Some Hard Truths About The Retirement Plan Business

By Ary Rosenbaum, Esq.

What makes me a very unpopular person in the retirement plan business and synagogue is that I'm very opinionated and I like to call it where I see it. Years ago, I was working for a producing third party administrator (TPA) in New York City and upon leaving, I said that revenue sharing would be phased out, fee disclosure would be a reality, and the TPA would be out of business in 5 years. I was right about everything except that the TPA went out of business in 3 years. Now I only wish I could predict next week's Powerball winning numbers. The fact that is some hard facts about the retirement plan business and I'm not one to sugarcoat them. It reminds me of the line when Dr. Rumack asks Elaine: "Elaine, you're a member of this crew. Can you face some unpleasant facts?" Elaine responds: "No." So whether you can deal with it or not, here are some unpleasant facts or hard truths. Don't worry; I'm still on some conference blacklists either way.

A new fiduciary rule is inevitable

The Department of Labor's rollout of the new fiduciary rule was the worst rollout since McDonald's rolled out the Arch Deluxe. While I think the idea was right (like the Arch Deluxe), the President Obama led Department of Labor is to blame for what I think was an epic disaster. It took forever for them to formulate the rule and let the final implementation of the rule to take into effect after Obama left office. Like most of the public, they assumed that the next administration was going to be friendly to the rule as well, not anticipating a President Trump. Once Trump went into office, it was only a matter of time before the DOL would gut the rule. Luckily for the DOL, it was the Federal courts that knocked out the fiduciary rule in one circuit court and they let the rule die by not appealing the decision. While many broker-dealers did their best to knock out the rule and are celebrating the defeat of the new rule, it cost them a lot. It cost them millions in legal fees and losing clients in order to comply with the rule. It also hurt them because, for two years, plan sponsors were being educated about the role of a plan fiduciary and how brokers would have to meet the rule. I believe that a fiduciary rule is inevitable, just like the fee disclosure rule was. Trump won't be President forever and the next administration could find itself more amenable to a fiduciary rule for retirement plan advisors. The current administration may even still have the DOL implement a rule based on what the Securities and Exchange Commission is trying to hammer out. I believe that a new rule is inevitable because the powers that be will eventually implement one and I believe that plan sponsors are being increasingly aware of the difference between advisors who serve in a fiduciary capacity and those who do not. I always believed that the industry should have wrapped itself around what the DOL tried to implement because anything that would come down further down the line as a fiduciary rule would be far more restrictive than what was being proposed. So while the new rule is dead, the next rule down the line may be harder for a broker to compete in the retirement plan space.

The TPA is the most important provider out there

One of the most iconic scenes in The Godfather Part II is when Michael finally meets Fredo after the death of their mother. Fredo is still upset that he was passed over as the head of the family even though he was older than Michael. "I'm smart, I can do things" lamented Fredo. As retirement plan providers, we're not like Fredo. However, the fact is that TPAs are the most important plan provider out there. They're the most important plan provider out there because they do the bulk of the work and they're usually at fault when something goes wrong. Good TPAs make fewer mis-

takes than bad ones, so that's why you need to make sure that the TPA is chosen for the plan sponsor because it's the right fit and will do the best job. Picking a TPA just because they're the cheapest or because of some relationship with the advisor or other decision maker. TPAs are in charge of the day-to-day administration of a 401(k) plan and there are just so many things that could absolutely go wrong. Whether it's an incorrect census or a flawed discrimination test, there are so many ways that a 401(k) plan gets into trouble. The biggest problem with TPA errors is that because of a lack of checks and balances, they're only discovered years later on a government audit or when there is a change to a new TPA. While everyone is enamored with litigation against 401(k) plan sponsors, the biggest threat to most plans is on the compliance end. So that's why it's paramount that a plan sponsor is steered towards a TPA that can do their job.

Stick a fork in revenue sharing

When I first started as an ERISA attorney 20 years ago this September, I was shocked when someone told me about revenue sharing. I always think my moral compass is a little too strong and everything seems to be a scam from the streets of Brooklyn. I thought revenue sharing was one of those street scams when plan sponsors were told that by using specific mutual funds, they could defray the costs of plan administration. While revenue sharing did decrease the costs of plan administration, 401(k) plans sponsors weren't told that mutual funds that pay revenue sharing tend to be more expensive than mutual funds that don't. Plan sponsors were led to believe in the pre-fee disclosure regulation age that it was more expensive to have a fund lineup with index funds and exchange-traded funds. Thanks to fee disclosure, plan sponsors are now aware that there is a cost in revenue sharing when they see how much their TPA makes. There were too many TPAs out there that would pocket revenue sharing without fully disclosing how much they really made. Litigation has also shown the cost of using revenue sharing when plan sponsors are held to have breached their fiduciary duty when the main or sole reason for selecting mutual funds was based on the revenue sharing they paid. Fee disclosure and litigation have been the 401(k) version of Scared Straight so that advisors and plan sponsors have moved towards a zero revenue sharing model.

Picking investments are the least important role of a financial advisor

As I said before, I'm very direct: actually, I'm too direct and my opinion is that almost anyone can pick out an investment menu for a participant-directed 401(k) plan. There are enough choices out there among thousands and thousands of mutual funds, so it's not exactly brain surgery. That doesn't mean that anyone can be a financial advisor on a 401(k) plan, it just means that picking out investment options is the smallest part of the job. A financial advisor on a 401(k) plan is more than just being a financial advisor, it means being a concierge. The 401(k) financial advisor can't get the hottest show tickets, but they're depended on by the plan sponsor to get things done and problems solved. When a TPA does something wrong, the plan sponsor doesn't complain to the TPA. When the ERISA attorney or auditor doesn't return multiple calls, it's the financial advisor who hears the complaints. A 401(k) financial advisor isn't always the complaint department, but they always end up being the quarterback of the plan provider team. A financial advisor isn't the most important plan provider, but they end up being the most trusted provider and trust is a big thing and requires a tremendous responsibility. A financial advisor is not only the ombudsman for the plan, but they also have the responsibility of reviewing the investment options for the plan as compared to the investment policy statement that they helped implement. An advisor is also responsible for aiding the plan sponsor in giving education and/or advice to plan participants to make sure that they have enough information to make informed investment decisions.

You don't have to fear the ERISA attorney, but….

As an ERISA attorney for mostly small and medium-sized employers, I understand why many plan sponsors and their other plan providers have a hesitancy in working with an ERISA attorney. Having been an attorney who has received a legal bill from a law firm, I certainly understand. Legal fees can be exorbitant and unreasonable because unlike most retirement plan billing, it's billed by the hour. That's why except for government audits, I charge a flat fee. After 20 years in the retirement plan business, I know how long things take. My clients love that my fee is fully transparent and upfront, so there is no shock at the end of the month that the fee is a lot more than expected. It's important for plan sponsors and plan providers to rely on an ERISA attorney when needed, but they also need to be sure they're not taken in for a ride.

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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