As A 401(k) Plan Sponsor, Some New Things For You To Know About

By Ary Rosenbaum, Esq.

The problem with being a 401(k)-plan sponsor is that you have to be on top of everything because as a fiduciary, you have the highest duty of care in law and equity. Being on top of everything also includes finding out what is new and what might be a great fit for your 401(k) plan. In addition, what also might be new is a new law and regulation or current government thinking that will require you to comply. So this article is about changes in the 401(k) plan business that has occurred or will occur that you should review and/or consider.

Another crack at the fiduciary rule

As you are probably aware, the Department of Labor (DOL) has been trying to implement a new fiduciary rule that would require all retirement plan advisors to operate on a fiduciary level because brokers don't meet the current definition, which goes back to 1974. The DOL tried to implement a new rule for the second time a few years ago, but the election of President Trump and litigation by the securities industry led the DOL to withdraw the proposed rule. The DOL has indicated that they will take another crack at it this December. Perhaps the third time will be the charm for the DOL as they try to replace a 45-year-old fiduciary rule that actually predated 401(k) plans. As a plan sponsor, all you need is a wait and see attitude concerning a new rule because if you use a broker, it's going to be on them to comply. If you use a registered investment advisor, well they've always served in a fiduciary capacity. So while the fiduciary capacity will likely require nothing for you to do on your end, I think it's important to identify that it's an issue that is going to be discussed and going to have to be complied with by your broker (if you use one as your financial advisor).

The student loan match

As a 401(k)-plan sponsor, you need to realize that one of the problems, why employees don't defer in your plan, is because they can't afford to. One major reason why they can't afford to is student loan debt. Student loan debt is likely the next financial bubble to burst and as a 401(k) plan sponsor, you should consider what can be done to alleviate this problem for your employees. It's amazing that when I met my old law school's new Dean a couple of years ago, she advised me that room, board, and tuition for my alma mater is now $75,000 a year. So a law student could have $225,000 in student loan debt at graduation and that doesn't include any college debt. If an employee has to service debt in the hundreds of thousands of dollars, they're not going to afford much to defer in a 401(k) plan. One company, in particular, realized that, so they asked the Internal Revenue Service (IRS) whether it was legal for them to offer a 401(k) match that could actually go towards particpants who don't defer because they are paying their student loan debt. The IRS said it wouldn't be an issue, so that has opened the floodgates for companies and plan providers to develop a program that would allow participants who pay off student loan debt to receive a matching contribution. Companies like my friends at Thrive or Vault offer programs within a 401(k) plan to offer the student loan match and they offer other student loan assistance programs outside of the 401(k) plan. As a plan sponsor, you need to identify any roadblocks that participants have to go through if they want to defer and one of the biggest problems out there financially are student loans.

Missing participants/ uncashed checks

I have always been under the belief that when participants leave your employment, it's best that they take their 401(k) account balance with them. If they're over a certain threshold ($1,000 or $5,000), they must give consent to any distribution. Unless their account balance is under the threshold, you simply can't cash them out. That's why I believe that as a 401(k) plan sponsor, you need to be very vocal that participants should take their account balance with them upon their termination of employment. Whether the participant takes the distribution in cash or transfers it to their next employer's plan or an Individual Retirement Account (IRA), you don't need the hassle of having them keep their money in your plan. Having former employees in your plan is a headache because of the continued notice requirements and the fact that former employees

are more likely to complain about your plan that current employees. If the former employee doesn't take a distribution at the point of severance from employment, they are unlikely to take a distribution later down the problem. That becomes an administrative headache because eventually, you lose touch with these former employees and they might become missing when they move. The reason this is a major problem is that the Department of Labor (DOL) has identified missing participants as an area where they want to provide more guidance and supervision. Right now, I'm going through a DOL audit on a terminated plan and the agent asked about missing participants and whether there was a process in place to locate them. I think the best practice is that after contacting a plan participant upon termination that they should consider taking their 401(k)-account balance with them is that the process should be repeated annually. If missing participants are under that involuntary distribution threshold (that $1,000 vs. $5,000 threshold where participants need to provide consent if it's over it), then you should consider using an automatic rollover IRA that is allowed under DOL guidance. Of course, you're going to have to go through a process to locating these participants first and you can move them to an IRA custodian after you've gone through the process. Most 401(k) custodians and platforms have their own preferred automatic rollover IRA solution. It might be their own solution or a provider whose primary business is being an automatic rollover provider. So whether you use Millennium Trust, Pen Checks, Rollover Saver, or my friends at FPS Trust, you actually have to do some information gathering. You need to identify the costs involved with setting and maintaining these accounts, and what they will invest in. Many of these providers will charge a nominal fee for the account and hold the money in an FDIC insured bank accounts. Others like FPS Trust may offer investments that mimic the 401(k) plan or allow for professional investment selection, which means these former participants may have some capital preservation and growth since bank accounts haven't paid much since the early 1990s. In addition to missing participants, you also need to be concerned with uncashed checks. Uncashed checks to former participants are likely to be another DOL focus point and they're an issue that most 401(k) plan sponsors and their plan providers kind of ignore unless they're vigilant in making sure their 401(k) asset balance is accurate. The problem with the uncashed check issue is that there is absolutely no guidance from the DOL and IRS on this. I still believe that assets attributable to uncashed checks are plan assets, so it's important that you develop a process to deal with that since being a 401(k) fiduciary means you are a fiduciary of all plan assets. You're going to have to go through the whole process of trying to locate these participants and if you can't, perhaps transferring their account balances to a Roth IRA since any uncashed check has had withholding taken from it and is no longer qualified money that you could keep in your 401(k) account. Any IRA provider that you deal with, could assist you with uncashed checks. I believe that missing participants and uncashed checks are going to be a big issue and the only reason why is because the DOL is saying it will be for them.

Shelf space payments

Prior to fee disclosure regulations, revenue sharing was a very big deal in 401(k) plans. It meant that certain mutual funds would pay a fee to a TPA to defray costs and expenses in plan administration. Only certain mutual funds ever paid that revenue sharing and it gave them the impression that there was some sort of kick-back or pay to play scheme. Litigation and fee transparency has made revenue sharing a very unpopular concept in 401(k) plans. The problem is that certain plan providers have been struggling with the loss of revenue sharing and they're upset that some of the low-cost funds such as Vanguard are getting a free ride on their platform. So many of these plan providers that have custodial platforms and have their own proprietary funds developed what I and many people call "shelf space payments". These are payments by mutual funds to the custodial platforms for access to those platforms. These payments are beyond what plan providers need to disclose to plan sponsors under fee disclosure regulations, so they were not. The problem is that one particular custodian is being sued and being investigated for these shelf space payment arrangements. As a 401(k) plan sponsor, you have a duty to know if these arrangements exist for your plan and what the fees are being paid to the plan custodian and you could do that, just by asking your advisor. As a 401(k) plan sponsor, you can't afford surprises.

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