401(k) Plan Sponsors: Let Your Providers Do Their Job

By Ary Rosenbaum, Esq.

Some of my worst clients are lawyers and I'm not afraid to admit that. The reason they are some of my worst clients is that since they know the law, they think they know ERISA and it's a federal law like no other. Lawyers sometimes get in the way of me doing my job. As a 401(k) plan sponsor, you hire plan providers to help you and the worst thing you can do is get in the way. This article is about how you should let your retirement plan providers do their job.

Let your TPA do their job by providing the correct information

The role of a third-party administrator (TPA) is to assist you with the day to day administration of your 401(k) plan. Unless you have a background in 401(k) administration, there is absolutely no way that you can do that job. Whether it's daily trading, reconciliation, allocation of contributions, compliance testing, or preparation of Form 5500 or a whole host of other tasks, your TPA does a lot of work. So the best thing you can do is get out of their way. How do you get out of their way? By letting them do their job. The first thing you can do is make their life a little easier by making sure you make those salary deferral deposits as soon as possible, preferably within 3 days. Outside of doing what you're supposed to be doing as a plan sponsor, one way you can help your TPA out is providing correct information on their census request. List the correct information about plan participants and make sure you detail the ownership of your company and any other companies that might have the same owners to make sure there is no control group or affiliated service group of companies that could affect meeting the coverage requirements of your 401(k) plan. You also need to alert the TPA as to your practice in administering the plan, just to make sure that your administration is consistent with the terms of the plan document. Your administration must be consistent with the plan document and any deviation from that document is a huge compliance headache if not corrected. So much of what the TPA does is dependent on the information you provide. If the information you provide is incorrect, the TPA can't correctly do their job., Providing wrong information for the compliance end is the same as the saying: garbage in, garbage out. Provide wrong information to the TPA and the compliance testing will be wrong. That's a problem if the compliance testing is discovered to be incorrect and causes the 401(k) plan to fail testing, especially when that error is discovered many years after the fact and when that error is discovered by an Internal revenue Service (IRS) or Department of Labor (DOL) agent on an audit. While a TPA can certainly make errors on their own and they do, they make more errors when plan sponsors likely you provide incorrect information.

Let the advisor show up and do their job

With all due respect, pretty much anyone can pick a fund lineup for a 401(k) plan. This isn't a knock against a financial advisor, just making a point. Picking a fund lineup is just a small aspect of what a financial advisor can do. A financial advisor isn't about picking funds for your 401(k) plan, advisors are essentially in the fiduciary liability protection business. They're in the fiduciary liability protection liability business because their role is protecting you from any claims you breached your fiduciary duty when dealing with the fiduciary process of the plan. There has always been a misconception when dealing with the liability aspects of offering participants the right to direct investments in their 401(k) plan. You are shielded from the losses sustained by participants who direct their investments as long as you meet the requirements under ERISA §404(c), it's that part people neglect. So, to get that fiduciary liability protection, you need a prudent process in place in selecting and replacing plan investments, as well as giving participants enough information so that they can make informed investment decisions. Helping you manage this fiduciary process is where the financial advisor comes in. A goods financial advisor will help you develop an investment policy statement (IPS), which is the blueprint on how investments are selected and when they are replaced. While an IPS isn't legally required, it's a blueprint and evidence that there was a prudent process in place to select and replace investments. What mat-

