

Tales Of The TPAs: The Good, The Bad, And The Ugly

By Ary Rosenbaum, Esq.

As I have always said, the most important 401(k) plan provider you can hire is a Third-Party Administrator (TPA). That's because a TPA does so much work, and their incompetence can lead to you getting penalized or forcing you to cough up significant money to fix compliance mistakes. This article is based on true stories from my 26-year career as an ERISA attorney dealing with 401(k) plan sponsors and TPAs. It's the Good, the Bad, and the Ugly.

Most TPAs are good, that's the truth

When I first started my practice in 2010, I would often write about the negative experiences I saw as an ERISA attorney for TPAs, as well as in my interactions in my practice. That led some people who worked for TPAs to think that I had a negative view of TPAs. That wasn't the truth, I support the work of good TPAs. While good TPA work is the norm, I would often talk of the bad TPA work because it's not that I like to dwell on

the negativity. I did it to highlight the need to value a TPA's work, more than just a price holder. When you hire a TPA, you expect good work, so I'm most likely to mention things when the work is terrible. Since I'm an ERISA attorney, a lot of times I'm only called when things break in a 401(k) plan and a lot of times, it's the TPA that breaks things. It's like restaurant service, you expect good service, and go ballistic when you don't get it. TPAs provide a service and you

should expect a good service since you'll be on the hook for penalties and corrective contributions when things go wrong. TPA services aren't like a gallon of milk, price isn't the most important factor in picking a TPA, competence in doing the work is.

The Good TPA

A good TPA will perform competent compliance testing and recordkeeping to keep a plan sponsor out of harm's way. A good TPA will keep the ERISA attorney and government auditor away. Mistakes by

no-action letter. Not only are they proactive in administration and compliance, but they will make sure that the plan is still a good fit for the plan sponsor as it expands and contracts from time to time. What worked great for you when you first set up your 401(k) plan may no longer fit today. A different employee population and a bigger budget may lead to a need for employer contributions, including contributions that can better benefit highly compensated employees. That might require your 401(k) plan to add automatic enrollment, a safe

harbor plan design, or cross-tested allocations. That might also mean adding a cash balance plan if you can afford it. Plan design can save tax dollars through greater tax deductions for employer contributions or save costly deferral refunds to highly compensated employees. Plan design might not be cinema as Martin Scorsese would say, but it's an art form and the good TPAs are artists. Being a 401(k) plan sponsor is a difficult position since you also are

serving in a fiduciary capacity. You don't have to be an ERISA expert, but you need to make sure you have one serving as your TPA. Ignorance of the law is no defense, especially if that law is ERISA. A good TPA is the only one to hire. Years ago, I had a plan sponsor client with a Defined Benefit Plan. What worked well when the plan sponsor had five employees, was no longer cost effective when they had 12 employees. I referred them to a new TPA that



these good TPAs are few and far between. They are proactive with clients, rather than reactive. These TPA's clients will rarely have catastrophic errors such as missing Form 5500s, late deferrals, corrective contributions, and plan document errors. If these good TPAs make mistakes, they won't hide it, and fix it. If the plan is audited by the Internal Revenue Service (IRS) or the Department of Labor, they will provide the necessary information to get that



put out the Defined Benefit Plan to pasture and replaced it with a Safe Harbor 401(k) plan that also had a new comparability allocation that gave a greater benefit to the highly compensated employees/ owners of the Plan. 15 years later, the TPA and the Plan still work for the 401(k) sponsor.

The Bad TPA

The bad TPA will serve as an anchor on you as a 401(k) plan sponsor and subject you to possible penalties or corrective contributions and actions. A bad TPA is consistent in their lackadaisical handling of your plan. I always feel they lack focus and concentration on details, which is such an important facet of being a TPA. For over 15 years, I've stated my opinion in about 15 articles as to why I think it's a bad mistake to hire the two top payroll providers in the country (ADP and Paychex) as your TPA. It's cost me a lot of business in referrals from those two companies, but I think honesty is the best policy. My problem with those companies is that there isn't the attention to detail that a TPA needs, but that's what you should expect from a company whose main focus is payroll. I find they offer little help and when they make a mistake, they expect the plan sponsor to fix it and go out of their way to disclaim any responsibility. I just had an issue where one of these payroll provider TPAs that uses initials in its name threw a plan sponsor under the bus for a mistake the TPA made. Even knowing this 401(k) plan was part of a controlled group and needed the same 401(k) enhanced safe harbor match design, they drafted the plan document as

a safe harbor non-elective, which was going to cost the plan sponsor an additional \$41,000. The TPA would allow self-correction by the plan sponsor as long as the plan sponsor absolved the TPA of all responsibility for the error they made themselves. There are quite a few TPAs that aren't in the payroll business, whose main business is TPA work and they're not good at it. A bad TPA will make more errors than a good one. So many of them won't discover the error they make on their own, so it only gets discovered when you change TPAs or when the error is discovered on an IRS or DOL audit. For the bad TPA that discovers their error, they'll make every excuse in the book as to why it wasn't their fault and go to great lengths to avoid being on the hook financially to fix their mistakes. I'll never forget the Bad TPA that butchered a Top Heavy test because they forgot to include the spouse and daughter of one of the law firm partners. The problem? The named law partner has his name in the law firm's name. Where I come from, we call that a clue.

The Ugly TPA

What separates an Ugly TPA from a bad one? I think it's a matter of intent. A Bad TPA will be negligent in their work, and an Ugly TPA will be so bad, that the bad work is intentional or is so negligent, that it can only be intentional. An Ugly TPA can be ugly because their price gouging is criminal. Ugly TPAs do some terrible things, that border on fraud. For me, that's the TPA that did no valuation reports for the 25 years they were working on a plan sponsor's retirement plan, so the TPA as-

sumed that the plan sponsor was embezzling money, so they sued the owner for \$3 million and won. One Ugly TPA wanted to backdate an amendment to cover up an improper employee exclusion on a plan. Another Ugly TPA slapped a 401(k) plan I was a fiduciary of, for \$80,000 in compliance and Form 5500 fees because we fired them. The only problem is we paid those fees as part of our annual service agreement. We didn't pay the fee and contacted the local DOL office. Punishing 401(k) plan sponsors for firing you with excessive non-disclosed deconversion fees makes you an Ugly TPA. I can count on one hand how many Ugly TPAs I've found in 26 years of practice on one hand, but you need to know that these kinds of monsters exist.

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