Another 10 Wrong Ideas That Plan Sponsors Have About Their Retirement Plans

By Ary Rosenbaum, Esq.

Most of the time, sequels suck. Except for perhaps Terminator 2 and The Godfather Part II, most sequels are like such bombs as Caddyshack II and Beyond the Poseidon Adventure. Despite this dislike of sequels, giving Plan Sponsor advice they can understand is a pillar of my law firm. So this article is about another ten wrong ideas that plan sponsors may have about their retirement plans.

10. There is nothing wrong with picking a provider that will benefit our business.

Plan sponsors need to have a process to pick retirement plan service providers and need to articulate a reason for the selection that will uphold their duty of prudence as a fiduciary. Selecting a plan provider just because they have an existing relationship with them that may benefit the plan sponsor in its business is not a good reason. Selecting a broker or third party administrator (TPA) just because they are affiliated to the bank that the plan sponsor has a line of credit with isn't prudent and may even be considered a prohibited transaction because the relationship on the plan level benefits the plan sponsor outside of the plan. A retirement plan is not a place for patronage and corruption, that's a place for government.

9. It doesn't matter who the TPA is

One of the biggest problems in the retirement plan business is that many plan sponsors don't fully understand the role of a TPA; they see them as glorified bookkeepers who just perform some recordkeeping and the filing of Form 5500. The fact is that TPAs are a lot more than bookkeepers because a good TPA will not only perform their duties competently, they also may maximize tax savings by increasing contributions for the plan sponsor's highly compensated employees through sophisticated plan design. A bad TPA will be negligent in their duties, causing plan errors that will risk the plan's qualification under the Internal Revenue Code and expose the plan sponsor to liability. So it does matter who the TPA is, so it would be wise for the plan sponsor to find a good one.

8. Our Plan is fine, nothing is going wrong.

A retirement plan is like your health. Unless you take preventative measures to check on your health, you may be ill and not find out until it's too late. How many people do you know who were terminally ill and didn't know it until shortly before their death? Just because something isn't readily apparent, doesn't mean it's not there. A retirement plan that looks on the surface to be healthy may not be. That is why retirement plan sponsors should have an annual review (like my proprietary, Retirement Plan Tune-Up) and undergo routine maintenance much like a periodic wellness visit to ensure proper practices and detect problems before they become fatal to the plan's tax exempt status.

7. Who is a fiduciary? Who cares?

Being a fiduciary is an extremely important job and it comes with an extraordinary amount of responsibilities. Fiduciary duty is the highest duty of care in equity and in law. Plan sponsors and plan trustees need to understand their roles and need to understand whether other service providers are fiduciaries or not, for purposes of the fee disclosure regulations and to understand their liability risks. Any service provider that serves as a fiduciary does minimize a plan sponsor's liability in their role as fiduciaries. Plan sponsors should understand what role their financial advisors have decided to take. If they are brokers, current law exempts them as a fiduciary. If they are registered investment advisors, are they a co-fiduciary, an ERISA 3(21) or an ERISA

3(38) fiduciary, because different fiduciary roles bring on different levels of fiduciary responsibility. Some TPAs serve as an ERISA 3(16) administrator Plan sponsors need to be aware whom beside themselves, are serving in a fiduciary capacity.

