The Art Of Terminating Your 401(k) Plan Provider

By Ary Rosenbaum, Esq.

As someone who has been fired and has been fired, it's never a pleasant experience. Even firing a gardener who wasn't doing their job wasn't fun for me. Yet, there are so many reasons why you have to fire your retirement plan provider. The problem with firing your retirement plan provider is extricating yourself from them with as little damage to yourself or more importantly, to the assets of your employees in your 401(k) plan. This article is about how to deal with terminating your plan providers.

There are many reasons to fire a plan provider, just make sure it's not this

Obviously, firing a retirement plan provider is a choice you've made after some deliberation (hopefully). Firing a plan provider is the last resort after showing some dissatisfaction with the plan provider. There are many reasons why plan providers can get fired. It can be a lack of communication by the plan provider, the plan provider failing to complete tasks they promised, and errors made by the plan provider. Many plan providers are terminated because their fees are just too high for the services they provide, which is an issue since you have a fiduciary duty to pay only reasonable plan expenses. That means you don't have to pick the cheapest provider, but some that charge reasonable fees. That being said, I would not terminate a plan provider just because another plan provider is a little cheaper. Fire a third-party administrator (TPA), auditor, financial advisor, or ERISA attorney (gulp) for a variety of reasons, but don't just because it's a nickel cheaper across the street. I know a guy who owns a TPA that had a happy client who fired him to have a payroll provider do it cheaper. Needless to say, they rehired the TPA they fired because the nickels they saved were dwarfed by the quarters they had to pay for plan errors. Firing a plan provider just because someone is cheaper usually blows up in the 401(k) plan sponsor's face.

Get the replacement in place

I always like to hear stories about George Steinbrenner and his annual firing of a New York Yankees manager, probably because I'm a Mets fan. Steinbrenner would plot and you knew when the ax was about to happen because George would rip the manager in the New York tabloids. One thing Steinbrenner made sure of was to have his new manager in place when you had to fire one. That was a little easy when he had a fired former Manager like Billy Martin or Gene Michael on payroll, itching to get back in the dugout. You need a replacement plan provider in place if you're going to fire the incumbent since you need to ensure a seamless transition between plan providers.

Have the contract reviewed for the termination clause

Most small and medium-sized plans never have an ERISA attorney review their contracts. I understand that they are wary of legal bills and most of my competitors bill by the hour, I flat fee these types of contract reviews. While contracts should be reviewed before they're signed, they should also be reviewed before you terminate your plan provider, as well. There will be a provision there that talks about the plan provider's termination. It will talk about timing and method of termination. Sometimes an email will suffice, sometimes they want a registered letter. Whatever the provision states, you want to comply. The reason you want to comply is that you want to terminate a plan provider on your schedule and not have extra time with them because you didn't follow the termination clause. I've seen plan provider transitions that were pushed back, just be-

cause the plan sponsor failed to comply with the termination clause.

The problem with stable-value funds

One of the reasons most of my legal services are flat fees is because 401(k) plan sponsors enjoy cost certainty and do not get the sticker shock of an unexpected 4 or 5-digit legal fee. I'm not too fond of surprises, so I always needed to know the amnio results for my 2 kids. One of the problems with terminating a TPA and/or custodian is the sticker shock involved with something you didn't expect when terminating a plan provider. Again, I hate surprises. The problem is the surprise of the Stable value fund and the effect of terminating the stable value provider, which is an insurance company, that could also be the TPA and/or custodian you want to fire. Stable value funds provide great returns, much better than money market accounts when it comes to capital preservation. There is a price to be paid for that. Stable value funds are guaranteed investment contracts and any termination may lead to a market value adjustment (MVA). An MVA is a monetary adjustment, or fee stated within a stable value fund contract. This fee is paid as the result of the plan sponsor's withdrawal before the provisions outlined in the contract are met. When switching TPAs, custodians, or financial advisors, you need to be mindful of the stable value fund, especially if there will be a change with the stable value provider. Even if you want to keep the stable value provider, a change in custodian or TPA may still trigger an insurance contract termination and an MVA, unless an in-kind transfer is allowed. I've seen MVAs where participant stable value accounts will get a 3% charge, so that could be a lot of money in the end. I implore you and any 401(k) plan sponsor to understand the ramifications of any plan provider change and its effect on the stable value fund.

Termination costs should be reasonable

If I get fired, I don't charge a termination fee. Same thing with my mechanic, Ralph, who saved my 2012 Toyota Prius V recently from the scrapyard. The retirement plan business has a custom that the fired TPA is entitled to a deconversion fee. Some advisors might feel the need to charge a similar fee. All termination costs, associated with firing a plan provider must be reasonable. It should be stated somewhere in the termination clause of that contract. Very few TPAs list the fee and there are quite a few TPAs out there that will take out their pound of flesh in being terminated, by charging exorbitant termination costs. I had the unfortunate situation of firing a TPA who felt they were entitled to $80,000 in compliance testing, and Form 5500 preparation costs, that we had already paid them for. One of the leaders of one of the 401(k) industry's leading trade groups, admitted to me the biggest dispute with plan providers is over these termination costs. I believe, one day, the Department of Labor (DOL) will require fee transparency when it comes to these termination costs,

It's business, not personal

When it comes to terminating a plan provider, just remember the Michael Corleone line in The Godfather: "It's not personal, it's strictly business." Every business relationship will end at some time, it's not infinite because time isn't infinite. At a certain point, any plan-provider relationship will end. For you, it shouldn't be personal. If you're rational, you will seek that the relationship will end on the best of terms. As someone who has quit jobs to take others, that isn't up to you. A relationship has two sides and there may be some acrimony on the plan provider for firing them. You can only manage your behavior and temper, you can't manage the behavior and temper with a plan provider who is upset about getting clipped. If the plan provider has a temper tantrum or wants to fight, be the better party. If they can't professionally handle the termination and it negatively impacts the 401(k) plan, a call to the local DOL office usually does the trick.

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