

Good Bets by a 401(k) Plan Sponsor to Avoid Liability

By Ary Rosenbaum, Esq.

I don't gamble because I don't like to lose and that's a big problem about gambling because people do lose. I stopped playing Powerball and Mega Millions. The last time I ever bet on a sport was betting a friend \$10 on the Riddick Bowe-Michael Dokes fight because putting money on Bowe was as close to a sure thing way back then. When it comes to a 401(k) plan, there are no sure things. However, there are bets that a plan sponsor can place that will have great odds in having the plan be in good shape and away from liability. So this article is about betting that a 401(k) plan will be fine by making good decisions.

Hiring a good TPA

With apologies to financial advisors, ERISA attorneys, and auditors, the most important plan provider that a retirement plan sponsor can hire is a third party administrator (TPA). I don't say that because they refer me work or market with people because most TPAs aren't very good at marketing ☹. I say that is because it's the truth. Retirement plans require a lot of good recordkeeping and precision compliance testing to see if the retirement plan can remain qualified under the Internal Revenue Code and compliant under the Employee Retirement Income Security Act of 1974 (ERISA). While many large 401(k) plans might be a target of class action lawsuits by participants for high fees, the larger threat to small to medium sized plans is poor administration and compliance. Too many plan sponsors scoff at the selection of a TPA because they really don't understand what a TPA does and

what the value is of a good TPA. Most plan sponsors don't know what a bad TPA does until it's too late and there are compliance issues because it was found during an Internal Revenue Service or Department of Labor audit or because they switched TPAs

payroll too is a good recipe for disaster.

Hiring a good financial advisor

Many plan sponsors think that a financial advisor only picks mutual funds and than any chimpanzee can do their job. A financial advisor is much more than selecting investment and quite honestly, it's not their most important role. The most important role that a plan sponsor has is minimizing the fiduciary liability of their 401(k) plan sponsor client. Protecting a plan sponsor isn't about getting the best investment options or how well plan participants earn in their retirement savings. It's not about results; it's about a process. What a good retirement plan advisor is making sure the fiduciary process is being run correctly. The process for a participant directed 401(k) plan is putting the plan participant in a good position to make informed investment decisions. That means providing investment education and/or advice to plan participants on investment options that were selected based on a criteria set by the plan sponsor and/or financial advisor. Using an investment policy statement (IPS) to select plan investments and even providing general investment education to plan participants isn't legally required, but it's paramount to avoiding potential liability. I always say that happy plan participants never leave and plan participants who make money in their 401(k) plan aren't likely to sue. A process that outs plan participants in a spot where they can make informed investment decisions will avoid liability than



a process that does not. It also makes sense to hire a financial advisor who has a broad experience in helping manage 401(k) plans, not a financial advisor who needs training wheels and using your plan as a learning experience. A good bet for a 401(k) plan sponsor is to hire a financial advisor with the experience to handle a retirement plan and understand the fiduciary process that need to help manage.

Communicating with plan participants

About 90% of the time in my life that I have had a falling out with someone was because of a lack of communication. Either I wasn't effective in getting my point across or the other person wasn't good at conveying their thoughts. When it comes to dealing with people, communication is key. When it comes to having a retirement plan, I would say that most plan sponsors fail at communicating well with plan participants. 401(k) plan sponsors often forget why they set up their retirement plan in the first place, to be an employee benefit. By forgetting the purpose of the plan, they forget how to communicate what a great benefit is. Employees can't get excited about their 401(k) plan if their employer treats it with less concern than the coffee machines it provides in the employee lunchroom. Plan participants won't know about their retirement plan unless the employer tries to communicate about it. Plan education/enrollment meetings should be advertised rather than being as treated as well as an upcoming visit to the dentist. Excitement can be contagious and so can apathy, so plan sponsors can convey more excitement by doing a better job of advertising education/enrollment as well as perhaps offering raffles to get plan participants to attend. I think better communication will increase plan participation in salary deferrals and avoid some participant disgust that could lead to litigation and/or complaints to the Internal Revenue Service or Department of



Labor. Plan sponsors should also know that timely distribution of all required notices is also an effective form of communication because it can avoid compliance headaches later down the line. Good communication is a good bet for plan sponsors because better-educated plan participants are less likely to be a liability threat to the employer,

Keeping good records

Good housekeeping will keep any home in good order and good recordkeeping can go a long way to keeping the 401(k) plan in good order and avoiding liability. Something as simple as keeping good notes and keeping transactional records, reports and plan documents can help a plan sponsor out. Keeping good records helps a plan sponsor manage the plan as well as show the government and/or plaintiff ERISA attorneys that they have operated the plan in a prudent manner. Many compliance issues are as a result of a plan sponsor not retaining old records such as old plan amend-

ment. Good recordkeeping is a good bet because it's an inexpensive way in limiting a plan sponsor's liability.

Maintaining fiduciary liability insurance

Even a vigilant 401(k) plan sponsor can't guarantee that there won't be litigation from aggrieved plan participants or from the government. Litigation of any kind can be costly, so that's why plan sponsors should purchase fiduciary liability coverage. Fiduciary liability coverage is different from an ERISA bond. An ERISA bond only protects plan assets from theft and is legally required. An ERISA bond does not protect plan fiduciaries from the costs of litigation and a fiduciary liability policy is not required. Maintaining fiduciary liability just makes good sense because the costs are nominal when you compare it to the costs of potential liability as a plan sponsor and fiduciary. I once worked with a plan sponsor that has \$1 million of litigation costs from a class action lawsuit brought against them that they won.

The fiduciary liability policy they had limited their cost to the \$100,000 deductible. So as a plan sponsor, it's a good bet to purchase fiduciary liability coverage.

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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