The Small Stuff That Plan Sponsors Should Sweat Out

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It's often said that you shouldn't sweat the small stuff. The problem is that many times, a retirement plan sponsor ignores the small stuff, and that small stuff leads to bigger problems. This article is about small details that plan sponsors shouldn't ignore because if they do, it could lead to bigger problems and more liability.

A retirement plan is an employee benefit

Plan sponsors must remember that, by sponsoring a retirement plan, they are providing an employee benefit. As employee benefits are often used to recruit and retain employees, . a poorly run retirement plan with high fees, low contributions, and a less-than-friendly website, will certainly not help to recruit or retain employees. A retirement plan with low fees, and great investment options, and attractive plan features, will help to recruit and retain employees and minimize a retirement plan sponsor's liability.

Being a plan sponsor means being a fiduciary

An employer that sponsors a retirement plan actually wears at least two hats: plan sponsor and plan fiduciary. What's a fiduciary? A fiduciary is one who holds a legal or ethical relationship of trust with one or more other persons). Being a retirement plan sponsor is also being a plan fiduciary because they have been entrusted with the retirement plan assets of their employees. Being a plan fiduciary means they have a higher duty of care than they have with their own money because the money belongs to plan participants. Failure to fulfill the fiduciary duty will result in liability. Plan sponsors who forget they wear another hat – that of a plan fiduciary -- in addition to will land them in trouble.

Fees are always about reasonableness and that can't be ignored

Thanks to the Department of Labor (DOL), all retirement plan sponsor get fee disclosures from plan providers who charge $1,000 or more directly or indirectly to plan assets. Why is this such a big deal? It's a big deal because plan sponsors have a fiduciary duty to pay only reasonable plan expenses and that was impossible to figure out when their plan providers weren't required to be transparent about the fees they were charging. Now that plan sponsors get these fee disclosures, too many of them just throw them out or do anything but review them. Even reviewing them isn't enough because plan sponsor have the fiduciary duty to pay reasonable plan expenses and the only way to do that is by benchmarking those fees against what other providers are charging. Plan sponsors can do that by shopping the plan around or using a benchmarking service. Now the fees have to be reasonable for the services provided, so that doesn't mean that the plan sponsors have to find the cheapest plan providers. It's not enough for plan sponsors to get fee disclosures, it means they actually have to review those fee disclosures and determine whether or not the fees are reasonable for the services provided.

Understand they will always be on the hook, no matter what

One of the things I'd often here is the plan sponsor that finally discovers all the problems caused by a plan provider and protest that they had no idea what was going on. While the complaints are sincere, the problem is that plan sponsors are on the hook for happens with their plan. If the TPA did a poor job of administration and the Internal Revenue Service (IRS) wants to penalize the plan sponsor, it's the plan sponsor that is responsible to pay the penalties. Of course, a plan sponsor can always proceed with a cause of action for negligence or malpractice (mal-

feasance?) against a plan provider, but the plan sponsor is still on the hook for any penalties assessed to a plan. Even if a plan sponsor delegates almost all of their liability to a plan provider who is willing to serve in an ERISA §3(16), §3(21), or §3(38) capacity, a plan sponsor is still on the hook for hiring a negligent plan provider if that provider isn't up to snuff. No matter what plan providers try to tell a plan sponsor, the plan sponsor will always be on the hook for liability if something goes wrong.

Knowing what a TPA does and knowing that the TPA knows what they're doing

One of my favorite movies is Back to School and a great scene is in the school bookstore where Thornton Melon's (played by Rodney Dangerfield) son wants to buy used textbooks for college because they've already been underlined and Thornton says it might have been underlined by a maniac. A plan sponsor needs to make sure that their TPA isn't a maniac. They also need to make sure their TPA is competent. A TPA is responsible for helping the plan sponsor with administration, plan design, compliance testing, and tax reporting. It's an essential service provider because most errors that threaten the tax qualification of a retirement plan are caused by a TPA that wasn't qualified. A plan sponsor not only needs to ensure that they hire a qualified TPA, but they also need to ensure that someone is reviewing annually what the TPA is doing. That means having another service provider as a reviewer, or hiring an independent retirement plan consultant or ERISA attorney to review the plan's administration and compliance. The reason why it should be reviewed because most plan errors take years to be discovered, whether by a new plan provider or by an an IRS or DOL audit. It is much easier to correct errors prior to an audit. Errors detected after an audit will involve the assessment of a penalty against the plan sponsor..

Keeping all plan records

It is essential for plan sponsors to maintain and preserve plan records because of their fiduciary responsibility. Too many plan sponsors don't have an investment policy statement and don't have minutes of plan fiduciary meetings. Too many plan sponsors are missing previous plan documents that they implemented, which the IRS will assume weren't drafted. I'm sure that you're familiar with the expression "dot all I's and cross all t's? For a plan sponsor, dotting the I's is keeping all the plan fiduciary records that show that the plan sponsor is exercising their fiduciary duty in a prudent manner. That means having copies of all plan documents, valuation reports, fiduciary meeting minutes, investment policy statements, participant education materials, and even attendance sheets from enrollment/education meetings. A plan sponsor can't prove that they acted prudently in their role as a fiduciary without evidence, and plan records are often the necessary proof.

Getting fiduciary liability insurance

Plan sponsors have to get an ERISA bond to protect the theft of plan assets by fiduciaries; it offers no protection from liability for fiduciaries. If there is a lawsuit by an aggrieved plan participant, the lack of a fiduciary liability insurance policy will put fiduciaries on the hook for all litigation costs and all liability. The problem with being a fiduciary is that liability may involve personal liability. That's why it's imperative for a plan sponsor not to forget the small detail of obtaining (procuring?) a fiduciary liability policy.

Know a good ERISA attorney

Plan sponsors don't have to just contact an ERISA attorney when things go bad with their plan. It's always good to know a qualified ERISA attorney as part of their role as plan fiduciaries. It's always good to have a retirement plan provider such as an ERISA attorney that has to represent your interest and afford a confidential relationship. ERISA attorneys aren't just there for litigation or plan audits; they can be there for annual plan reviews and contract reviews. Most plan sponsors aren't aware of their role as plan fiduciary and don't know what plan providers are supposed to do in their roles.

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