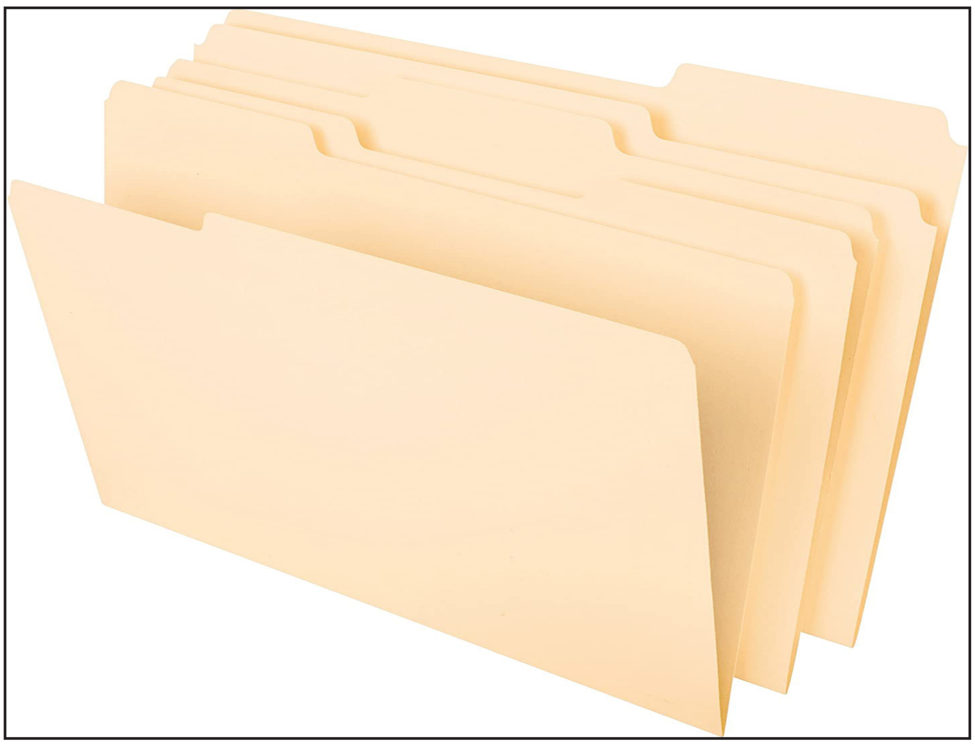
You Need To Be Organized As A 401(k) Plan Sponsor

By Ary Rosenbaum, Esq.

The Container Store can be both a heaven or hell, depending on your love or hate of organization. There are probably cheaper alternatives to organization than that store, but it's pretty amazing to see all of that stud under one roof. When it comes to the 401(k) plan you sponsor, you don't need to shop at The Container Store, but you need to understand that as a plan fiduciary that a lack of organization can lead to chaos and chaos can lead to potential fiscal liability. This article is all about organization and how it will minimize your financial liability.



Know Your Role

You're not just a 401(k) plan sponsor, you are also a plan fiduciary. No matter what you do or who you hire and what they do, understand that you're almost always going to be on the hook for liability. If your third-party administrator (TPA) screw up your compliance testing or fail to prepare your Form 5500, you're still responsible no matter what. Just remember that and why you need to be organized.

Avoid the Army of One

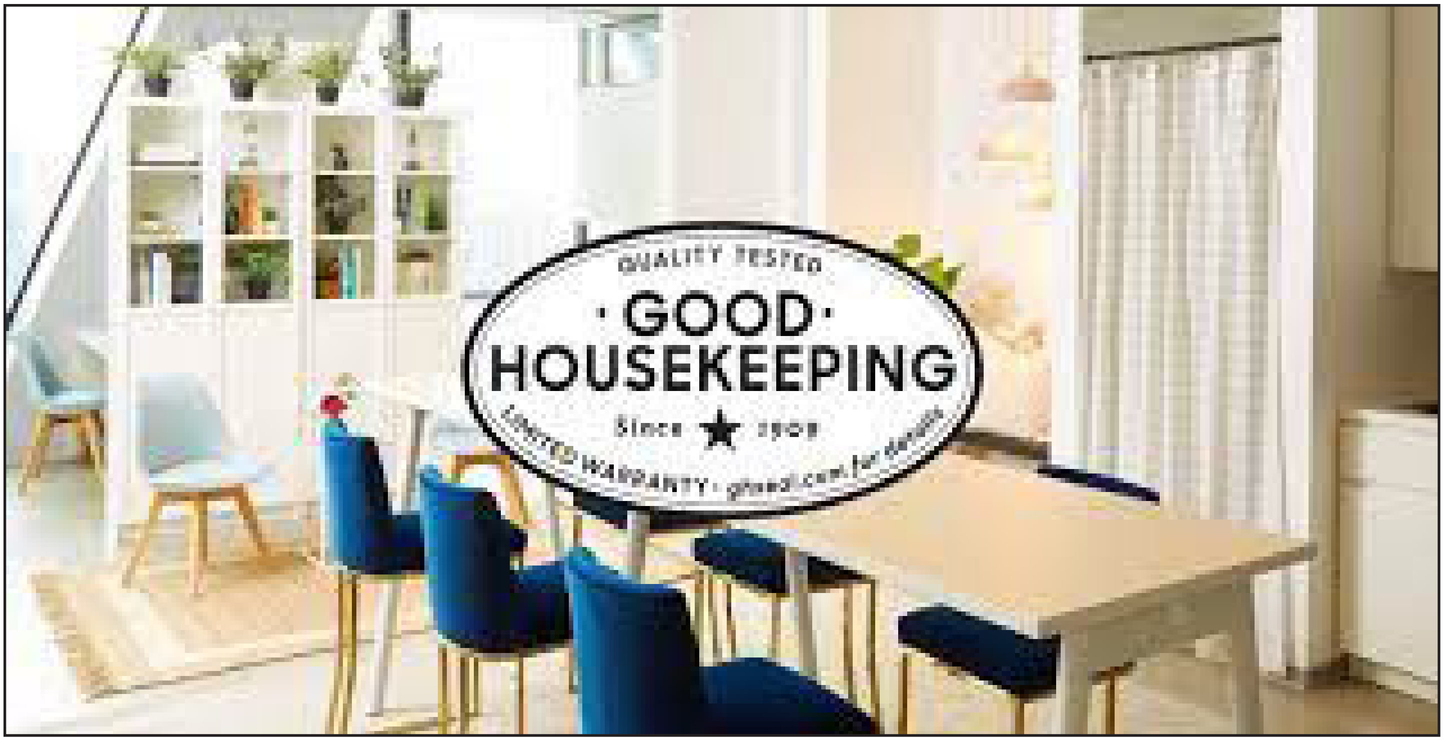
An Army of One was a slogan used by the U.S. Army for recruitment ads in the early 2000s. It's also the name of a Sopranos episode where Jackie Jr. got whacked. It was also the way I described myself as the only member of the legal department at the TPA I worked at when I tried to get a raise. It didn't work well for the raise and it was worse for them when I left and the Army of One eventually became an Army of Three. So many small and medium-sized employers just have one person in charge of their retirement plan and if they have a handful of employees, that is a bad idea. It's a bad idea because it reminds me of how we treated things at the first TPA that I worked with. At that TPA, we made sure that every employee shared the information on what they working on in case they got "hit by a bus." It's not that they thought employees would get hit by a bus or meet an untimely death, it just meant that they wanted to make sure that important information isn't lost if it's shared by more than one employee. I've seen too many times when someone would die or leave employment and the information they had, "died" with them. In addition, having multiple people with your 401(k) plan creates a system of checks and balances. I've found too many times where 401(k) plan sponsors had to pick up the pieces when they discovered that the solo person in charge of the plan was late in the deposit of salary deferrals for multiple payrolls over the years and they only discovered that error when that employee left. Consider using a "buddy system" for your 401(k) plan where at least two people (preferably more as discussed below) will be involved in the day-to-day administration of your plan.

