What Employers Can Do to Protect Employees' 401(k) Accounts 02-26-10
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Now that the stock market is rebounding somewhat, there is much discussion of Fiduciary Responsibility and Due Diligence with respect to monitoring 401(k) plans. Discussions of asset type, selection, and benchmarking, fee disclosure, and ERISA Sec. 404(c) compliance. However, an emerging issue which has not garnered much discussion, perhaps because of the difficulty in understanding and detecting problems, is that of TPA errors in retirement plan administration.

Such errors can shortchange participants, cost employers thousands of dollars in unnecessary contributions, or worse, lead to IRS and DOL audits, legal fees, and lawsuits.

Since ERISA (the Employee Retirement Income Security Act of 1974) was passed, there have been major revisions and additional pension legislation almost every year. In some cases, the law has become so technical and difficult to understand that an ERISA attorney is needed to interpret the statutes. The custom, especially among small and medium sized businesses which sponsor a 401(k) plan, is to outsource the plan administration to a Third Party Administration (TPA) firm. These TPA firms often operate as a branch of an investment or advisory firm, or sometimes as a stand alone, independent entity providing consulting and administration services.

These TPA firms provide annual testing as per the IRS requirements in order to maintain the plan's tax-qualified status, prepare the annual 5500 information reporting and other tax forms, calculate required contributions, collect and/or allocate contributions, and distribute funds to participants.

There is no particular qualification or education necessary to become a retirement plan administrator. In order to drive a truck, one needs to pass a written test in order to obtain a license, but in order to apply tax laws and calculate eligibility and contributions correctly to a retirement plan with millions of dollars in it, and affecting the future retirement security of many people, one need not even demonstrate that one has the ability to read and write, or add and subtract. There is no requirement to demonstrate an understanding of the laws affecting retirement plans.

And so there are many retirement plan administrators who are deficient in even the most basic life skills tracking YOUR plan. Many small business owners write checks totaling millions of dollars to retirement plans based on a determination made by a retirement plan administrator of dubious qualifications, sometimes located in another state or another country, without any thought to whether the determination is fair, correct, or even legal.

To be fair, there are several organizations sponsoring classes and offering designations and credentials aimed at retirement administrators and consultants. Even the IRS has, only since 2009, offered a specialized Enrolled Agent program targeted specifically for retirement plan professionals who can demonstrate extensive knowledge of the pension laws. The IRS has finally recognized the need to acknowledge those professionals who take their job, and your plan, seriously. And it's about time, but not nearly enough.

The purpose of ERISA (the Employee Retirement Income Security Act of 1974) was and is to protect employees' pensions. The basic premise is for the employer offering the plan to provide meaningful benefits to a majority of the workers, not just the highly paid executives. And most business owners can accept this premise. Unqualified plan administrators routinely violate these laws, either through ignorance or deliberately.

How can employers protect their plan, their employees, and themselves from being victims of incompetent, unscrupulous TPA firms and such activity? Pay attention and ask questions.

First and foremost, ask if anyone on the staff of your current or potential TPA firm, including the Principals or Owners, has any of the American Society of Pension Professionals and Actuaries (ASPPA) National Institute of Pension Administrators (NIPA) Certified Employee Benefit Specialist (CEBS) or other accredited organizations' professional credentials. Ask if that credentialed person will be working on YOUR plan, or at least will review your plan.

Ask for references from the TPA firm's clients. Yes, they may give you the name of their brother-in-law, but ask nevertheless. Call the references and ask questions. You never know when something may slip in an unguarded moment - you may pick up a sense of frustration, aggravation, etc.

When given a dollar amount to pay as an annual contribution, which was calculated by the TPA firm, is it similar to the last few years? If not, why not? Can they explain to you clearly how it was calculated, or are they vague, or seem not to be able to explain it?

Look at the reports provided. Even if you don't understand the testing, you can notice if there are employees omitted, contributions that seem too large, etc. Ask questions if you do not understand. Remember, as a business owner, you ultimately have fiduciary responsibility for the plan, and you can be sued. Also remember, the TPA you hired works for YOU.

These are just temporary measures. Long term, there needs to be fundamental changes in how the retirement system works in America.

First, responsibility for enforcing the pension laws is split among the Internal Revenue Service (IRS) Department of Labor (DOL) and in some cases, the Pension Benefit Guaranty Corporation (PBGC.) With such a mish mash of agencies, nobody is really watching, and the bad guys know it. We need to create one pension government agency which will enforce, monitor, provide training and outreach programs, and pay retirement benefits for abandonded plans.

Second, there needs to be education and/or licensing requirements for retirement plan administrators, advisors, salespeople, and anyone affiliated with handling of or accounting for plan funds.

Finally, we need to remember the long term reason for retirement plans, and take them seriously, instead of bastardizing them with day trading, loans, excessive fees, and other short term issues which eat away at our future.