What They Don't Know As A 401(k) Sponsor May Hurt Them

By Ary Rosenbaum, Esq.

When I worked at a semi-prestigious law firm, one of the named partners (whose son is a Congressman who was kind enough to offer me a cannoli at a Knicks-Clippers game a few years ago) asked me what my practice was. I told him it was ERISA, said he said didn't know anything about it and walked away. Most people who ask me what I do in practice pretty much have the same response and walk away. There is nothing wrong about that. The problem that I've always had with clients and potential clients are the ones that think they know something about retirement plans and don't. So this article is about the dangers of retirement plans that plan sponsors who have no experience in the retirement plan world don't understand.

Don't talk about what you don't know

My wife is also an attorney and one of our pet peeves (especially with Facebook posts) is when non-lawyers speak authoritatively about the law and are actually wrong. For example, you don't have a constitutional right of free speech to post on a Facebook group's page. While I get a chuckle from those posts, one of the biggest problems with getting clients is the potential client who thinks they know about how retirement plans work and are insistent that everything with their plan is fine. Speaking of lawyers, my least favorite clients working as an attorney for a third party administrator (TPA) were other lawyers. Lawyers go through three years of law school and they think they know every law and they don't. I don't make opinions on criminal procedure, so I would appreciate if other lawyers don't make opinions on ERISA without any training or knowledge.

It's OK not to know

The reason that a plan sponsor hires retirement plan providers is that they don't know how to effectively administer their retirement plans on their own and there is nothing wrong with that. I have used my mechanic Ralph for 20 years and 6 cars because other than starting a car and filling it with gas, I have no idea how cars work or don't. It's important for a plan sponsor to understand the limits of their knowledge of their retirement plans and understand that there is nothing wrong with that. What's wrong is when plan sponsors think they know about retirement plans and don't. Even the smartest chief financial officer or human resources director may not understand the nuts and bolts of how a retirement plan works or doesn't. Like first responders responding to a car accident, plan sponsors should get out of the way of the work of plan providers. Administering a retirement plan is a very tedious process requiring lots of correct technical data. It also requires correct information and to make sure what's done in practice is consistent with the terms of the plan. So it's best left to the retirement plan providers to help plan sponsors manage their plan. Plan sponsors should let the experts handle the plan and step to the side. Plan sponsors don't lose credit or points for not knowing the pitfalls and potential liability of sponsoring a retirement plan as long as they have the right team of plan providers to help them.

Just because things look good, doesn't mean they are

When I was dating my wife, she asked me if I had good credit. Since I always paid my bills in full and on time, I told her it was. The problem is that I made that statement when I didn't see my credit report. Months later when I got the credit report, I found out that my mother had a $17,000 credit card balance on a credit card that I opened up with her when I went to college and this was a card I had not used since I graduated law school My wife wasn't happy that I affirmatively made a statement based on knowledge that I didn't have. Annually, I write an article criticizing the role of payroll providers working as the TPA for 401(k) plans. It's

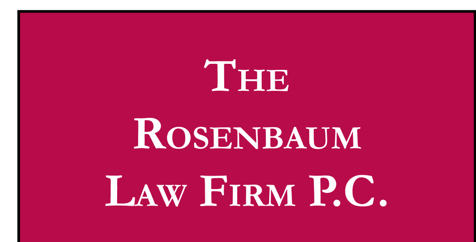
always the most widely read article I write because non-payroll provider TPAs disseminate it. A few years back, I got a very weird phone call about these articles. The caller wanted to talk about the article and actually didn't know who the two largest payroll providers are in this country that happens to also be in the 401(k) TPA business. Regardless of his limited knowledge of the TPA business, I get a rather long and disjointed email from this person. This person says he's the part-time chief financial officer for several companies and he's never had a problem with payroll providers doing the TPA work for his clients. I suspect this individual got my article from a TPA and his diatribe criticizing my article was his form of justification that he wasn't doing anything wrong with his clients. My opinion articles are just opinions based on my experiences, so I wasn't going to try to debate with someone who doesn't have any experience in the retirement plan business. The problem here is that most administrative problems are only discovered when there is a governmental audit or when there is a change of providers. Bad retirement plan providers who make a lot of mistakes aren't going to be the ones to alert retirement plan sponsors about the errors they created because they never caught these errors in the first place. Just because a plan a sponsor assumes that their payroll provider TPA is doing a great job doesn't mean that's the case, these errors are usually only discovered when there is a change to a more competent TPA. I have consistently repeated the story of a former client who used the same actuary for only 25 years and only realized that the actuary provided bad advice and didn't perform their job of providing annual valuation reports until this client was sued by the Department of Labor (DOL) for $3 million dollars because the DOL was under the impression that the plan sponsor was embezzling money from the plan. Had the actuary not died and/or the DOL did not investigate, they too would think there was nothing wrong with their plan. Just because a plan sponsor thinks there is nothing wrong with their plan doesn't make it so. Most plan errors are only discovered years after the fact on an audit or provider change. That's why it's important for plan sponsors to hire independent counsel or other retirement plan professionals to review their plan's administration to make sure that the plan is running correctly and that the plan providers in place are doing a competent job.

Fees are important, but they aren't the only concern

Thanks to fee disclosure regulations, plan sponsors are more aware of plan administration fees and their fiduciary duty to make sure they're reasonable. While plan sponsors should focus on fees, they shouldn't only focus on fees. The reason that plane expenses shouldn't be their only concern is that the fact is that fees are only concern that plan sponsors should have. As described before, plan administrative errors is usually a bigger headache for small to medium sized plan sponsors. Not only are they a headache, they are far costlier to correct than just by lowering fees by changing plan providers.

Plan sponsors are always on the hook, no matter what

When he DOL and/or the Internal Revenue Service penalizes the plan sponsor because of bad work by their plan providers, plan sponsors will tell the government auditor that they had no knowledge and it wasn't their fault. The problem is that no matter what the plan provider does; the plan sponsor is always at fault. The plan sponsor is a fiduciary, which they have the highest duty of care in law and equity. So despite the plan sponsor's inexperience in handling a retirement plan, hiring third party plan providers aren't going to do that much in limiting liability for the providers' poor work. Plan sponsors can always hire plan providers that assume most if not all the liability of being a plan fiduciary, but the plan sponsor is at fault for negligent hiring if they hire incompetent providers who serve in that fiduciary function. Being a plan sponsor is a thankless job because of the potential liability that goes with it, but that's what happens when you're responsible for holding someone else's money. Plan sponsors can never fully eliminate their liability; they can just practice good practices in minimizing that threat of liability.



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The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
Follow us on Twitter @rosenbaumlaw