# 401(k) Plan Sponsors: Please Read This Article!

By Ary Rosenbaum, Esq.

You're a 401(k) plan sponsor and we understand that you're busy running a business and talking about retirement plan issues is as exciting as watching paint dry. The problem is that paint drying won't expose you to liability, but sponsoring a retirement plan can. So someone thought this was a good idea for you to read this article about how neglecting your 401(k) plan isn't a good idea. We'll try to make this article as painless as possible.

**We know you're busy**

Being an employer is hard work. If it was easy, everyone would do it. As an employer, the whole point of being in business is making money. So you need to make sure you turn a profit as well as trying to manage employees. Add taxes, licensing, insurance, rent, and everything else under the sun, you don't have the time to devote to something like reviewing your retirement plan. The problem is that you can't afford to when you're not only the plan sponsor, but you're also the plan's fiduciary.

**The Meaning of Being A Fiduciary**

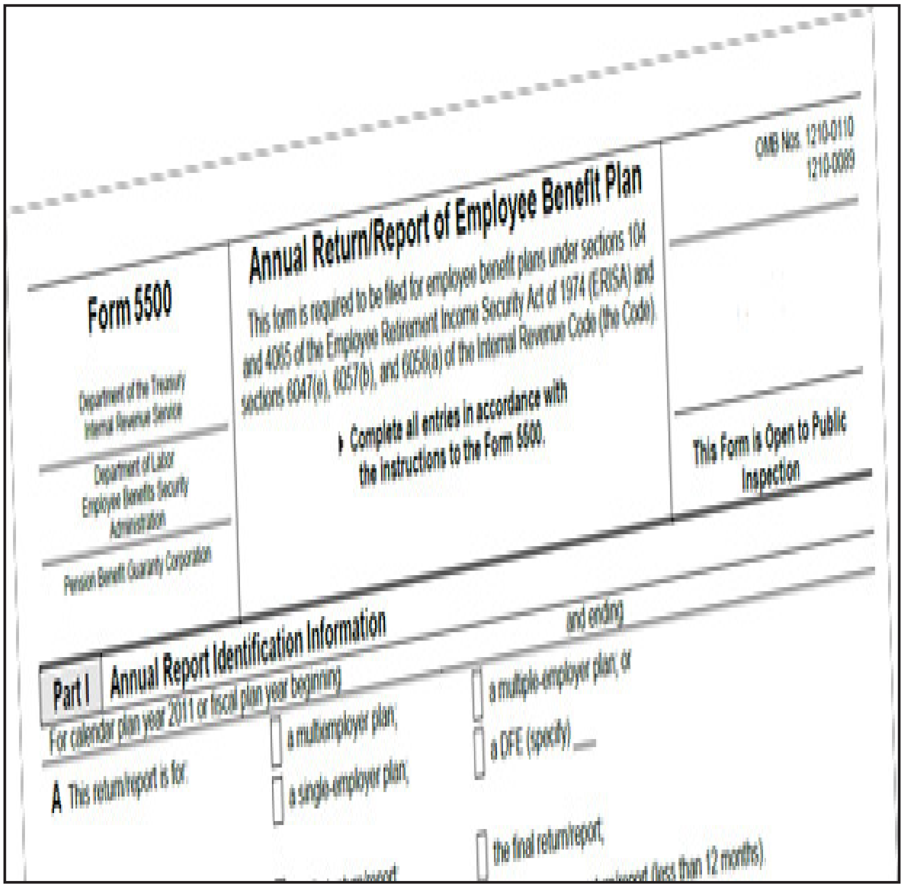
You may offer many employee benefits such as health insurance or something as small as free coffee, but there is something different with offering a retirement plan to your employees. Being a retirement plan sponsor also makes you a fiduciary and you need to have the highest duty of care as a plan fiduciary so it's something more than just giving away free milk for the free coffee. Being a fiduciary requires a higher duty of care than anything you do for your employees and clients because you're holding the retirement assets of your employees in the plan. So when a retirement plan provider calls you up wanting to sell you their services, just remember that a retirement plan should be treated a little more importantly than the water cooler you provided to your employees.

**Yes, you are responsible for your providers**

The problem with being a plan fiduciary is that you are ultimately responsible for what goes on with your retirement plan. So while your third party administrator (TPA) and or/financial advisor will have to answer to you for any mistakes they make, you're still responsible for those errors. So if your TPA fails to prepare your Form 5500, you're the only that is going to get the penalty from the Department of Labor. Even if you hire a provider such as an ERISA §3(38) fiduciary who is going to assume all of the liability that goes with managing the investment process of the plan, you're still liable for hiring them. So that means that no matter how much you delegate your liability as a plan fiduciary, you'll always be on the hook. While you can minimize your liability exposure, you can never fully eliminate it.

