

# The Rules Of 401(k) Plan Provider Engagement

By Ary Rosenbaum, Esq.

**H**iring a 401(k) plan provider isn't an easy process and there are so many mistakes that plan sponsors like you have been made. It's not like making any other decision of your own in life, because it's a fiduciary decision, as a plan fiduciary responsible for the retirement assets of your employees. So this article is the rules of engagement in hiring 401(k) plan providers.

## Speak to several providers of the same type

When people ask me for a recommendation for a plan provider like a third-party administrator (TPA) or financial advisor, I'll give them 2-3 names and let them see what's the best fit for them. Unlike the human resources director at my old law firm (sorry Pat, too easy), the plan sponsor will select one of the names I recommended. The reason I do that is that from my mistakes in hiring home contractors, it's best to talk to several plan providers rather than just one. Different plan providers have different levels of services, offer different experiences, create different levels of expectations, and charge different fees. There are many factors in hiring a plan provider and you can't figure out who will be a good fit if you only talk to one.

## It's your decision regardless, so make it

I worked 9 years for two TPAs and the fact is that many times we were hired or fired was because of the prodding and pushing of the financial advisor. There are financial advisors out there, that want their block of 401(k) business stationed at

a single TPA. That's great for the advisor, not necessarily great for the plan. Unless you delegate the power to hire and fire plan provider to an outside ERISA fiduciary (such as an ERISA §3(16) administrator), you're on the hook for hiring a plan provider, so make sure the decision is right for you and not someone else.

## Any decision to select a plan provider has to look above board

Selecting a plan provider has to be rational and look above board. Hiring a plan provider just because they're the cheapest



isn't rational. Hiring someone just because they're a big provider isn't rational. When hiring a plan provider, consider the rational reasons behind it. Consider cost, competency, experience, level of service, and fit. In addition, for plan provider selection to be rational, it has to look above board. I come from the school that if it looks bad, it is bad. So don't select your relative or an employees' relative, or someone connected that benefits you whatsoever, such as the bank that holds your credit line. Your 401(k) plan shouldn't operate like my

school district, it's not a place to be a patronage mill. As far as selecting and reviewing all the competing plan providers, everything used in the decision-making process to render your ultimate hiring decision must be memorialized in your plan files.

## Review any proposed contract

We take people at their word until we can't. The problem is that sometimes people promise one thing and their agreements don't reflect said promises. Every proposed contract proffered by a plan provider should be reviewed by an ERISA attorney

to make sure the promises and claims made are in there. Too many times, plan providers may claim they will offer a service or play a fiduciary role in the sales process, but neglect to keep those promises in the proposed contract. A contract should also be reviewed for the termination section. In the end, every plan provider is going to be replaced one way or the other. Even when there is no termination, there could be a problem when you think a plan provider is responsible because they

promised to serve in a fiduciary capacity, but the contract says otherwise. I have seen too many disputes revolving around the termination of plan providers. Any proposed contract should be clear on any termination notices, as well as any termination charges that will come due as a result of the firing of a plan provider. Depending on the provider, that could be a surrender charge or a deconversion fee. Whatever the termination fee is, it should be explicit in the dollar amount or the formula to determine what the charge is. I, unfortunately, had to



In Yiddish, a mensch means someone with integrity and honor. Firing anyone isn't fun and as a plan fiduciary, it's one of the hardest things I've had to do in the retirement plan business. I even had to fire a good friend as a plan provider over a dispute that didn't involve me. As Michael Corleone would say "it's business, it's not personal." I try to treat people the way I wanted to be treated and most of the time, it works. When firing a plan provider, be a mensch. Even when the plan provider was terrible, have the higher ground and leave them with honor. Sometimes, that doesn't happen because the plan provider does take things personally such as that plan provider that I had to report to the DOL over their obscene termination fees. As long as they didn't cause gross negligence on your plan, also pay them what they're owed, don't stiff them.

report a plan provider to the Department of Labor concerning their termination fee, which had no formula set in the contract, and just seemed to be arbitrary and capricious for the 401(k) plans that terminated them. When you get an ERISA attorney to review any proposed contract, you end up not getting some unfortunate surprise when it comes to fire your plan provider.

#### **Make sure the providers do their job**

Your 401(k) plan shouldn't be a place for corporate welfare, to pay plan providers for nothing. There are plan providers out there that do collect a quarterly fee and don't do their job. I just reviewed a 401(k) plan that pays their financial advisor 25 basis points (0.025%) on an \$11 million asset base, netting the advisor \$27,500 annually. The only problem is that the financial advisor belongs on a milk carton because they have been missing in action for quite some time. You can't afford for your plan providers to slouch on the job, make sure they're doing their work.

#### **Have the providers reviewed**

If you ask a plan provider how things are, they will likely tell you everything is fine. Things might be fine and things might not. The problem with compliance errors and issues regarding your 401(k) plan is that they're usually not caught when it happens, but years later when there is a government audit or there has been a change of plan providers. The problem with errors and issues

is that the longer it's not detected, the more expensive it will be to fix it. So that's why I recommend that now and then, you have your plan providers reviewed to make sure they're doing the job effectively as promised. There are many ERISA attorneys and pension professionals that will do a heck of a job in reviewing your plan and your plan providers and offer a seal of approval. I hate surprises and I think any surprise found on your 401(k) plan won't be a happy surprise, especially if found on an Internal Revenue Service (IRS) or DOL audit.

#### **Notice plan provider changes**

Not only do you have to review the plan providers for the work they do, but you also need to be aware of the changes that they may be going through. If there is a constant turnover of employees working on your plan at a certain plan provider, that is a pause for concern. I know several plan providers (including the one I reported to the DOL) that were simply ruined because they were bought out by a larger firm that didn't value their clients. I've seen plan providers suffer when the next generation of a family-owned business takes over. Many good plan providers don't remain good and there are outside elements beyond your control that cause it. The point is you need to be aware of any changes that could impact your retirement plan provider and the level of services that your 401(k) plan receives.

#### **When leaving, be a Mensch**

However, make sure that they cooperate on converting your plan to a succeeding plan provider. Firing a plan provider sometimes reminds me of the MTV television show *The Real World* which was filmed "to find out what happens when people stop being polite and start getting real." I often find that many plan providers are very cooperative until they're terminated by you and then, they pretend you don't exist and won't cooperate in the transition to the succeeding plan provider. In that case, contact an ERISA attorney who can make things happen or get the DOL involved.

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