most plan sponsors fail at communicating well with plan participants. 401(k) plan sponsors often forget why they set up their retirement plan in the first place, to be an employee benefit. By forgetting the purpose of the plan, they forget how to communicate what a great benefit is. Employees can't get excited about their 401(k) plan if their employer treats it with less concern than the coffee machines it providers in the employee lunchroom. Plan participants won't know about their retirement plan unless the employer tries to communicate about it. Plan education/ enrollment meetings should be advertised rather than being as treated as well as an upcoming visit to the dentist. Excitement can be contagious and so can apathy, so plan sponsors can convey more excitement by doing a better job of advertising education/enrollment as well as perhaps offering raffles to get plan participants to attend. I think better communication will increase plan participation in salary deferrals and avoid some participant disgust that could lead to litigation and/or complaints to the Internal Revenue Service or Department of Labor. Plan sponsors should also know that timely distribution of all required notices is also an effective form of communication because it can avoid compliance headaches later down the line. Good communication is a good bet for plan sponsors because better-educated plan participants are less likely to be a liability threat to the employer,

Keeping good records

Good housekeeping will keep any home in good order and good recordkeeping can go a long way for a 401(k) plan to avoid liability. Something as simple as keeping good notes and keeping transactional records, reports and plan documents can help a plan sponsor out. Keeping good records helps a plan sponsor manage the plan as well as show the government and/or plaintiff ERISA attorneys that they have operated the plan in a prudent manner. Many compliance issues are as a result of a plan sponsor not retaining old records such as old plan amendment. Good recordkeeping is a good bet because it's an inexpensive way in limiting a plan sponsor's liability.

Maintaining fiduciary liability insurance

Even a vigilant 401(k) plan sponsor can't guarantee that there won't be litigation from aggrieved plan participants or from the government. Litigation of any kind can be costly, so that's why plan sponsors should purchase fiduciary liability coverage. Fiduciary liability coverage is different from an ERISA bond. An ERISA bond only protects plan assets from theft and is legally required. An ERISA bond does not protect plan fiduciaries from the costs of litigation and a fiduciary liability policy is not required. Maintaining fiduciary liability just makes good sense because the costs are nominal when you compare it to the costs of potential liability as a plan sponsor and fiduciary. I once worked with a plan sponsor that has $1 million of litigation costs from a class action lawsuit brought against them that they won. The fiduciary liability policy they had limited their cost to the $100,000 deductible. So as a plan sponsor, it's a good bet to purchase fiduciary liability coverage.

Benchmarking fees

Plan sponsors have a fiduciary duty to pay only reasonable plan expenses. That used to be a problem before mandatory fee disclosure regulations when 401(k) plan sponsors had no idea how much they were paying in fees. Fee disclosures do give plan sponsors a false sense of security concerning fees if the 401(k) plan sponsor doesn't bother to benchmark the fees being charged against the plan. A 401(k) plan sponsors can avoid a lot of potential drama by determining whether the fees being charged against the plan and the fees of the investment options under the plan are reasonable or not. The only way that a plan sponsor can determine reasonableness is benchmarking fees or seeking pricing from competing plan providers. So much litigation these days centers around plan costs and the way to avoid problems is actually determining whether the fees are reasonable or not.

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