SOS ("Save Our Stuff"): Common Mistakes Employers Make That Put Their Assets at Risk

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To be competitive, most employers offer some employee benefits: generally, at least medical benefits through a cafeteria plan, and a 401(k) plan. Benefit plans are complicated. It is difficult to keep up with all of the compliance requirements when it's one's full-time job, let alone if that's coupled with trying to run a business. People try to reduce their risk by hiring benefits consultants and advisors or having their 401(k) plans comply with Section 404(c). But there are still several common mistakes that employers make that put their business – and even their personal assets – at unnecessary risk.

Titles

When adopting a plan, the documents will ask who is the "trustee", "plan sponsor", or "named fiduciary". Employers often will designate the person in the company that makes benefits decisions, such as the business owner, chief executive, CFO, or HR executive. However, these terms have very specific legal meanings, and carry with them specific, individual, and personal liability. An individual designated as the "trustee", "plan sponsor", or "named fiduciary" of a benefit plan – without the limited liability shield of the company – puts his or her own home and personal assets at risk if the plan is sued. The plan documents should be reviewed to ensure that the company, not an individual, is assigned those roles.

Service Providers

Most benefits consultants, third party administrators, and investment professionals refuse to accept fiduciary liability for their advice to, and services provided on behalf of, employer-provided benefit plans. Most often, contracts with these providers reflect their refusal to accept any fiduciary liability, assigning all of the fiduciary responsibility - and liability - to the employer. However, two sets of recently finalized ERISA regulations place more fiduciary liability on service providers, and require that liability to be clearly spelled out and accepted in provider contracts. New contracts, renewing contracts, and even existing contracts (since many contracts permit amendments to reflect changes in law) should be reviewed and amended to delegate the appropriate level of fiduciary liability from the employer to the service providers.

Insurance

General liability, professional liability, and directors and officers insurance policies routinely exclude claims relating to ERISA and employee benefit plans, although that coverage is available under a standard rider for an additional premium. As indicated, maintaining benefit plans is so complicated that mistakes and compliance errors are bound to be made from time to time. Even if the employer hires others to do the work – such as a third party administrator, investment provider, etc. – the liability of that service provider might be limited (see above), so that the employer is still liable for their actions. Moreover, even if fiduciary liability is properly delegated, the employer still remains on the hook for certain actions, including properly choosing and supervising service providers. Therefore, the employer has potential liability not only for its own actions (or inaction), but for the actions (or inaction) of all the service providers of the plan, both for compliance with the Internal Revenue Code and ERISA, compliance with any other applicable law (Health Insurance Reform, COBRA, state law), and for the mistakes that just happen even when the plan is compliant. It makes sense for an employer to purchase insurance to pay for damages incurred in these situations.

Offering your employees medical and pension benefits should not require you to risk your business or your home. A review of your company's plan documents, contracts, and insurance coverage can save money and minimize your risks.