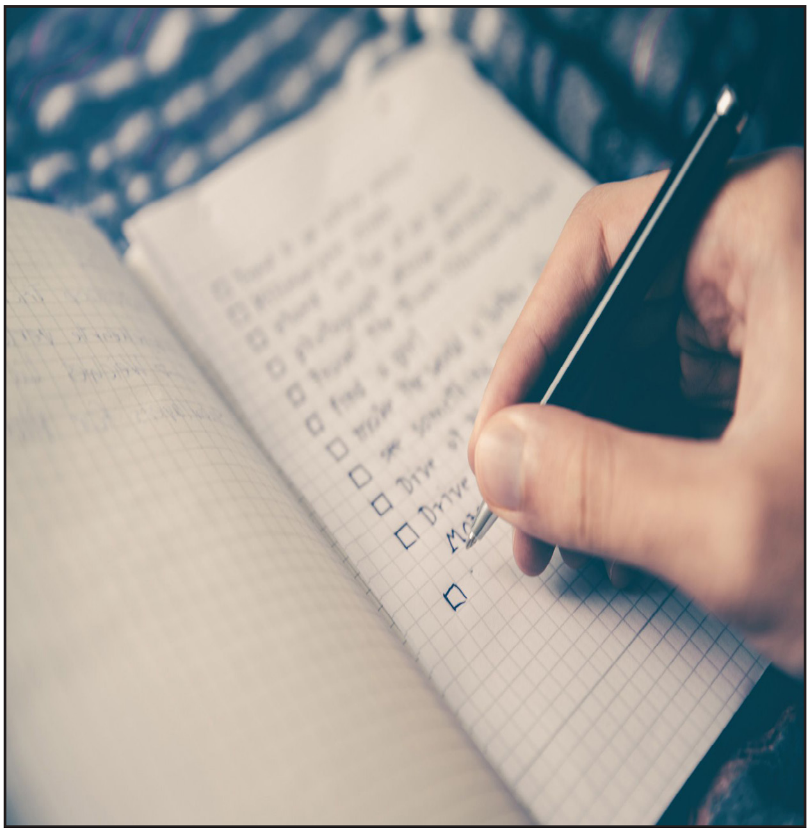
The To-Do List For 401(k) Plans Now: 2018-2019 Edition

By Ary Rosenbaum, Esq.

Being a retirement plan sponsor is a tremendous responsibility and the problem is that most plan sponsors don't understand that. Plan sponsors often act passively because they hire retirement plan providers to help them. The problem is that fiduciary responsibility doesn't allow plan sponsors the luxury to be passive when the buck stops with them. So that means you need to be active and understand what's going in the retirement plan industry that can impact your plan. With changes in how retirement plans are run and constant concerns with rampant 401(k) litigation, there is a list for you to do now.



Understand the new fiduciary rule is dead

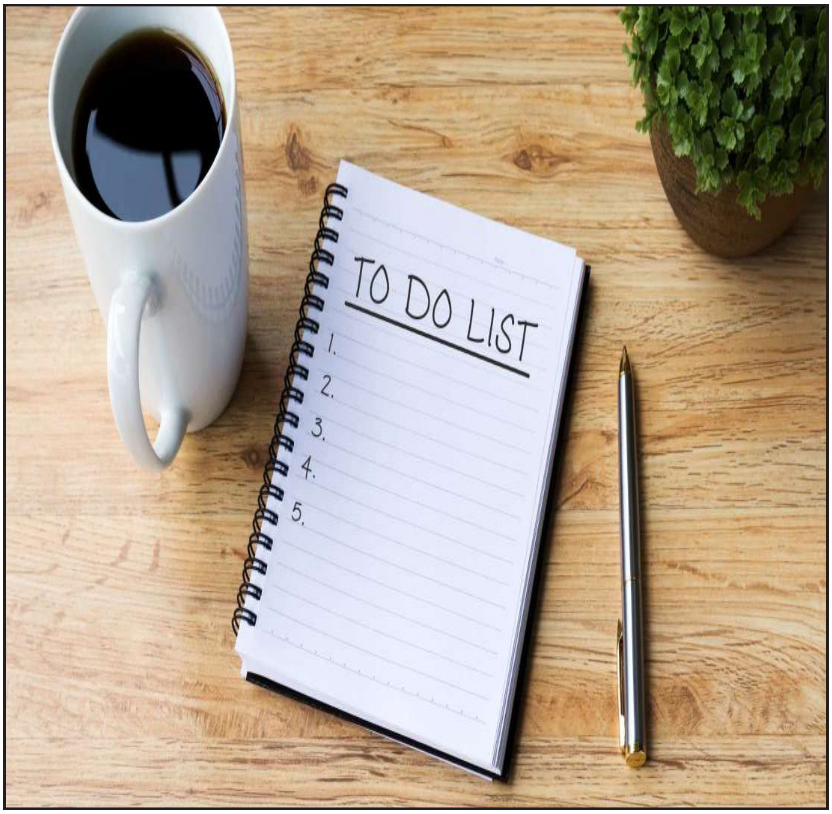
For years, the Department of Labor (DOL) tried to change their fiduciary rule that was first put in place in 1976 that created a loophole where stockbrokers aren't considered plan fiduciaries. For the second time in the past 15 years, the DOL tried to implement a rule that would consider brokers as fiduciaries and require all types of retirement plan advisors to only offer investments that were in the best interest of their plan sponsor clients. It should be noted that registered investment advisors have always acted in a fiduciary capacity. Part of the new FOL fiduciary rule when into place and ran into a roadblock that most people never contemplated, President Donald J. Trump. The Trump administration effectively killed the new DOL rule by not defending it in court after they lost a couple of cases. What does it mean? Despite the millions that broker-dealers spent in legal costs and writing off business lines, they're basically back to what they were pre-new rule. As a plan sponsor, you should understand that brokers can only serve as a plan fiduciary if they accept that responsibility by contract or if they assume the roles of a plan fiduciary. Having an advisor serving in a fiduciary or co-fiduciary capacity is all about minimizing liability. You can always sue a broker for giving bad advice, but suing an advisor in a fiduciary is a little bit easier because a fiduciary needs to comply with a higher standard of care and duty.

