Fall Back Into Your Role As A 401(k) Plan Sponsor

By Ary Rosenbaum, Esq.

Summer seems to be a time of enjoyment where we slack off a little but we end falling into place when Fall is upon us. I always joke that Fall equals death because of the foliage and the inevitable change in the weather and the return to standard time. Fall can also be time for 401(k) plan sponsors like you to snap back into shape in your role as plan fiduciaries. Here are some reasons why it's time to Fall back in place.

You're a fiduciary for the entire year

While Summer might be the time to lay back a little with those early Friday closings, you really can't fall back in your role as a plan fiduciary. No matter how great the weather is, there is no time to slack off on the job. Being a fiduciary means that you have to operate to the highest duty of care, so no time to slack off. That being said, I certainly know the reality of things. Therefore, use the Fall to get back to things in running your 401(k) plan.

It's the end of the year, pal

The main reason that you need to Fall back in your role as a 401(k) plan sponsor and fiduciary is that the end of the year is here. As stated before, I hate the Fall because that means the end to the warm weather. I will certainly think differently in retirement. The reason the Fall is so important because I'm sure that with most 401(k) plans, your plan year is ending December 31st. If you have any issues, plans, or certain fiduciary tasks to take care of, now is the time to do it. The reason it's the time to do it because there are certain tasks that you might not be able to accomplish so quickly if you don't accomplish it by December 31st. The timing of the calendar year is why you need to be a little more focused than you usually would be (even though you should be focused all of the time).

The issues of the safe harbor match

One of the greatest developments in 401(k) plans in the last 20 years has been the introduction of safe harbor plans. Safe harbor plans allow 401(k) plan sponsors to make a fully vested contribution to participants to satisfy deferral/match/top-heavy tests that they ordinarily would fail which would require corrective contributions and/or loss of deferral/match contributions from highly compensated employees. The problem with safe harbor 401(k) plans is that they would require you to have ESP in the sense that you could only prospectively add a safe harbor contribution to an existing plan for the following year. If your plan was failing for that year, you could only add a safe harbor contribution the following year with a safe harbor notice disseminated to plan participants by December 1st. The safe harbor non-elective contribution is a fully vested 3% of compensation contribution to all participants. The basic safe harbor match is more cost-effective since it is essentially a 4% contribution (100% of the deferrals of the first 3% of compensation and 50% of deferrals between 3% and 5% of compensation). There is also a safe harbor match that is tied with automatic enrollment that is cheaper than the basic match and offers a two-year vesting schedule. The Safe Harbor 3% non-elective contribution was substantially changed by the SECURE Act, which was signed into law last year. Safe harbor non-elective contributions no longer need a safe harbor notice. More importantly, you can add the safe harbor contribution mid-year if you know you're failing. You can even add a safe harbor non-elective contribution after the plan year is over if you bump up the contribution to 4% of compensation. However, the SECURE Act made no substantive changes to the safe harbor match and it makes complete sense why. Safe harbor match is tied to participants deferring and it would be unfair to make retroactive and prospective changes to the plan mid-year when they have already made salary deferrals throughout the year. That is why it's still

important for plan sponsors like you to figure out in the Fall whether they need to add safe harbor contributions or not since they still have to figure out by December 1 whether they want to add a safe harbor matching contribution or not. While you do have the flexibility of adding a safe harbor non-elective contribution mid-year or after the year, low deferral rates in your plan may make the basic safe harbor match contribution so much cheaper to satisfy the compliance testing.

Time to review the plan document

While you can certainly make most plan changes throughout the year, there is a benefit for making any substantive changes prospectively, starting January 1st. The reason is that the beginning of a Plan Year is a perfect break to make a substantive plan provision change and avoid the headaches that many retroactive or mid-years changes make, such as eligibility and entry dates. When it comes to plan amendments, I am a strong advocate of the KISS theory (keep it simple, stupid). Any substantive changes that are retroactive or prospective can have a significant impact on the plan that might be difficult to administer. That is why I like changes made effective January 1st prospectively because it keeps things simpler and clearer, so the chances of stupid administrative mistakes are minimal. Whether it's eligibility, vesting, forms of benefit, distributions, or any other change, makes so much more sense to do it prospectively January 1st.

It's time to review plan fees, review plan providers, and make plan provider changes

Like I said, making changes for the plan effective January 1st is a whole lot easier than making mid-year changes. The Fall is a perfect time for you to review the fee disclosures provided to you by your plan providers. Most plan sponsors take their 401(k) fee disclosures and ignore them like the Privacy Notices they get from their bank. As a plan fiduciary, you must determine whether the fees charged to the plan by your plan providers are reasonable for the services provided. You can't fulfill that duty if you don't benchmark the fees listed in that fee disclosure. Whether you put the 401(k) plan up for bid or use a service or publication to benchmark fees, it's something you have to do. You also have a duty of prudence as a 401(k) plan fiduciary. That means you have to review your plan providers to make sure they're doing a competent job as they promised, you simply can't take their word for it. Since I like simple and clean, it's also better to use January 1st as the date when you make a change of plan providers, especially third-party administrators (TPAs). I often find that mid-year changes, especially on the TPA side, there often seem to a discrepancy on certain points on which TPA is responsible for certain administrative tasks. I often find that when it comes to retirement plans that less is more and multiple TPAs a year or multiple advisors a year is certainly is only more when it comes to headaches and things that can go wrong.

Time to review bond and insurance coverage

When the Northeast blackout of 2003 happened, I was working for a TPA in Midtown Manhattan. When the power went out, many thought it was temporary. The person in charge went on the intercom (powered by an emergency battery) suggested that the blackout was the perfect time to pull out an ERISA book he provided to everyone a week before. I wisely left the office and walked the 12 miles back to my apartment. I laugh about that day, but the Fall is a perfect time to review all aspects of your 401(k) plan including some minutiae that most 401(k) plan sponsors ignore. Those small details or minutiae include the proper amounts for an ERISA bond and fiduciary liability insurance. As your 401(k) plan assets grow, it may mean the amount of coverage provided by your ERISA bond or fiduciary liability insurance is out of date. Since an ERISA bond and the amount of coverage is required, it's something you need to take care of. The ERISA bond requirement is a question on Form 5500, so a lack of coverage could be an issue and make you a target for a plan audit if you note that you don't have the statutory requirement under ERISA. Fiduciary liability insurance is the policy that protects you and other plan fiduciaries form litigation costs and liability, so getting the proper level of coverage only makes sense and any coverage increases are likely minimal.

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