End of Year Tips for The 401(k) Plan Sponsor

By Ary Rosenbaum, Esq.

With Thanksgiving done, we look to the holidays and the New Year. While many of us are busy shopping for loved ones, many businesses and individuals have their eye geared towards next year. As a retirement plan sponsor, you have the fiduciary responsibility to look over your plan and part of looking over the plan is preparing for the future. This article is about what end of year planning you as a plan sponsor should be doing in maintaining and improving your retirement plan for the coming new year.

Special Deferral Election of Bonuses

Many businesses offer holiday bonuses, at least that's what I hear. When I started working in the retirement plan business in 1998, Harvey Berman gave me $300 and I have never received a holiday bonus since. If you are a business that has given bonuses in the past or are considering giving one this Holiday Season, it may be a good idea to see whether your 401(k) plan allows for a special bonus deferral election. That special bonus deferral election would allow your plan participants to defer up to 100% of their bonus without impacting their current deferral election and not needing to wait until a change is allowed under your plan. This requires a plan amendment, so contact your third party administrator (TPA) or ERISA attorney for further information.

Getting ready for compliance

Whether you like it or not, after December 31st, you will be contacted by your TPA for census information. In order to conduct their discrimination testing, your TPA will ask you for your employee census, which typically includes name, date of birth, date of hire, date of termination (if any), hours of service (if your plan counts it instead of elapsed time), and compensation. You will also be asked company information such as who are the owners or whether there are other companies that have the same ownership or are affiliated with you. While the month of December is not the busiest, it may be wise to get the ball rolling by getting that information accessible.

Review of ERISA bond and fiduciary liability insurance

They tell you to check your air filter when every season starts and to check you fire/carbon monoxide alarms every six months to avoid a greater harm later. When it comes to being a retirement plan sponsor, the greater harm usually involves plan asset theft or litigation from aggrieved plan participants. As you should know, all retirement plans covered under ERISA must have an ERISA bond to protect assets from theft. Make sure you have one in place. If not, contact your property & casualty broker. Fiduciary liability insurance is actually optional; it offers plan fiduciaries protection in case of litigation because fiduciaries like individual plan trustee may be personally liable otherwise. So while it is an option, it is something that all plans covered by ERISA should have, just in case. Speaking as a lawyer who doesn't litigate, litigation costs a heck of amount of money. Being sued doesn't mean you did anything wrong and a lot of innocent plan sponsors have had to pay through the nose to defend them. I had a client who had $1 million in litigation

expenses who won their case on summary judgment; thankfully they had a fiduciary liability policy that bore $900,000 of that amount. If you don't have a current policy in place, check your property & casualty broker for details.

Compare plan to the health of the company

Look at the demographics of your plan participants in the past year, as well as your company's financial well-being. If your corporate finances have drastically improved, you may have the financial wherewithal to start or increase employer contributions, perhaps contributions that may be skewed favorably to the highly compensated employees that run the business. If you want to make changes for this year, you have until December 31st to put an amendment in place. If you want to make the change for the following year, you have some time, but it may make some sense in getting that ball rolling with your TPA. The TPA will need to do a study to see what kind of formula they could design that will pass testing or whether it may make sense to achieve the contribution goals by setting up another plan. If business is contracting and you already allocate employer contributions, it may make sense to suspend or eliminate such contributions. Based on how the plan document is drafted as well as the retirement plan rules, these contributions might not be eliminated for the current plan year. If you have a tough time coming up with the contributions to the plan or you need to reduce that amount, contact your TPA or ERISA attorney immediately.

Review of Plan Expenses

You have a fiduciary responsibility to pay reasonable plan expenses. The end of the year maybe a good time to review the expenses charged to your plan. With fee disclosure regulations finally implemented, you should have received fee disclosures from your plan provider. If you haven't, contact them immediately because you are on the hook for any disclosures not provided to you as well as to plan participants. If you did receive the disclosures sent to you, you need to review them and benchmark those fees (based on plans of similar size) by using a benchmarking service or by comparing fees to what other providers are charging by asking for price quotes from competing providers. While you don't have to pick a plan provider who is the cheapest, you need to make sure that the fees being charged to the plan are reasonable in light of the services being provided to you.

Review of Plan Providers

One of my favorite Mayors of all time, New York's Ed Koch always asked: "How am I Doing?" As a retirement plan sponsor, you need to know how your plan providers are doing. The reason you need to know because you are on the hook for their errors, it's your fiduciary responsibility to make sure they are doing the job they should be doing. That's why this time of the year maybe a great time to review the work of your providers to make sure they are doing the work promised. Do you have a financial advisor who never offers investment education to plan participants or hasn't shown up in years to review plan investments? Do you have a TPA who has trouble with compliance testing? Do you have an ERISA attorney who can't spell 401(k)? Seriously, you need to have your plan providers reviewed for competence. You may want an independent retirement plan consultant or ERISA attorney to review plan providers if you don't have the capacity to do it. Regardless of who will do it, it will eliminate any unfortunate "surprises" that you don't need.

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