Don't Let Your 401(k) Plan Providers Off The Hook

By Ary Rosenbaum, Esq.

When I was younger, I didn't speak up for myself. You realize later that if you want something, ask for it because they won't read your mind and give you what you want or deserve. I remember when I got a promotion and expected a $20,000 raise and only got $5,000. I should have complained then and there, instead of stewing over it for the next 4 years. You also that when you get older, if you have complaints, speak up, rather than be passive-aggressive and blow up when the long trigger is finally lit. You learn that people will walk over you if you let them. As a 401(k) plan sponsor, you hire plan providers to work on your plan. You can't let them walk over you and you can't let them off the hook.

If they break it, they should pay for it

In a gift shop, the saying is that if you break it, you pay for it. Retirement plan providers should be no different. If a retirement plan provider makes a mistake, they should pay something for what they break. What should they pay? The damages in my opinion is the difference between what has happened and what would have happened if the error was not made. How do you figure that? Well, years ago, I had a law firm where they fired the third-party administrator (TPA) and hired another. 3 years later, they found out that the previous TPA screwed up the Top Heavy Test. The old TPA's administrator didn't think to add a named law firm partner's wife and child as key employees. If they were added correctly as Key Employees, they would have failed the test and have to make an $8,000 contribution at that time. Now, the error was discovered, and the law firm had to fork over $8,000 and earnings for the Top-Heavy contribution they needed to make 3 years earlier. The law firm got back over $3,000 from the old TPA since if the test had been done correctly, the law firm still would have been out $8,000. With any error, you need to be put back in place, as if the error never happened. An example of when a financial advisor makes an error is the time when an advisor to a 401(k) plan I represented, told them to switch providers, including the stable value fund, that triggered a market value adjustment. The advisor promised to make the 401(k) plan sponsor until he found out that the adjustment cost plan participants $30,000. Let's just say that the advisor stopped returning the 401(k) plan sponsor's call until I got involved. Years ago, I was an ERISA attorney working at the offices of a TPA, that made a screwup in the processing of contributions. My boss, Harvey Berman, who also was one of the owners of the TPA, had the error corrected because that's what errors and omissions insurance is for. If your plan provider makes an error, don't accept just an apology, but accept a check to help cover the mistake, they made.

The revolving door of contacts

My son is involved in a program where we have an administrator to help run it. Every 3 months, the day-to-day contact is gone. What does that tell me? The administrator has a revolving door, and that could be for a myriad of reasons. I worked for a TPA, where I joked that our front door, should have been replaced with a revolving door. If the day-to-day contact for your plan provider changes every 3-6 months, that's not good. You need a rapport with your plan provider that is built on communication and trust. That's hard to do when the person you know is changing every few months. One of the places I like to go to for business lunch is The Cheesecake Factory in Melville, New York. Every so often, I meet Dan Venturi for lunch, who is a TPA and 3(16) administrator. At that restaurant for the past 5 years, Dan Esposito, the bartender serves us. Dan the bartender knows I'm always good for a Sam Adams Seasonal (even if Octoberfest is by far, the best) and knows what Dan Venturi is likely to eat. Now if the bartender there, changed every few months, the experience wouldn't be as fun. Again, I think turnover is a sign that there are problems with your plan provider because as a former malcontent employee, happy employees never leave. Whether it's pay or opportunity, there is a reason why a plan provider may have a constant turnover in your day-to-day contacts. Turnover doesn't help you, so speak up.

Going into business for themselves

There is an expression in professional wrestling when someone goes "off script" in a selfish way that is called "going into business for themselves." When it comes to 401(k) plans, you are plan fiduciaries working on a retirement plan for the exclusive benefit of your employees. You can't go into business for yourselves by making decisions and moves that benefit you, in spite of plan participants. So don't let plan providers do that too. If you're happy with your TPA, don't let your financial advisor demand you change because they liked another TPA. When I worked at TPAs, there would be advisors who would have their block of business move to us. That means convincing plan sponsors to make a TPA switch, which is both time-consuming and not any fun. While it might have been good for the advisor, it might not have been good for the 401(k) plan sponsor. A good TPA can be hard to find and you shouldn't fire them for the wrong reason. There may be a TPA that has its own affiliated financial advisory firm of advisors they like to work with. Don't fire an advisor, simply because the TPA wants the business for a friend of theirs, or themselves. Your 401(k) plan shouldn't be a patronage mill for providers that other providers like. Any choices you make as a plan sponsor should be for the benefit of plan sponsors, not plan providers. So don't let these providers off the hook.

The termination fee

When you hire a retirement plan provider, they will eventually be replaced one day. Nothing lasts forever, and neither will your relationships with retirement plan providers. You sign a contract when you hire a retirement plan provider, but you might not have actually fully read the terms. Most plan sponsors just sign away without looking. One of the biggest issues that plan sponsors have with their providers is when they make the tough decision to fire them. Every contract with a retirement plan provider has a termination clause and describes how you can terminate them. One of the issues with firing a retirement plan provider is that normally, a TPA feels they are entitled to a deconversion fee. The deconversion fee is the cost associated with a 401(k) plan getting off their system and moving to the next TPA you hire. It should be mentioned in the contract, but the problem is that the cost is rarely identified in the contract. I'm not going to be Don Quixote here and take on deconversion costs because that would be an uphill and futile battle. However, I will fight outrageous and irrational deconversion fees that a TPA will charge, simply because their feelings hurt. I filed a complaint with the Department of Labor over a TPA that was charging an excessive deconversion fee and wanting additional fees to complete valuation and Form 5500 preparation they were already paid for. I worked for a TPA where the only rhyme and reason for deconversion fees was based on the relationship we had with the 401(k) plan's financial advisor. The more business we did with the advisor, the less one of their clients would pay in deconversion costs. Deconversion fees need to be related to the work done and if the fees seem excessive, then hire an ERISA attorney to come to bat for you. As far as termination fees, one of the fees that people forget about is the costs involved with changing the stable value fund in the plan when the TPA or financial advisor is fired. A stable value fund is governed by a guaranteed investment contract. There may be surrender charges if the contract is terminated early or if a market value adjustment. What's a market value adjustment? A market value adjustment is a calculation an insurance company applies to the amount you get if you take or move your money out of the insurance contract before your term ends, and it's affected by interest-rate changes. Any termination fees or market value adjustments might have a sticker shock. There may be ways to avoid these fees if you can work with the stable value provider with a possible transfer. Again, this might be another area in working with an ERISA attorney (cough, cough) to see what can be done. You should never let a provider off the hook if there are outrageous termination costs.

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