The Value Of An Independent ERISA Attorney

By Ary Rosenbaum, Esq.

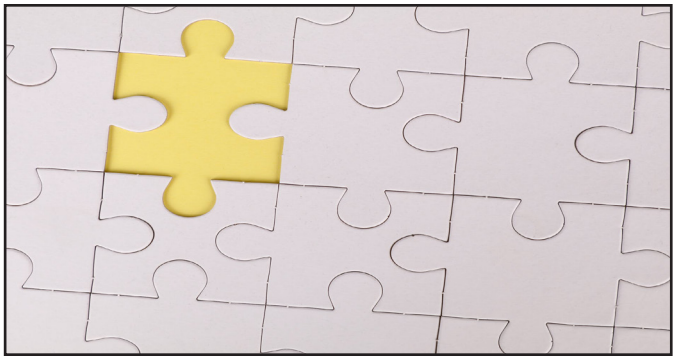
When I was younger, my parents rarely took me to the doctor when I was sick. My parents practiced medicine in a sense, checking my temperature and only taking me to the pediatrician when they thought something was serious like when I suffered an asthma attack at 5 or when I had tonsillitis. As a parent today, I take my children to the doctor anytime they are ill because I'm not a doctor nor do I play one on TV. While I usually know when my children are seriously ill or not, I would rather place my children's health into the hands of the people that actually graduated from medical school. Let the professionals with the background to make those important decisions to make those decisions. That is why I'm still surprised by how many retirement plan sponsors implement and operate a retirement plan without using an independent ERISA attorney. This article is about how when and why you should hire an ERISA attorney.

Why You Need An ERISA Attorney. Qualified retirement plans like 401(k) plans and defined benefit plans are legal entities that operate on plan documents that must adhere to the laws of the Internal Revenue Code and ERISA. Yet most plan sponsors have never used an ERISA attorney and only seem to need one when something goes wrong. Using a retirement plan without the services of an ERISA attorney is like using a car without a mechanic. When you finally call them, it's usually too late and you have suffered enough pecuniary damage. The use of an ERISA attorney can be a valuable, preventive measure that will save the plan sponsor money and minimize fiduciary liability.

The problem of the billable hour. Plan sponsors shy away from hiring an ERISA attorney because it requires hiring an attorney. Attorneys don't exactly have a sterling reputation when it comes to billing their clients, so I can empathize with their wariness of hiring one. As I always say with a little help from former Chief Justice John Marshall, the power to bill by the hour is the power to destroy. Not only can clients be incessantly billed for hourly work, but they also get billed for expenses incurred by a law firm like postage, copies, and faxes. I have a friend who is a financial advisor and he advised that one of his clients hire an ERIA attorney to do an overview of their 401(k) plan including a document review, administrative review, and review of their processes as it results in participant direction of investment. I charge $750 for the review; this attorney nearly charged $100,000. So it would be imperative that plan sponsors have an idea of what type of legal bills an ERISA attorney may charge for plan documentation. That is why except for client representation before the Department of Labor (DOL) and the Internal Revenue Service (IRS), I charge a flat fee so clients don't have sticker shock after my work is done (comparable to what many third-party administrators (TPAs) charge).

The TPA legal department or not. When it comes to implementing and operating a retirement plan, plan sponsors usually rely on the TPA firm for the preparation of plan documents. Some TPA firms are large enough to have their own legal departments; some are too small to have any lawyers on staff. For the TPAs that have no legal staff, plan documents may be drafted by a paralegal or someone with no legal training at all like an actuary or a plan administrator. While these TPAs will state that they are not practicing law and I would agree, the fact is that a plan document is a legal document with legal consequences to the plan sponsor and the plan's trustees. I believe that plan documents should be drafted by those with legal training and ERISA law experience. Case in point, I have a client who was under Internal Revenue Service audit because the TPA was not operating the 401(k) plan according to its terms in the way that matching contributions were allocated. The plan document said that contributions would be allocated pro-rata, i.e. a proportional share according to what the participant deferred as compared to what all participants deferred. However, the TPA allocated the matching contribution the way most plans do, as a percentage of what a participant defers. So there was an error in allocating a few thousand dollars of matching contribu-

tions. The TPA refused to take the blame for the error, blaming it on the plan document. Of course, the TPA drafted the plan document.



