

The Ultimate Retirement Plan Sponsor Checklist

By Ary Rosenbaum, Esq.

Whether it's a hurricane or items to buy for shopping or baseball cards you need to complete your set, it's important to develop a checklist. The recent bestseller, *The Checklist Manifesto* by Atul Gawande proves a very simple point that no matter how much of an expert you may be, well-designed check lists can improve outcomes. Look at Captain Sullenberger and the crew of US Airways 1549 who used checklists to safely land the plane on the Hudson River.

While being a retirement plan sponsor isn't the same as piloting a plane whose engines have been destroyed by multiple bird strikes, plan sponsors should develop a checklist to develop good practices and avoid unneeded liability in their stewardship of retirement plans for their employees. So this article is intended to serve as a checklist for plan sponsors to navigate the perilous waters of retirement plan sponsorship.

[] Do you have an Employee Retirement Plan? What type of a plan is it, who first established it? When? It's a fairly obvious question, but many times plan sponsors don't have an obvious answer. Thanks to changes in the business whether through a purchase, merger, or just changes through time, many plan sponsors are unaware of some or all of the retirement plans they sponsor and don't know when they were actually first started. This obviously is a problem because most plans have annual tax filings and valuations that need to be done, as well as understanding the type of retirement plan they have because different retirement plan types may have different employer contribution requirements and different features. Retirement plans are like motor

vehicles, they need constant monitoring and maintenance. A defined benefit plan that was started for an employer where the owners were the only participants may no longer be a good fit as the company expands. A 401(k) plan that might have been started with a safe harbor plan design may require one because the plan is failing its discrimination/compliance testing. So it's important to understand what type of plan you have and when it was first established.



[] Are you properly insured as a plan sponsor? All plans that are subject to ERISA need an ERISA bond which protects plan assets from theft. If you have a retirement plan, you need one because it's a question on your Plan's Form 5500 and a no answer will likely trigger an audit from the Department of Labor. While an ERISA bond is required, it only protects plan assets. It does not protect plan fiduciaries from litigation. So it's recommended that all retirement plans with participants purchase fiduciary liability insurance to protect it and the individuals serving as trustees. Any good property and casualty insurance broker can help you in procuring an ERISA bond and fiduciary liability insurance.

[] Do you have all the plan documents and records and are they up to date? All ERISA plans need to have a written plan document. However, that's not enough as plan documents need to be constantly amended and completely redone every 5-6 years. If you don't have the required plan documents and amendments, you may have a plan that can be disqualified or subject to huge penalties. So you need a good third party administrator (TPA) or ERISA attorney (cough, cough)

who can make sure that your plan documents are up to date with the law. In addition, you should keep a copy of signed plan documents, dating back to the start of the plan because there are situations where that may be required. In addition, you should have copies of all valuation reports, trustee meetings, attendance sheets from any participants meetings, any employee investment education/advice materials, and Form 5500 preferably going

back to the beginning of the plan if you can because I have seen situations where former employers claim benefits that they were not entitled to, received it years later because the plan sponsor didn't have the records to show that they were not entitled to it.

[] Who administers your plan? And do you have full disclosure of all the fees involved? Are the fees reasonable for the plan's size and how are the fees related to what is offered in the marketplace? Plan sponsors should always understand that they are usually the plan administrator (unless they name someone else) and that a third party administrator (TPA) is a third party administrator, which means the plan sponsor is still on the hook for

the TPA's errors and omissions. Thanks to the new fee disclosure regulations, plan sponsors will no longer be in the dark on how much plan providers make off of the plan, directly or indirectly. It's a great development because a plan sponsor as a plan fiduciary had the duty to only pay reasonable expenses and that was often hard when the plan providers didn't have to disclose their fees. The problem is that with this added information comes added plan sponsor responsibility. So it's not important enough to get the fee disclosures (failure to get them may have your plan provider agreements become prohibited transactions, which means penalties), you have to benchmark your fees to determine whether they are reasonable or not in the marketplace. You are not required to pay the lowest fees (most times, you shouldn't), but you have to determine whether the fees you are paying are reasonable for the services you provided. So if you want white glove treatment, pay for it but don't pay top dollar for no-frill administration or investment advisory services.

