

Things That 401(k) Plan Sponsors Don't Do, But Need To Do Anyway

By Ary Rosenbaum, Esq.

In the Dirty Harry movie, “Magnum Force”, Harry Callahan has little use for his superior Lt. Briggs. Briggs has little use for Callahan’s violent ways and tells Dirty Harry that he never had to draw his gun out of his holster once. Harry cleverly retorts: “Well, you’re a good man, lieutenant. A good man always knows his limitations.” A 401(k) plan sponsor can have a lot of limitations, the problem is that they’re certain things they don’t do but have to do anyway. This article is all about things that 401(k) plan sponsors may not do, but they have to do it anyway.

Making sure salary deferral deposits are made on time

With a 401(k) plan, the most frequent error deals with the most frequent feature of such a plan: the timely deposit of 401(k) deferrals. Over the past 10 years, the Department of Labor (DOL) has focused on the enforcement of quick deposits of salary deferrals. The DOL reinterpreted the guidance on the deposit of salary deferrals by saying they must be done as soon as possible, which could be as little as 3 business days. Plan sponsors need to make sure the staff in charge of managing the 401(k) plans is on top of the deposits made to the plan and that they should be done as soon as possible.

Making sure the compensation definition is correct

Next to the deposit of salary deferrals, the biggest error out there deals with the defini-

tion of compensation. A plan sponsor may think that their idea of compensation is one thing and their plan document says something else. For example, the plan sponsor may think bonuses are excluded from compensation, but the plan document states otherwise. That error may require additional employer contributions as well contributions for missed deferral opportunities.

claims they have a benefit under the plan even if they didn’t. In addition, the Internal Revenue Service (IRS) takes the position that any missing plan documents and amendments will be treated as having never been done, which could put a plan on a collision course for heavy fines or plan disqualification if the plan is audited.



Keeping good records and signed documents

My wife loves jigsaw puzzles and I hate them. With plan sponsors not maintaining good records or not having copies of all required plan amendments and restatements, I feel like I’m dealing with jigsaw puzzles with missing pieces. It’s important for a plan sponsor to keep good records, especially if a long-lost employee

Reviewing fees and benchmarking them

I’ve been in the retirement plan business for almost 25 years and it was really odd that plan sponsors had a fiduciary duty to pay only reasonable expenses, but there was no requirement that plan providers had to tell them how much they were charging. A third-party administrator (TPA) could have pocketed revenue sharing payments they’d get from a mutual fund that was supposed to defray administrative costs and the plan sponsor wouldn’t have been the wiser. Those abuses pretty much ended with the implementation of fee disclosure

regulations by the DOL in 2012. Plan sponsors since that time, are supposed to get fee disclosures from their plan providers. The problem isn’t that plan providers aren’t furnishing them, the issue is that plan sponsors are treating these fee disclosures the way most people treat their bank’s privacy practices and chuck it in their trash. Too often, plan sponsors aren’t bothering with reviewing their fee disclosures and that could be a breach of their fiduciary duty if the

fees being charged against the plan aren't reasonable for the services provided. The only way for a plan sponsor to understand whether the fees being charged are reasonable is if the fees are being benchmarked to what other providers may charge for similar services. When I was doing work on my house, the only way I knew a contractor was overcharging us for years is when we fired them and hired new contractors. If I overpay for home contractors, that's my issue. Plan sponsors don't have that luxury as plan fiduciaries because of that duty to only pay reasonable plan expenses. So it's important for plan sponsors to review their fee disclosures and determine whether they're reasonable for the services provided by benchmarking them.

Providing clear communication to participants

I think I learned that most employers were poor at communication when I was a law clerk in Boston for a mid-sized law firm while I studied for my tax LLM degree at Boston University. There was a paralegal who was told how good she was at her annual review and then was quickly let go a few weeks later because she wasn't that good. Too many plan sponsors forget that a retirement plan is a benefit for their employees and fail to properly communicate with their employees about it. The problem is that there are plenty of required notices under ERISA such as handing out a summary plan description, providing a safe harbor notice, or notifying of an investment fund change. You will be amazed how many plan sponsors flout their responsibilities under ERISA and fail to furnish the required notices. In addition, many plan sponsors aren't very good at conducting timely participant and enrollment meetings. When participants direct their own plan investments, plan sponsors can only eliminate the liability from losses sustained by participants if they provide them with enough information to make informed investment decisions. It's important for plan sponsors to conduct timely enrollment and education meetings with their financial advisors providing the services that they were hired for.



Letting plan providers do their job

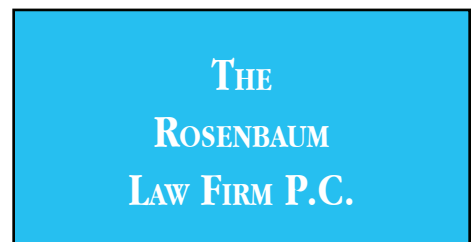
I had a friend in college that like me, was heavily involved in student politics. When re-elected to the student senate, he claimed he was "the stick in the wheels of corruption." As an ERISA attorney who has to get things done for a plan sponsor and their provider, I promise not to be the stick in the wheels of progress. A plan sponsor can't be the stick in the wheels of progress for their plan providers by getting in the way of their plan providers doing their job. When it comes to the TPA, the 401(k) plan sponsor needs to provide all requested information and make sure that the information is correct. When it comes to the annual census request from your TPA, I always say "garbage in, garbage out." That means if a plan sponsor provides incorrect information about ownership, connected companies, or compensation, expect the compliance testing from the TPA to be incorrect as well. As for the financial advisor, a plan sponsor can't delay the required fiduciary meeting to review plan investments and shouldn't forget to hold the participant enrollment/ education meeting. Plan Providers are hired to do their job and it's costly for a plan sponsor to pay people to do their job and stand in their way of doing their job. A plan sponsor has a fiduciary duty to run their plan effectively and standing in the way of their plan providers is violating their duty of prudence.

Complimenting plan providers on a good job

Robin Quivers from The Howard Stern Show once said that Chesley "Sully" Sullenberger, the hero pilot of US Airways

Flight 1549 wasn't a hero because he was doing his job of landing the plane. I don't know, but I think deciding to safely land a plane in the Hudson River after a double bird strike after knowing in his gut that he couldn't go back to LaGuardia Airport or land at Teterboro Airport is pretty heroic. Plan providers, for the most part, do a very good job. Yet, they will always get more complaints than compliments. As someone who rarely got compliments as a kid (everything comment received seemed to be a backhand insult), I'm stingy with the compliments too. Most plan

sponsors won't compliment a plan provider for doing a great job but will complain if they just think that something is wrong. I've dealt with clients that wanted to bite the head off of their TPA, just because the TPA wanted to clarify common ownership issues on whether companies were part of a controlled group or affiliated service group. Plan providers do a lot of work and all they get are complaints for when things go wrong, even if it's not their fault. They rarely get complimented because plan sponsors think that's the job, doing work competently. In part, they're right, but most plan providers go beyond what they're supposed to do. That's why I think it doesn't hurt to give them a compliment for a job well done.



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