For The 401(k) Plan Sponsor, "Secrets" Of The Retirement Plan Business Exposed

By Ary Rosenbaum, Esq.

Even with fee disclosures, there are certain things. are still not transparent in the retirement plan business. The problem is as a 401(k) plan sponsor, you need to know these things because these secrets could hurt you and cause you pecuniary harm. As someone who hates surprises and secrets, let me let you know some things about the retirement plan business to keep you out of harm's way.

The real fiduciary threat doesn't come from litigation

One of the great selling points from retirement plan providers concerning plan costs and fiduciary duty has been the explosion in litigation against retirement plan sponsors over the last dozen years. Many well-known companies have been the target of class-action lawsuits, which has had a chilling effect on many retirement plan providers and with fee disclosure requirements as well, has helped drive down fees. The thing about class action lawsuits is that unless you're a big company with lots of retirement plan assets, you're not likely the target of a class-action lawsuit. The reason is rather simple, you're not worth the time of ERISA litigators. I'm not trying to insult you, but just being frank on how this class action litigation game goes. Class action litigators take these ERISA cases on a contingency, they work on a case upfront with the hopes of a large settlement later down the line, which could be 33-40% plus costs. ERISA litigators want to work on "whales," retirement plan sponsors with deep pockets who would have to shell out millions in an ERISA class action settlement. While there have been a handful of small and medium-sized 401(k) plans that have been sued, they are certainly few and far between. The real threat to you as a plan sponsor is a government audit, whether conducted by the Internal Revenue Service (IRS) or the Department of Labor (DOL). The reason why these audits are a real threat is that the audit is the opportunity when compliance errors that have been ignored or not detected, are discovered by a government auditor. Just like when a plan sponsor changes their third-party administrator (TPA), errors you may not be aware of, might be discovered on an IRS or DOL audit. The problem with detecting errors then, rather than correcting them when they first happen is that it's costlier. Some cheaper solutions to correct errors may be too late to be allowed, as well as self-correction comes without penalty. Plan errors discovered on a government audit may subject you to penalties by the auditor that never would have been applicable if you had the chance to self-correct before the audit.

A good TPA keeps the errors away

I think I'm a pretty good retirement plan provider, I think the same way for most of the financial advisors and auditors I know. However, I do believe that the most important plan provider you can hire is the TPA. The difference between a plan in compliance hell and the one that is doing well usually depends on the TPA you use. While many compliance errors can be caused by a plan sponsor that provides incorrect information to their TPA on their annual census request, I usually find the TPA to be the main culprit of most compliance errors. The difference between a good TPA and a bad TPA is that the good TPA commits fewer errors. That's why it's important who you pick as your TPA. You need to stress quality over cost. You need to see a TPA as being more than just a price. You need to find a quality TPA that fits your needs as a plan sponsor and understand that picking a TPA because they're the cheapest isn't going to work out.

Anyone can pick mutual funds, a good advisor is there to minimize your liability

When you have employees, your 401(k) plan is covered under ERISA. While you can certainly handle your own investments with your own money, you do need a finan-

cial advisor for your plan. Sure, you can pick mutual funds for a fund lineup. I think anyone who could read Morningstar profiles could figure out a decent fund lineup, but that's not what a good financial advisor is important for. A good financial advisor will help you minimize your fiduciary liability by helping you manage your fiduciary process. That means developing an investment policy statement, selecting and replacing investments based on that policy, as well as educating plan participants. If your plan offers participants the right to invest their 401(k) account on their own, you might be mistaken that you're free from liability for losses sustained by them. That's not true if you don't have a prudent fiduciary process in place. If you don't have an investment policy statement, you haven't reviewed funds in the last 10 years, and haven't provided education to plan participants, chances are that your liability protection for participant losses is slim to none. That is why you need to hire a financial advisor with knowledge of retirement plans and the effective ways to limit your liability as a plan sponsor.

The sticker shock of termination costs

Some people hate prenuptial agreements because it makes them feel uncomfortable when they're on the verge of getting married. People hate bringing up sore subjects when there is hope and dreams surrounding the impending nuptials. The same can be said of hiring a plan provider. Other than a notice requirement in a plan provider contract, you may not see what else comes with firing that plan provider. If you fire the TPA, you may owe deconversion costs for transitioning the plan to the next TPA and/or charges that might have actually been paid as part of your annual services, such as the Form 5500 and annual valuation, even if it has to be completed the following year. Someone from one of the most well-known retirement plan provider associations advised me that the most popular complaint with plan providers deals with termination. I recently had a situation with a certain TPA that wanted to shake down a plan for $80,000 for the completion of a Form 5500 and valuation that the plan had paid for, as part of the $130,000 annual fee. I've seen plan sponsors hammered by surrender charges, assessed against them because their retirement assets are contained with an insurance product. The same can happen when you terminate the contract connected with your stable value fund if there is a market value adjustment. There is nothing wrong with costs associated with terminating one or several of your plan providers, but the problem is when you don't know what those fees are upfront. As a plan fiduciary, you have a duty to only pay reasonable plan expenses for the service provided by your plan providers. Excessive termination costs may violate that duty.

No magic pill can cure you, nothing can fully eliminate your liability

You can only minimize your fiduciary duty as a 401(k) plan sponsor, you can never fully eliminate it. Even if you delegate some of your fiduciary duties to a plan provider such as an ERISA §3(38) advisor or ERISA §3(16) administrator, you're still on the hook for liability in hiring them if they do something wrong. While certain hucksters may claim they will eliminate all of your fiduciary liability, just remember that no magic pill can cure you by eliminating all of your liability.

There isn't a solution for everybody

Every day, there seems to be a new product or solution for plan sponsors like you. It could be a sparkling plan provider website, a new type of plan design, or another service where you can delegate your fiduciary liability to a plan provider. Whatever the product or solution may be, it doesn't mean it has to be right for you. Even hiring an ERISA §3(38) to assume the fiduciary process or an ERISA §3(16) administrator to handle the day to day administration of your plan may not be a good fit if you are diligent in your duties as a plan sponsor and you don't want to give up control of any parts of your plan. No matter the "gimmick" they're trying to sell you, there is nothing in the retirement plan business that is the right fit for every plan sponsor. Like with Goldilocks, anything being offered has to be "just right."

THE ROSENBAUM LAW FIRM P.C.

Copyright, 2021 The Rosenbaum Law Firm P.C.
All rights reserved.
Attorney Advertising. Prior results do not guarantee similar outcome.

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