[] Do you have an investment advisor and do you review your funds regularly to see if they are performing well, or can employees hold you responsible for not being vigilant? You can do a lot on your own, but picking the investment options for a plan where you have employee participants (whether the participants direct the investment option or not) isn't one of them. They may hate me at my old law firm for always repeating the story, but when I joined this semi-prestigious firm, I was asked to look at their 401(k) plan. The plan had no financial advisor and the mutual funds that participants could invest weren't updated for 10 years (an ERISA attorney picked those funds, swell). An investment advisor needs to be hired, but an investment advisor who doesn't constantly review the investment options with you and develop an investment policy statement (IPS) that dictates which investment options to keep or discard has to be replaced. Plan sponsors are under a misnomer that ERISA, under Section 404(c) protects plan sponsors from the losses sustained by plan participants. However, that protection is only afforded if the plan sponsors gives the participant enough information to make investment

decisions and that requires education, an IPS, and review of the investment options to see if they still meet the requirements of the IPS. The fiduciary process is one of the most important responsibilities that a plan fiduciary has, so it has to start with using an investment advisor. If you haven't seen your advisor in six months to a year, get another one.

[] When was the last time you reviewed your employee retirement plan to see if it still fits your current needs?

Retirement plans when set up can become like your toddler's clothes, at a certain point, they will no longer fit. So it's important to review your plan and its



design to see if it still meets your needs. Perhaps you can afford a new comparability plan design that can give greater contributions to the highly compensated employees while maintaining a minimum contribution to your non-highly compensated employees (works great with the safe harbor 3% non-elective contribution). Maybe you need a non-qualified plan to augment the benefits of your top paid employees. Contact your TPA to see whether the current structure still works and if not, whether an alternative plan type or design is a better fit.

[] Do you distribute accurate, informative educational retirement fund materials and required documents to your employees?

Whether your plan is participant directed or not, plan participants must receive a copy of the current summary plan description, an annual statement of benefits/account balances (quarterly statements if the plan is participant directed), as well as any notices for plan amendments and summary annual reports. For participant directed plans, participants need investment education. Thanks to new regulations, advice can be given to participants by your advisor (if they met the strict requirements to comply) or by a third party like RJ20.com, who can serve as a ERISA §3(21) administrator for a

reasonable per participant charge. Knowledge is key, but providing the participants with enough information will limit your liability.

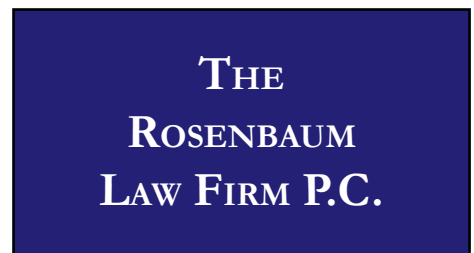
[] Is it time to retire your current plan in favor of one that works better for you in this economic climate?

All good things must come to an end and there are times when a plan must be terminated or phased out because you could no longer afford it or because there is something more economical or cost efficient on the table. You should contact your TPA for a review.

[] Who should you call to find out what you need to know?

You are only good as your team. So if you hire the right TPA, financial advisor, auditor (if an audit is required for your plan), and ERISA attorney (cough, cough), then you have won half the battle of limiting your liability as plan sponsor. Not only do they serve as your plan providers, they can serve as resources and confidantes in helping you in making sure the plan fits your needs and whether you have met the responsibility as a plan sponsor and fiduciary.

I do suggest that if any of the boxes aren't checked, perhaps it's time to seek the guidance of your plan providers or new plan providers if the current ones aren't pro-active in informing you about these important responsibilities.



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