ters is that the IPS is implemented and followed because just putting it into place and forgetting about it is a breach of a prudent process. Also, the advisor needs to provide enough information so that participants have enough information to make informed investment decisions. That doesn't mean just handing them a bunch of Morningstar profiles and wishing them good luck. That means giving participants at the very least, investment education during the participant enrollment meetings. It could also mean on a higher level, offering them specific investment advice. However, too many 401(k) plan sponsors don't let their advisors do their job. When the advisor calls up to schedule the quarterly or semi-annual fiduciary and enrollment meetings, the plan sponsor gives the advisor the runaround, complaining that they're just too busy. We're all busy, but you need to provide time for your financial advisor to do their job since you're paying them a nice fee and their big job is to cover your rear end as a 401(k) plan sponsor. A good financial advisor will come in for the meetings and help you document everything that went on so that you could show the DOL or a court that you fulfilled your fiduciary duty as a 401(k) plan sponsor. They will also help you conduct enrollment/plan education meetings to get newly eligible employees to enter the plan and give all participants some investment information so they can do a better job in managing their own 401(k) plan investments, which does limit your potential liability. So while you're busy, you need to make time for your financial advisor to help you manage your plan. Otherwise, you're leaving yourself open to a whole lot of trouble that you can't afford. Let your advisor do their job and show up when they're supposed to.

Let your ERISA attorney keep you out of harm's way

When you hire an ERISA attorney, their job is to keep you out of harm's way. You can hire an ERISA attorney as a preventive measure or you can hire them in a reactive measure, i.e., fixing a big compliance error. Regardless of the reason, you need to let the ERISA attorney do their job, especially if they're charging you by the hour (which In only do, during a DOL or IRS audit). When it comes to having your 401(k) plan to comply with ERISA and the Internal Revenue Code, there are no short cuts or cutting corners. If your plan is broken, it has to be fixed and it has to be fixed according to methods prescribed by the DOL and IRS. You can go to Vegas or your local casino to gamble, but you should not play the audit gamble by not correcting plan errors in the hopes that you don't get audited within the statute of limits period for the plan year(s) in question. Taking your ERISA attorney's advice in maintaining and/or fixing their plan is better than taking your chances and not listening to their advice. Voluntary correction programs are a lot less to be a part of than the penalties levied by IRS and DOL agent in an audit. A retirement plan and trust is a legal entity, so trust a legal advisor's advice as to what needs to be done and when. As always, call me when you need some ERISA legal services.

Let your auditors review the plan

Larger plans (usually 100-120) need an audit that they must attach to Form 5500 by a CPA firm. The purpose of the audit is to verify the financial well-being of the plan and the plan's ability to pay benefits to plan participants. Auditors want to make sure the money is where the custodian says it is and they're looking for any compliance threats to those benefits. As preparation for their audits, the CPA firm will ask for statements, valuation reports, and documents to review. By not providing the CPA firm what they need, you're going to hold up the audit from being completed and most times, it's the audit that holds up the filing of Form 5500. Sure, you can get an extension to the filing of your 5500 but October 15th comes pretty quickly after July 31st and I've spent enough days being nervous on October 15th, waiting for the plan audits I have to personally file. If you give the CPA firm what they want in an expeditious manner, that's one less roadblock in your audit being completed.

Let the ERISA fiduciaries do what they were delegated to do

When you hire an ERISA §3(16) administrator to handle plan administration and/or an ERISA §3(38) advisor to handle the fiduciary process of the plan, you're delegating those part of the plan and the bulk of the liability that goes with. An ERISA §3(16) administrator is the named plan administrator, responsible for the filing of Form 5500, as well as signing off on plan distributions. An ERISA §3(38) fiduciary is responsible for the fiduciary process of the plan, they will implement the IPS, select investments, and replace investments without needing approval from the plan sponsor. Once you delegate the administration process and/or the fiduciary process to these types of an ERISA fiduciary, it's not time for you to stamp your approval on the work that they're responsible for. If the ERISA §3(16) administrator is signing off on distributions, they can do it without your approval, just like you don't need to approve an IPS that the ERISA §3(38) fiduciary is implementing. It's your responsibility to review what your providers do, but you should let them do what they're supposed to do. You should always provide the information needed for these fiduciaries to do their job, but you should at least them do their job. If you want a say in the plan administration and the fiduciary process, don't hire these types of ERISA fiduciaries. Otherwise, you're wasting money.

The Rosenbaum Law Firm P.C.

The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
Follow us on Twitter @rosenbaumlaw