Surely, You Have To Do These Things As A Retirement Plan Sponsor

By Ary Rosenbaum, Esq.

Since I first saw Airplane! When I was 9, it was my favorite movie. I didn't understand all the jokes at first, but my love for the film has only increased over time. The beauty of the movie is that it's played as a straight drama with serious actors like Peter Graves, Lloyd Bridges, and Leslie Nielsen (pre-Naked Gun, but wooden as the Captain in The Poseidon Adventure). The most famous line in the movie is when Ted Striker (played by Robert Hayes) asks Dr. Rhumack (played by Leslie Nielsen), "Surely, you can't be serious?" Of course, Dr. Rhumack responds: "I am serious, and don't call me Shirley." My favorite line is Dr. Rhumack saying he remembers he had the lasagna when Elaine, tells him the choices on the flight were steak or fish. That being said, this article is surprisingly easy things plan sponsors shouldn't be doing, but have been done.

Not stealing from the plan

Under the Employee Retirement Income Security Act of 1974 (ERISA), a retirement plan is for the exclusive benefit of its participants, the employer's employees. Thou Shall Not Steal is one of the Ten Commandments, it's been a long time since Hebrew School and I had to look up that it was #8. It should be pretty easy to understand that you shouldn't steal the retirement plan assets of your employees, but I know three people, two retirement plan providers, and a plan sponsor who spent time in Federal prison because they didn't follow this advice. So much of my time is thinking rationally about irrational people. While I know stealing is wrong, I don't understand how a retirement plan provider or plan sponsor can steal assets from a retirement plan's trust and expect to get away with it. A disgraced plan fiduciary by the name of Mathew Hutcheson was tripped up by a Third Party Administrator (TPA) who questioned his orders to transfer plan assets to an outside account. For the plan sponsor who didn't heed my advice and admitted wrongdoing to the Department of Labor (DOL), it was his failure to file multiple Form 5500s that had the DOL on his tail. The greatest Ponzi scheme failure of all time, started by Bernie Madoff only lasted so long, because he had an affiliated company of his, serving as plan custodian. If you have a well-known financial services company serving as plan custodian, they will keep records of where the assets go. Start writing checks from the account to yourself, they will know. You may get away with it for a time in stealing plan assets, but there are enough checks and balances between the custodian, the TPA, the financial advisor, and the government that won't allow you to get away with it for long. Stealing from a plan with a custodian is like leaving a fingerprint at the scene, you have a better chance of putting pantyhose on your head and robbing a bank and getting away with it (I strongly ask that you don't consider a life of crime). It is such basic common sense that you don't use retirement plan assets for your gain, but that doesn't stop plan sponsors and plan providers from trying. Don't be the subject of a DOL/ United States Attorney press release, don't steal.

Not using the plan for any type of gain

I live in Nassau County, New York, and there are so many different forms of government between a village, town, county, and special tax districts like my hamlet's sanitation district, I joke that it's done to give everyone jobs, and everyone is like Don Fanucci from The Godfather Part II and wants to wet their beak. We have more people on the local school board with children on the school district payroll than we have children as students in our schools. These school board members will claim that there is nothing wrong since they abstain from the vote even if their buddies on the board approve. I think it's wrong and any type of transaction that looks wrong is wrong, appearances of impropriety suggest impropriety. Call me The Last Boy Scout (also an underrated Bruce Willis movie) and avoid any use of the plan for your needs. The retirement plan is for the exclusive benefit of your employees, it's not some patronage mill. Every plan provider selection and every decision you make should be on the up and up. If you want to put your relative on payroll and you own the business, you can do that but don't hire a relative as a plan provider because it just doesn't look right. While it might not be a prohibited transaction such as hiring your spouse as a financial advisor, it gives plan participants, outside ERISA attorneys, and the government the idea that your plan is not being run on the up and up. Giving your plan to your bank and having them serve as TPA to maintain or increase your credit line is wrong. Any use of assets for personal gain is a prohibited transaction. You want to see friends and family, use your plate, not the assets of your plan.

Provide the correct information to your TPA

A TPA is the most important provider you have. They do so much of the recordkeeping and compliance end that will keep you out of harm's way. Yet so much trouble that a plan sponsor gets into with compliance is that they withhold information or provide incorrect information to their TPA. A TPA's compliance work is conditioned on a plan sponsor providing correct information on the annual census and questionnaire. Incorrect information could affect a multitude of tests, such as ADP, ACP, coverage, and Top Heavy. In addition, failure to note commonly controlled and affiliated businesses could lead to catastrophic results later down the line when they're discovered. I've known too many plan sponsors that didn't note important transactions such as corporate acquisitions, affiliations, and leased employee situations, that led to a massive amount of employer contribution corrections. Not only must you comply with your TPA requests for information, but you also must make sure the information is full and accurate.

Take the fiduciary component of your Plan seriously

Too many plan sponsors think that as long as participants direct their investments, they're off the hook for any losses. That's a wrong reading of ERISA Section 404(c). You will only mitigate your liability by providing enough information for participants to make informed investment decisions. So if your plan has no financial advisor, or you haven't reviewed your investment options or provided investment education to participants, your liability limitation will be close to zero. You need to hire a competent financial advisor who will help you develop an Investment Policy Statement (IPS), select and replace funds based on that IPS, and provide investment education and/or advice to participants. It's not enough that you hire a financial advisor for this job, it's also important to let them do their job. So if they request a meeting for an investment review or plan enrollment/education, don't refuse. Sure, that takes time away from work, but it also helps limit your liability.

Review plan costs and plan providers

You have a fiduciary duty to run your retirement plan, which may involve personal liability if you reach it. Since you are responsible for the retirement assets of your employees, it requires the highest duty of care in law and equity. You must pay reasonable plan expenses for the services provided. If you want to overpay for your supplies, you can. You can't overpay for the administration of your retirement plan when participants are footing the bill. Your plan providers are required to provide fee disclosures to you on the direct and indirect fees they collect. You won't know if these fees are reasonable or not if you don't benchmark them against what other providers charge. Again, fees don't have to be the cheapest, they need to be reasonable. You also have a fiduciary duty of prudence. Not openly you have to watch what you did, you also have to watch your providers. You need to make sure your plan providers are doing what they contracted for and that the work is done competently. Unless they're taking on full fiduciary responsibility and liability, you're on the hook for their errors.

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