

# Mistakes An Employer Needs To Avoid When Starting A 401(k) Plan

By Ary Rosenbaum, Esq.

Too many plan sponsors would rather eat fish on an airplane flight than they would call an ERISA attorney. Calling an ERISA attorney is always an issue if you've ever received a legal bill and were charged by the hour. That's why most of my billing is on a flat fee, but I still have trepidation from the plan sponsor being coaxed by the third party administrator (TPA) or financial advisor who referred me as if I was an actual dentist because dentists get a bum rap too. The point here is that while a plan sponsor may always fear a legal bill, they can't ignore their retirement plan problems because it won't go away. Surely, plan sponsors seriously need to call an ERISA attorney. I am serious and don't call me Shirley.

## Stewardess, I speak ERISA

When someone asks me a legal question that has nothing to do with ERISA, I always preface my answer that I may not be the right person to ask a legal question that has nothing to do with ERISA.

That's what happens when I'm on the verge of celebrating 20 years as an ERISA attorney. People always ask me a lot as to what an ERISA attorney does, so I tell them I'm a retirement plan attorney. Being called an ERISA attorney is a misnomer since I handle retirement plans that are subject to the Employee Retirement Income Security Act (ERISA) and owner-employee only plans

and non-qualified plans that are not. One of the biggest mistakes that a plan sponsor can make is leaning on advice from an attorney with no ERISA background. I can vouch that ERISA (and retirement plans) isn't required coursework for law school and isn't a topic on any state bar exam. There have

are alike and what always set me apart is that my background comes from 9 years working as a TPA attorney, so my experience is working through the problems and issues that plague day-to-day plan administration. There are ERISA attorneys who have spent their entire career working at a

law firm, so their experience is derived from knowing how retirement plans should run, so I feel I've always had a more practical experience because I know how they're actually being run, I've seen it when things aren't run correctly and the method to fix it may not be in the book that most ERISA attorneys in law firms have on their mantle. I will also suggest that plan sponsors need to hire an ERISA attorney that actually speak English rather than what I call, ERISAese. Thanks to my non-law firm background, I've had the ability to discuss retirement plan issues in a language that both plan sponsors and plan providers can understand. Heck, you're reading this article, aren't you?



been a few times when a company's general counsel or outside corporate attorney have acted as a stumbling block because they insist to the plan sponsor that an ERISA attorney shouldn't be consulted even though they really have no idea on whether they should or not. Plan sponsors need to hire an ERISA attorney with an actual retirement plan background. Not all ERISA attorneys

## I've got to get out of here.

Plan sponsors don't hire an ERISA attorney for a lot of reasons and the first reason is the dread of working with an attorney and the bill that comes attached to the attorney. I went to law school and worked three unspectacular years working at a law firm, so I know why people don't like attorneys. Another reason that plan sponsors

don't work with an ERISA attorney because they tend to be reactive than proactive, meaning they only work with ERISA attorneys when things go spectacularly wrong rather than being pro-active and nipping issues in the bud before they become bigger issues. Plan sponsors are very busy with running their business and don't think they have time to manage their retirement plan. The best example about plan sponsors not being pro-active is that I offer a full top to bottom retirement plan review called the Retirement Plan Tune-Up. I charge just \$750 for it and it can be paid from plan assets, but maybe I've done about 10 in the past 8 years because plan sponsors don't feel the need to detect issues before they ripen. It's the same as people who only go to the doctor when they're sick rather than take preventative checkups. The most unfortunate part with plan sponsors is that many errors and compliance headaches can be minimized if detected earlier. If plan sponsors wait too long, the issues are usually only discovered in a government audit which can subject plan sponsors to penalties. Plan sponsors need to understand that plan reviews conducted by a cost-effective ERISA attorney like yours truly can go a long way in avoiding costly compliance headaches later down the line.

### **You can make a hat, brooch, or a plan document**

Plan sponsors can certainly work with an ERISA attorney that works for a TPA. They're pretty good at what they do. I know because I was an ERISA attorney working for a TPA for 9 years. I represented clients during Internal Revenue Service (IRS) and Department of Labor (DOL) audits, I handled plan terminations, voluntary compliance program submissions, and I prepared all plan documents including amendments and mergers. The difference between what I did for them and what I do now with my own practice is that there is an attorney-client relationship with my clients today. When I was a TPA attorney, I owed no attorney-client relationship to my clients, so there was no duty of loyalty to them. My



loyalty was to the TPA paying my salary and sometimes, I had to clean up messes caused by my plan administrators. Everything I did was to protect my employer and keeping the client happy and a continuous client of my TPA. As an ERISA attorney with my own practice, the plan sponsor's needs is paramount. There are no conflicts of interest and everything is done to minimize the potential liability of a plan sponsor as a fiduciary. For plan document needs including plan documents, amendments, and adopting resolutions, a plan sponsor should consider using an independent ERISA attorney for all plan document needs.

### **Have you ever been to an ERISA prison?**

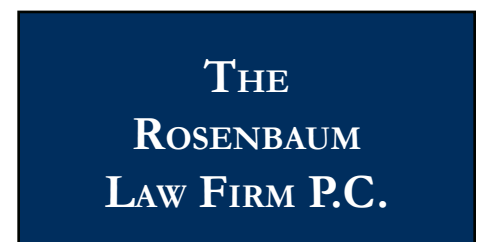
When a plan sponsor gets a notice that their plan is under IRS or DOL audit, the worst thing they can do is handle it themselves. I had an advisor who told me that a plan sponsor client didn't want to hire me to represent them for an IRS audit because they didn't want it to be an adversarial process. An audit is nothing but an adversarial process when an agent is there to review the plan and make sure it complies with the Internal Revenue Code. The reason why a plan sponsor should hire an ERISA attorney is that an ERISA attorney knows how to manage the process and handle the agent. An IRS agent does treat a plan sponsor a little differently when they know that counsel is representing them. The major reasons that a plan sponsor should never handle a

plan audit on their own because they don't know the nuances of retirement plan law and they usually end up volunteering information that the agent didn't ask. A plan sponsor with zero experience in retirement plan law has the ability to turn a normal audit into an inquisition and three-ring circus. An ERISA attorney can also review the plan before the audit to see whether the audit was random or whether there is a glaring issue that needs to be addressed as soon as possible such as late deferrals. I've seen so many situations with a plan sponsor spiraling out of control and landing them into trouble because they didn't have counsel in place

to detect issues that spiraled out of control. Believe me, there is nothing worse than being identified in a press release that you're a plan sponsor that the DOL wants to sue.

### **Yes I remember, I had lasagna**

A plan sponsor should understand that retaining a cost-effective ERISA attorney can go a long way in minimizing a plan sponsor's potential liability as a fiduciary and is less costly than the damage that can be caused by not having one. If you need a cost-effective ERISA attorney or know a plan sponsor that does, chat me up.



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