The Mid-2022 401(k) Plan Sponsor Update

By Ary Rosenbaum, Esq.

Time goes so quickly and a 401(k) plan sponsor can't let it slip away without being on top of things. Before we blinked, it was already summer. One of the problems with being a plan sponsor is that the law, regulations, and news concerning 401(k) plans constantly change and you need to be aware of it. So without further ado, here are some of the important issues impacting 401(k) plans in Mid-Year 2022.

The restatement deadline is July 31st

I had a bankruptcy law professor who used to joke that the Bankruptcy Code gets updated every few years to help give bankruptcy attorneys work. I'm sure that there are plan sponsors that think that plan amendments and restatements are mandated by the Internal Revenue Service (IRS) to feed ERISA attorneys like me, but that's not true. Qualified plans such as a 401(k) plan must operate according to the terms of a written plan document to meet IRS qualification requirements. These documents must be fully rewritten (or "restated") every six years to reflect recent law changes. The last 6-year restatement cycle for your 401(k) plan was called "PPA" after the Pension Protection Act of 2006, which had a deadline of April 30, 2016. So that means we are going through a new restatement process. Since we haven't had a major overhaul of retirement laws since PPA, the new process is called Cycle 3. This Cycle 3 restatement process means that all qualified pre-approved 401(k) plan documents will need to be amended, certified by the IRS, and adopted by the plan sponsor by the deadline of this July 31, 2022. This is a mandatory IRS requirement with penalties for non-compliance. Note that if you have a defined benefit plan or a 403(b) plan, there will be a separate restatement cycle applicable to them. During this restatement process, we've had a few new laws, including the SECURE Act and the CARES Act that have impacted the operation of 401(k) plans. The funny part is Cycle 3 plan documents only consider retirement plan law changes made prior to February 1, 2017. So that means that changes since 2017 including the SECURE Act and CARES Act will have to be taken care of in separate, good-faith amendments and not in the plan documents. So while people on social media may take about freedom or constitutional rights, you have no choice, but to restate your plan even if you wanted to terminate your 401(k) plan today to avoid a restatement. You can have your third-party administrator (TPA) handle your restatement or you can have an ERISA attorney like me handle it for you. If you haven't done it yet, you don't have much time longer. Give me a call if you are stuck with no plan restatement. Better to be last-minute with a restatement than out of time and either correcting it for a fee through a correction program.

Cryptocurrency in a 401(k) plan is a solution looking for a problem

I started in the 401(k) plan business in 1998. At that time, plan sponsors and participants were trying to chase huge returns in any mutual fund related to technology. Just two years later, the technology stock market crashed, we call it the dot.bomb era. Chasing huge returns reminds me of an old saying that my great grandmother once said: don't run after the carriage if it's not going to pick you up. People who bought Bitcoin when it was $8,000 to $15,000 are still doing well, the crowd that bought when it was over $60,000, is not. When Bitcoin was near its highs, several well-known plan providers thought that offering Bitcoin within a 401(k) plan was a great idea. As they say in business, timing is everything. As with any new product, it takes money months to come to market. When plan. providers said they would give plan sponsors the opportunity for their 401(k) participants to invest, but Bitcoin lost half its value. While I write this, it's around a third of its all-time high. Even without getting the opinion from the Department of Labor (DOL) on this, I would never recommend offering Bitcoin in a plan whether it's $69,000 or $23,000 a coin. Bitcoin, like other forms of cryptocurrency, is unregulated and volatile. They are not a fit within a 401(k) plan that is highly regulated under the Internal Revenue Code and ERISA, especially when they are more prone to cyber theft than other assets. Well, the DOL did opine on cryptocurrency within ERISA plans and their concerns were consistent with mine. The only difference is they can enforce their opinion. The DOL warned plan sponsors from offering the option of cryptocurrency as a plan investment. Their compliance assistance bulleting cautioned that they would conduct investigations of plan sponsors that may offer it within their ERISA plan. The way I read it, that means plan audits. As someone who has gone through the DOL audits and with their power of subpoena, any plan sponsor is putting themselves at risk. The lead plaintiff ERISA litigator, Jerry Schlicter effectively warned that any plan sponsor offering cryptocurrency within their 401(k) plan is at risk for litigation. As a crypto investor, I see no upside for offering it within your 401(k) plan, especially with that stern DOL warning, While a compliance assistance opinion doesn't have the weight of a regulation, I listen when the DOL speaks, and so should you. While one retirement plan provider has sued the DOL and the largest TPA out there started their Bitcoin 401(k) offering after the DOL compliance assistance to perhaps change the DOL's way of thinking, I can't see the DOL changing their opinion anytime soon.

IRS announced pilot pre-audit correction program

One of the great changes over the 24 years that I've been an ERISA attorney is the willingness of the Internal Revenue Service (IRS) and the DOL for creating self-correction compliance programs to allow retirement plan sponsors the opportunity to correct their plans voluntarily. Rather than getting caught on an audit and handed the hammer of sanctions and penalties by a government auditor, these correction programs allow a more cost-effective way for a plan sponsor to correct errors that they have identified. For example, far better to pay a few thousand in program fees for several late filings of Form 5500 through the DOL's Delinquent Filer Voluntary Compliance Program than the DOL charging a plan sponsor up to several thousands of dollars per day for one late 5500. The problem with these programs is that it requires plan sponsors to identify these errors and if they are under audit by the IRS or DOL, they can't submit their corrections and are considered out of time. However, the IRS created a new pilot pre-audit compliance program. Under this new program, the IRS will send letters to retirement plans that they have been targeted for a plan audit and have 90 days to review their plan's documents and day-to-day operation to make corrections. If the plan sponsor doesn't respond to the IRS, the plan will be audited and risk the penalty when the error is inevitably discovered. Under the pilot program, the plan sponsor can self-correct through the IRS' self-correction program or submit through the Voluntary Compliance Fee for the regular program fee, rather than the hammer of a penalty under audit. If they self-correct through self-correction or the voluntary compliance program, the plan sponsor will be reviewed for the documentation they submitted to correct the problem. If the IRS doesn't fully agree with the plan sponsor's correction, they will conduct a limited scope or full scope audit. You may not think this is a big deal, but it is. It's like being given as a kid the opportunity to clean your room before you get punished, why do nothing and get punished? I hate surprises and would rather identify errors and fix them on my own, rather than get the hammer of an IRS agent who finds them.

Climate Change

DOL under the Trump administration lumped "climate change" with other environmental, social, and corporate governance concerns that the DOL initially said should generally not be considered when selecting retirement plan investment investments, but then changed course under the Biden administration when clarified they can be considered if they might have an impact on investment returns. Now, the DOL is considering climate change as a stand-alone issue by asking for comments on more than 20 questions concerning the effect of climate change on retirement plan investments. While this is just a request for information and comments, this is something to consider.

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