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The Ultimate Plan Sponsor Checklist

While they don't have a book called *Retirement Plan Sponsorship for Dummies*, they should. So in the interim, here is a checklist that plan sponsors should review that can help them develop good practices and avoid unnecessary liability in their stewardship of retirement plans for their employees.

❑ Do you have copies of all the plan documents and records?

The Employee Retirement Income Security Act of 1974 (ERISA) requires plan sponsors to maintain all records necessary to determine benefits that are or may become due to each employee. Without copies of plan documents or clear records showing a participant has already received his plan benefits, or was never eligible for benefits, it can be very difficult to convince a now-retired former employee (possibly from several decades ago) that he or she is not due benefits from the plan.

Records that should be maintained include (but are not limited to) the following:

- Plan documents, including amendments and determination letters/opinion letters;
- Summary Plan Descriptions;
- Participant notices and documentation of the dates and method of delivery;
- Participant elections such as deferral and investment elections;
- Census information including payroll data and employment history;
- Nondiscrimination test results;
- Form 5500 including attachments;
- Plan account and financial statements;
- Recordkeeping/valuation reports at both the plan and participant level;
- Participant loan documentation including promissory notes; and
- Participant distribution forms including special tax notices, election forms and 1099-R forms.

Physical storage can be expensive, so many plan sponsors have turned to electronic storage for some or all of their plans records.

❑ Are you properly insured as a plan sponsor?

Plans that are subject to ERISA need an ERISA bond which protects plan assets from theft. If you have a retirement plan, you need one because it's a question on your plan's Form 5500 and a "no" answer may trigger an audit from the DOL.

While an ERISA bond is required, it only protects plan assets. It does not protect plan fiduciaries from litigation. So it's recommended that a retirement plan with participants purchase fiduciary liability insurance to protect it and the individuals serving as trustees.

❑ Do you timely distribute required documents, notices and educational retirement fund materials to your employees?

At a minimum, defined contribution plan participants must receive an annual statement of benefits (quarterly statements if the investments are participant directed), as well as a summary annual report which is a snapshot of the financial schedules attached to Form 5500.

Defined contribution plans allowing participants to direct the investment of some or all of their accounts must provide notices that inform and educate them on the options available to them. Plan sponsors that seek to avail themselves of the ERISA 404(c) safe harbor protection must provide additional participant disclosures. Compliance with Section 404(c) may relieve plan fiduciaries of liability for investment losses resulting from the participant's exercise of control of assets in his or her account.

A summary plan description (SPD), which is a "plain English" summary of the plan's provisions, must be provided to new participants and, in general, every five years. Also a notice or new SPD may be required due to plan amendments.

There are deadlines associated with distribution of these notices and documents. Knowledge is key—providing the participants with enough information in a timely manner will limit your liability.

❑ Are you depositing 401(k) deferrals and loan repayments by the required deadlines?

Your plan's Form 5500 includes a question asking if there were any late deposits of participant contributions for the year. To avoid raising any red flags that could lead to a potential audit and to avoid excise taxes and making up missed investment gains, it is important that you deposit these contributions in a timely manner.

Employee contributions and loan repayments are required to be deposited into the plan as soon as they can be reasonably segregated from the employer's general assets but no later than the 15th business day of the following month. The 15th business day isn't a safe harbor—it is the maximum deadline and most employers should be able to segregate the funds much sooner, many times within days of being withheld from payroll.

For plans with fewer than 100 participants, a safe harbor time frame may be utilized. As long as the employee contributions and loan repayments are deposited into the plan no later than the 7th business day following payroll, they are deemed to be timely, even if the employer is able to make the deposit earlier.

❑ Are you enrolling and covering the right employees?

Plan documents clearly spell out when employees are eligible for plan participation. Many require a period of service and/or an age requirement. Unfortunately, many plan sponsors are under the misconception that all part-time employees can be excluded from participation in the plan when, in fact, the Internal Revenue Code does not permit part-time employees to be excluded as a class.