Forming an apparatus/committee

Managing 401(k) plans require you to serve in a fiduciary capacity and that requires you to have the highest duty of care. Among those duties is the duty of prudence. One way is making sure you have a prudent process in place to manage the plan and one way of being prudent is creating an apparatus in managing the plan. That apparatus should be some sort of governing body that manages the plan. We usually call that apparatus a committee, but there are plan sponsors that may call it something else. Whatever the title, it makes sense to have an entity within your organization that serves as the governing body for your 401(k) plan.

The problems with committees

Whether it's called a committee or not, there are problems inherent with these governing bodies (I will call it the committee for this paragraph). The biggest problem with committees is the joke I made about the managing attorney for the law firm I



worked at. I joked that if Lois wanted to ignore an issue, she would create a committee for it because nothing would come out of the committee. I was selected to a committee for an alumni organization recently and I knew it was doomed from the first meeting because there was no set agenda on what needed to be accomplished and when you set no goals, you get bogged down in minutiae. The first problem with committees is size. Too many members create paralysis and too few can serve as a dictatorship. Take the Goldilocks approach, the number of members for the committee has to be just right. The committee does need a set of by-laws serving as a constitution or operating agreement so it has rules that it adheres to because chaos does not rule. The committee also needs an agenda and a purpose and that purpose is managing the plan.

Hiring a good advisor and let them do their job

Hiring a financial advisor goes a long way in organizing your plan. A financial advisor isn't just about picking investment options for the plan because anyone can just simply pick index funds for a fund lineup. A good financial advisor helps you manage the fiduciary process. They can assume almost all of the liability of the fiduciary process by serving as an ERISA §3(38) fiduciary or serve in a co-fiduciary capacity by serving in an ERISA §3(21) or under the new definition of fiduciary if they are a broker. One of the biggest misnomers about 401(k) plans is that employers aren't liable for the losses sustained by participants when these participants make their investments. That's not true if 401(k) plan sponsors don't "organize" their fiduciary process in a prudent manner. You need to hire a qualified financial advisor and you need them to do their job by meeting them when they request. They will assist in developing an investment policy statement (IPS), selecting and replacing investments based on that IPS, and providing enough information to participants so that they can make informed investment decisions on their own. Another way you could get the advisor to do their job and act as a roadblock is by allowing them in and every now and then providing investment education through participant enrollment meetings.

Be a good 401(k) housekeeper

When it's at your home, it's great that you have great housekeeping skills. As a 401(k) plan sponsor, minimizing your fiduciary liability can be done through some good housekeeping. When you have a 401(k) committee, it's important to have meetings and it's important to take minutes of these meetings. Any decisions or considerations made during these meetings must be documented. The minutes of the meetings need to be kept. Also what needs to be kept are the IPS and all plan documents, even if they've been completely restated, as well as plan records for the past 7 years. Make sure that your financial advisors meet with you regularly during these committee meetings. Memorialize any discussion of investment decisions made. Make sure that participant enrollment and education meetings are handled regularly, tied into the date where participants enter the plan. You also need to review your TPA and other plan providers consistently to make sure that they're still handling the plan competently. You also need to make sure that you collect all fee disclosures provided by your plan provider, as well as benchmarking those fee disclosures to make sure that the fees being charged are reasonable for the services provided. Good 401(k) plans don't happen by accident, it takes vigilance and good housekeeping.

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