Things That Shouldn't Impress You From 401(k) Plan Providers

By Ary Rosenbaum, Esq.

When I was a kid in day school in Brooklyn, we had a classmate whose shtick was that he was rich. He wasn't rich, his father was a pathologist who worked at a city hospital, his mother didn't work, and they rented a nice apartment in Brooklyn. Yet, he was insistent to our classmate that he was rich, he liked to brag, and deep down, he was insecure. My grandmother always said it best, that those who bragged the most, have the least. There will be 401(k) plan providers trying to get your business as a plan sponsor, and they will try to impress you with things, that really shouldn't. This is what this article is all about.

Years of Experience

In Caddyshack, Judge Elihu Smails couldn't believe Ty Webb never kept score. When Smails asked Webb, how he measured himself against other golfers, Webb, remarked by height. There will be plan providers that will tout their years of experience as some sort of thing to impress you. It shouldn't. Just like you shouldn't discriminate against someone who is old (hard to believe I'm north of 50), you shouldn't discriminate against plan providers with fewer years of experience. Years of experience are essentially an arbitrary number because I've worked with plenty of people with lots of experience and the experience must have been dreadful because they were dreadful. I always say that if people don't get the proper training to start as a plan provider, they never get better. So their years of experience might be a bad thing. I know one plan provider who ended up in Federal prison, who touted his years of experience. In the end, years of experience is just another number that doesn't indicate quality of service. Like height, you can measure plan providers by years of experience too, because it's just a number.

Plans under management or administration

Just like years of experience, I think an arbitrary number is plans being administered or under management by a plan provider. Bigger plan providers will have more plan sponsor clients than small plan providers. It doesn't make them better. Quite honestly, two of the worst Third Party Administrators (TPA) are two of the biggest and they're only big because their main business is doing payroll. You should pick a plan provider because they're the right fit, for the service you want, for the services they deliver, and at a reasonable fee. Some of the best providers out there that I've seen have a very small client base. I have a friend who has done TPA work on her own for the last 15 years. She does as much work as she can handle, but her work is excellent and she's got great taste in music (like me, a huge Aerosmith fan). Bigger is not better. It's like with hamburgers, Mcdonald's has the most locations, but Shake Shack has better food.

Awards

There is a local magazine touting top-notch lawyers in New York, they probably have the same things for other metropolitan areas. There is supposed to be a process of nominating these top lawyers and it's just a list of names by specialty. Of course, it's also to sell ads for law firms who tout their top-named lawyers. Of course, there is some correlation between the number of top lawyers a firm has and the size

of their ad. One of the worst ERISA attorneys I had to work with since she represented a plan sponsor client and I was the attorney for the Third Party Administration (TPA) that needlessly had me write a plan document seven times, was noted by that magazine as a top ERISA lawyer. My old law firm would always have about a half dozen lawyers on the list, who were always partners of the firm, and the big shots calling the shots for the law firm's business including the Managing Attorney and litigation department chairman destroyed the law firm. The Managing Attorney would always get this Business Person of the Year award from some local business paper or some civic group, and she destroyed the firm. So don't be impressed by awards, unless it's the Nobel Prize or National League Most Valuable Player.

Location

Some people who live in my village are weird, actually a lot of them. There are just so many residents who won't shop outside of Oceanside. This is funny since most businesses open these days in Oceanside are bagel stores, cookie bakeries, and nail salons. Pre-Internet, it made sense only to pursue plan providers who were around the corner. With the advent of the digital age, it makes no sense to only see plan providers in your neck of the woods. While it's ideal to have a financial advisor who is local to conduct enrollment and education meetings, it's not a must. There is this thing called virtual meetings and air travel. If you're in New York, there is no reason to disqualify a plan provider from California, just because they're in California. Thanks to technology, that plan provider in California is as good as being next door. With everything so technologically based, the idea that your plan provider needs to be next door is as obsolete as a VHS tape rental store. You need to pick a plan provider that charges a reasonable fee for the services and will do a good job. So location isn't something you need to consider as some sort of requirement.

Free stuff

There was a national provider in my area that was trying to get one of my clients to hire them. It was an insurance company with one of the gimmicks of a fiduciary warranty. The fiduciary warranty was a promise that this insurance company would defend the client if they were sued for a breach of fiduciary duty. The problem was that the warranty was only good for a breach that no plan sponsor has ever been sued for, which is offering a suitable variety of investments for participants to select their investments. It only takes three mutual funds to satisfy this requirement, which is why no plan sponsor would ever get sued. So I told the plan sponsor that this wasn't a good fit for them and they agreed. Not knowing this, the local representative tried to get me on their side. He provided me with four tickets on the third base line for a weekend afternoon Mets game at CitiField. In addition, I also got four tickets for a Mets game at the Hyundai Club, which are great seats and all-you-can-eat food. It's my favorite place at the stadium and I have an outing there, once a year. That being said, I understood that this plan provider was trying to buy my opinion. No matter how much I love the Mets and free tickets, those gifts didn't change my mind. As a plan sponsor, you shouldn't be swayed by free stuff. It might be a breach of fiduciary duty to accept any gift that is more than de minimis from a plan provider you currently employ. Plan assets are for the benefit of plan participants and accepting gifts from a plan provider you work with, might be considered a prohibited transaction as you theoretically used plan assets to score free swag or tickets, You can't be Don Fanucci (obligatory The Godfather Part II reference) and use plan assets to wet your beak.

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