The Attorney-Client Privilege. For the TPAs with a legal department of attorneys drafting plan documents, you have to understand that using them affords you no attorney-client relationship. The attorneys working for the TPA draft plan documents and may help you with work before the DOL and the IRS, but they can't afford you the same relationship as an independent ERISA attorney because they don't work for a law firm. ERISA attorneys who work for a TPA do a good job drafting plan documents, I know, I did it for 9 years. The problem is that drafting plan documents are only one element in the role of an ERISA attorney and TPA attorneys will never complete those other elements because they are biased, the needs of the TPA come first. Case in point, I have a law firm client that I worked with when I was a TPA attorney and when I was an independent ERISA attorney. As the TPA ERISA attorney, I drafted a new plan document for them and got a favorable determination letter from the IRS. Nothing more, nothing less. Two years later when I was an independent ERISA attorney, my client wanted to move on from the TPA. At that point, I discovered that the TPA was pocketing revenue sharing and the TPA placed my client in a stable value fund that would have a market value adjustment (MVA) if they changed TPAs (netting the TPA an extra 25 basis points in fees) which would cost participants thousands of dollars. I was able to find them a new TPA that reduced their fees by 30% and allowed for an in-kind transfer of the stable value fund to avoid any MVA. Some will say that I used my inside knowledge of my old TPA to my client's advantage. As a TPA ERISA attorney, I had neither knowledge of our pricing nor any concern about what they were doing with stable value investments because that wasn't part of my job. My allegiance was with the TPA and I had no duty to that client since I wasn't working for a law firm. As an independent ERISA attorney, I had a duty to know what my client was being charged because knowledge of plan administration costs and whether they are reasonable is one way to minimize fiduciary liability for plan sponsors and trustees. Two years later, the new TPA advised us that the top-heavy test was done incorrectly by the old TPA and the client owed $28,000 for a missed, required top-heavy minimum contribution. Working with the client, we were able to get $7,500 from the old TPA as a settlement for negligent testing. As an independent ERISA attorney, plan costs and poor administration are some concerns I will raise with my client. If I'm still the TPA attorney, I don't have those conversations as long as I wanted to keep my job. The inherent conflict of interest that I saw as a TPA ERISA attorney is the reason I decided to become an independent ERISA attorney where the client's needs are paramount.

Independent ERISA Attorneys don't see their work as ancillary. TPAs with a legal department feel that it is a cost-effective way to fully serve their clients, but they see their legal department as an ancillary service to their main role of plan administration. I contend that there is nothing ancillary about the continued compliance and qualification of a retirement plan within the parameters set by the Internal Revenue Code and ERISA. Which ERISA attorney would have your needs come first, the one whose main function is to keep you as a client of the TPA or the independent one who is required to fully represent you in an attorney-client relationship? Seems pretty clear to me.

A check and balance. The value of a good ERISA attorney is rooted in the fact that an independent ERISA attorney can serve as a check and balance on the other retirement plan providers. An independent ERISA attorney would keep an eye on the administrative practices of the TPA and whether the financial advisor is complying with the processes that they agreed to with the plan sponsor and trustees. Case in point: my client relied on the service of a TPA for her defined benefit plan including the production of all plan documents. For almost 30 years, she received no valuation reports or any distribution forms for her benefit. While she thought she had delegated the duty of plan administration to the TPA, she was personally sued by the DOL for breach of fiduciary duty because she is still at fault. While she needs an ERISA attorney now, an independent ERISA attorney hired earlier would have uncovered the discrepancies in the administration of the plan and had it corrected before any legal action by the DOL. So hiring an ERISA attorney at the implementation of the plan or during the continuing operation can be a more cost-effective measure because the legal assistance at that time is preventative, rather than hiring an ERISA attorney after all the damage has been done.

A big piece of the puzzle. As part of the retirement plan provider puzzle, an independent ERISA attorney not only acts as an advisor on the continued qualification of the plan, they also serve as a trusted advisor on plan design issues to maximize contributions, as well as an ombudsman to help out with issues resulting from other plan providers. The value of a good ERISA attorney is like the use of insurance. While it may be considered costly, it is an effective way to minimize liability and avoid greater financial harm later. In life, you usually get what you pay for. Using the plan document services of a TPA gives a false sense of security because they cannot function in the same role as an independent ERISA attorney. For unbiased, legal representation, there is no substitute for an independent ERISA attorney.

The Rosenbaum Law Firm P.C.

The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
Follow us on Twitter @rosenbaumlaw