The Conduct Code for Retirement Plan Sponsors

By Ary Rosenbaum, Esq.

When we were in school, there was a conduct code. For some of us that have occupations that require a license, we have a code of conduct to follow as well. Unfortunately for plan sponsor, no one ever tells them that their conduct or lack thereof can have some bad consequences. So this article is supposed to act as a Conduct Code, so you can follow it and turn your retirement plan from something that can be a liability pitfall into something that can be used as a tool to recruit and retain treasured employees.

1. Never forget, it's an employee benefit

When it comes to retirement plans, it's often forgotten that it's supposed to be an employee benefit. Like health insurance, it's something that current and potential employees should value and if the plan is poorly run or high in fees or comes with draconian plan provisions, it's something that they are going to dread. So with all this talk about fiduciary liability and plan fee disclosure, you should never lose sight of why you put the plan in the first place: as a benefit for your employees. If you remember that, the rest of the Code should come easy.

2. If something goes wrong, it's your fault

In another life, I must have been a scapegoat. Whether it's business or personal, I often get the blame for the transgressions of others. Seven years later, I still get blamed that my sister is terribly immature, but that's another story. Unlike my neurosis, the fact is that you are on the hook for liability when it comes to what goes on with your plan. As a fiduciary, you have the highest duty of care. That means that even if you hire plan providers and delegate duties, you are still at fault if something goes wrong with your plan even if your providers screw up. You are also still on the hook for some liability even if you hire an ERISA §3(38) fiduciary to assume all the responsibility for managing your plan's investments. You can never fully eliminate the liability, but good practices will help you minimize that risk.

3. Look for the best providers

If you are on the hook for liability for hiring plan providers, then common sense dictates that you hire plan providers that can handle the job. So find a financial advisor, third party administrator (TPA), and ERISA attorney that are up to the task of helping you administer your Plan.

4. Focus more on competence, less on cost for plan providers

One of the fears in allowing retirement plan fee disclosure was that there would be a race to the bottom in terms of fees and when presented with choices, plan sponsors would seek out providers who charge the lowest fees. While that may be a consequence of fee disclosure, the fact is that too many times you get what you pay for. Some of the lowest cost providers are the lowest quality providers and the cost to fix the errors that these providers cause outweigh any of the upfront savings.

5. Your plan needs to be constantly reviewed

Too often, plan sponsors have what I called a "back in the drawer" mentality, which means that they often take their retirement plan and put it in the back of drawer to forget about it. A retirement plan is like a car, you need constant maintenance to make sure that it's running in optimum shape. Over time, plan assets change; the demographics of your company change, the stock market changes, and the retirement plan industry change. As a fiduciary with the potential liability that goes with it, you can't stand pat. Every1-3 years, you should have the "hood" of your retirement plan lifted up to make sure that everything is in work-

ing condition and what needs to be replaced that isn't.

6. Your plan is for the exclusive benefit of your employees, it's not a patronage mill

When you have your own business, there is nothing legally wrong to hire a relative or someone you know socially. It happens all the time, how do you think my town hires employees? When it comes to your retirement plan and your plan providers, you can't. You have to hire plan providers for what they know and not whom they know. A retirement plan is for the exclusive benefit of its participants and any benefit that you derive by using the hiring of plan providers for patronage might be considered a prohibited transaction. Hiring plan providers requires a process that needs to be documented and it can be an issue if the reason your hire a provider is because he's your nephew; a fellow congregation member at church or synagogue; or your golf buddy. With your neck on the line as a plan fiduciary, you will want to find a provider that was selected for reasons other than the fact that they were "juiced" in.

7. The plan's financial advisor does more than just pick investment options

A financial advisor is supposed to assist you with the fiduciary process and the fiduciary process is a little more than just selecting mutual funds and other investment options. The fiduciary process requires the development of an investment policy statement (IPS) that delineates on what basis investment options are selected and need to be replaced. It requires that investment options be reviewed on a consistent basis to make sure it still meets the needs of the IPS. It also will require that if participants direct their own investments that you make sure that they receive enough information to make informed decisions. If you have a financial advisor that covers all these bases, a good chunk of your liability as a plan sponsor will be minimized. If you have a financial advisor that only focuses on investment options, then you don't have your bases covered.

8. It's the little things that cause the greatest headaches and potential liability

As a retirement plan sponsor you have so many responsibilities, but it's the ministerial acts that many plan sponsors don't follow that lead to the greatest liability threats. While having a financial advisor or someone in your company steal your plan assets, it's less likelier than some of the most common plan mistakes that plan sponsors fail to avoid making. So having a financial advisor not doing their job as it pertains to the IPS or fund selection or not checking your plan expenses is likelier to happen and likelier to cause you pecuniary harm. Forgetting to provide participants investment education when they direct the investments in their account is a greater threat or having poor compliance work by your TPA are likelier to cause you to have more grey hair and sleepless nights.

9. Good practices will minimize liability, so will enough insurance

Good practices will help minimize your potential liability as a plan sponsor, but that may not stop an aggrieved former employee to be suing you for perceived transgressions to your Plan. That is why in addition to the required ERISA bond to protect the plan assets from theft, you need fiduciary liability insurance to help you in the case of ERISA litigation because legal costs to defend any lawsuit can be staggering. I know, I'm an ERISA attorney and I play one on TV.

10. Fee disclosures aren't fish wrapping, they need to be reviewed

80% of businesses that received their initial fee disclosures from their plan providers didn't understand them and that's understandable when it's full of legalese. The problem is that as a plan sponsor and a plan fiduciary, you need to understand what they mean and what you have to do with it. Putting the disclosure in your back drawer isn't an option. You need to determine whether your plan expenses are reasonable and the way to do it is to benchmark them by using a service or working with an ERISA attorney. Reasonableness is determined by the fees paid for the service provided. So you can pay more in plan expenses if you receive a level of service that justifies those fees.

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