The plan may be drafted to require that an employee work a minimum number of hours to enter the plan, but the maximum number of hours that can be required in a twelve-month period is 1,000. This maximum translates into approximately 20 hours a week, making many part-time employees eligible for plan participation.

Problems may also occur if the plan provides for immediate eligibility. For example if your employees' college kids come to work part time over the summer, they are eligible for the plan.

Although they probably wouldn't make any contributions anyway, if they are not given the opportunity to enroll, they are treated as being improperly excluded and you will be required to contribute on their behalf to correct the error.

You should have a complete understanding of the eligibility requirements and plan entry dates and track and monitor these throughout the year.

Also, many businesses are affiliated with other businesses, either because one company owns the other or because the same five or fewer people own a significant portion of both businesses (referred to as a "controlled group"). If your company is part of a controlled group, you may be required to cover employees of other members of the controlled group in your plan if certain coverage testing is not passed.

It is important for you to be aware of the controlled group rules and to disclose to your TPA any and all ownership interests in order to determine if additional employees need to be covered by your plan.

❑ Are you monitoring the plan's fees?

Do you have full disclosure of all the fees involved? Are the fees reasonable for the plan's size and how are the fees related to what is offered in the marketplace?

Thanks to the fee disclosure regulations, plan sponsors are no longer in the dark about how much compensation plan providers are receiving from various sources, directly or indirectly. It's a great thing because a plan sponsor as a plan fiduciary has the duty to only pay reasonable expenses and that was often hard to analyze when the plan providers didn't have to disclose their fees.

The problem is that with this added information comes added plan sponsor responsibility. So it's not important enough to get the fee disclosures—you have to benchmark your fees to determine whether they are reasonable.

You are not required to pay the lowest fees (most times, you shouldn't), but you have to determine whether the fees you are paying are reasonable for the services you are provided.

❑ Do you have an investment policy statement (IPS)?

An IPS is a written guideline which outlines the process for selecting, reviewing and changing the plan's investments. Although ERISA does not specifically require an IPS, it is one of the first things that the DOL will ask to see when they audit a plan and will want proof that it was followed.

Fiduciary responsibility doesn't end with the creation of an IPS. At the very least, investments and service providers should be monitored on an annual basis to ensure that they continue to be appropriate choices. Details of these periodic reviews should be documented in writing in case it is ever necessary to demonstrate that actions and decisions were made in accordance with the IPS.

An IPS can provide important documentation that demonstrates the employer is meeting its fiduciary responsibilities by establishing prudent and diligent written policies solely in the interest of participants and beneficiaries. Failure to develop and keep an IPS up to date can lead to breach of fiduciary rules and subject fiduciaries to personal liability for plan losses.

❑ When was the last time you reviewed your employee retirement plan to see if it still fits your current needs?

Retirement plans when set up can become like your toddler's clothes...at a certain point, they will no longer fit. It's important to review your plan and its design to see if it still meets your needs.

- A defined benefit plan that was started for an employer where the owners were the only participants may no longer be a good fit as the company expands.
- A 401(k) plan that might have been started without a safe harbor plan design may require one because the plan is failing its discrimination/compliance testing.
- Perhaps you can afford a new comparability plan design that can give greater contributions to the highly compensated employees while maintaining a minimum contribution to your non-highly compensated employees.

Conclusion

If any of the boxes on this checklist are left unchecked, perhaps it's time to seek the guidance of your plan providers or new plan providers if the current ones aren't proactive in informing you about these important responsibilities.

You are only as good as your team. So if you hire the right TPA, financial advisor and auditor (if an audit is required for your plan), then you have won half the battle of limiting your liability as plan sponsor. Not only do they serve as your plan's third party providers, they can serve as resources in helping you meet your responsibilities as a plan sponsor and fiduciary and assist you in making sure the plan continues to fit your needs.

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