401(k) Plan Sponsors Need To Sweat The Small Stuff

By Ary Rosenbaum, Esq.

"Often we allow ourselves to get all worked up about things that, upon closer examination, aren't that big a deal. We focus on little problems and blow them out of proportion. … Whether we had to wait in line, listen to unfair criticism, or do the lion's share of the work, it pays enormous dividends if we learn not to worry about little things. So many people spend so much of their life energy "sweating the small stuff" that they completely lose touch with the magic and beauty of life." That is a quote by Dr. Richard Carlson, the author of Don't Sweat the Small Stuff…and it's all Small Stuff (1997). Dr. Carlson probably was never a 401(k) plan sponsor because 401(k) plan sponsors have to sweat the small stuff. After all, they often ignore the small stuff. This article is all about identifying the small stuff that 401(k) plan sponsors like you need to identify and be concerned about.

Hiring plan providers

One of the biggest mistakes I ever made in life was hiring a contractor to renovate a bathroom and build an extension in my house. The mistake I made was I never considered other contractors and I never benchmarked their fee. When I had to sue them after they walked off the job, I had regrets. What I do for my house is my problem, what I would do as a plan fiduciary is different. If you want to be careless with your money, you can. However, as a plan fiduciary which is your role as a 401(k) plan sponsor, you can't. As a plan fiduciary, you need to be more careful about the retirement assets of your employees than your own money because you have a higher duty of care as a plan fiduciary. When it comes to hiring providers for your 401(k) plan, you just can't simply pick the first provider you meet. You need to meet a handful of providers for each plan provider position (such as third-party administrator (TPA) and financial advisor) and decided which one is the best fit. Don't pick a plan provider just because they're cheap or because they're related to you, because they do your payroll, or because they will help you in ways outside of the plan. You need a process in place to review potential providers and a criteria that is rational when it comes to selecting a plan provider that is the right fit and charges a reasonable fee for the services provided.

