It's The 401(k)Plan Sponsor's Job, Just Because

By Ary Rosenbaum, Esq.

I have been a fan of Sesame Street since I was a child and again as an adult when my children were younger. It's a brilliant show that has educated millions of kids in the past 54 years. One of the great events in Sesame Street history is when they acknowledged in 1983 the onscreen death of the owner of the luncheonette, Mr. Hooper (the actor Will Lee died the year before). Big Bird wanted to give a picture he drew of Mr. Hooper to him and didn't understand that since Mr. Hooper died, he wasn't coming back. Big Bird doesn't think it's fair and how he'll miss Mr. Hooper and the adults tell him that the way it has to be: "just because." While a retirement plan sponsor isn't the same as a giant bird Muppet; there are many times that they have to be told that they are responsible for and they are on the hook "just because". This article is about the stuff that the 401(k) plan sponsor is responsible for, whether it's fair or not.

Just because, the nature of being a plan fiduciary

Being a retirement plan sponsor is more than just sponsoring a retirement plan. Along with starting and maintaining a retirement plan is the role of being a plan fiduciary. As a plan sponsor, the employer is also a fiduciary to the plan just like the individual trustees chosen to be the trustees of the plan. Being a fiduciary requires the highest duty of care in equity and law because a plan fiduciary is responsible for the money of plan participants. When a plan sponsor loses money in business, that's their problem. If they lose the money of plan participants, it's a much larger problem because any delineation from being a competent plan fiduciary is only going to increase potential liability because any breach of fiduciary duty is going to cost a lot of money. Responsibilities of being a plan fiduciary include: acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them; carrying out their duties prudently; following the plan documents (unless inconsistent with ERISA); diversifying plan investments; and paying only reasonable plan expenses. It's more than a mouthful of words; it's about a real duty and a duty of care that goes with it. In the end, the buck stops with a 401(k) plan sponsor.

The true cost of plan administration is on the Plan Sponsor

Prior to fee disclosure regulations that were implemented in 2012, there was an interesting dilemma for plan sponsors. While they had the fiduciary duty to only pay reasonable plan expenses, the problem is that they had absolutely no idea how much they were being charged for plan administration because plan providers were under no requirements to tell plan sponsors how much payments there were receiving for their work, whether those fees were directly pad by the plan sponsor or indirectly paid by a third party (such as a mutual fund company through revenue sharing). So how could plan sponsors know if the fees that the Plan was being charged were reasonable when they had no idea how much they were? Fee disclosure regulations have alleviated this dilemma, except most plan sponsors don't know their role after getting these fee disclosures. Plan sponsors now have to be more vigilant in the review of their fees, which means they have to take their fee disclosures and benchmark their fees against what is currently being offered in the current marketplace. Plan sponsors don't have to pick the cheapest plan pro-

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vider (which can be another problem), they just have to make sure that the fees being charged are reasonable for the services being provided. If a plan sponsor wants to pay for white glove treatment or brown bag (low service) treatment, that's fine as long as the fees are consistent with the number of services. Fee disclosure is an excellent breakthrough for the plan sponsor who handles their fiduciary duty diligently; it's a bad thing for the plan sponsors that just put those fee disclosures in the back of the drawer. Plan sponsors are amazed about their responsibility in paying reasonable fees; they think the duty should rest with the plan provider. The problem is that it's the plan sponsors that hire these plan providers and most of these plan providers won't be serving in a fiduciary capacity anyway. So the hook of liability is with the plan sponsor in determining whether fees are reasonable for the plan services provided. That's the way it has to be unless a plan sponsor would hire an ERISA §3(16) administrator who would assume the responsibility of determining fee reasonableness.

Mistakes a plan provider makes are on the Plan Sponsor

Retirement plan sponsors are shocked that when it comes to plan errors, they ultimately bear the burden and brunt of it. While plan providers are responsible for the errors they create, it's ultimately the plan sponsor's burden to fix. Form 5500s aren't filed, the plan sponsor has to pay to fix it. Discrimination tests that are not properly done will have to be fixed by the plan sponsor. Plan sponsors have been sued by plan participants and by the government for the transgressions created by inept plan providers or even by good plan providers who make a mistake. Life's not fair and plan sponsors will be upset that they will have to pay through the nose for the mistakes of their plan provider. However, it was the plan sponsor who had the responsibility of hiring plan providers, so it's not much of a logical leap to hold plan sponsors responsible for the mistakes of the people they hired. It's just because they are plan providers that they are responsible for the errors of the providers they hire. Sure, a 401(k) plan sponsor can sue a plan provider for negligence, but it's still the plan sponsor's duty to clean up the mess.

Yes, plan documents have to be updated

My favorite Professor from law school, Bernie Corr once joked that the reason that the Bankruptcy Code is updated every few years was to keep bankruptcy lawyers in business. I'm sure people will theorize that retirement plans are constantly updated because they need to keep ERISA attorneys in business. I don't know if that's true, but constant amendments and restatements certainly help pay the bills. Every few years, the Internal Revenue Service will require a plan amendment that is attached to the plan document and then require a new plan document every 6-7 years. The problem is that if the third-party administrator (TPA) is not on top of the situation, then the plan sponsor could go without a required plan amendment or restatement. Too many plan sponsors go through the cracks and a few plan amendments or restatements have not been timely adopted. The problem with failing to properly amend or restate a plan is that it's potentially a disqualifying provision and will cost thousands of dollars in penalties if caught on an audit or thousands in voluntary compliance fees. If you can't find a plan document that you had for your 401(k) plan, the Internal revenue Service will take the position. it was never adopted. It doesn't seem fair that a plan sponsor is on the hook for liability for plan amendments and restatements they may be unaware of, but that's the life of a plan sponsor when you have a fiduciary responsibility to plan participants. While a plan sponsor may not know when plans have to be amended, fiduciary duty requires them to know or to hire competent plan providers that will let them know.

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