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HOW TO MAXIMIZE YOUR COMPANY'S 401K PLANS (& NOT GET FINED BY THE DEPARTMENT OF LABOR)

By: Steven Abernathy

In 2014, the Department of Labor (DOL) changed their rules and took aim at 401k Plan sponsors without proper oversight of their companies' retirement plans. I warned business owners about the potential consequences of this in articles written for Forbes and Medical Economics. It's time for business owners to pay attention.

If you—or your clients—own a company which offers a 401k plan to employees, we recommend you review the rules and take note of any company practices which may be actionable as soon as possible.

The DOL is moving forward with investigations. And if they audit your company, prior preparation is advised to avoid facing serious consequences. When significant planning, time, effort, and money is expended to offer employees a well-structured 401(k) plan, we recommend hiring an experienced legal fiduciary to execute the following:

- overseeing the plan's record keeping;
- educating plan participants;
- formally documenting each participant's awareness of the risks and rewards of plan participation;
- making sure the fund's investment options are compliant with rule 404c to avoid liability;
- ensuring the fees each participant is paying –both hidden and direct—are reasonable and within a generally accepted range.

While the rules implemented by the DOL a few of years ago aren't new, a stricter level of enforcement from them is. ALL tax free, qualified plans require fiduciary oversight. This could cause major problems for employers who aren't mindful of the rules—including significant monetary fines.

In 2015, the DOL recovered $693.3 million in fines (up $100 million from 2014). A partial list of lawsuits, past and present, including 2016 and 2017, is available on the Department of Labor's website: (https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/eci).

According to Matt Straz, founder and CEO at Namely, "fines could run as high as $2,063 per day for failure to file form 5500, and, more severe monetary charges for failure to follow adequate fiduciary oversight of the plan could result."

Simply put, current regulations put fiduciary responsibility squarely on the shoulders of employers. So, no matter what your firm's area of expertise is, an employer assumes the role of "Legal Fiduciary" when your employees are offered a 401(k) plan. If anything is awry with the administration or fiduciary oversight of the plan, employers will be held responsible.

So, how will an employer know his or her responsibilities with respect to delivering the 401(k) plan?

This is a difficult question to answer. Knowing the exact requirements to oversee one plan (never mind several potential offerings) is complex. Furthermore, if the employer isn't a professional investor, how will s/he know if the investment strategy is dubious, or, even if the 401(k) fees are excessive and fleecing plan participants?

Business owners are legally accountable to every beneficiary of the 401(k) plan. That includes: their employees, every spouse, domestic partner, child, and all other plan recipients.

Fun fact: in addition to this expertise, 1) employers are expected to educate employees about the plan's options, 2) determine that all fees are "reasonable" (the DOL has their own definition of the word—i.e., what's "fair and customary" across the competitive landscape), and 3) confirm that tax and regulatory filings are in good order.

There is a margin for error with all three.

Employers who have not monitored their investments have been sued by employees. Alternatively, some have written large checks to honor the agreements of their retirement benefits packages. As the saying goes, nothing ever matters…until it matters.

Large companies with robust legal and human resources staff are not immune. According to reporting in the Los Angeles Times, a Lawsuit alleging General Electric ripped off its workers shows the pitfalls of 401(k) plans. Michael Hiltzik writes, "The GE lawsuit underscores a fundamental flaw in the 401(k) system, which offers

employees the option to contribute a percentage of their wages into a retirement fund, tax free—but leaves the investment options in the hands of employers."

When reporting for BenefitsPro, Scott Woolridge notes that Hico Flex Brass, a manufacturing firm in the Chicago area, would pay $79,000 to settle a case where the company failed to properly distribute 401(k) earnings. He also noted a complaint by the DOL asking the courts to rule that a machine shop in Santa Maria, California restore $58,000 in 401(k) contributions that the company improperly mixed with other business accounts.

Like GE, the employees of International Paper brought forth a lawsuit resulting in a $30 million settlement. (This case was litigated by a law firm—not the DOL—but the firm had the law squarely on their side.) But the size of a company is relatively insignificant given that administrative errors will hit an employer's bottom line hard no matter what their size or revenues. Employers, to their attorneys' detriment, do not always pay attention to the complexities of administering retirement plans. Well-intentioned employers who put a retirement plan on offer but aren't in compliance with the DOL's rules are on their own—and they may not even know it.

Our firm recently reviewed a company-sponsored retirement plan of a prominent organization. Since they were unaware of the specific workings of their plan, they were hemorrhaging money and didn't know it. Never mind the fact that no one within the organization could offer any education whatsoever to plan participants about their investments. That all needed to change. By the end of our review, checks and balances were implemented to fulfill the DOL's requirements and assume shared fiduciary responsibility.

The rules governing retirement benefit plans are clear: employer responsibility isn't optional and cannot be delegated away. However, when it's shared between an employer and a legal fiduciary working within the retirement benefits investment vertical, this dramatically reduces a company's liability by creating a shared legal responsibility (the legal fiduciary knows the laws surrounding the requirements and obligations of a 401(k) plan sponsor) and should ensure your plan is 100% compliant when a DOL audit takes place.

Every 401(k) plan varies since every participant is different. Investment mixes might, for example, offer an average annual return between 5% and 8%. However, yearly volatility is a reasonable expectation, and often causes plan participants to react improperly unless they are adequately educated with access to an investment professional. Participants' knowledge, needs, and investment strategies are individual—there's no "one size fits all." Asset allocation questions alone are an excellent argument for having a highly qualified professional advisor available to plan participants. (This would be true even if the DOL didn't mandate fiduciary responsibility.)

As I see it there's no fool proof solution today for any employer. However, there are three simple steps to drastically reduce risk:

1. Schedule a complete audit of the retirement plan by an outside source; and
2. Hire an independent, external advisor who will become a legal fiduciary and share responsibility if something goes awry.
3. Be mindful of advisory fees. A co-fiduciary is legally obligated to adhere to upholding fiduciary responsibility for a solid plan. The responsibilities of the advisor will include periodic review of the investment alternatives for Plan Participants.

Requirements of plan sponsors seem to be here to stay. Employers who do not hire an advisor as a co-fiduciary are gambling with their reputations, their fates, and their bottom line.

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