Plan Sponsors Should Know Their "Hat" as Retirement Plan Fiduciaries

By Ary Rosenbaum, Esq.

I love baseball jerseys and I also love New Era on-field Major League Baseball hats. Speaking of hats, a retirement plan sponsor wears many hats when they main a retirement plan. Plan sponsors know they wear the hat of the employer when they set up a retirement plan because they set it up to benefit their employees. Plan sponsors know they wear the hat of a retirement plan sponsor when they set up the plan. What plan sponsors fail to understand that they also wear the hat of a plan fiduciary and the duty that comes with it. So this article is about the hat of plan fiduciary that a plan sponsor has to wear and the duty and liability that goes with it.

More than just a Plan Sponsor

Setting up a retirement plan isn't just about setting up a retirement benefit program to recruit and retain employees. Not only is an employer who sponsors a retirement plan a plan sponsor; they are also a fiduciary of the plan. A fiduciary prudently takes care of money for another person and a plan sponsor is supposed to take care of the money belonging to the participants to the plan. A fiduciary requires the highest duty in equity and law. People can do whatever they want with their money, but they have more responsibility when they are handling someone else's money. So with great power comes great responsibility and plan sponsors have great responsibility in starting and maintaining a retirement plan.

Fiduciary duty brings potential liability

By being a plan fiduciary, a plan sponsor has potential liability if they breach their fiduciary duty. So a plan sponsor needs to be careful in their role as plan fiduciary and make sure what they do doesn't involve breaching that duty. Too many plan sponsors neglect their role as plan fiduciaries and they do so at their own risk. Breaching fiduciary duty may involve personal liability, especially for those who are serving as plan trustees. So to avoid the headaches of plan litigation and liability, plan sponsors need to buy fiduciary liability insurance to protect themselves and the plan trustees.

Plan sponsors can never eliminate their potential liability

Plan sponsors can manage the risk of their potential fiduciary liability by being diligent in their duties through good practices. No matter how great a plan sponsor is in managing their risk as a plan fiduciary, they can never fully eliminate that risk. Even hiring outside fiduciaries such as a financial advisor acting as an ERISA §3(38) fiduciary who will assume the fiduciary process of the plan or an ERISA §3(16) administrator who assumes the liability for the day to day administration of the Plan won't fully eliminate the plan sponsor's liability in those delegated areas. The buck will always stop with the plan sponsor. So since a plan sponsor can't fully eliminate their plan fiduciary liability all they can do is to minimize it by following good practices.

If it's a plan provider's mistake, it's still their problem

Many of the problems that a retirement plan goes through are a result of mistakes caused by a plan provider. For example, errors happen in the day-to-day plan administration of a retirement plan. Even the best third party administrators (TPAs) make mistakes. There are financial advisors who make errors, same with ERISA attorneys. The problem for the plan sponsor is that since

the buck stops with them, they are responsible for the errors of their plan providers. I represented a client that was accused by the Department of Labor (DOL) of embezzling money from their defined benefit plan because the owner of the company was told by the actuary that since the bulk of the plan's assets belonged to them, that it was OK to write checks directly from the defined benefit plan to another affiliated business so it could be propped up. The other problem was that the plan actuary didn't bother to do a valuation report for 25 years. While the owner lamented that the actuary/TPA went rogue, it didn't matter to the DOL because the buck stopped with the plan sponsor. That's why a plan sponsor needs to review the work of their plan provider to insist that the work is being done and done correctly. Simply shrugging off the plan provider's incompetence won't do it especially when the Internal Revenue Service and/or DOL comes knocking because the plan sponsor will end up paying the compliance penalties.

Fiduciaries need to pay reasonable plan expenses

One of the major duties of being a plan fiduciary is only paying reasonable expenses. It should be noted that reasonable plan expenses does not mean lowest plan expenses. What's reasonable? Expenses are reasonable if they are reasonable in the marketplace in relation to the services provided. So a plan sponsor can pay more in plan expenses if they are getting more in plan services and it's never a good idea to pick a plan provider just based on cost. How does a plan sponsor determine what cost is reasonable? First off, a plan sponsor is supposed to get a disclosure of direct and indirect fees that their plan providers receive. Second, the plan sponsor needs to benchmark those fees either using a benchmarking service or shopping the plan around to another provider. The DOL fee disclosure regulations mandated the release of fee disclosure by plan providers to plan sponsors, so the DOL is expected to enforce these regulations by random audits of plan sponsors. So a plan sponsor that isn't reviewing their fees on a regular basis will find out the hard way by a DOL audit or by litigation from plan participants. While most thought only larger retirement plans were prone to be sued, there have been smaller plans that have already been sued because participants claim they are paying too much in fees. ERISA litigators have made a good living the last dozen years in retirement plan fee litigation. A plan sponsor is breaching their fiduciary responsibility when they don't review their fee disclosures and determine whether the fees they pay are reasonable or not.

The duty of prudence

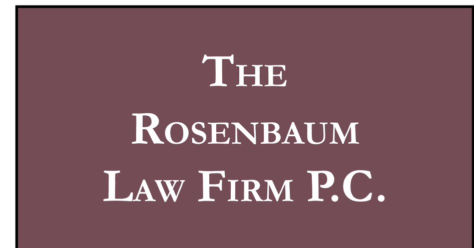
One of the central responsibilities of being a fiduciary is the duty of prudence. Acting prudently can be a wide duty, but it's an important duty that plan sponsor must make sure they don't breach. Part of the duty of prudence is hiring plan providers that can handle the functions that the plan sponsor doesn't have the expertise to perform on their own. The duty of prudence requires plan sponsor to offer the lowest cost share classes possible of the investments they offer. Plan sponsors may be on the hook for liability if the plan offered retail share classes of mutual funds in the Plan when investment share classes of those very same funds are available. It's important for a plan sponsor to act in a prudent manner.

Putting the plan participants first

Plan sponsors, as fiduciaries must solely act in the interest of their plan participants. So a retirement plan is not a piggy bank or something to be used to curry favor. Hiring a bank, as a financial advisor for a retirement plan just to procure a loan for the company isn't putting plan participants first; neither is using plan assets to purchase a building that the plan sponsor could rent. So the plan participants should always come first, everything else comes after that.

Following the plan document

A retirement plan is controlled by a plan document, so following the terms of the plan document is an important responsibility of being a plan fiduciary. It may sounds like common sense, but there are many situations where the plan sponsor fails to operate the plan according to the terms of the plan document. That might be because of plan sponsor or TPA error. Regardless, not following the plan document is a good way for a plan sponsor to be exposed to liability as a plan fiduciary.



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