A Plan Sponsor Should Never Assume Their Providers Are Doing A Great Job

By Ary Rosenbaum, Esq.

My wife and I have been in our house for over 11 years and it's been one remodeling project after another. This is what happens when the previous owner did nothing for 20 years. We hired a general contractor to redo our bathrooms and we liked them so much that we hired them for an expansion, which added a mudroom to the front of the house. We thought they were good, but we didn't monitor them closely. Had we looked closely at the sloppy work in the bathroom, we'd probably have second thoughts of using them again. The mudroom expansion was a disaster from even before day 1 when they brought in architects that weren't licensed architects. We saw the warning signs and we did nothing, because we placed faith in professionals that didn't deserve it. The work was shoddy, there were large cost overruns, and they essentially walked off the jobs before Hurricane Sandy hit. We eventually sued them and recouped some of what we spent, but some things can never be repaired. As homeowners, we pay the price for this mistake. As plan sponsors and fiduciaries, employers can't afford to just put faith in their plan providers without reviewing the work they do. This article is all about why plan sponsors make the mistake of just assuming that everything their plan providers is perfect because it never is.

Never assume it all goes to plan

There is a funny scene in the first Austin Powers movie that satirizes almost every James Bond movie. Dr. Evil puts Austin Powers and Vanessa in a convoluted death trap and tells his henchman to close the door because he's not going to witness it, which is something out of Goldfinger and most other Bond films. When asked by his son, Scott Evil, why he won't witness their deaths, Dr. Evil states: "No no no, I'm going to leave them alone and not actually witness them dying, I'm just gonna assume it all went to plan." That's how plan sponsors are usually with their retirement plan providers, they assume everything went to plan and their providers did their job competently. As plan fiduciaries, plan sponsors can't assume everything went to plan because they are going to be on the hook if things go wrong.

Most providers are good, but….

Despite my many articles about plan errors, the fact is that most plan provider's, especially third party administrators (TPAs) do a really good job. There are quite a few bad providers out there, but the vast majorities do a good job for their plan sponsor clients. The problem is that even the good plan providers make mistakes. I've seen great TPAs that I will still recommend even though I've seen them make mistakes that hurt their plan sponsor clients. While they corrected the errors when they discovered them, it still shows us that no plan provider is perfect. Plan administration is a difficult, technical and precise job. So with so many things to do with plan administration, mistakes happen no matter how great that TPA is. The same can be said for financial advisors who do great work, they can make mistakes too. So no matter how wonderful a plan provider is, they make mistakes that can be costly for plan sponsors.

Plan sponsors are always on the hook

Even though a plan sponsor hires a TPA, the plan sponsor is ultimately responsible for the errors made by that administrator. Sounds unfair? Well no one said being a fiduciary was fair. Plan sponsors are

fiduciaries, so they have the highest duty of care in equity and law. So when a plan provider makes the error, the plan sponsor is on the hook for liability. Of course, a plan sponsor can have recourse against a plan provider for errors they make. The problem is when it comes to fixing that error, the plan sponsor is ultimately responsible. There are many plan providers offering what I call ERISA fiduciary services where the plan provider will assume the discretion and liability that goes with some or all of the components of the plan. For an example, a plan sponsor can hire a financial advisor serving as an ERISA §3(38) fiduciary where the advisor will assume discretionary authority and the liability over the fiduciary process of the plan. Another example is a provider that can serve as an ERISA §3(16) administrator which means they are the named Plan administrator and assume the discretion and liability in the day to day administration of the plan. So while a plan sponsor can cede the control and the liability of some or all components of the Plan, the hiring of these providers is a settlor function. So while a plan sponsor may not be on the hook for fiduciary liability for the components of the plan they ceded control, they're still on the hook for hiring plan providers. So if there ever was an ERISA §3(38) fiduciary who was the second coming of Bernie Madoff, the plan sponsor is on the hook for hiring such a terrible advisor. So no matter what they say, a plan sponsor is always going to be on the hook for liability for the errors of their plan providers.

Most errors go undetected for a long time

While most good plan providers will discover the errors they made pretty quickly, the not so good providers never detect their plan errors. Since the plan sponsors rarely get an independent plan review, errors in plan administration or the fiduciary process will go on until it's discovered on an audit by the Internal Revenue Service (IRS) or Department of Labor (DOL) or when the plan sponsors changes providers. Like the holes that were dug in the desert that Joe Pesci's character Nicky Santoro in Casino talked about that had bodies in them, there are a lot of holes were plan sponsor problems are buried. The problem is that these "holes" are eventually discovered and they are discovered many years later. I always talk about a plan sponsor who used an actuary for 25 years and only discovered that he didn't do the necessary compliance and valuation work until the DOL came knocking. This lack of work and poor advice gave the DOL the distorted opinion that the owner of the company was embezzling plan assets for their own personal use.

Plan providers do change and sometimes, not for the better

The TPA or financial advisor that was good 10 years ago may not be so good today. Thanks to changes in the retirement plan business, plan providers do change because of ownership changes and staff changes. So assuming that the provider will provide the same good consistent service over the years is a false assumption especially if the provider went through changes that impact the competency of their services.

Loyalty to a plan provider is absolutely misguided

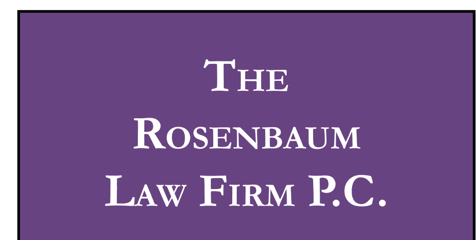
There are so many plan sponsors who stay with a plan provider just because they have been with that certain plan provider for so long. It's an absolute mistake and can run into conflict with a plan sponsor's fiduciary duty especially when the provider is charging too much or causing too many compliance problems. You can be loyal to a dry cleaner, the local pizzeria, or house of worship. Blind loyalty to a plan provider is an absolute mistake because the only loyalty that a plan sponsor should have, is the loyalty and duty to plan participants.

Ignoring fees is a recipe for disaster

Thanks to fee disclosure regulations and a litigious environment for retirement plans, it is absolutely imperative for plan sponsors to benchmark fees of their plan providers. A plan review as discussed below or an independent fee benchmarking report is necessary to determine that fees being charged against the plan are reasonable for the services provided. Plan sponsors should understand that fees need to be reasonable and not the lowest. Assuming that long time plan providers are charging a reasonable fee is misguided. Just like with the contractors I discussed earlier, I only knew how expensive they were when I sought out a contractor to fix their mistakes.

Get a plan review

The only way to ensure that plan providers are providing competent services is through using an independent plan review performed by an ERISA attorney (cough, cough) or an independent retirement plan consultant. It should be noted that an audit for larger plans isn't a plan review, it's just an accountant's opinion on the financial health of the plan to pay benefits to plan participant. I offer a through plan review for only $750 called the Retirement Plan Tune-Up that can certainly spot glaring and not so glaring plan errors made by plan providers. Regardless of who they use, a plan sponsor should always have a review of the work done by their plan providers by a retirement plan professional who can provide independent advice.



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