15 Symptoms that a Plan Sponsor's Retirement Plan might be "Ill"

By Ary Rosenbaum, Esq.

One of the most important things that an individual can have is their health. Like they always say, all you need is your health. While your health is certainly dependent on genetics and living a fit life, sometimes the difference between living a long life and dying prematurely is how you listen to what your body tells you. If you notice a sudden departure from your body's normal function or feeling, you may have a symptom. If you take care of these symptoms and seek medical attention, you may avoid or beat a serious condition or disease. I am sure we all know people who survived or died prematurely from diseases because of how they handled symptoms that they experienced. For example, Colon cancer is one of the most curable forms of cancer if detected early, same with prostate and breast cancer. I had a colleague who had symptoms for years and neglected going to a doctor. His neglect allowed this Colon cancer to spread to his liver and he was dead within 3 months of diagnosis. Early detection can be the key to surviving a deadly disease or not.

The same can be said about retirement plans. Early detection of symptoms can avoid a greater harm to plan participants and especially plan sponsors and fiduciaries. The problem is that most plan sponsors are unaware of their responsibilities and their potential liability as plan sponsors. Plan sponsors don't know that they are ultimately liable as fiduciaries for their errors as well as the errors and transgressions of the providers they select. The road to fiduciary liability hell can be paved with good intentions. The problem is that while there are symptoms as to when a retirement plan is ill, plan sponsors are often unaware of what symptoms to look for. So this article is intended to serve as a wakeup call as to what symptoms to look for to determine whether their retirement plan might be "ill" and should contact a retirement plan "doctor" (plan consultant or ERISA attorney).

1. A plan where the third party administrator (TPA) is not transparent on fees, especially when it comes to indirect payments they receive, such as revenue sharing payments from mutual funds.

As Professor Barbay said in the movie Back to School, there are two types of businesses, the quick and the dead. While fee disclosure regulations will be implemented in 2012, many TPAs have been practicing full fee disclosure long before that was in style and legally required. To this day, some TPAs will wait until the very last second to abide by these regulations. A plan sponsor should always be wary of any TPA that is not fully transparent on the fees they received, whether it's directly or indirectly. A plan sponsor may be in for some sticker show when these TPAs are forced to reveal all of their fees in 2012.

2. A company that has a profit sharing and money purchase plan that covers the same group of employees.

Many plan sponsors had paired plans, a money purchase plan combined with a profit sharing plan (whether it is a 401(k) plan or not) because of deductibility limits placed on profit sharing plan contributions. The limit changed in 2002, so most plan sponsors merged their money purchase plans into their profit sharing plans to save on administrative expenses because the need for two plans was pretty much eliminated when the limit on profit sharing contribution deductions was lifted from 15% to 25% (to finally be on par with money purchase plans).

3. A plan that has consistently failed their discrimination testing, whether it's the tests for salary deferrals, top heavy, match or 410(b) participation.

If a plan is consistently failing its discrimination tests, it is certainly a sign of a problem. While failed discrimination tests need to be remedied, there are many plan designs such as a safe harbor plan 401(k) plan design that can help avoid these types of failures and save plan sponsors some money and some headaches. There are too many plans failing discrimination tests with TPAs who did not have the foresight to suggest what type of corrective plan designs can be used.

4. A defined benefit plan which is underfunded.

With a falling stock market, a defined benefit plan that are underfunded in its defined obligations to participants at normal retirement age will be more underfunded. Any plan that is underfunded, whether the plan has frozen its accrual of benefits (contributions for current service) or not should have s study to determine what can be done, whether it is to freeze contributions, change its investment strategy, or engineer an exit plan to terminate the plan

over a seven year period (or less).

5. A defined benefit plan for a company that has increased their workforce.

Any plan sponsors with a defined benefit plan with an expanding workforce should sit down with their TPA and accountant to determine whether they can still afford the plan as more employees mean more required contributions.

6. Any plan with no financial advisor.

Every retirement plan that has employee participants needs a financial advisor to help develop an investment policy statement, help chose and replace investments, as well as offering investment education. A TPA who assists in fund menu selection and takes on no fiduciary role is not a financial advisor.

7. A money purchase plan that is covering non-collectively bargained employees.

Just like #2, money purchase plans for non-collectively bargained employees should go the way of Betamax or bellbottoms. Unless contractually required, a money purchase plan should be converted into a profit sharing plan.

8. Any 401(k) plan that has not reviewed their contract with their insurance company provider in the last 5 years.

Plans should always review their contracts with a plan provider that is an insurance company. Perhaps the provider has a better program or pricing based on the plan's size or economies of scale or perhaps a plan is better going the fully unbundled route. Only reviewing a contract can a plan sponsor possibly know they might be paying too much in fees.

9. Any plan without an investment policy statement (IPS).

Any retirement plan whether investments are participant directed or not must have an IPS that dictates what criteria was used in how investment options were selected as well as when they are replaced. Outside of a plan document, it is probably the most important document a plan sponsor needs to have to protect against fiduciary liability. A plan without an IPS is a plan asking for a lawsuit.

10. Any plan that has not reviewed their choice of investments in the last year.

It is not enough that a retirement plan has an IPS. In order to manage the fiduciary process and minimize liability, the plan sponsor and trustees must review their investment options on a semi-annual or annual basis and determine whether they still meet the criteria set forth by the IPS.

11. Any plan that has not seen their financial advisor in the last year.

Having a financial advisor that is invisible and is not meeting the fiduciaries on a consistent quarterly, semi-annual, or annual basis is the same as not having one (see #6 above).

12. A participant directed retirement plan that offers no education to participants.

If a plan is participant directed, plan participants should be provided education because under ERISA 404(c), plan participants must be provided or have the opportunity to obtain sufficient investment information regarding the investment options available under the plan in order to make informed investment decisions. A plan that offers no education to participants risks some liability from financially uninformed plan participants.

13. Any plan without an ERISA bond and/or fiduciary liability insurance.

Generally, every retirement plan needs an ERISA bond to protect plan assets from theft. In addition, any plan with employees as plan participants should purchase fiduciary liability insurance to protect plan sponsors and fiduciaries to protect against any liability lawsuits from plan participants.

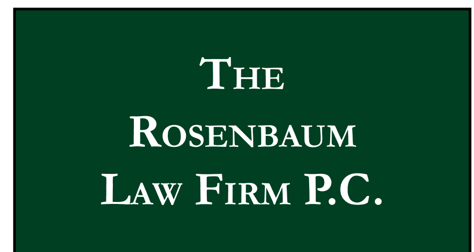
14. A 401(k) plan with low participation or low average account balance per participant.

These may be the result of the employee population and the type of employees the plan covers. It also may be explained by something less innocuous like poor investment education or lack of enrollment meetings. Regardless, it should be reviewed.

15. Any plan that has not been updated in the last 2-3 years.

Whether it is a plan amendment or a review of its fees or administration, it is imperative that plans be reviewed on a 2-3 years basis (annually is preferred) to make sure that the plan still meets the needs of the plan sponsor and that there are no glaring administrative issues such as out of date plan documents or recordkeeping errors.

These are just some examples of symptoms that indicate you may have a retirement plan in distress. Regardless of whether the plan is ill or not, you should have your plan reviewed by an ERISA attorney or a retirement plan consultant.



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