Hot Topics For 401(k) Plan Providers

By Ary Rosenbaum, Esq.

The beauty of the retirement plan business is that it's constantly changing, the bad part of it is that it's constantly changing. As a plan provider, you always need to be on your toes because it's such a competitive marketplace that you can't afford to be asleep at the wheel. If you're not ahead of the curve, you will certainly be behind it and the history of this business is littered with plan providers who failed, just because they couldn't adapt to a changing environment. This article is about some of the hot topics that you should be aware of and using these topics for marketing help and to better focus your service.

It's all late deferral deposits these days

One of the biggest issues these days for the Department of Labor (DOL) in terms of compliance and random audits is dealing with payroll, especially with respect to payroll deposits. As you are aware, over the past 10 years, the DOL wants salary deferrals to be deposited as soon as possible. No one can rely on the 15th day of the following month regulation anymore, salary deferral deposits must be done in days. We know it became a chief concern for the DOL when they added a question to Form 5500 which asked plan sponsors if they were late with deposits. Where I come from, we call that a clue that the DOL was going to clamp down on this issue. From experience, most of my DOL audits deal with late salary deferral deposits. You would think that something that should be so automatic, should be done without issue. However, when you're dealing with employers with multiple locations and possibly, multiple payroll providers, late deposits seem to be a fact of life. The problem with late deposits if the plan sponsor is late with one payroll deposit of deferrals, there are likely multiple late deposits. As a plan provider, you have to be aware when your plan sponsor clients are late with one just late deferral because it gives you the chance to nip things in the bud. Otherwise, you look bad as a plan provider for not keeping attention to your plan sponsor because as you know, when things go wrong, you get the blame. Even if a plan sponsor can correct the late deferral deposits through self-correction, one problem persists the Form 5500. Under penalties of perjury, the plan sponsor must state whether they've had late deferral deposits and you can't support suborn perjury. If a plan sponsor does admit that they have had at least one late deposit, they are certainly a target for a DOL audit and there is nothing to do about it. My problem with self-correcting late deferrals is that I've had plan sponsors who have been contacted by the DOL as to why they didn't seek relief under the DOL voluntary fiduciary compliance program because they don't have a copy of the plan sponsor's application. So when I would get that notice from the DOL, I consider it a good practice to send an application in and get DOL's forgiveness for the fiduciary transgression. To be pro-active, I suggest you advise your plan sponsor clients to not only self-correct as soon as possible but also, submit an application to the DOL's correction program. If a 401(k) plan sponsor is being contacted by the DOL for an audit, I would recommend being pro-active and determining whether there are any late deferral deposits that need to be corrected. It's better to fix it before a DOL audit, than after and I hate surprises. From a pro-active standpoint, I suggest maybe creating a payroll procedure policy, that implements a process to deal with deferral deposits that would insure against late deposits., Of course, no process is useful if the plan sponsors aren't going to follow the policy to a T. Like good dental habits to promote, consider other opportunities in the late deferral deposits space that makes you look proactive in your client and potential client's eyes and helps them avoid the conundrum of late deferral deposits.

Compensation issues are flaring up

In addition to late deferral deposits, another compliance headache for a plan sponsor that seems to be flaring up is the definition of compensation for plan purposes. For a lot of reasons, it seems that too many plan sponsors use one definition of compensation in practice and there is another definition of compensation in the plan document. Obviously, it's a problem because plan sponsors have to operate their plan according to the terms set forth in the plan document. In addition, shorting a participant on the right to defer and earn a contribution on a form of salary contribution that the plan sponsor is excluding if the plan document says they should include it. Corrective contributions must be made and they're costly because

it's correcting an error that really is unnecessary if the plan sponsor and/or the third-party administrator (TPA) should have been aware of. The problem is that since the plan document is written, it's clearly an error that should have been detected ahead of time. It's very easy to avoid the error, just read the plan document and confirm with the 401(k) plan sponsor whether it's their intent and practice, using the definition of compensation if the plan. If it's not, have the plan document corrected and make any necessary compliance fixes for mistakes that have been made.

The new fiduciary rule

For the last decade or so, the DOL has been intent on developing a new fiduciary rule. It does make sense that they update the rule since the original rule dates back to the implementation of ERISA, which predates 401(k) plans, 12b1 fees, and a whole host of other issues that the original rule never contemplated. The last two times, the DOL tried to change the rule, it had to be withdrawn. The last attempt at a new rule had an implementation date that so many broker-dealers spent millions of dollars in legal fees to comply with it. Fortunately or unfortunately (depending on your view), the rule was withdrawn thanks to litigation and a Trump administration that was against it. The DOL will make another attempt at it, probably at the end of the year. It will certainly try to mirror what the SEC is trying to implement as part of a new fiduciary rule on their side of things. What is guaranteed is that not everyone is going to be happy with what the DOL proposes. Whether you serve as a fiduciary or don't or may have to under a new rule, keep in mind that a new rule is certainly in the cards. How a new rule will impact your business is something you need to figure out, so you can tailor your business to another possible change in the retirement plan business.

Consolidation

Fee disclosure regulations was a game-changer in the retirement plan business when it was implemented in 2012. One major change is that it was a sign for many retirement plan providers to exit the retirement plan business. Fee disclosure regulations created fee transparency and fee compression and that wasn't a positive step for plan providers. Fee compression has had the effect of consolidation in both retirement plan business, both on the TP and advisory side of things. If you're a provider that hasn't consolidated, you may see this as a challenging time if your competition is getting larger and larger. What you may see as a hardship could be an opportunity because time and time again, bigger isn't better. If you are a provider that has consolidated or have become larger thanks to consolidation, it is also an opportunity because economies of scale can allow you to provide a better service at a better price. In a nutshell, see what the competition is doing and see if you can do better. Differentiate yourself among the competition and it will allow you to stand out in a way that you thought was never possible.

Missing participants and automatic rollovers

They used to have that E.F. Hutton brokerage commercial where they said that "when E.F. Hutton talks, people listen." In the retirement plan business, when the DOL talks, people do listen. One of the areas that the DOL has been talking about as one of their areas of concentration is dealing with missing participants and the automatic rollover provision. The DOL is realizing that despite their changes to how we treat missing participants, 401(k) plan sponsors aren't doing much to locate these missing participants who are former employees that they have lost touch with. Most plan sponsors don't bother to try to locate these plan participants and they just let these participant's assets to languish. By doing so, plan sponsors let these participants suffer in their retirement savings (since they can't change their investments or receive required notices) and it becomes a potential liability headache because the plan sponsors aren't prudently exercising their fiduciary duty in trying to fix the problem. Most 401(k) plan sponsors only deal with missing participants when they decide to terminate their plan. That is why it's important for your plan sponsor clients to try to tackle the issue of former employees with account balances annually instead of waiting for them to become "unsolved mysteries" as to their whereabouts.

In addition, the plan sponsor should use their automatic rollover provision where they can. One fact that many people don't realize in the retirement plan industry is that as part of the DOL audit that asks about missing participants and the automatic rollover provision, the DOL is asking plan sponsors on who the automatic rollover provider is, how where they selected, and what fees they're charging. So as a plan provider, it's incumbent for you to make sure that your plan sponsor clients are aware as to who the rollover provider is and what fees they're charging. As time goes on, you will see that missing participants and the automatic rollover provision will become hotter topics that you and your clients will have to grapple with.

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