The problem of late deferrals

As an ERISA attorney, I deal with many plan errors because part of my job is to correct them. One of the biggest changes in the past 10 years is the DOL interpretation that 401(k) plan sponsors need to deposit employee salary deferrals as quickly as possible instead of a safe harbor that they had up to the 15th day of the following month to do it. Many 401(k) plan sponsors still don't know of this rule change, so they may deposit the deferrals anytime they feel like. In addition, errors may stop the 401(k) plan sponsor from keeping up with their schedule of deferral deposits. What's the problem? The Form 5500 aks you whether you made late deposits and if you did and didn't go through the DOL correction process, you're likely to be audited by the DOL. Late deposit of deferrals is the most common and avoidable mistake. It's plan participant's money and not yours, so there is no excuse that it's deposited late.

Compensation Issues

Another plan error that is becoming more frequent these days is the plan having a definition of compensation in the plan document and the plan sponsor doing something completely different. The best example is the plan sponsor not making employer contributions or allow salary deferrals for a part of the W-2 compensation (because it wasn't their intent), but the plan document doesn't have that exclusion. That means that the plan sponsor failed to operate their plan according to their plan document. That requires extra employer contributions that the plan sponsor never intended to make, but these are the breaks when there is an error in the definition of compensation. So it's important as a plan sponsor that you need to make sure that what you are doing in the administration of the plan in recognizing compensation is consistent with your intent and with the language of the plan document.



Review Your Plan Expenses

Fee disclosure regulations implemented in 2012 require the plan providers that charge $1,000 or more from your retirement plan (directly or indirectly) to hand you paperwork detailing the fees they charge. Most plan sponsors have taken these fee disclosures and put them in some drawer, never to be seen again. Don’t be like most plan sponsors. Review the fee disclosures and benchmark the fees your plan providers charge against what other providers charge for similar services. It should be noted that you don’t have to pay the lowest plan expenses: you only need to pay reasonable expenses for the services provided. So you can certainly pay plan providers more than what other providers charge as long as you get more in services.

Understand there is an uptick in 401(k) litigation and plan oversight

Like they did in those old westerns, you need to keep your ear to the ground. While you won’t hear horses, you may hear the chatter surrounding 401(k) plans and the uptick in litigation and oversight from the government. Every day, retirement plans are being sued. Most cases involve high plan expenses and some involve employer stock offered as a plan investment when the stock implodes. While most of the lawsuits are targeting the larger 401(k) plans out there, smaller plans have seen an increase in litigation. A lawsuit was brought against a $9 million 401(k) plan has since dropped, and an eye doctor’s 401(k) plan that only had $300,000 was sued because the doctor who directed plan investments put the bulk of the money in one stock. Regardless of how small or large, your plan is, you need to understand that litigation is always a risk, no matter how remote. Litigation might be a small risk if you have a small plan, but audits from the Internal Revenue Service (IRS) and the Department of Labor (DOL) are a much greater risk to you as a plan fiduciary. Plan errors in plan administration can be detected on an IRS audit. The DOL audits are looking into the rights of plan participants, but mostly looking into a plan sponsor exercising a fiduciary responsibility in a prudent manner. If your plan gets in trouble on a plan audit, you’re the one who is going to have to foot the bill.

Be careful about share classes, revenue sharing, and proprietary funds

The litigation against 401(k) plans is mostly about fees. Concerns over high fees aren’t just about the direct fees charged they your plan providers against your plan’s assets; it’s also a concern about the cost of the investments in your plan. One big issue is improper share classes because you’ll violate your duty of prudence if a more expensive retail share class of a mutual fund is being used in your plan when a less expensive class of the very same fund is available for a plan of your size. In addition, a big problem is if you select mutual funds in your plan mainly because they make a revenue sharing payment back to your third party administrator (TPA) to help defray administration expenses. Selecting investments as a plan fiduciary is all about what’s best for the retirement savings of plan participants and not about defraying plan expenses. Revenue sharing funds tend to be more expensive than those funds that don’t pay revenue sharing. Another hot topic of litigation against 401(k) plans is the use of proprietary mutual funds that are distributed by the bundled provider TPA. Again, mutual funds selected for your plan should be done because they’re best for plan participants and not just because they happen to belong to the bundled provider you use for plan administration. Everything you do as a retirement plan sponsor needs to be above reproach because your duty is to the plan participants and not your own pecuniary gain.

Get your plan reviewed

You can’t afford just to rely on your retirement plan providers; you need an independent review to determine that you’re doing your job and that your providers are doing the job they promised to do. To avoid any headaches or unwanted surprises on an IRS or DOL audit, it’s a smart idea to get an independent plan review. You can hire an independent retirement consultant or you can hire an independent ERISA attorney such as yours truly. For example, I offer a Retirement Plan Tune-Up that reviews all aspect of retirement plan administration and the fiduciary process to ensure proper compliance The Tune-Up is only $750 and can be paid from plan assets. Regardless if you use me or someone else, I recommend a plan review no matter what. You can’t afford to take your plan provider’s word that your plan is in good shape.

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