

Important Tasks That Most 401(k) Plan Sponsors Ignore

By Ary Rosenbaum, Esq.

When I was a kid, there were advertising campaigns that advised people to check their blood pressure because it's always a great barometer of one's health. When I was a teenager, the campaign with blood pressure was so successful, they eventually started a campaign for people to find out their cholesterol level. I have to say that as an ERISA attorney for 20 years, I have been part of a retirement plan industry that has stressed the need for 401(k) plan sponsors to understand their fiduciary duties as plan sponsors and the need to take care of certain tasks. That campaign has been a little successful, yet there are just too many tasks that 401(k) plan sponsors don't complete and which puts them in harm's way. This article is about the tasks that plan sponsors should complete, but many don't.

Reviewing their plan and plan providers

Most 401(k) plan sponsors hire a plan provider and delegate the work to them and assume that everything went to plan. A 401(k) plan sponsor is a plan fiduciary and being a plan fiduciary requires the highest duty of care in law and equity, so just delegating their work to a plan provider and nothing else is an awful idea for a plan sponsor. The reason why it's a bad idea is because if a plan provider screws up, it's the plan sponsor that will still be on the hook for liability. That's even the case when a plan sponsor hires an ERISA §3(16) plan administrator or an ERISA §3(16) investment manager because the plan sponsor is on the hook for hiring these plan providers. Plan sponsors must review their plan and their plan providers to make

sure work on the plan is being done and being done correctly. Too often, plan errors and omissions aren't discovered by the plan sponsor, they are discovered on a government audit or are discovered years later when there is a change of plan providers, which is a lot costlier. An annual review of the plan and the providers will go a long way for the plan sponsor to avoid unexpected compliance costs years later.

Reviewing plan fees

Thanks to fee disclosure regulations that

many plan sponsors treat these fee disclosures like I treat those privacy notice statements that I get from a company that has my personal information, they ignore it or throw it out. Plan sponsors can't afford to throw these fee disclosures because they do have that fiduciary duty to make sure that the plan provider's fees are reasonable for the services provided and plan sponsors can't do that by putting those disclosures in the garbage. The only way for a plan sponsor to determine whether their plan's fees are reasonable is by benchmarking them

by selecting bids from competing plan providers or by using some type of benchmarking service. When I was using a home contractor that was too expensive, that was my fault that I wasted money by not benchmarking their fees. The reason plan sponsors can't do that is because they are fiduciaries and maybe be held liable for not determining whether the fees are reasonable or not. Fee disclosures are there for a reason and it does the plan sponsor no good if they're tossed in the trash or put in the back of the drawer.

Getting Fiduciary Liability Insurance

It's amazing how many plan sponsors and many of their plan providers don't know what fiduciary liability insurance is or how many confuse it with an ERISA bond. All retirement plans that are covered under ERISA because it covers at least one non-owner employee have to purchase an ERISA bond. An ERISA bond must be put in place by the plan sponsor to protect the participants from the theft of plan assets by fiduciaries such as the plan sponsor or a registered investment advisor. It offers absolutely no protection to plan



were implemented by the Department of Labor (DOL) in 2012, 401(k) plan sponsors get fee disclosures from their plan providers to know exactly how much the plan is paying in administrative expenses. It was a big deal because while plan sponsors have a fiduciary duty to pay only reasonable plan expenses, they had no idea how much the plan was paying in fees until fee disclosure regulations if their provider wasn't fully transparent. While plan sponsors are getting these fee disclosures, too

fiduciaries who might be sued over the plan which may involve personal liability on a part of a fiduciary. Fiduciary liability insurance is a protection policy to defend plan fiduciaries from risk and that risk is litigation brought forth against the plan and its fiduciaries. I once represented a union that sponsored a retirement plan and was sued in a class-action lawsuit over the high fees in the plan they offered. There were over \$1 million in litigation expenses even though my client won the lawsuit. When you get sued and win, you still lose thanks to the high cost of litigation. Thankfully, the union had fiduciary liability insurance so the union was only responsible for the \$100,000 deductible. Any 401(k) plan sponsor must buy a fiduciary liability policy to protect plan fiduciaries from the headache and potential damages resulting from litigation.

Hiring an advisor or hiring an advisor that understands 401(k) plans

Yes, Virginia, there are 401(k) plans that don't have a financial advisor on their plan. I know that firsthand because the law firm I used to work for didn't have one for 10 years until I joined the firm and told them it was a good idea. A financial advisor isn't about selecting mutual funds because I think people with a basic knowledge of investing can put forward a good selection of mutual funds. The true role of a financial advisor is to minimize a plan's sponsor liability by helping manage the fiduciary process. That means developing an investment policy statement (IPS), selecting and replacing investments based on that IPS, frequent visits with the plan fiduciaries to review the fiduciary process, and educating plan participants so that they can make sound investment decisions. It's not only important for the plan sponsor to hire an investment advisor, but it's also important that they hire an investment advisor that is well experienced with 401(k) plans. There are a lot of good financial advisors out there that are ill-fit to handle 401(k) plans because they do not know how to handle these plans and a good 401(k) financial advisor isn't



someone who dabbles in 401(k) plans. The plan sponsor needs to hire a financial advisor who has experience in working with 401(k) plans. Plan sponsors need someone with some knowledge about the fiduciary process, the need to hire quality third-party administrators (TPAs) and an advisor who understands that picking mutual funds for the 401(k) plan is just a small portion of what it takes to be a 401(k) advisor.

Understanding what the TPA does

I always think that if 401(k) plan sponsors would understand the role of the TPA and their part in keeping plan sponsors out of trouble, they would be a little more careful in who they select as TPA. TPAs are responsible for compliance testing, plan accounting, reconciliation of trades, tax reporting, and other important plan functions. When something goes wrong with a 401(k) plan, most of the time it's the TPA's fault because of the nature of their role. Unfortunately, most 401(k) plan sponsors and many of their financial advisors only see a TPA as a pricing point, so they pick a TPA based just on whether they fit the price they pegged for them. It's important for plan sponsors to understand that a good TPA will make fewer compliance errors and afford better utilization of employer contributions through plan design. People don't pick doctors at the cheapest price and I think plan sponsors should understand that picking a TPA on price is a bad idea too.

Asking employees about the 401(k) plan

Too many plan sponsors forget that a

401(k) plan is an employee benefit. Like health insurance and the holiday party, a 401(k) plan is an employee benefit that was implemented to recruit and retain employees. Yet most employers/plan sponsors don't bother to talk to their employees about the 401(k) plan after they've established. Constant communication with employees about their experiences with the 401(k) plan is a great tool to determine whether changes to the plan and changes to the plan providers should be made. A 401(k) plan sponsor can be a great plan sponsor by talking to plan participants and get-

ting their input, whether they are happy or critical of the plan. I think giving plan participants either an input or outlet to air their opinions about the plan can go a long way in improving participant satisfaction with the plan as well as increasing plan participation. Ignoring plan participants and their needs aren't going to improve the 401(k) plan. Getting input and finding inexpensive ways in improving the 401(k) will certainly help with plan participation and retention of employees. Constant communication with employees on such an important employee benefit will go a long way in improving the plan, improving the plan experience for participants, and limiting fiduciary liability.

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