# You Might Have A Problem With Your 401(k) Plan If….

## By Ary Rosenbaum, Esq.

There are many situations in life when you clearly have a problem such as leaving the stove on when you leave home, or when the next-door neighbor leased the house to a rock band looking for a place to practice. When it comes to sponsoring a 401(k) plan, there are many situations that may lead to an immediate problem. This article will let you know which signs on your 401(k) plan are actual major problems.

**Your Plan Provider is on TV and it's not for an interview or a commercial.** We live in a post-Bernie Madoff world, so it's no longer a shock for fiduciaries, third-party administrators (TPAs), attorneys, or accountants to be charged with defrauding plan sponsors and participants. While Bernie Madoff ruined Ponzi schemes for everyone, there is always a plan provider being charged or sued for transgressions. Just check the Department of Labor's news release page. Over the last 25 years, I have seen it more times than I wanted to. Heck, I succeeded a fiduciary on a multiple employer plan who stole $3 million from other multiple employer plans. Clearly, if your plan provider is accused of some criminal activity, as a plan sponsor, you are actually on the hook because as a plan fiduciary, you're still responsible for the work or lack thereof of your plan providers.

**You haven't reviewed your plan providers.** Even if your plan provider is not under indictment or investigation, it's necessary to review your plan providers for competence and service. I had a client being sued for $3 million by the Department of Labor (DOL) because her TPA didn't bother to do valuations for 25 years, so the DOL thought the plan sponsor embezzled money because the TPA told the owner to write checks from the retirement plan (representing the owner's retirement benefit) to prop up another failing business. While the owner was clearly inno-cent of any embezzlement, he was guilty of not reviewing the TPA to make sure the TPA was doing its job proficiently. Consider having your provider reviewed by an independent retirement plan consultant or an ERISA attorney (cough, cough) for an impartial plan provider review.

**Your Plan has no financial advisor.** If you have a 401(k) plan with employees, you need a financial advisor. I don't care how smart you are, if you are not licensed to be a financial advisor, you need one. Anyone can select investments, but not everyone can do it proficiently and professionally like a financial advisor. The fact is picking investments is a retirement plan financial advisor's lesser important attribute. Your Financial Advisor is missing in action. Whether your plan is participant-directed or not, to limit your fiduciary liability, you need to have a financial advisor who you actually see on a frequent basis (at least semi-annually). There are too many plans with what I call "milk carton" advisors because they are missing when it comes to servicing their clients. A good financial advisor will assist in the fiduciary process such as helping draft an investment policy statement and select a menu of investment options, While all ERISA plans should have a financial advisor, it is my opinion that you are in far worse shape of having a financial advisor who is doing nothing than not having one because you are paying someone a nice fee for doing nothing.

**You haven't reviewed your plan expenses for years.** Did you ever sit down in a comfortable spot and you didn't want to get up? I have known too many people who have made career mistakes because they didn't want to change jobs because they were comfortable at a certain place of employment even though that place was holding them back. Plan sponsors don't have that luxury with their plan providers. While they may not want to change plan providers because there is that comfort level, plan sponsors need to determine whether the fees charged by these providers are reasonable for the service provided. Over the past 25 years, ricing for daily valued 401(k) plans has been more competitive so when I discovered in 2008 that a potential client had a

1995 contract with an insurance company provider that expired in 2001, with a 267 basis point charge (2.67%) for a $4 million plan, I was flabbergasted. While you want to stay in a comfortable place, you have to make sure that your plan providers aren't taking advantage of that comfort level. So with the fee disclosures now obligatory, you have a mission that you have to accept (this isn't Mission Impossible and the IMF), and that's to determine whether the fees you are paying are reasonable or not by having those fees benchmarked by either a service or by seeking pricing from competing plan providers.

**Your plan's participants aren't getting investment education and/or investment advice.** Like the Arch Deluxe and Incredible Universe, participant-directed 401(k) plans were a great idea on paper. By giving participants the right to direct their investments through a menu of investments, plan sponsors were supposed to be shielded from liability under ERISA §404(c) for a participant's investment losses. Suppose to because many people forget one of the important duties a plan sponsor has when it comes to participant-directed plans is that Plan sponsors will only get that full protection from ERISA §404(c) by providing plan participants with sufficient information to make informed decisions. Sufficient information isn't a Morningstar profile from a mutual fund (sorry, Pat) or a prospectus with enough jargon to make my Securities Law professor happy; it means providing plan participants with investment education (a general education about investments) and/or investment advice (specific advice on how to invest). The Department of Labor has made it easier to have your financial advisor provide advice if they meet the requirements of the new regulations because previously they could not. If your financial advisor can't provide it because of the cost of compliance, consider hiring an outside firm that will offer advice on the investment menu selected by your advisor for a very reasonable per-participant charge. Providing investment education and/or advice, especially in today's stock market is a great way to reduce your liability risk. If you are not offering at least investment education, you are opening yourself out to a lot of harm when markets tank again.

**You haven't reviewed your plan's terms.** It is extremely important to review your plan's terms and determine whether the plan still fits the needs of your business. Perhaps your business is now flush with cash, so you could consider a new comparability/non-elective 401(k) design. Retirement plans are great employee benefits, but they are also great tax savings vehicles, so better plan designs may maximize tax savings and contributions to highly compensated employees, which do include the owners of the business. That is why I often stress the need to find a quality TPA who understands plan design. In addition, you need to review your plan terms to make sure you are administering the plan according to the plan document. I have seen too many plan errors simply because the plan sponsor and/or the TPA is not administering the plan correctly because someone has misread or misinterpreted the plan document. In addition, I have seen plans penalized on an audit by the Internal Revenue Service because the plan sponsor did not operate the plan according to its terms. If you haven't had your plan reviewed in a while, you may have a problem.

**You are not following through on the small stuff.** Often, huge plan problems can be caused by small plan errors committed by the plan sponsor. So if you are not handing out summary plan descriptions, making sure you and plan participants (when required) are getting fee disclosures, or not remitting salary deferral contributions to your 401(k) plan as soon as reasonably possible, you certainly have a plan that has a problem.

Thanks to space and time, these are just a few ways to determine whether you have a problem or not with your plan. So if you experienced any of these issues, I strongly consider contacting an independent retirement plan consultant or ERISA attorney (cough, cough) to review.

**THE ROSENBAUM LAW FIRM P.C.**



**The Rosenbaum Law Firm P.C.**
**734 Franklin Avenue, Suite 302**
**Garden City, New York 11530**
**(516) 594-1557**

**http://www.therosenbaumlawfirm.com**
**Follow us on Twitter @rosenbaumlaw**