Organization Ideas For 401(k) Plan Sponsors To Limit Liability

By Ary Rosenbaum, Esq.

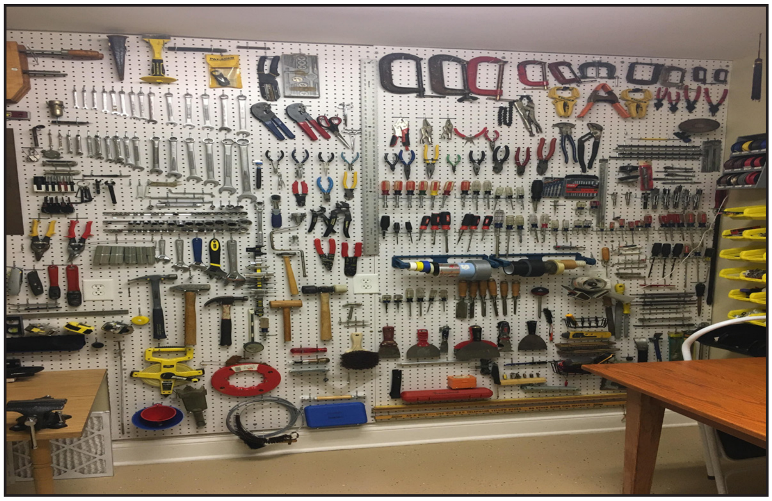
Organization tools always pop up for sale after New Year's because a lot of people want to try to keep their resolutions. My local Costco always trots out the plastic bins and organizational stands and carts after the new year. One of the most fascinating and profitable stores is The Container Store, which sells all things in organizational and cleaning tools. If you're a 401(k) plan sponsor, there is no Container Store in handling your role as a plan fiduciary. However, you have this article that will tell you why you need to be organized and what you should keep organized.

Why you need to be organized

If you want to be a slob with your finances, you can. However, when it comes to your 401(k), you can't. As a plan sponsor, you're also a plan fiduciary which means that you have a higher duty of care when handling the money belonging to other people than you do with your funds. Keeping good plan records and being organized falls under your fiduciary duty of prudence. You have a responsibility to your plan's participants and you need to be organized because missing records and documents are going to threaten the tax qualification of your plan and put you in high water with the government and/or plan participants. When it comes to plan administration, you need to be organized in keeping records for your third-party administrator (TPA) to effectively do their job. If you don't have the right plan document and if you don't have all your valuation reports, it's going to be very hard for your TPA to make sure that your plan complies. Also, disorganization is a problem if your plan is audited by the Internal Revenue Service (IRS) and the Department of Labor (DOL). Not having complete records is only going to prolong the audit. I had one DOL audit last a year and a half because the 401(k) plan sponsor failed to keep all their payroll records when at issue was the late deposit of salary deferrals. If you're missing plan documents and you're under an IRS audit, the agent has this belief that if you don't have the necessary plan documents, they're going to assume you never drafted them in the first place. I once had a plan sponsor sued by the DOL for millions because a lack of plan records and valuation reports gave their agents the idea that the plan sponsor was embezzling money. Despite my suggestion to settle, this plan sponsor hired litigators and still had to agree to forfeit millions in plan assets that did belong to the owners of the company. We live in a world of the show and tell and not having the organized records to indicate your compliance with the Internal Revenue Code and ERISA is just going to open a hornet's nest that might not actually be one.

Plan documents

While there are certain plan documents you may dispose of after time, you can't do that with plan documents. Your 401(k) plan must have a written plan document and this plan document thing isn't a one-time thing. The IRS requires you to restate and amend your plan document at certain points, thanks to changes in the law. Expect that you have to restate your plan into a new plan document every 6 years and add a tack on amendment every 2-3 years, dependent on the changes in the law. We are going through the Cycle 3 restatement process that likely required your plan to be restated by July 31, 2022. You will need copies of all your plan documents and summary plan descriptions for any IRS audit. As stated above, any missing plan documents will be treated as if you never executed them in the first place. That could put your plan at risk of disqualification (dependent on how many plan documents are missing) or more likely, at risk of thousands of dollars of penalties. Another reason to have a complete set of documents is to ensure that plan provisions are consistent and carry forward from plan document to plan document., Mistakes often happen along the way, so it's also important to have a complete set so that any mistakes made along the way are corrected. I remember once having to draft a plan amendment to a union pension plan because some provisions from the 1976 plan document were lost between the initial plan document



and the restatements, with the last one in 2005. So for many reasons, keep copies of all plan documents in a place where you can find them.