6. A Corporate Trustee limits our fiduciary liability.

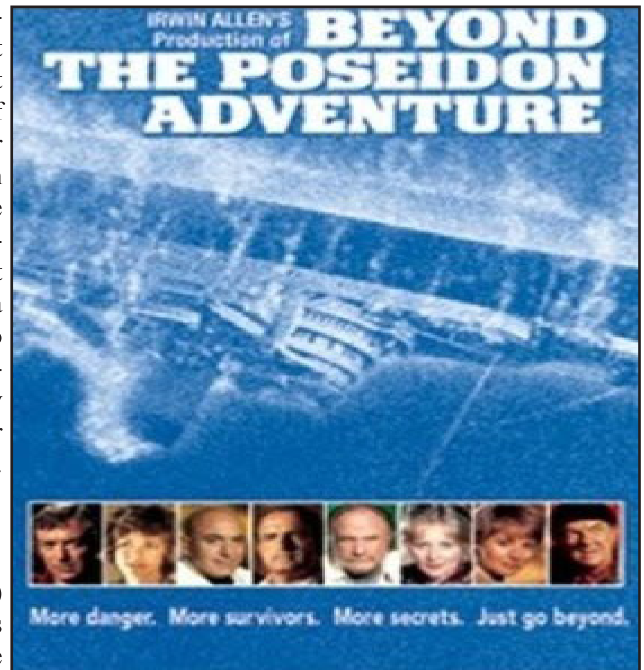
There are several reasons why a retirement plan sponsor would want to hire a trust company to serve as the trustee of their plan. A corporate trustee is often used when no one wants the headache or liability of serving as an individual trustee. It is also popular when a plan requires an audit (where it has more than 100 participants) because the trust company (as trustee) can certify the trust statements, so a limited scope audit is only required (which saves on the audit fees of a full scope audit). A corporate trustee does not limit a plan sponsor's fiduciary liability because the corporate trustee serves in a non-discretionary role (they rarely serve in a discretionary role), which means they have no authority to take on that liability.

5. My plan provider is great and I don't have to consider a change.

Most plan sponsors are happy with their provider and will never consider a change. The problem is that many plan sponsors really aren't knowledgeable enough to determine whether their providers are actually great and competent. As plan fiduciaries, plan sponsors are required to evaluate their providers for competence. I had a client who thought their actuary was doing a great job for over 25 years until a Department of Labor (DOL) investigation proved otherwise. Loyalty is an admirable trait, but it has to be backed up by a provider's performance. A plan sponsor should consult with a retirement plan consultant and/or ERISA attorney to determine whether their provider is doing their job effectively because as a plan fiduciary, the plan sponsor is liable for the incompetency of the providers they hire.

4. It's best to pick the most expensive provider.

When it comes to the retirement plan industry these days, 50% of the conversation is about plan expenses. Plan sponsors need to pay only reasonable plan expenses to their providers. Otherwise, it's a breach of their fiduciary duty. Reasonableness is open to interpretation, but it's all about paying a fair price for a fair service and the way to determine reasonableness is to check what is the going rate in the marketplace. Finding the most expensive provider doesn't guarantee the best level of service since there has never been a correlation between price and quality of service when it comes to plan services. Picking just the most expensive option can be a mistake, ask the folks who bought a Cadillac Cimarron and discovered it really was a Chevrolet Cavalier with a Cadillac nameplate.



3. It's best to pick the cheapest provider.

While the talk of 401(k) fee disclosure regulations is about making sure that the administrative expenses of a retirement plan should not be excessive. On the flipside, choosing a retirement plan provider just because they are the least expensive provider is a mistake. Hiring a service provider in and of itself is a fiduciary function. When considering prospective service providers, plan sponsors need to make sure of the capabilities of the service provider as well as the needs of the plan. Picking a plan provider just based on the lowest advertised fee is a fool's bargain because many times, the cheapest provider is the most incompetent provider. Low fees should be a consideration, but not the sole consideration because as they say, you get what you pay for.

2. We don't need to provide investment education and advice.

While it's true, there is nothing legally required for plan sponsors to provide investment education and advice to participants who direct their own investment under a 401(k) plan. However, for plan sponsors to get ERISA §404(c) protection, they need to make sure that plan participants have enough information to make informed investment decisions. Participant education and/or advice will provide participants the information they need. While plan sponsors see investment education and advice as a participant benefit, they should see it more as liability protection.

1. All that we have to do with fee disclosure is just get it

With fee disclosure regulations, both plan sponsors and participants get disclosures as to the true cost of the administration of their plan. The problem is that just receiving disclosures isn't enough. Fee disclosure merely highlights the plan sponsor's requirement to fully evaluate its plan providers for competency and reasonable fees. The only way to determine whether their provider's fees are reasonable is for the plan sponsor to see what competing providers are charging in the marketplace. That could either be through the use of retaining a retirement plan consultant, an ERISA attorney, or handling the plan shopping on his or her own. Taking the fee disclosures and putting them in the back of the drawer will only increase the plan sponsor's liability, so a plan sponsor should never lose sight of their requirement to ensure that the fees that the plan is charged are reasonable.

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