Now Do You Care About Your 401(k) Plan? Well, You Should

By Ary Rosenbaum, Esq.

When I was in law school, I was very jaded about things because I didn't think the law school was very honest about some of the problems that I afflicted. So as the top editor of the law students' magazine, I would mention problems affecting the school and offering concrete solutions for them. A lot of times, I would use the Robert DeNiro line from a very forgettable 1996 movie called The Fan, where he asks: "Now Do You care? Maybe just a little bit?" My comments and criticism didn't go over well with many students and faculty members because of my role as the "turd in the punch bowl" by exposing problems that were an issue for people who only wanted to think nice and happy thoughts. I'm still the same way as an ERISA attorney, which gets some heat from plan providers who also only want to think nice and happy thoughts. As a 401(k) plan sponsor, you need to care and you need to care always.

401(k) plans are a liability threat that too many plan sponsors ignore

The fact is that a 401(k) plan is a hidden danger, kind of a carbon monoxide for employee benefits. As an employer, you need to realize that a 401(k) plan is an attractive employee benefit used to recruit and retain employees. However, unlike the gym discount and the free coffee, a 401(k) plan has liability pitfalls that come with it. As a 401(k) plan sponsor you have a fiduciary duty to your employees that are participants. Being a fiduciary means you have the highest duty of care in law and equity. Liability on a 401(k) plan could even mean personal liability if you are identified as a fiduciary. While you should care about your money, you have a higher duty of care when being responsible for the retirement savings of your employees. I understand as a businessman, time is a luxury you don't have. The problem here is that neglecting your 401(k) plan will only put you in harm's way. A 401(k) is like your health, you neglect it and you may have to deal with crippling, long-term issues. I always joke that the person who said "the road to hell is paved with good intentions" must have been a 401(k) plan sponsor. Setting up a 401(k) plan is a great idea, but you may end up regretting it if you ignore it. Thanks to the requirements set forth by the Internal Revenue Code and ERISA, you can't have a set it and forget it mentality. Whether you decide to handle the plan yourself or delegate some of that fiduciary authority to another provider, you need to understand that a 401(k) plan is something that needs to be looked after. You can't afford to be a spectator with your 401(k) plan when the rules require you to be a heavily involved participant with the most liability at stake and the most to lose. Hiring plan providers isn't enough because unless you delegate fiduciary liability to one or more plan providers serving in a fiduciary capacity, you will still be on the hook for liability as a plan fiduciary. The best you can do is minimize your fiduciary liability, you can never completely eliminate it. Like brushing your teeth, good practices will go a long way in protecting harm to you later down the path. You need to care about your 401(k) plan, caring is the first step towards limiting liability.

The difference-maker besides you being vigilant is a good TPA

Besides you being vigilant and. Involved, the difference-maker in making sure your plan doesn't go off the rails is hiring a good third-party administrator (TPA). You need a TPA that will help you in the day-to-day administration of your plan and handle the compliance end in a competent manner at a reasonable fee. A good TPA goes a long way in helping you through the compliance end, as well as assisting you in plan design that can maximize your tax deductions through contributions that can benefit your highly compensated employees. Hire a TPA that is good at what they do, not just because they're cheaper, they're

related to you, or they're your payroll provider.

The biggest threat isn't a lawsuit

Years ago, I was on LinkedIn and posting articles and comments regarding the liability threat to plan sponsors. There was one person, who wasn't even a retirement plan provider who suggested I was selling fear because he claimed that small and medium-sized plans aren't liability threats to the companies that sponsor them. This person said that small and medium-sized don't have these threats because these types of plans don't get sued. Yes, mostly larger 401(k) plans are the targets of ERISA class action lawsuits because it's more attractive for an ERISA litigator to target companies with larger pocketbooks. Companies like Chevron, Oracle, Fidelity, and Abbott are great targets, the small electrical contractor with five employees isn't. While a couple of small plans have been sued, those types of lawsuits are few and far between. The problem with thinking of a lawsuit as the greatest liability threat that could be ignored is that it isn't the greatest liability threat to any type of 401(k) plan. Even with the largest 401(k) plan, the greatest threat out there is an audit by the Internal Revenue Service (IRS) or the Department of Labor (DOL). The reason why is because the threat is real since the IRS and DOL using the audit process to make sure that a plan voluntarily complies with the Internal Revenue Code and ERISA, respectively. In addition, actual complaints by plan participants to the government may also result in a plan audit. Based on a Form 5500 for a particular plan year (within the 3-year statute of limitations of a filed Form 5500), the government will audit a plan to ensure compliance. The problem is that many errors on the compliance part of the plan are often undetected until a government audit finds it. Your third-party administrator (TPA) that made a plan error isn't usually the best one to find that error since they caused it. Too often, plans may be penalized and/or go through a written agreement with the government to correct plan errors. Correcting plan errors through elf correction or a voluntary correction program is far cheaper than any penalty lodged on you through a plan audit. You can nip plan errors in the bud by being pro-active and like I said before, not being a spectator. Most plan sponsors are reactive, very few are pro-active. Being pro-active means being heavily involved in your plan and making sure it's reviewed for any type of compliance issues that need to be corrected immediately. You need to understand that litigation isn't your biggest threat, it's a government auditor.

The most common error is the most common activity

Years ago, 401(k) plans would rely on DOL regulations that salary deferrals from participant paychecks need to be deposited by the 15th day of the following month. That guidance was issued when 401(k) plans were new in the 1980s and everything was done by paper, especially paper checks to deposit salary deferral in the 401(k) plan's trust. Thanks to the Internet and the use of moving money through Automated clearing house (ACH) required the DOL to rethink their regulation. They decided to reinterpret the regulations that the 15th day of the next month was the maximum time to deposit salary deferrals and that 401(k) plan sponsors really needed to deposit salary deferrals as soon as possible (which might be as little as 3 days). The problem with the re-interpretations is that many 401(k) plan sponsors didn't know about the rule change because of a lack of communication and/or forgetfulness that they needed to comply with since this was such a dramatic change. The problem with being late with depositing deferrals is that when 401(k) plan sponsors are late, they are always going to be late more than once. If you are late with depositing salary deferrals, you have to do more than just be a little sorry. What you need to do is to provide earnings to participants for holding on to their money. In addition, you do need to file through the DOL's Voluntary Fiduciary Compliance Program (VFCP) and actually pay an excise tax on IRS Form 5330 for holding the salary deferrals. On Form 5500 for your 401(k) plan, you have to answer under penalties of perjury on whether you were late in depositing salary deferrals. This is why you need to correct that error and make those corrective changes through the DOL and IRS. I know from experience that plans that just self-correct get contacted in the future by the DOL that they don't have a VFCP application on file from the plan sponsor. You really need to care about making quick deposits of salary deferrals because depositing them late is such a costly and avoidable error.

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