

Documents That 401(k) Plan Sponsor Can't Afford To Have Missing

By Ary Rosenbaum, Esq.

I can personally attest that there is no excuse for not doing your homework. Thanks to my malfeasance in not getting the homework done for Sequential/Integrated Mathematics 4 in my freshman year of high school, in addition to others, we had to provide carbon copies (I'm timing myself to 1987) of our homework to Ms. Mulholland. As a 401(k) plan sponsor, anything you have missing for the purposes of running your plan will cost you more than a carbon copy. This article is all about missing items that you can't afford to not have.

Plan documents and amendments

401(k) plans need a written plan document, that's a big requirement of The Employee Retirement Income Security Act of 1974 (ERISA). The Internal Revenue Code requires all plan documents to be amended or restated at certain times to deal with changes in the law. Some changes require ancillary amendments, some require full restatements. The Internal Revenue Service (IRS) has implemented a six-year cycle for most 401(k) plans, those using a pre-approved document such as a volume submitter or prototype document.

While these restatements are financially rewarding to my practice, I don't set the rules. When I worked for a third-party administrator (TPA), I will state that restatement and required amendment times were not fun, when dealing with 750 clients. I had to be Monty Hall and make deals with clients that didn't want to pay the \$475 amend-

ment charge or the \$2,500 restatement fee. I would have clients claim that the documents I did were all mail merge (not true about restatements, true about ancillary amendment) and it was annoying because, unlike my predecessor, I didn't receive a percentage of the fees. While you need plan documents and have to update them every now and then through an amendment or re-

ance purposes, but it's also a great roadmap to see when provisions were changed or if they were wrongly changed. While ERISA was signed into law in 1974, I once had to look through a client's original ERISA plan from 1976 to figure out when the pension credit of a pension plan was incorrectly changed. Failure to timely amend for a required amendment and restatement can

threaten the tax qualification of your 401(k) plan. Missing plan amendments and restatements have to be corrected through the IRS' Voluntary Compliance Program, which is a less costly situation to fix than getting the error caught on an IRS audit. While the 401(k) plan missing plan documents might be disqualified since it's a qualification issue, it isn't likely. Plan disqualification is the death penalty for 401(k) plans where employer contributions for the past 3 years would be disallowed, and plan participants would have immediate taxation of their 401(k) account. While a penalty as severe isn't likely, it is possible, so make sure you have all necessary plan documents, restatements, and amendments. If you don't, contact an ERISA attorney like me (cough, cough).

Form 5500

Every 401(k) plan that falls under ERISA has to file an annual tax return called Form 5500. Even if you don't have employees and fall under ERISA, you will have to file a Form 5500 if your Solo 401(k) plan hits \$250,000 in assets. Form 5500 must be completed seven months after the end of the month the plan year ends, with an option to extend the deadline for two and a half months. If



statement, you also need to retain your old copies. The IRS has this weird concept that if you don't have a copy of an amendment or restatement, then they act as if you never did it because they don't trust anyone, especially plan sponsors. Not only is important to have all copies of your plan restatements and amendments for IRS audit and compli-

you have a calendar year-end plan, for example, on December 31, Form 5500 must be completed by July 31 of the following year, with an option to extend the filing until October 15. The costliest error is not filing Form 5500 on time, you can't afford to miss a Form 5500. A lot of the time, a plan sponsor isn't aware that they are late in filing until they receive a letter from IRS or DOL stating the plan sponsor didn't file one. It's normally a year after it was due and includes a substantial penalty. While there is a 3-year statute of limitations for a filed Form 5500, there is no statute of limitations for a Form 5500 that hasn't

been filed. Late-filed returns are subject to penalties from both IRS and DOL, so it's very important to file on time. The IRS penalty for late filing of a 5500-series return is \$250 a day (up to a maximum of \$150,000). The DOL penalty for late filing can run up to \$2,529 per day, with no maximum. Recently, I received a letter from a potential client where the DOL is demanding an \$86,000 penalty for a late 5500. If a plan sponsor has a late Form 5500 to file, one of the great things out there is the DOL's Delinquent Filer Voluntary Compliance Program (DFVCP). It gives the plan sponsor the opportunity to pay reduced civil penalties for voluntarily complying with the annual reporting requirements, instead of getting a six-digit penalty letter. To be eligible to reduce these potential penalties through the DFVCP, you will have to file the application as a plan sponsor. If the plan is under IRS or DOL audit or you get a penalty letter from either, you are going to find yourself no longer eligible for the DFVCP. Sometimes, your third-party administrator (TPA) is at fault for a late or missing 5500, but the problem is that you will foot the bill. If your plan required an audit for Form 5500 because it has 100-120 or more participants with an account balance (starting in 2023, it was just participants prior to 2023) and you didn't include it, you're treated as if you never filed it. The maximum penalty to pay under the DFVCP is \$4,000 for a plan that is audited, which is an ab-



solute bargain compared to what the DOL and/or IRS would penalize a plan sponsor for one or multiple missed Forms 5500.

Annual Valuations

Your TPA was hired to record keep your plan, which includes compliance testing. After a census request and questionnaire are filled out by you, they create an annual valuation, which includes census information, compensation, contributions, and compliance testing. It is imperative that you keep a record of this. This is proof of end-of-year balances, as well as testing results. It will be one of the first things that an IRS agent will ask you for if they're auditing your plan for a specific plan year. I once knew a plan sponsor falsely accused of embezzling millions from their retirement plan, just because the TPA never produced valuation reports that would show the benefits owed to employees. An annual valuation is something you can't afford to miss.

Investment Policy Statements, meeting minutes, and other fiduciary things

While not legally required, it's imperative that every 401(k) plan with participant direction of investments have an Investment Policy Statement (IPS). It's effectively a statement of principles, that explains when and why investments are chosen and/or replaced. The IPS has to be coupled with meeting minutes that conform to the parameters of the IPS. So it's not important just to have an IPS, it requires compliance

because not following it, is a breach of your fiduciary duty. You should keep all fiduciary meeting minutes, as well as enrollment meeting materials, including a sign-in sheet. You also should keep any fee disclosures you receive from your plan providers, and any backup to show that the fees being paid are reasonable. That could be materials from other plan providers, or it could be materials picked from a benchmarking service or the 401(k) Averages Book.

PDF everything

I was a big fan of paper until Hurricane Sandy destroyed my filing cabinet. The cabinet sat in my backyard for about 9 months, so it could dry. After that, I went paperless. It's easier to find things on my network than misplace paper files. It's the 21st Century, plan records should be kept online including scanning important plan documents, such as all restatements and amendments. Saving everything to digital will mean fewer missing documents, as well as eliminating space that paper documents take up. I would recommend keeping wet signature plan documents, those should never be tossed.

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