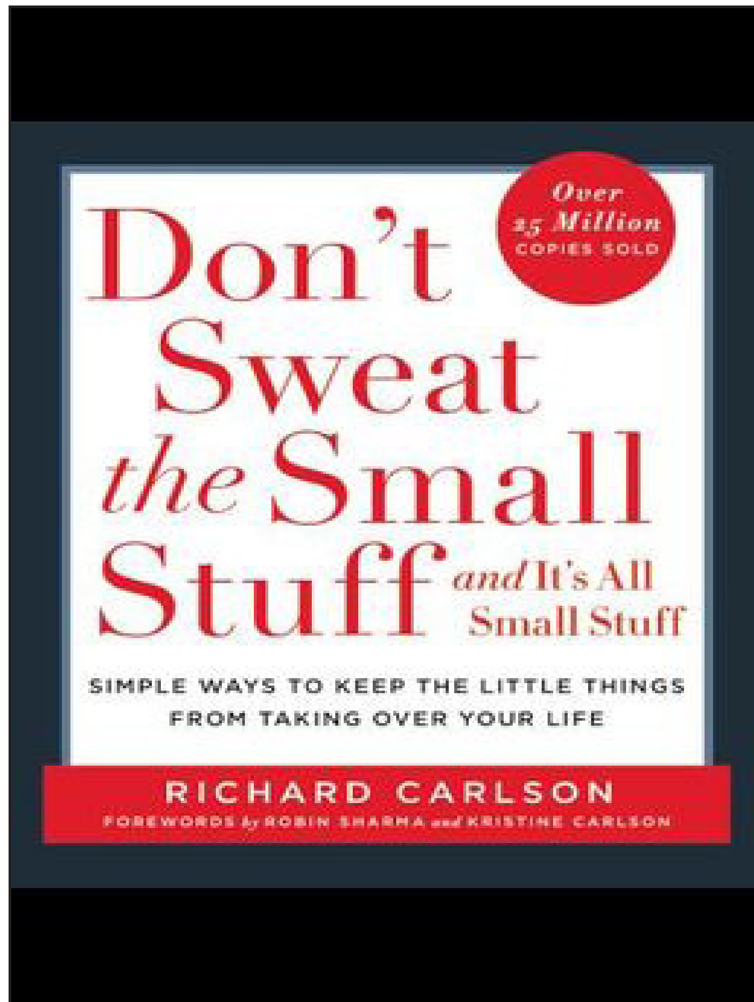
Identify all fees

When you buy a 2 liter of soda, you know how much it will be. The retirement plan business isn't satisfied with just one fee. While ERISA attorneys may charge you by the hour or a flat fee (much better) and advisors charge an asset-based or flat fee, TPAs may charge you many ways. A TPA can charge your plan one or more of the following ways: a base fee, a participant fee, or, an asset-based fee. These fees can be charged proportionally, per person, or per capita. These fees may or may not be reduced by revenue sharing/sub-TA fees paid by particular mutual funds in your 401(k) plan. I used to joke that some TPAs would create a fee, just to replace a fee they had to eliminate (such as when revenue sharing payments have to be fully disclosed). Not every type of fee is the same and not every TPA charges the same type of fee. As a 401(k) plan sponsor, you need to identify all the fees being charged to the plan and understand them. Without identifying and understanding the fees, you will have no idea whether the fees being charged to your plan are reasonable for the services being provided.

Have any plan provider contract reviewed

A contract is a legally binding document with consequences for both parties that enter into it. The problem is that it tends to be one-sided when the plan sponsor doesn't have counsel to review the agreements they have with their plan providers. Contracts should be reviewed for fees, breadth

of services, as well as questions regarding the termination clause. There have been plan providers out there who promise a 401(k) plan sponsor that hired them, the moon, but the contract offered far less. Some financial advisors promise they will serve in a fiduciary capacity for the plan, yet the contract disclaims any fiduciary role and fiduciary liability. A contract review by an ERISA attorney will go a long way in protecting you from any unforeseen harm that is within the parameters of that plan provider agreement. One of the terms that a 401(k) plan sponsor tends to ignore is the termination provision. Hiring a plan provider is like getting married: you go in with the best of intentions, but things go south. While most marriages are really until death does them apart, a plan provider is hired to be fired. That's why that every plan provider contract has a termination clause and unless there is a pre-nuptial agreement, a marriage license does not have a divorce clause. A termination clause in a plan provider contract should have the notice requirement as well as any costs that are due for a plan provider through a deconversion process (usually the TPA). From experience, the termination costs should be clear and understandable and the TPA should not be expected to be compensated for services that they've already been paid for such as the Form 5500, even if it is completed the following year.



The annual census request and client questionnaire

After the end of each plan year, the TPA will provide you with an annual census request and client questionnaire. While the information request sounds redundant because it seems the same questions every year, it's a necessary exercise. It's necessary because the census request and client questionnaire are dependent on for the plan's compliance testing. Your plan is qualified under the Internal Revenue Code. By complying with the provisions of the Code, the plan will allow tax-deferred treatments over the retirement plan assets as well as deductions for your corporate tax return for any employer contributions you make. One of the comping provisions with the code is abiding by compliance testing to make sure that your plan isn't discriminating in favor of highly compensated employees. That's why it's important to be correct and be honest in that census and questionnaire. Garbage in and garbage out is what I call compliance testing based on incorrect information included in a census and questionnaire. If you provide incorrect salary info for your employees or you forget to mention ownership stakes in other businesses, the testing is going to be skewed and the problem is that testing has to be accurate. I've seen too many errors discovered years after the fact because the plan sponsor reported incorrect information and the problem is that the bill to fix issues becomes more expensive than when it's detected early.

Review those fee disclosures

As a plan sponsor, you have a fiduciary duty to pay only reasonable plan expenses. That doesn't mean you need to pay the least amount in fees, it just means it needs to be reasonable. The only way to understand whether the fees being charges are reasonable once you identified is by checking what other plan providers would charge. You need to benchmark your fees and show evidence of it and you can't afford to take your providers' word that their fees are reasonable.

Keep good records and hand out required notices

Whether it's taking minutes of your fiduciary meetings, keeping attendance of participant enrollment/education meetings, and keeping copies of all plan documents, you need to keep good records. You also need to make sure that all participant notices are handed out including copies of the new Summary Plan Description and Summary Annual Report. You have a job to do and there is no turning back (I love the movie Dunkirk, by the way). While it seems like the small stuff, keeping good records and doing a good job is all about showing that you're following a prudent process in managing your plan. Whether it's an Internal Revenue Service or a Department of Labor audit or a lawsuit, following a prudent process and keeping good records is your 401(k) plan sponsor version of the "Get out of Jail Free" card.

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