It Takes Only One Participant To Sink A Retirement Plan Sponsor

By Ary Rosenbaum, Esq.

I am a fan of the original Highlander movie with Christopher Lambert and Sean Connery. The subsequent sequels and television series make the cannon of the series nonsensical, but I do love the original. Maybe it's because of the soundtrack by one of my favorite bands, Queen or maybe because it had footage of a Pro Wrestling USA/ AWA wrestling show I attended live at the Brendan Byrne Arena in 1985 (even though the movie claimed it was Madison Square Garden which has an exclusive deal with the WWF). The theme of the movie was that there could be only one (even though the other movies and TV shows showed that there was clearly more than one). For retirement plan sponsors who do nothing to minimize their fiduciary liability, they need to know that it only takes one. This article is about how it only takes one plan participant to cost a plan sponsor dearly in terms of headaches and fiduciary liability

A plan is never too small to land in trouble

As an ERISA attorney with a nationwide practice helping plan sponsors and plan providers, the most annoying thing is when I hear a plan sponsor tell you that they don't believe that they have any issues with their 401(k) plan when it's clear that they do. Sometimes these plan sponsors take this position based advice on their attorney, who likely has absolutely no knowledge about how retirement plans work. I won't seek a dermatological examination from a podiatrist and you shouldn't seek retirement plan advice from a non-ERISA attorney. These plan sponsors will tell you that they aren't likely be sued or be under governmental scrutiny because they are one of the small plans and they only like to make examples of the larger ones. Sorry fellas, small plans can get in a heap of trouble too.

Trouble can be more than a class action lawsuit

When it comes to new about 401(k) plan sponsors that get into trouble, much of that publicized trouble is through a class action lawsuit. With any class action, there needs to be someone with huge pockets because attorneys need to get paid, so it's a fact that only larger 401(k) plans get sued through a class action. One of the most recent seminal class action cases involves California utility Edison International, which is a $1 billion 401(k) plan. While smaller plans aren't likely going to be the target of a class action lawsuit, there is a lot more harm that a plan sponsor can go through than just a class action lawsuit.

It Only Takes One

No matter how we may think differently, it only takes one to change everything. It takes one co-conspirator to sink a criminal conspiracy. It takes one employee to complain to end a hostile workplace. It takes one person to do the right thing to stop something terrible that is happening. So it will only take one plan participant to sink a plan sponsor who is not handling their retirement plan with the requisite fiduciary duty that the plan requires. If a plan sponsor is reckless or not handling their fiduciary duty in a prudent manner, it will only take one plan participant which could be a current or former employee from taking matters in their own hand and making a complaint either through some form of litigation or complaint with a regulatory authority. Being an employer is often a human resources headache especially when you have to let employees go. Some employees take their layoff well, others don't. If you are sponsoring a terrible retirement plan, would you want to let a current or former employee the opportunity to cause you great harm by making a complaint? One of the worst things you can do in life is letting someone like a former employee have the power to hurt you. By operating that fiduciary duty in a prudent manner, a plan sponsor doesn't give any employee that power.

The Fuzz

I don't know when the authorities were nicknamed the Fuzz, but some of the largest pitfalls that a retirement plan sponsor goes through are a review by either the Internal Revenue Service (IRS) or the Department of Labor (DOL). While the IRS is concerned with retirement plans qualifying under the Internal Revenue Code, the DOL is concerned about participant's rights under ERISA. So having been involved in quite a few IRS and DOL audits, I can attest that only one plan participant to complain about a plan sponsor's retirement plan is enough. Quite honestly, my two largest DOL audits were directly as a result of plan participants complaining to the DOL because of their claims that they were due benefits that they didn't get. These complaints about benefits led to larger investigations concerning breach of fiduciary duty and in one situation, resulted in a plan sponsor being sued by the DOL. Sometimes, it's better off for a plan sponsor to get sued through a class action than going through an audit. Thanks to the fee disclosure regulations, the DOL's use of the auditing process will be ramped up too. The DOL takes participant's complaints very seriously. I know, I made one and the DOL was quite diligent in their investigation. That is why a plan sponsor needs to clean up their act, despite their attorney's claim otherwise. An IRS or DOL audit is absolutely not fun and can be more costly than any form of litigation.

The smash and grab

I worked at a TPA that I have written about extensively in the past. I might not have liked the fellow who ran the office, I just don't think he discriminated against anyone unless it's illegal to discriminate against the incompetent. Two former administrators later complained about discrimination, one who handled it herself and the other one hired an attorney. For the administrator who sued pro se, they fought her tooth and nail. For the fellow who hired an attorney who complained about religious discrimination (the administrators and the owner of this TPA were Jewish), he got $4,000. While they were innocent of discrimination, this TPA thought that litigating it would have been more money and they dismissed the $4,000 as nuisance value. Sometimes a vindictive former employee uses the threat of litigation as a way to extract some sort of pecuniary reward for having been rightfully terminated. I call it the smash and grab, akin to a quick score/theft. That being said, a poorly run retirement plan can be the one weapon a former aggrieved employee could use to get back at a former employer. Call it blackmail or anything else you want to call it, but complaining or threatening to complain about a poorly run retirement plan could be used as a way to get a small (probably less than $5,000) settlement for the incompetent former employee. Again, it only takes one to make a plan sponsor's world spin out of control. Why give that former employee to opportunity to make a few extra dollars through a quick settlement because of threatened litigation because you have a poorly run retirement plan? The cost of running an efficiently run retirement plan is a lot less than what you may have to pay an aggrieved former employees who was terminated for cause, but complaining because you never provided them with investment education and they lost money in their account.

To avoid harm, all it takes is one (competent plan provider)

For the retirement plan sponsor who wants to avoid the ire of that one plan participant, all it takes is one. That one being a competent plan provider such as a TPA, financial advisor, or ERISA attorney.

Seeking the guidance of solid and cost effective plan providers is like going to the dentist. It may not be the most pleasant experience, but it's a necessary one to maintain health now and avoid greater harm later. Having a plan provider that understands the dilemmas and duties of a retirement plan sponsor will go a long way to hiring other competent plan provider as well as minimizing the risk of the one, the one participant that can put you in financial harm by claiming a breach of fiduciary duty.

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