Everything Employers Wanted to Know About Their Retirement Plans* (*But Were Afraid to Ask)

By Ary Rosenbaum, Esq.

Being a plan sponsor isn't just about setting up a plan to benefit you and your employees. With setting up a plan, there comes tremendous responsibility and exposure to liability. The problem is that as a plan sponsor, most of them don't understand their role, so hopefully this article will ask questions and provide the answers you need to understand your role as a plan sponsor.

Q: Aside from setting up the plan, why should I care?

A: Establishing a retirement plan is an important decision, but it comes with a lot of responsibility that continues with the day to day administration of the plan. As a plan sponsor, you are a plan fiduciary which requires a duty of care that is the highest duty in law and in equity. Any breach of that duty will expose you to liability. If you are also a plan trustee, that liability could be personal. As a plan sponsor, you must hire retirement plan providers to help you manage your plan, but you are still responsible for the work they do.

Q: Why am I liable if a participant directs their investment in our plan?

A: A major misconception out there is that if a participant directs the investments under their account, then the plan sponsor cannot be liable for any losses. That is a misinterpretation of Section 404(c) of ERISA. In fact, you only avoid liability under ERISA §404(c) by offering participant direction is by managing the fiduciary process effectively. The only way to do that is by hiring a financial advisor with the background in retirement plans to assist you. Too many plan sponsors have been sued for breach of fiduciary duty because they have no investment policy statement (IPS) or they haven't reviewed their plan investments on an annual or semi-annual basis. The lesson here is to hire a financial advisor who will help manage the fiduciary process and avoid the financial advisor who shows up once in a while and doesn't understand his or her role.

Q: Should I offer investment education and/or advice to plan participants?

A: While you are not legally required to provide investment education and/or advice, you should. The reason you should is that under the ERISA §404(c) regulations, in order for plan participants to exercise control for purposes of making it a participant directed plan, the fiduciaries must provide sufficient information to participants so that they can make informed decisions. While Morningstar profiles and mutual funds prospectuses looks nice, it's debatable whether those written materials qualify as sufficient information. As a plan sponsor, you should see that providing education and/or advice is a powerful human resources tool. It will kill two birds with one stone, improving the retirement savings of plan participants while decreasing the risk of participants suing for losses in their account because education and/or advice gives them sufficient information to exercise control and improve their investment performance.

Q: With the fee disclosure regulations, do all I have to do is to get the disclosure from my provider?

A: With fee disclosure regulations to be implemented in April, many retirement plan sponsors are under the assumption that their only role is to get the disclosure form and just put it in the back of their drawer. As a plan fiduciary, you have a duty of prudence and that duty requires you to only pay reasonable plan expenses. The only way you can determine whether your fees are reasonable is to take those disclosure forms and compare what you are receiving in services and what you are paying for them to what's out there in the marketplace. There has been a tremendous amount of litigation concerning plans paying excessive plan fees that it would be wise for plan sponsors to limit their liability by reviewing their plan fees on an annual

basis. While you don't need a formal process like an RFP (a request for proposal), you should consult with a retirement plan consultant or ERISA attorney to review the fees you are paying.

Q: I pay nothing for the administration of my plan, am I right?

A: There is no such thing as a free lunch or free plan administration. The myth of free administration is the biggest misconception that plan sponsors have about retirement plans. Hopefully, the myth ends with fee disclosure Regardless of who is your third party administrator (TPA), you are paying for administration. The myth of free administration is usually associated with a mutual fund company or insurance company serving as the TPA. Since these providers charge very low or no upfront costs, plan sponsors often assume they paying nothing for plan administration. However, the fees are often tacked on to the plan's investments either embedded in a more expensive share class or what is known as a wrap fee.

Q: What's wrong with picking my (insert type of familial relationship) as the plan's financial advisor?

A: Selecting a plan provider is a fiduciary function and any poor selection of providers is a breach of fiduciary duty which may expose you to liability. Selecting plan providers needs to be conducted through a process of reviewing a number of competing plan providers and you need to document why you selected a certain provider. Simply picking your cousin as your financial advisor simply because he's your cousin is not a proper exercise of your fiduciary duty. However, you may select your cousin as your financial advisor in an arm's length transaction and if you actually had a selection process where your cousin was selected for legitimate business reasons (and making your aunt happy isn't one of them).

Q: Should I use my payroll provider as my TPA?

A: While payroll providers are very good at providing payroll services, they have not been proven to be effective at administering retirement plans. While payroll providers promise plan administration with seamless integration with payroll and low fees, the fact is that competent plan administration has very little to do with payroll. So since retirement plan administration has very little to do with payroll, pick a TPA that understands administration and retirement plan design. While one stop shopping has been a boon to consumers, it hasn't worked especially well in the retirement plan business.

Q: Should I pick the TPA who charges the lowest fee?

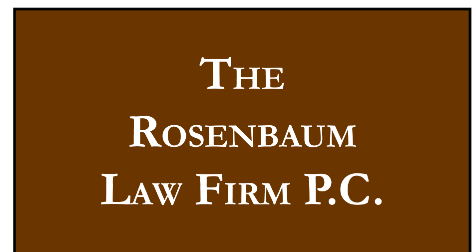
A: Do you pick your doctor based on price? I don't think you did. While cost is certainly a consideration in choosing any plan provider, the competence of a TPA is a far more important criterion. Most plan sponsors are unaware of the TPA's role and too often only know what the role is when they are liable for the incompetence of one. Not only will a good TPA provide competent plan administration, they can also maximize the use of employer contributions with plan design. Too often plan sponsors waste money or don't maximize their contributions (and tax deductions) because of inefficient plan design.

Q; Doesn't hiring a corporate trustee reduce my fiduciary liability?

A: There are really only two reasons to hire a corporate trustee for your retirement plan. The first is that if your plan requires an audit (which is for plans with 100 or more participants), you will save on auditing costs because the use of a corporate trustee makes you eligible for a limited scope audit (which is less expensive than a full scope audit). The second reason is that no one at the plan sponsor wants to serve as a trustee. Since a corporate trustee tends to serve in a non-discretionary position (they act at the behest of the plan sponsor), they do very little in minimizing a plan sponsor's liability as a fiduciary.

Q: If my Plan has an ERISA bond, do I need fiduciary liability insurance?

A: Any plan that is subject to the terms of ERISA are required to get an ERISA bond, which only protects plan assets against theft. Fiduciary liability insurance is purchased to protect plan fiduciaries including the trustees from litigation for any claims of breach of fiduciary duty. It would be wise for any retirement plan sponsor to purchase fiduciary liability insurance.



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