

# Employer's Excuses About Their Retirement Plan And Why They're Wrong

By Ary Rosenbaum, Esq.

When dealing with my children and many adults, I hear many excuses why things don't get done correctly. No one wants to accept responsibility for their ineptness; they just cling to these excuses. Plan sponsors don't have that luxury of clinging to an excuse because they are on the hook if a plan goes wrong. This article is about plan sponsor's excuses on why their plan is running correctly and why they are absolutely wrong.

## It Costs Too Much Money

As with any business, retirement plan sponsors are very cost sensitive. So when they hear their current or potential retirement plan provider talk about a plan review, they have this tendency to hold on to their wallet. While these plan reviews do cost money, they are not as costly as one thinks when the amount of work in reviewing a plan is factored in. For example, I do a plan review called a Retirement Plan Tune-Up where I do a review of the plan's administration, expenses, and the fiduciary process for only \$750 which can be paid through plan assets and there are similar fiduciary reviews that other providers provide for similar costs. There are financial providers that have even done free reviews of the plan's investment options. So any type of plan review won't set a plan sponsor back a lot of money when you consider how much liability a good review can help a plan sponsor avoid. When we were children, we were told that consistent dental

check ups will help preserve our teeth and avoid the high dental costs that our parents and grandparents faced. Retirement plan sponsors need to be taught the same approach, that an annual or bi-annual review of their retirement plan will not only preserve the financial health of the plan's retirement assets, but also help the plan

stantly changes. That is just another reason why a plan review is necessary even if it costs a negligible amount of shekels.

## Their plan provider says they're OK

Henny Youngman once told a joke about a man who was given six months to live by his doctor. When he couldn't pay the doctor's bill, the doctor gave him another six months. The same can be said about retirement plan providers who tell their clients they are OK without bothering to do some sort of analysis to prove it. The good retirement plan providers do the best job possible and demonstrate that on a regular basis. The not so good providers will be self-serving and telling the plan sponsor they are doing a great job without proving why. If a retirement plan provider is saying their fees are reasonable without showing you some independent benchmark, then a plan sponsor is doing is taking their word on it. While most plan providers are trustworthy, others are not. Being a plan fiduciary doesn't allow a plan sponsor to take their word because they're on the hook



sponsor avoid unnecessary pecuniary harm for a breach of their fiduciary duty if they neglect their retirement plan. A retirement plan isn't like a piece of furniture, it was something that was drafted and created to meet the plan sponsor's financial needs at its installation. So it needs to be constantly reviewed to see if the plan and the plan providers still meets their needs since the business condition of the plan sponsor con-

is the plan provider's word is no good. They say that proof is in the pudding, I still don't know what that means. All I know is that you can't take a plan provider's word for it; you need an independent benchmark or review.

## Their attorney says they're OK

When I worked at a semi-prestigious Long Island law firm (sorry, Lois), the most senior partner asked me what type of

law I practiced. I told him ERISA and he told me he had no idea what that meant. At least this partner was honest, but there are quite a few attorneys out there who think they know ERISA. ERISA is like no other law out there, so plan sponsors should not rely on the legal opinion of non-ERISA attorneys whether their plan is fine or not. Too often, I have been asked to speak to potential clients about the unnecessary fiduciary risks that their retirement plan has and I'm later told that their general counsel doesn't see that same risk. Someone with a toothache isn't going to seek the opinion of a podiatrist, so any retirement plan sponsor shouldn't seek the counsel of a non-ERISA attorney about their plan.



**It's a small plan; they have nothing to worry about**

Thanks to a stock market that has been choppy for the past dozen years, there has been a proliferation of lawsuits against plan sponsors for a variety of reasons including poor investment selection and high fees. These lawsuits tend to be class action lawsuits where groups of plan participants collectively sue the plan sponsor. Small plans will point out that they are not likely the targets of these class action lawsuits because ERISA litigators tend to target larger plans because larger plans have plan sponsors with deeper pockets. While this is absolutely true, class action lawsuits are just one problem that retirement plans suffer from. Regardless of plan size, the Internal Revenue Service and/or the Department of Labor can sanction a poorly run retirement plan. Regardless of plan size, a poorly run retirement plan can be the target of a former plan participant who wants a small settlement to walk away. It's a tough job to be a retirement plan sponsor and there are risks and threats to being a plan fiduciary, regardless of plan size.

**They got their fee disclosures, so they are OK**

Fee disclosure regulations require plan providers to provide plan sponsors with a disclosure of the fees they charge. Of

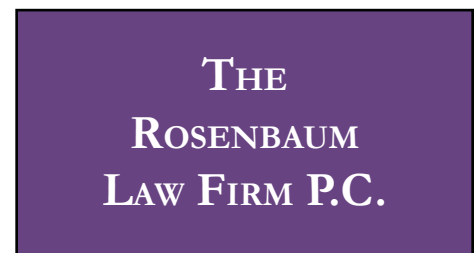
course, too many plan sponsors didn't understand that there was a duty involved with these fee disclosures. Too many plan sponsors have treated the fee disclosures like most of us do with the privacy policy

notices we get from financial institutions; they get thrown in the garbage. Others just merely put these disclosures in the back of the drawer, never to be seen again except for Spring Cleaning. Plan sponsors have a fiduciary duty to determine whether the fees they pay are reasonable or not and the only way to do that is to benchmark those fees by using a service or by seeking pricing from competing providers. Too often in my life, I have found to be overcharged for the services I have received and the only way I discovered is getting pricing from someone else. If I overpay for plan services, it's my money and my loss. Plan sponsors don't have that luxury because they are plan fiduciaries and need to be extra careful since they handle other people's (plan participants) money. Therefore, just getting the require fee disclosures from their plan sponsors isn't enough, they need to actually make sure that the fees they pay are reasonable for the services provided and the only way to do it is to find out whether they are.

**They have a better chance getting struck by lightning**

Plan sponsors usually hear that line from one of their ineffectual plan providers or through their non-ERISA attorney that the chances that they will get caught in a lawsuit or government audit are slim,

they have a better chance getting struck by lightning, I never understood that phrase, struck by lightning because people do get struck by lightning. While the people who use that phrase to death to describe the chances of something remote happening, I bet these people don't stand next to tall trees or power lines when lightning does strike. While plan sponsors and their ineffectual counsel think the chances a plan sponsor will end up in trouble is slim, the fact is that there has been regulatory oversight in the past few years that will make life more difficult for the plan sponsors that don't want to clean up their act. Fee disclosure regulations are just a heads up, it should be assumed that the Department of Labor will enforce these regulations by plan audits to make sure that plan sponsors comply with evaluating their fees. Thanks to more governmental scrutiny, more litigation from plan participants, and the occasional negative investigative piece by Frontline or 60 Minutes, plan sponsors have a better chance getting struck for running a bad plan than being struck by lightning. The days of wine and roses and neglecting you retirement plan are long over.



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