**You Can Get Sued, But That's Not the Only Threat**

For years, everyone claimed that only large 401(k) plans got sued in class action lawsuits and that there was no threat to smaller plans. However, that was premised on the fact that a class action lawsuit is the only liability threat to a plan sponsor. While a class action lawsuit against a smaller plan was unlikely because of the limited recovery amount, the bigger threat then and now is through government review. An Internal Revenue Service (IRS) and/or Department of Labor (DOL) audit can be a huge liability pitfall for plan sponsors if the agent reviewing the plan discovers that something went wrong. Plan sponsors have paid huge penalties and some have had their plans disqualified because of plan compliance issues caught on an audit. Another liability threat is the former employee who is trying to sue you over the 401(k) plan just to punish you for firing them for cause. As far as the class action threat, a 401(k) plan with only $9 million in assets was just recently sued in a class action lawsuit. No matte the threat of liability, the threats to a plan sponsor are real.


Form 5500

Department of the Treasury
Internal Revenue Service

Department of Labor
Employee Benefits Security
Administration

Pension Benefit Guaranty Corporation

Annual Return/Report of Employee Benefit Plan

This form is required to be filed for employee benefit plans under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6047(e), 6057(b), and 6058(a) of the Internal Revenue Code (the Code).

▶ Complete all entries in accordance with the instructions to the Form 5500.

OMB Nos. 1210-0110
1210-0089

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Part I Annual Report Identification Information

For calendar plan year 2011 or fiscal plan year beginning and ending

A This return/report is for: a multiemployer plan; a multiple-employer plan; or a single-employer plan; a DFE (specify) ___

the final return/report;

(less than 12 months).

### Get a financial advisor, but get the right one

While you certainly could manage your own investments, you need a financial advisor to manage the fiduciary process of your 401(k) plan. The role of a financial advisor is to assist in the selection and replacement of investment options on the plan. One aspect of the selection of investment options is developing an investment policy statement that serves as the basis and criteria for the selection and replacement of plan investments. Another important aspect of advising a 401(k) plan is educating plan participants if they direct the investments for their own 401(k) account. 401(k) plans where participants direct their investment fall under ERISA §404(c), which is supposed to protect you from liability from losses incurred by plan participants. This liability protection is not a suicide pact, it's a sliding scale based on how the fiduciary process is managed. ERISA §404(c) requires that plan sponsors make sure that participants have enough information to make informed investment decisions if they want this liability protection. It also requires that the selection and replacement of plan assets go through a decision making process. A good financial advisor will help with plan education, will help in investment selection, and will help in making sure that the mutual fund expenses are reasonable based on plan size. A good financial advisor can go a long way. If you want to delegate the decision making process and the liability that goes with it, you could always hire an ERISA §3(38) financial advisor who will have the discretionary authority to make the investment decisions. Of course as discussed previously, hiring an ERISA §3(38) is a decision that the plan sponsor can be liable for.

### Review, Review, Review

My mother never wanted to go to a doctor for a checkup because she didn't want to find out what was wrong. In her mind, she's healthy if she doesn't have to go to the doctor. No, my mother wasn't a plan sponsor. Most 401(k) plan sponsors don't want to review their plans because they don't want to know what's wrong and the problem is that the problems with the plan never go away. The problem with these 401(k) plan problems is that most plan sponsors don't know what's wrong until it's discovered and that's usually too late in avoiding penalties and/or huge legal fees for voluntary correction programs. Plan errors are usually discovered on audit or when they change TPAs. Paying someone like an ERISA attorney (cough, cough) to review your plan in a cost effective manner can go a long way in detecting plan errors before they become bigger and costlier to correct. Assuming that your plan providers are doing their job in a competent manner is not a bet worth taking. You can avoid the headache by having your plan reviewed by an outside party on a consistent basis.

### Focus the right way on fees

Thanks to media exposure, a bad stock market for the past 15 years, litigation, and fee disclosure regulation, there has been a renewed focus on the costs of plan administration. As a percentage of assets, administering 401(k) plans has gone down considerably thanks to transparency, competition, and technology. As a plan sponsor, you have a fiduciary duty to pay reasonable plan expenses. Fees are reasonable based on the services provided; it doesn't mean that you have to select the cheapest plan providers. You only need to make sure that the fees you are paying are reasonable and you can't do that without benchmarking the fees you are charged by looking at the fee disclosures provided by your plan providers. Your providers can even help you benchmark their fees and the fees of other providers as long as they use a neutral third party benchmarking service. While you should focus on fees, it should not be the defining reason why you should select and replace plan providers because the competency of a plan sponsor is more important. Saving .05% on fees doesn't mean much if the new TPA isn't doing a good job.

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