Proactive Steps Every 401(k) Plan Sponsor Should Take

By Ary Rosenbaum, Esq.

As a 401(k) plan sponsor, you need to understand that not only is the plan a great benefit for you and your employees, it has some negative aspects if you're not proactive in maintaining it. If you ignore your 401(k) plan, The 401(k) plan can be used as a weapon against you because of the potential liability exposure from litigation by participants or penalties from the Internal Revenue Service (IRS) or Department of Labor (DOL). This article is how you can be proactive in maintaining your 401(k) plan.

Why be proactive?

The reason why you should be proactive is pretty much the same reason you vaccinate yourself against measles, mumps, polio, rubella, chickenpox (wish they had that when I was a kid) and the flu. Being proactive like vaccination is protection. A 401(k) plan sponsor that is proactive in dealing with their plan is going to be less likely to have catastrophic plan errors and threats of litigation. From 20 years of experience, it is the plan sponsor that wasn't proactive and unaware of their role as plan fiduciary that was far more likely to pay tens of thousands of dollars in penalties, corrective contributions, and huge legal bills. There is nothing wrong to be laid back in life except in your role as a 401(k) plan sponsor. Even if you are using a third party administrator (TPA), financial advisor, or ERISA attorney, you are on the hook for liability in connection with anything in the plan because you're a plan fiduciary. A 401(k) plan isn't like a piece of furniture, you can't set it and forget it. As a daily valued plan, anything can happen any day of the week. It's like a sophisticated piece of machinery, but the difference is that it will likely break down a lot more often. A 401(k) plan is like a Yugo for dependability if you're not pro-active.

Review fee disclosures

Thanks to the fee disclosure regulations implemented in 2012, you are told how much your plan providers are charging you. You may not realize it, but it's a pretty big deal because prior to 2012, your plan provider may not have been transparent with their fees and that could have been a problem since you have a fiduciary duty to pay only reasonable plan expenses. The fact that you get these disclosures and you know all the fees is not enough. In order to make sure the fees are reasonable, you have to check what's out there in the marketplace for similar services. So you need to check out what other providers charge and you could do that by seeking prices quotes for them or using a benchmarking service. Whatever you do, please remember that you have a duty to pay reasonable plan expenses, that doesn't mean you have to pick the cheapest. That means you have to make sure the fees you pay are reasonable for the services provided You can certainly pay more as long as you get more.

Have your plan reviewed

The problem with your 401(k) plan when it comes to compliance errors is that many times, errors are only discovered many years later when there is an IRS or DOL audit or when the TPA is replaced and the new TPA discovers it. Having your plan reviewed by an independent retirement plan consultant or an ERISA attorney can go a long way to detecting plan errors before they become bigger issues. Detecting errors rather than later may allow you some more cost-effective correction methods that can't be used when the plan is under examination by the IRS or DOL. Consider a 401(k) plan like your own health, early detection can be a huge tool in avoiding graver issues later. I charge $750 for my Retirement Plan Tune-Up plan review, which can be paid out of plan assets. One review saved a plan sponsor $50,000+ in annual administration expenses by highlighting that their advisor was not only getting paid a king's ransom but wasn't doing any of the work.

Have your errors fixed

It's not enough that your plan is reviewed, it's important that any errors detected are fixed. Often, a plan sponsor that is given the bill of what it would cost to fix an error through corrective contributions and/or legal fees get sticker shock. They think that they can get away with not fixing the error. They think that they can play a game of what I call "audit chicken" or "audit gamble", by taking the chance the plan won't get audited by the IRS and/or DOL. I would never play audit chicken or audit gamble because I don't gamble because I hate to lose. As a plan sponsor, you can't afford such a gamble that your plan won't be audited. In addition, plans that refuse to get into compliance usually find themselves getting fired by a TPA that doesn't want a client who won't have their plans comply with the law. Fixing plans through voluntary means and voluntary programs are less costlier than errors that are discovered during a plan audit. From experience, gambling isn't a good idea.

Stress the importance of enrollment/ plan education meetings

From experiences, most plan enrollment/ plan education meetings are as uncomfortable and interesting as a funeral. Plan participants avoid these meetings because they're usually boring. You need to make sure that plan participants are engaged during these meetings because it will increase participation in the plan and it will decrease liability because you can show how you complied with ERISA §404(c), which may offer liability protection from any losses incurred by participants from their self-direction of investments in their account. It's important to understand that these meetings must take place on a continuous schedule, in connection with your plan's entry date so that new participants and current participants are up to date on the plan. It's also important that the advisor you hire to work on your plan has the ability to not only conduct these meetings but in a manner that will connect with the audience of plan participants. Not everyone who is an advisor knows how to connect with plan participants, so it's important to hire one that does. It's also important for you to take attendance at these meetings and save all the materials that were presented.

Get input from your employees

I've worked on retirement plans for 20 years and I rarely have seen plan sponsors actually engage with participants and try to get their input on the 401(k) plan. You often forget that a 401(k) plan is an employee benefit like health insurance, the coffee machine, and gym reimbursements. A 401(k) plan can be an effective tool in recruiting and maintaining employees. So if you want to utilize that tool properly, it's a great idea to get the input from participants on what they like about the plan and what they don't. Maybe you're unaware that the TPA's website is hard to master or the advisor doesn't return phone calls, so getting participants to give their honest opinion about the plan is a great pro-active tool in making sure that your 401(k) plan is there for what it was implemented in the first place, helping out your employees.

Implement features that just make sense

Choice is a good thing and too much choice is a bad thing, but allowing participants to make after-tax Roth contributions is a no brainer. However, there are still so many plans out there that don't offer. While few employees can afford to pay taxes on their deferrals now to get tax-free treatment at retirement, you should still give employees that option. Offering Roth after-tax contributions in your 401(k) plan will just cost you for the plan amendment and some coordination with payroll, but it won't impact the compliance end of your plan. If your participation rate is very low and that may negatively impact how your highly compensated employees can save for retirement, you might want to consider an automatic enrollment feature that would automatically deduct from a participant's paycheck as a salary deferral if they didn't affirmatively state they didn't want to participate through salary deferrals. This could help boost participation from your rank and file employees, which could allow the highly compensated employees to save more through better compliance testing results. Another no-brainer is signing the plan up through Evoshare (evoshare.com). This company allows plan participants to shop online or in stores with their credit card and the participants will get rewards that will get translated into 401(k) salary deferrals. To me, it's a great tool for participants to save for retirement for tasks they're already doing. Contact the folks at Evoshare and tell them Ary Rosenbaum sent you.

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