Good Housekeeping Tips Every 401(k) Plan Sponsor Should Follow

By Ary Rosenbaum, Esq.

Good housekeeping isn't just about keeping your house clean, it's about keeping everything in order. When it comes to being a 401(k) plan sponsor, good housekeeping isn't about dusting and putting baking soda in the refrigerator. Good housekeeping for a 401(k) plan sponsor is about doing the small stuff that every plan sponsor needs to do but forgets. For a 401(k) plan sponsor, good housekeeping is about exercising fiduciary responsibility in a prudent manner and minimizing potential liability. This article can give you some tips to avoid liability headaches later.

Keeping good plan records

Many years ago, I was an ERISA attorney for a plan where a former participant claimed his distribution check was stolen and cashed. A look at the plan records showed where it was cashed and a little digging allowed the plan sponsor to verify that it was the former plan participant who cashed it. Keeping good plan records isn't just about combating fraud, but it's about keeping the plan healthy and out of trouble. Since a plan is ripe for audit by the Internal Revenue Service (IRS) and Department of Labor (DOL) for the past 3 years, it's always good to have the payroll reports, valuation reports, census, records of contributions, and everything else needed to answer a government auditor. At the very least, ERISA records should be kept for at least 7 years. Thanks to convenient storage such as USB flash drives and other convenient network drives, I think your best bet is to transform paper records to digital files, so it eliminates the need to ever destroying plan records if they are available digitally.

Keep copies of all plan documents

While the rule of thumb is that retirement plan records should be kept for at least 7 years, it's important that you keep plan documents, amendments, and summary plan descriptions for at least the life of the Plan. The reason you keep all the copies of the plan document is to show evidence that the plan maintained tax qualification for all years by having plan documents which complied with the law at that time. There have been so many times where I've sought Internal Revenue Service (IRS) approval for plan terminations and the plan sponsor can't find a plan document or amendment put in place more than a dozen years earlier, which the agent needs to approve it. In addition to tax qualification, another reason to keep copies of all plan documents is to serve as a historical record in case there are issues delaying with plan provisions. Many times, mistakes are made through the restatement process especially when dealing protected benefits like vesting. I will never forget to work on a union pension plan and fixing errors that were made since the first ERISA version of the plan that was effective in 1976. It allowed the actuary to identify where the errors were made and how we could make corrective actions with IRS approval. So while you may destroy plan records after 7 years, don't destroy plan document because like clean underwear, you never know where you'll be and when you need them.

Make sure those who are eligible get enrolled

Whether your plan has immediate eligibility to participate or 1,000 hours of service within 12 months of employment, you have to make sure that the employees who are eligible to participate actually get the opportunity to participate. Why? Well, you have to follow what the plan says and you may have to fork over a corrective contribution to make an employee you withheld from participating whole. Depending on how long these employees aren't allowed to participate, you may have to make a corrective contribution for their lost deferral opportunity even if they had no intention to defer and even if they have already left your employ. Always keep good records of your employees and always identify those who become eligible by constantly keeping the TPA in the loop with correct hiring dates when submitted with the payroll reports.

Give out the notices when you need to

Being a 401(k) plan sponsor is all about following a process in a prudent fashion. A 401(k) plan is a legal instrument that has to follow its rules as well as the rules set forth by the Internal Revenue Code and ERISA. As a plan sponsor, you have the duty to hand out the legally required notices to plan participants. Whether it's handing out safe harbor notices, summary annual reports, summary plan descriptions, and plan enrollment forms, you have to fulfill these tasks in order to prudently exercise your duties as a plan sponsor. Not handing out required notices is a bad idea especially when the DOL comes knocking with a random audit or an audit based on a participant complaint.

Keep beneficiary forms up to date, avoid the soap opera

Yes, I love soap operas. It probably started when my aunt named my tropical fish after Luke and Laura from General Hospital, but I think it has to do with starting to watch Dallas when I was 12. To this day, I still watch The Bold and the Beautiful on and off for the last 26 years. Soap operas are fun with the multiple marriages, love triangles, and fake deaths. It stops being fun when real life mirrors a soap opera. As a 401(k) plan sponsor, one way to avoid the soap opera is to make sure that the beneficiary forms of plan participants are constantly updated especially when there is a change of marital status. Divorce, remarriage, additional children, these are the situations which threaten the validity of a beneficiary form. I've been involved in too many instances where a legal analysis of a beneficiary form had to be made because the participant didn't get a chance to update them when they were alive. A 401(k) plan sponsor has enough to do without having to be the arbiter of a family feud. Every time there is a new plan document, every time someone in human resources knows of a life altering change, a new beneficiary form needs to be handed out and filled out.

Making sure the fiduciary process is managed

As a 401(k) plan sponsor, you may be under the impression that if you give a plan participant a choice of investments, then you're 100% not liable for the losses sustained in their accounts. That's not entirely true because the limited liability under ERISA §404(c) depends on how you manage the plan's fiduciary process. The liability protection isn't all or nothing, but it does bear a relationship to what you do. What you need to do is have a financial advisor in a fiduciary capacity that will help you review and replace investment options under the plan on a consistent basis. Your financial advisor also must at the very least, provide investment education to plan participants. If you want the liability protection, which is the big selling point of participants directed investments; you need to keep your end of the bargain by completing your end of properly managing the fiduciary process.

Review fee disclosures

As a plan sponsor, you have a duty to make sure that the fees that the plan is paying are reasonable. That doesn't mean that you have to pick the cheapest plan provider, but it does mean that you have to make sure that the fees are reasonable in relation to the service provided. So you can have the plan pay more in fees to get more service. The disclosures aren't suitable for wrapping fish or putting it in the back of a drawer. The disclosures need to be reviewed and the fees need to be benchmarked by either using benchmarking services or by seeking out competitive bidding by other plan providers. Seeing how much you charged by looking at the disclosures isn't enough, you need to see if the charges are reasonable as compared to the marketplace.

Have the plan reviewed

It's not enough that you get fee disclosures from your plan providers, you need to make sure that your plan is running in fit shape. So many of the problems affecting your plan are something that you can't see since you don't have the expertise in plan administration. Too many plan errors are only discovered years after they occurred because of a plan audit or there has been a change of plan providers. A good thorough plan review can spot errors and issues before they become bigger and costlier to fix. The review is best done by an independent ERISA attorney or retirement plan consultant. I provide a plan review that reviews all aspects of the plan from top to bottom for $750. I think it's money well spent to have an annual review or one every few years to make sure that your plan is running in an optimum condition.

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