Setting up a committee

Being a plan fiduciary is all about setting up a prudent process for running your 401(k) plan and following it. One way that can be done is by setting up a committee to handle the plan and document the process and the decision-making. Keeping notes of all meetings will help you show evidence that you took your role as a plan sponsor seriously. Setting up a committee isn't enough; you have to hold meetings and record all the decisions with the minutes of those meetings. Setting up a committee isn't full proof because many times, a committee creates a bureaucracy that paralyzes the plan from operating correctly. I once worked at a law firm where I joked that if the managing attorney wanted to put a stop to something, she would create a committee for it. A committee should allow you to manage your plan prudently, not stifle that. One major mistake in creating a 401(k) plan committee is by having too many members on it. Too many members on a committee are not only the same as too many chefs in the kitchen, but they also paralyze the committee into inaction when they should be doing their job. As far as minutes, it's not like a deposition where you need a court reporter. Draft minutes that record all the decisions made in the meeting, as well as those who attended. A big decision for the committee is usually going to be the fiduciary process of the plan. When the advisor of the plan makes recommendations or decisions (if they are an ERISA §3(38) fiduciary), make sure it's reflected in the minutes. Also, summarize all the presentations that are made as well as the thought process used in making the decisions that were made. As I stated before, setting up a committee and drafting minutes is all about developing a process and following it. Setting up a committee and not having any meetings shows a breach of the process you put in place.

Plan valuation reports, Form 5500s, Payroll records, and distributions

Form 5500s are available online for your plan from the time that the DOL and IRS required the online filing of Form 5500s. I still recommend keeping a copy of all your Form 5500s in an easily accessible place. I recommend the same for your plan valuation reports which include all the discriminating testing required for a 401(k) plan. The rule of thumb for 401(k) plans is to hold onto these types of records for 7 years, but I recommend that all valuations reports and Form 5500s should be scanned into pdf form so that there are no concerns that they are inadvertently thrown out, lost, or causing too much storage problems in the file cabinet. We are in 2022 and it makes so much sense for you to immediately scan what you receive so that you can have a safe presence for all of your plan records and there would be no concern that you have to throw them out to make any storage room. For payroll records, you need to keep all copies to make sure that there are no late deferral problems that might pop up on a government audit or because of an opinion by a plan provider. As far as distribution records, I would keep them until the end of the Plan. The reason is that I have seen too many situations, especially in the pension plan space, where former participants pop out of nowhere and claim they never received a distribution of their account many years ago. If you don't have the records that this participant was fully paid out, a DOL agent may think you owe them money even though you paid them.

Distribute required ERISA notices

ERISA is all about protecting participants' rights. Under ERISA, there are a whole host of required notices that must be provided to participants as of right or upon their request. Whether it's a summary plan description, fee disclosure, annual account balance, plan enrollment/beneficiary form, a summary annual report, or a safe harbor match notice, there are plenty of notices that you need to make sure are provided to participants. You need to keep copies of these notices as well as records on how and when they were transmitted. Of course, with the DOL's e-disclosure regulationns, getting these notices out will be a lot easier.

Fee Disclosures don't belong in the drawer

As a plan fiduciary, you must determine whether the fees the plan pays are reasonable for the services provided. So when you are handed the fee disclosures by your plan providers, you just can't drop them in the back of the drawer. You need to benchmark your fees against what other similar providers (in terms of service) charge and keep records of the work you've done in determining whether your fees are reasonable or not.

Keep records of plan enrollment/education meetings

Plan enrollment meetings need to be scheduled to enroll new participants and provide investment education to them, as well as existing participants. All records for these meetings should be kept including the advertising done to announce these meetings, attendance sheets (which most plans never do), as well as the materials handed out by you and the plan providers (TPA and advisors) who attend.

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