

# 401(k) Plan Sponsors Should Focus On What The Government Is Focusing On

By Ary Rosenbaum, Esq.

In the movie Casino, Robert DeNiro as Sam “Ace” Rothstein wanted to take on the Nevada Gaming Board after they denied his request for his license. Andy Stone, a Teamster controlled by the Mafia and played by Alan King told him it was a bad idea: “The old man said, ‘Maybe your friend should give in.’ And when the old man says ‘maybe’, that’s like a papal bull. Not only should you quit, you should run!” As a 401(k) plan sponsor, you’re concerned with a lot of things as a plan fiduciary. However, the Internal Revenue Service (IRS) and Department of Labor (DOL) have covered quite a few topics to focus on. Like with the old E.F.Hutton commercials, treat the IRS and DOL like an E.F. Hutton broker, so listen when they talk.

## The Cycle 3 Restatement

The IRS requires your plan to get a new plan document through a restatement process every 6 years. The latest process is called the Cycle 3 restatement process and you need to make sure your plan is amended and restated by July 31, 2022. What is interesting about this restatement process is that it only covers changes made through the last required restatement, which is 2016. So that means an ancillary amendment for the CARES act distribution, will also have to be done by December 31, 2022. While many sarcastic plan sponsors will think that the restatement

process is some concession for ERISA. Attorneys to make bank, this has been consistent that a plan document conforms to law and it is the IRS that sets the time and nature of the restatement process. So while ERISA attorneys and TPAs have some fees to charge for a plan restatement, this is something mandated by the IRS. Qualified retirement plans must abide by the Internal Revenue Code to remain tax-qualified. One



of those Internal Revenue Code requirements is that the plan document must be restated when the IRS says so. So while you may hope that a restatement is optional, it’s not and you have to get it done if you want to still have a qualified plan. Failure to restate a plan document as required by the IRS is a qualification issue that may lead

to plan disqualification. If your plan gets disqualified, all participant accounts would be taxed immediately and you would lose deductions for previous employer contributions. If you’re late with drafting that restatements and the plan aren’t under review by the IRS, you would have to file with the IRS’ Voluntary Compliance Program for the missed deadline. If your plan is under review by the IRS and you missed

the deadline, a huge penalty or plan disqualification is coming your way. That’s why you must get that plan restated, in plenty of time before that drop-dead date of this January 31st.

## The missing participant problem

In the old days, plan sponsors didn’t do anything with former employees that had account balances that couldn’t be located. Plan sponsors only worried about missing participants when their plan was terminated and they had to locate these people to avoid filing another Form 5500. I remember we either used the IRS’ letter forwarding service to track people down or

forward the account balance to the IRS for 100% withholding. It was interesting because any participant including those that are missing is entitled to required notices and information under ERISA. So even with a requirement to provide notices and information to missing participants, there was almost zero enforcement from the

DOL on this, to make sure that plan sponsors comply. Due to the nature of employment these days where people bounce around from one employer to another, the DOL has discovered a huge amount of missing participant accounts within retirement plans. So the DOL decided to focus on this issue and provide guidance to plan sponsors and plan providers on how to locate missing participants and procedures if they still can't be located. Based on the nature of DOL plan audits these days and the questions that their auditors ask, I think it's extremely important for you as a 401(k) plan sponsor to develop a missing participant procedure. The procedure focuses on being vigilant and contacting former participants that leave an account balance in your plan. Thanks to the Internet and inexpensive locator services, it's not difficult or expensive to find former employees. Providing notices and information to former participants goes a long way in fulfilling your duties under ERISA and limiting your liability.

### **Offering crypto in your 401(k) plan, just don't do it**

I started in the retirement plan business where everyone wanted to be in a high-flying mutual fund with technology exposure, and then the internet stock bubble burst. People always want to chase returns and like my great grandmother once said, you should never run after a carriage that won't pick you up. Chasing returns never works and plan sponsors have contemplated adding cryptocurrencies as an investment option within their 401(k) plan. My simple suggestion: just say no. The DOL recently provided guidance to plan sponsor where it's clear they have zero interest in allowing plan sponsors the option to add it. The DOL has serious concerns about the prudence of a 401(k) plan fiduciary's decision to allow plan participants to direct investments in cryptocurrencies. The DOL also indicated that these crypto



investments present significant risks and challenges to participants' accounts including significant risks of fraud, theft, and loss because of valuation, non-regulation by the government, speculation, custody issues, and fraud. With these concerns, the DOL expects to conduct investigations aimed at plans that offer participant investments in cryptocurrencies and related products and to take appropriate action to protect the interests of plan participants concerning these investments. 401(k) plan sponsors that allow such crypto investments through brokerage windows will be questioned about how they can justify their decisions on allowing crypto investments, with their fiduciary duties of prudence and loyalty.

### **Cybersecurity issues**

I started in the retirement plan business in 1998, where all transactions were made on paper or over the phone. Thanks to technology, everything a plan participant can do, can be done online. The only issue is that ease, allows for the theft of plan assets through breaches of cybersecurity and this is another thing that the DOL is focusing on. The DOL released cybersecurity guidance directed at plan sponsors, plan fiduciaries, administrative record-keepers and plan participants. The DOL outlined 12 points for cybersecurity risk mitigation,

including conducting cybersecurity risk assessments at least annually, as well as conducting third-party audits of system security controls. The DOL also listed six points that you should follow to meet their responsibilities under ERISA. The DOL suggests that you ask potential plan providers whether they have cybersecurity insurance coverage, and review public information discussing the plan provider's cybersecurity track record and potential liabilities. When it comes time to enter into a plan provider contract, you need to be sure that the contract includes protections addressing access control policies, encryption policies, and a

notification protocol should a cybersecurity threat impact plan participant data. Lastly, make sure that plan provider contracts include a clause requiring ongoing compliance with evolving cybersecurity and information security standards. The 401(k) industry has already seen plan thefts through breaches in cybersecurity and you need to protect yourself and plan participants by following the DOL's current thinking.

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