

# When You Need To Hire an ERISA Attorney

By Ary Rosenbaum, Esq.

Unlike Rodney Dangerfield, ERISA attorneys do get respect. However, quite a few people including plan sponsors and retirement plan financial advisors have no idea what we actually do. We all come in different sizes, different shapes, and different specialties, but our concern is the workings of retirement plans. ERISA attorneys are a great resource for the plan sponsor and other retirement plan providers, they just may not know when. They may need them so this article is about when you may need the services of an ERISA attorney.

## ERISA Attorneys are not all alike

ERISA attorneys work on retirement plans, whether they are qualified or not. We get the name ERISA attorneys from that bible of retirement plans: ERISA stands for the Employee Retirement Income Security Act of 1974. There are ERISA attorneys who specialize in just ERISA litigation and then there are those that just handle the day-to-day workings of a retirement plan. Even then there are ERISA attorneys that only handle multi-employer union plans and there are some that just handle single employer retirement plans (some attorneys like me have done both). There are ERISA attorneys that work for consulting firms, third party administrators (TPAs), and law firms. The main difference? An ERISA attorney that works for a law firm can have an attorney-client relationship with you that means that your concerns are paramount and the advice you receive has to

be unbiased. Consultant and TPA ERISA attorneys can't do that because they don't work for a law firm. Now that doesn't mean that they aren't competent because most of them are (I had the pleasure of being a TPA ERISA attorney for 9 years), it just means that their opinion isn't really independent. Their main goal is to ensure



that their firm and their clients are ERISA compliant, as well ensuring that the client will still be a client. So that means that the TPA's needs will come before the client's if any compliance issues come up. A legal document department of a TPA is a natural outgrowth of what that TPAs does, but it will always be an ancillary service. An ERISA attorney working in a law firm setting never treats plan documents as an ancillary service. Regardless of whether you use a TPA attorney or one working for a law firm, make sure that attorney fits your needs.

## Plan documents and amendments

Every 5-6 years, the Internal Revenue

Service (IRS) requires all qualified plans to be completed restated into a new plan document. Every year or two, the IRS requires a tack-on amendment to conform the plan document to new laws and/or regulations. In addition, you may need a plan amendment if you want to change a plan provision like the plan's eligibility require-

ments or you may need to add an adopting employer or adopt a multiple employer plan. You need to conform the administration of your plan to the plan document and conform the plan document to current law. So it's important to have your plan document to be drafted or reviewed by an ERISA attorney, whether it's one who works for a law firm or a TPA. There are many TPAs out there that draft plan documents that may or may not have an attorney drafting them.

A paralegal or an actuary or a plan administrator may draft them. There is nothing wrong with these types of professionals drafting your plan document, but it just may be a good idea to have an outside ERISA attorney to review the newly drafted plan document. Many plan sponsors when they get the advice to contact an outside ERISA attorney have the sudden knew jerk reaction to hold on to their wallets. It's understandable because most law firm ERISA attorneys charge by the hour and as a plan sponsor with bills to pay, you like to have cost certainty. There are quite a few ERISA attorneys who charge a flat fee and charge fees that are in line with what many TPA ERISA attorneys may charge. Regardless of whom you use,

it's important to have an ERISA attorney involved in the plan document process.

### **Making Sense of Fee Disclosures**

As a retirement plan sponsor, you have heard quite a bit about fee disclosures for the past couple of years. The recent implementation of plan sponsor disclosures under the Section 408(b)(2) regulations and the plan participant disclosures under Section 404(a)(5). As a plan sponsor, your responsibility doesn't end when you get the disclosures. You have a fiduciary responsibility to make sure that the fees you pay for the administration of your plan are reasonable for the services provided. So that means you need to determine whether you are paying reasonable plan expenses and the way to do that is to benchmark your fees. One of the ways to do that is to hire an independent ERISA attorney who can benchmark your fees by comparing the fees you pay to what other providers are charging for similar services. Surprisingly, hiring an ERISA attorney who charges a flat fee and has enough contacts in the retirement plan industry may provide benchmarking services that is more affordable than what an independent retirement plan consultant would charge, as well as what a full blown RFP process may cost.

### **IRS and DOL audits**

When either the Internal Revenue Service (IRS) or the Department of Labor (DOL) audits your plan, it could be a random audit or an audit based on information provided by an aggrieved plan participant or provider. Regardless of the reason, you should contact an ERISA attorney for representation. An actuary or a pension consultant has the background to work with you on plan audits. Just remember that retirement plans use legal documents that have legal consequences, so an attorney should be used. I have been involved with too many random audits where huge plan errors are discovered as well as targeted audits where the reason for the investigation led to larger problems. While most audits will lead to no change for the plan sponsor, it is important to hire an ERISA attorney who could represent you and not create a mountain out of a molehill by answering IRS and/or DOL questions directly and not volunteering information that could lead to further investigation.

### **5500 Foul ups, Plan Errors**

Retirement plans have legal requirements, such as an annual Form 5500 if the plan is covered under ERISA as well as rules under the Internal Revenue Code. While there are many plan errors that can be self-corrected by your TPA, there are certain errors that can't. Whether it's large



plan errors that cover several years or the failure to timely draft plan documents and amendments, you will certainly need an ERISA attorney to help you in submitting the plan under the IRS' voluntary compliance program. In addition, you need to contact an ERISA attorney if you fail to timely file a Form 5500. If the DOL and the IRS haven't contacted you, you can avoid huge penalties by applying to the DOL's Delinquent Filer Voluntary Compliance Program (DFVCP). If you haven't made an application to the DFVCP and you have been contacted by the IRS and/or DOL asking for it or attached with a large proposed penalty, you should always contact an ERISA attorney. If you use an ERISA attorney, you are more likely to be left unscathed by the government than if you did it by yourself. In addition, if you have failed to make timely deposits of employee salary deferrals, you will need an ERISA attorney for self-correction or to get DOL approval under their Voluntary Fiduciary Correction Program.

### **Plan Reviews**

People hate dentists, but the fact is that preventative care like checkups will avoid problems later. The same can be said about

ERISA attorneys, where a preventative plan review can uncover plan and fiduciary issues that can be corrected now, rather than festering to create larger problems later. Whether the issue is with the plan document, the administration, the fiduciary process, or plan expenses, a good plan review can uncover a host of issues that can threaten your plan's tax qualification as well as create a liability risk that can create litigation later. The problem is that like the dentist, too many plan sponsors avoid using an ERISA attorney because of the pain (money) it can be. That's why I have developed plan reviews that for as little as \$750, a plan sponsor can get a through plan review to serve as a checkup to determine whether the plan fits their needs and whether there are any issues that can be a liability pitfall. For \$1,000, I have developed a one stop legal solution for retirement plan sponsors in managing the risk of their retirement plans. So there are cost effective legal solutions out there either offered by my office or through another ERISA attorney that can help you take care of small plan issues now, rather than being larger problems later.

Would you let your pharmacist give you a checkup? Would you let the car parts salesperson work on your car? While retirement plans are handled by fine retirement plan professionals, there are often times where you need an ERISA attorney in helping you handle your retirement plan. Hopefully, this article has helped you know what ERISA attorneys do and when you should call one.

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