How Plan Sponsors Can Have A Good 401(k) Plan After The Long Run

By Ary Rosenbaum, Esq.

As a huge fan of The Eagles, one of my favorite songs is the title track "The Long Run." From the album that pretty much broke the band "You can go the distance. We'll find out in the long run." While the song is really about love and relationships, I love it because it speaks to me about the challenge of how people's actions can be reviewed over the long run. For a retirement plan sponsor, the nature of maintaining a retirement plan is all about the long run because it's a long process in serving as a fiduciary and holding the retirement assets of their employees. So this article is about how a plan sponsor can go the distance over the long run and avoid the liability pitfalls along the way.

Having a good retirement plan is no accident.

When it comes to your health, the way you conduct your life is a big contributing factor to your health and your life expectancy. Your genetic makeup is another big factor. You can have an uncle who's 95 still smoking Lucky Strikes and you can have a cousin who died of lung cancer in his 40's who never smoked a pack of cigarettes in his life. Genetic makeup isn't based on luck; there is a certain randomness to it that makes it look like luck. It's such a big factor in your life expectancy that it may make your good or bad habits moot. Sponsoring a retirement plan doesn't have a genetic makeup that would allow a reckless or ignorant employer to have a good retirement plan despite the lack of fiduciary oversight. Employers who neglect their fiduciary duty don't have good retirement plans because good retirement plans don't happen by accident. Good retirement plans have good retirement plan providers, but even good retirement plan providers can service bad retirement plans because of a neglectful plan sponsor. So no matter what happens over the long run, a good retirement plan can only happen if there is diligence on the part of the retirement plan sponsor. Having an interested plan sponsor in exercising their fiduciary duty in a prudent matter is the most important part in running a retirement plan over the long run.

Hiring the right TPA

With apologies to financial advisors, auditors, and fellow ERISA attorneys, the most important plan provider is the third party administrator (TPA)/record-keeper. A retirement plan is like complex machinery, there are so many moving parts that need to be maintained and that can easily be neglected that could cause it to no longer work properly. Performing compliance testing, completing the Form 5500, making and reconciling trades, dealing with payroll reports, confirming deposits of contributions, these are just some of the "moving parts" that a TPA is responsible for. So many things can go wrong with a retirement plan and the things that usually go wrong have something to do with plan administration. The problem with errors in administration is that most plan sponsors are unaware of them until it's too late: it's discovered on an Internal Revenue Service (IRS) or Department of Labor (DOL) audit or it's discovered by a new TPA on a conversion from the old TPA. When plan errors are discovered, it's the plan sponsor that is ultimately responsible even though they don't have the knowledge to be aware and that's the price to be paid for being a plan sponsor. A TPA is a third party administrator, the plan sponsor is the named administrator (unless they hire someone else to handle that role like an ERISA §3(16) administrator), so the buck stops with them. So it's important to hire a good TPA that makes very few mistakes. Another major role for a TPA is assisting with plan design. Plan design is a topic that most plan sponsors are unaware of. They don't understand how a different plan design can avoid failed compliance tests and maximize contributions for the highly paid employees that own/

and or run the employer. A bad TPA doesn't place a value on plan design because they don't have the necessary background, but inefficient plan design has the habit of not maximizing employer contributions (and tax-deductible employer contributions) to highly paid employees as well as requiring salary deferral refunds to highly paid employees if the actual deferral percentage test fails. Failing to maximize contributions to highly paid employees because of an inefficient plan design and/or failed compliance testing for deferrals will impact retirement savings over the long run. So by a hiring good TPA, a plan sponsor can avoid most administrative errors and maximize their tax deductions by a more efficient use of employer contributions. A plan sponsor shouldn't hire a TPA just because they are the cheapest or that they are their payroll provider, it should be because a certain TPA will do a credible job at a good price.

Hiring the right advisor

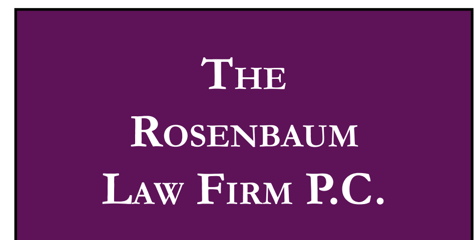
If the whole job of a financial advisor was to select the mutual fund lineup of a 401(k) plan, I would honestly tell every plan sponsor to do it themselves because almost anyone could do that. However, picking mutual funds is a small part of what a good 401(k) financial advisor can do. A good financial advisor is all about helping the plan sponsor navigate the fiduciary process when it comes to plan investments. Selecting and replacing plan investments and offering education to plan participants is all about a process and following that process. There is no point in having a process in place that isn't being followed; a plan sponsor can't afford treating the fiduciary process in a manner they would with the New Year's resolution diet. So a good financial advisor will help the plan sponsor out with developing an investment policy statement (IPS) that states the process of how investment options are selected and replaced. They will guide the plan sponsor in selecting, monitoring, and replacing plan investments according to the broad terms set forth in the IPS. Then the financial advisor will help educate plan participants about broad investment terms so that they can make informed investment decisions. The final piece of the good investment advisor puzzle is that the advisor will serve as an ombudsman if there are issues with other plan providers especially the TPA. A good financial advisor for a retirement plan is someone who is less of a rock star and more of someone that understand the nuts and bolts of good processes for retirement plans.

Delegate what they don't want to handle

TPAs and financial advisors usually serve in a non-discretionary manner, and all the decisions rest with the plan sponsors. That means the plan sponsor is ultimately responsible for everything that goes on with the plan, whether they are unaware of the plan's issues or not. Thanks to concerns over financial duties, there are TPAs that offer ERISA §3(16) administrative services and there are registered investment advisors that offer ERISA §3(38) services. In these ERISA services, the plan provider calls the shots by having discretionary control and assumes the bulk of the liability for the process they are in control of (§3(16) for administration and §3(38) is responsible for investments). So a plan sponsor that doesn't want the responsibility of making these important decisions can delegate the decisions and the liability making these decisions to those providers. Delegating decisions and liability doesn't absolve the plan sponsor from all liability since the plan sponsor has a duty to monitor the providers they hire to make sure they are doing the job as promised contractually.

Always monitor

Even the best plan providers can make mistakes, so a plan sponsor always has to monitor their plan. Plan sponsors cant just dump off the responsibility of running their plan to the providers they hire. Plan sponsors still need to be vigilant in order to exercise their fiduciary duty in a responsible manner They need to make sure they read fee disclosures and benchmark the fees that their plan providers charge to determine reasonableness. They need to make sure that their plan providers are handling their roles responsibly and sometimes that may require an outside party (such as an ERISA attorney, cough cough) to conduct a review. Again, good retirement plans don't happen by accident. They happen because a plan sponsor is vigilant in their role as a plan fiduciary.



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