So You Decided to Set Up a Retirement Plan?

By Ary Rosenbaum, Esq.

Buying a new car can be a harrowing experience. You have so many makes and models to choose from and there are a lot of factors that figure into your choice. Not only that, the model you may be interested in has different packages and trims to choose from. Will it be the package with the GPS or the one with cloth seats? Besides the aesthetics, there are many factors that dictate which car to pursue. Factors include money, the purpose and use of the car, as well as fuel efficiency. A family of five isn't going to buy a Corvette and a single college student isn't going to buy a Honda Odyssey. When it comes to buying a car, all I know is I have no say. That is why instead of a Ford Flex or a Honda Odyssey, I drive a Toyota Prius (my wife's choice).

When a company decides that they want to put a retirement plan in place, it's almost like trying to buy a new car. A company needs to look at several factors to determine what type of retirement plan they want to offer, as well as the goal of the plan they wish to implement. Too many plan sponsors put retirement plans in place without knowing the consequences and costs, whether it's for liability concerns or for the company's bottom line. The retirement plan that a company wants to put in place has to be the right fit because if it doesn't fit correctly, the plan sponsor may either leave money on the table or risk its financial health in running it. This article shall serve as a blueprint on what plan sponsors should consider when they are deciding to implement a retirement plan.

1. How many employees do you have? This is a rather simple question for you. If you are on your own, you have more choices in what type of retirement plan you could establish. While all plans are available to almost all employers, some plans maybe more cost prohibitive when you start to add employees as plan participants. A case in point is when I had an attorney call me up. He indicated that he had a Simplified Employee Pension Plan (SEP-IRA), which is a retirement plan but it is not a qualified plan since it uses IRA accounts and requires almost no administration with a maximum annual contribution at that time of $49,000. The attorney had a $500,000 legal fee just paid to him. Based on his age (75) and that he had no employee made a defined benefit plan attractive as he was able to make a $230,000 contribution that first year. Had the attorney had an employee, he would have been required to fund that employee's benefit for that year which might have been cost prohibitive. Even some of these "easy" retirement plans like a SEP-IRA or a SIMPLE-IRA may not be a good fit with a company with employees because the trade-off in using a plan with no administrative cost is that you have to make required contributions to employees. So a company with employees and a small budget for making employer contributions may be more limited in the type of plan they choose than if they had no employees.

2. What is the purpose of setting up a retirement plan? You would think that is a simple question, but it's not since there can be more than one answer. Is the purpose of the plan because the goal is to save for the retirement of the owners and highly compensated employees or is it because a retirement plan is a great employee benefit to boost morale and employee retention? The purpose behind setting up the plan may guide you in what type of plan to choose and what type of plan design. Regardless of what the actual purpose and goal of setting up a retirement plan is, you should never lose sight of the fact that there was a reason in setting one up and you may breach your fiduciary duty as a plan sponsor and/or plan trustee by neglecting it. \

3. What is the age and compensation of the owner(s)/highly compensated employees? Despite the fact that retirement plans are a great benefit for all employees, one of the goals of setting up a retirement plan is saving the maximum benefit for the owners and highly compensated employees of the business. One way to achieve the maximum savings is the use of a defined benefit plan, cash balance plan, or a cross tested profit sharing allocation that will award higher contributions to these high paid employees and some of the

key factors are age and compensation. If the demographics and the pocketbook of the business could support it, then these types of employer contribution allocations should be considered.

4. How much can you afford in employer contributions? As stated before, what is the financial strength of the company to fund contributions for employees? If the company can't afford any employer contributions, then clearly plans with an employee salary deferral feature such as a 401(k) plan should be the plan of choice.

5. Who will pay plan expenses? For plans other than daily valued 401(k) plans, plan expenses tend to be paid out of pocket by the plan sponsor since it's an allowable business deduction. For daily valued 401(k) plans, plan expenses are usually charged to participant accounts. Once again, your finances will dictate whether you can afford to pay the administrative expenses or have the participants foot the bill.

6. Ask the Employees. A small business is usually not a democracy, but it may be wise to ask employees for input in setting up a retirement plan. Consider sending a questionnaire to employees to gauge their interest in a retirement plan. The questionnaire should be tailored towards trying to indentify whether they see this plan as an important employee benefit and if you decide the 401(k) route, whether the employees would defer. Now employees shouldn't have a say in designing the plan since they aren't going to be the ones funding the employer contributions.

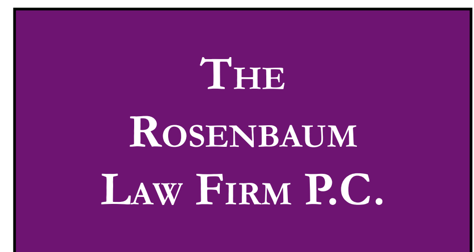
7. Find a financial advisor. If you have just one non-owner employee, a financial advisor for the plan should be hired. No ifs, ands, or buts. A financial advisor is not just important for selecting plan investments, but they are a tremendous asset in reducing the liability you will have as plan fiduciaries since they will assist in the investment management of the plan whether the plan is trustee or participant directed. While many TPAs such as payroll providers may allow you to use mutual fund lineups without a financial advisor, they are not legally culpable if something goes wrong with the plan's investments since they are not financial advisors.

8. Find a good TPA/ERISA attorney. Obviously, to have a good retirement plan, you need a good team. I cannot stress the need for you to find a solid third party administration firm (TPA) and a good ERISA attorney (preferably an independent ERISA attorney who will draft a plan document at costs comparable to what a TPA would charge). This "dream team" can go a long way in maximizing your tax deductions, facilitate your plan administration, and maintain its qualification at an affordable price.

9. Get the proper insurance for the plan and the plan's fiduciaries. It is required by the Department of Labor that all retirement plans get an ERISA bond, which will protect plan assets from theft. In addition, you should purchase a fiduciary liability policy that will protect the Plan's fiduciaries from any litigation from aggrieved plan participants for breach of fiduciary duty. Check with your property and casualty broker for both types of policies.

10. Once you set it, don't forget it. After implementing their retirement plan, many companies neglect their role as plan fiduciaries. They neglect their duties in reviewing their plan providers for cost and competence and they do that to their detriment. Hiring plan providers such as a financial advisor, a TPA, or ERISA attorney is not enough. Plan sponsors need to review their providers for competency and cost. Now with fee disclosure regulations being implemented in April 2012, you will find out what your plan providers are charging you whether it is directly or indirectly. Too many plan sponsors will take the fee disclosures they get and put in their back drawer. Those plan sponsors will likely breach their fiduciary duty or may have their contracts with their providers be considered prohibited transactions by the Department of Labor (which will net them an excise tax to boot). In order to avoid a prohibited transaction, you must shop your plan around to determine whether the cost you are currently paying is reasonable. Thanks to resources like this article, you will know that taking care of your retirement plan is like taking care of your car. Keep maintaining it and it won't stall on you. Neglect it and you may be having more problems that what your bargained for.

Setting up a retirement plan can be hard work and with some pitfalls if you don't take your job as a plan sponsor seriously. However, if you follow the advice in this article, you stand a good chance of enjoying the fruits that a qualified retirement plan can bear for you and your employees.



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