Things That 401(k) Plan Sponsors Are Supposed To Do, But Aren't Doing Anyway

By Ary Rosenbaum, Esq.

There are so many things in life that we're supposed to do, but we don't. Flossing teeth and gums are probably at the top of the list, along with drinking 8 cups of water daily, plus eating lots of fruits and vegetables. If we don't do what we're advised to for our health, it's on us. For 401(k) plan sponsors, not doing what you're supposed to do is a big problem because you're a plan fiduciary and that might incur liability. This article is about things you should be doing as a 401(k) plan sponsor, but you're probably not doing anyway.

Keeping good records

The Internal Revenue Service (IRS) agent conducting plan audits take a half-empty/ pessimistic look at retirement plans that don't have the necessary plan documents and paperwork means that they never put it into place. So if you don't have the required plan document or restatement, the IRS agent will assume that you never put it into place in the first place. IRS does require plan restatements every six years and may require the implementation of ancillary amendments to take care of certain law changes. So it's important that you keep track of all your plan documents and amendments and note anything missing to make sure you don't need to apply for the IRS' voluntary compliance program. In addition to plan documents, you also need to keep copies of any plan loans, valuation reports, compliance tests, and distribution forms. These records are extremely important if you're audited by the IRS or the Department of Labor (DOL) or there is some issue with a current or former participant. I've spent 20 years in this business, so I've seen so many errors and even attempted thefts that were thwarted because of great recordkeeping by the plan sponsor. On the flip side, I've seen plan sponsors being penalized for not having something that they did at one point. Yes, I know the files and records can be burdensome, but we also live in a technological world where we can store many of our paper records electronically. Everything relevant to the plan should be kept, especially participant records, compliance tests, and plan documents. While most ERISA documents can be jettisoned after 7 years, that isn't the case for plan documents, If you have the original 401(k) plan document in 1982, you'll need to keep it until 3 years after the plan has been terminated.

A plan review

One of my favorite scenes in the first Austin Powers is when Dr. Evil walks away and doesn't want to see the death of Austin Powers and Ms. Kensington because like most James Bond villains, he'll assume it will all go to plan. Like the Bond movies, these elaborate deaths of Austin doesn't happen. Like Dr. Evil, 401(k) plan sponsors have this weird assumption that everything concerning their 401(k) plans goes to plan and they're almost always wrong. While 401(k) plans should be properly administered, mistakes do happen, I know that every time that I see a typo in my articles. As a 401(k) plan sponsor, you can't assume that your plan is doing is fine. If you ask your plan providers if the plan is fine, they'll tell you. Asking your plan providers is your plan is doing well is like asking a Yankees fan about the chances of the Red Sox come playoff time. Viewpoints from plan providers who either have no incentive to tell you the plan has no problems or has no knowledge that he plan has no problems doesn't do you any good. The problem with any plan errors is that they're usually only discovered on a plan audit by the IRS or DOL or if there has been a change in the third-party administrator (TPA). The problem with correcting errors years later is that it's more expensive to fix and some corrections that might not have cost you money are no longer available because too much time has passed. I offer these plan reviews called the Retirement Plan Tune-Up that only costs $750 and can be paid from plan assets. It's an independent review that can help give the plan sponsor, piece of mind, and for the past 10 years that I've offered it, I've only done about 10 of them. The reason I've done so few isn't for the lack of trying, it's because plan sponsors aren't pro-active, they're reactive. That means they won't nip things in the bud, they will only act when something goes wrong in their plan and the problem with

that approach are the costs.

Purchasing fiduciary liability insurance

Too many plan sponsors don't know the difference between an ERISA bond and fiduciary liability insurance, so they decide to cheap out on protecting themselves. Every plan covered under ERISA must purchase an ERISA bond, the bond covers plan assets from theft by plan fiduciaries. If your plan doesn't have an ERISA bond and you answer that you don't have one on the annual Form 5500, don't be surprised your plan gets audited by the IRS or the DOL. While an ERISA bond protects plan assets from theft, it doesn't protect you. If you're being sued by a plan participant, you may be liable not only as a plan sponsor, you may be personally liable. A good fiduciary liability policy will protect in case of litigation. I had a client that was targeted for a class-action lawsuit over their retirement plan. They won the case, but the problem was that $1 million in legal expenses. The beauty of having fiduciary liability insurance is that my client was only on the hook for the deductible ($100,000). Litigation is expensive and fiduciary liability insurance can protect your business and anyone in your business that can be considered a fiduciary. Fiduciary liability insurance won't break the bank, like buying a whole life policy for a 75-year-old. It's an expense that can keep your mind at ease when it comes to any potential liability.

Providing required notices

One of the requirements for ERISA plans is providing legally required notices and documents to plan participants. Whether it's a new Summary Plan Description, a Summary Annual Report, or a safe harbor notice, you have requirements to distribute to plan participants. Until the DOL changes then rules, you can't rely on email to deliver all of these required notices. One of the things that plan sponsors are supposed to do and aren't very good at is distributing notices. That can certainly be a problem if the plan is audited by the DOL or there is an investigation by them, based on a participant's complaint. Also, not providing a safe harbor notice could potentially lead your contribution to be disallowed by the IRS. Providing notices could be as painful as cleaning up your bathroom, but good housekeeping goes a long way (my wife tells me that all the time). ERISA and the DOL are all about protecting participant rights and participants are entitled to receive the notices that they're supposed to get.

Reviewing fees

Thanks to fee disclosure regulations, you are provided a disclosure from your plan providers on how much they charge. What plan sponsors are supposed to do, but many don't, is to determine whether the fees being charged are reasonable for the services provided. It's your job to make sure that plan fees are reasonable and you can't do that if you just chuck the fee disclosure in the garbage or place it in a folder, never to be seen again. You have to benchmark the fees being charged by either shopping the plan around to competing plan providers or by using a service or using a plan consultant. Your job is to determine what fees are reasonable for the service provided, you don't have to pick providers that charge the lowest fees.

Allocating forfeitures

If your plan doesn't have immediate vesting, your 401(k) plan document has a provision regarding forfeitures. Forfeitures can be used to pay administrative expenses, it could also be reallocated to participants or used to reduce employer contributions. Forfeitures must be allocated the way the plan documents say it should and it should be done annually. Why? It's in the plan document and participants may be owed a contribution if the document calls for reallocation. The problem is that so many plan sponsors don't use the forfeiture provision annually and the forfeiture part of the plan grows into war chest territory. It was never intended for plan sponsors to stockpile forfeitures, that's why the provision should be used annually. Not allocating forfeitures annually violates the terms of your plan document and may deprive contributions that participants might be owed if allocations are reallocated. So make sure that the forfeiture provision is used annually.

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