



Protect your perks

Is your 401(k) an asset or a liability for your small business?

By Brian J. Bibb



No doubt about it: Having a matching 401(k) plan is an asset when it comes to recruiting and retaining top talent. But are you aware that sponsoring a 401(k) can put you at risk?

If you, as an employer, choose to offer a 401(k) plan by becoming a plan sponsor, you incur a significant liability—and that liability extends to your personal assets.

If you act as a plan sponsor, you are held legally responsible for every aspect of the plan, such as fulfilling 5500 filing requirements, depositing employee contributions within the proper time frame, and providing investment oversight, along with many other operational requirements.

No assumptions

The Employee Retirement Income Security Act of 1974 (ERISA) Section 404c provides a plan sponsor with statutory relief from liability for the investment actions taken by participants in a participant directed account plan.

Unfortunately, you cannot assume that because you are meeting 404(c) requirements or have a full-service 401(k) vendor that all of your fiduciary exposure is covered. This reasoning is one of the biggest disconnects in the 401(k) market today.

Many plan sponsors and CFOs assume because they are using a recognized 401(k) vendor that that vendor is taking care of all the necessary compli-

ance issues. Unfortunately, as demonstrated by recent court rulings, this is not always the case and could be a financially devastating assumption.

ERISA, a federal law that regulates retirement plans, defines fiduciary responsibility in functional terms as anyone who exercises authority and control over the plan's assets or has discretionary authority and responsibility in the plan's administration.

Its day in court

In recent years, court cases hold ERISA fiduciaries personally liable to replenish retirement plan funds that become depleted because of the fiduciary's actions or inactions. Even failing to make employee contributions from

payroll within the required time frame exposes the plan fiduciary to unnecessary risk.

In 2008, the United States saw ERISA-related class actions top \$17.7 billion, a shocking increase from the \$1.8 billion payout in 2007. Of these, some of the largest settlements involved allegations of breach of fiduciary duty. The plans involved are also more frequently those of smaller businesses.

In 2008, the Supreme Court (*LaRue vs. Dewolff, Boberg, & Associates, Inc.*) ruled that 401(k) plan participants be permitted to sue plan sponsors over the investment performance of their account. This ruling put all 401(k) plans at risk, regardless of size, because of the possibility that it allowed any individual participant the ability to file a claim for losses in their individual, self-directed account.

Because these class-action and individual lawsuits are often fueled by poor economic conditions, you will see more attorneys encouraging employees to sue. Each employer and/or CFO acting as a plan sponsor or fiduciary therefore must remember to take precautions by keeping up with new regulations and taking steps to reduce legal exposure. If you are a plan sponsor, you must also fully disclose to your employees the associated risks and costs.

Your alternatives

Employers acting as plan sponsors do have the option of delegating duties of a limited scope to a specialized fiduciary for the plan's administration: one for selecting, monitoring, and replacing the plan's investment options, or one for certain trustee duties.

Plan sponsors can even go so far as unloading the liability for other duties by delegating them to a full-scope, professional, and independent fiduciary in accordance with ERISA section 3(21).

If you are thinking about freeing yourself from the personal liability associated with your fiduciary role, you have options. One of the best and most overlooked options in the market is the use of a Multiple Employer Plan (MEP).

MEP is a single-employer plan maintained by two or more contributing sponsors that are not members of the same controlled group, under which all plan assets are available to pay benefits to all plan participants and beneficiaries. This allows two or more smaller employers to offer a more robust and affordable benefit to its employees.

With this MEP type of plan, a principal plan sponsor bears all responsibility and liability—including residual oversight duty to monitor a full-scope independent ERISA section 3(21) named fiduciary—for running the

retirement plan.

For decades, small-business owners have used MEPs to provide top-quality plans for their employees without the liability and administrative burdens associated with traditional single employer plans.

In most cases, the costs to provide these plans are significantly less as well.

“One of the best and most overlooked options in the market is the use of a Multiple Employer Plan.”



Know what you're getting into

A 401(k) can actually be a great thing, and it's important to assess how you, as a business owner, go about managing your employee benefits.

Remember to be wise when selecting a partner to assist you in your retirement plan benefits program. You will want a trusted partner who will not only show you options that provide your employees the greatest benefit in the marketplace, but one who will show you how to provide that benefit for the greatest value to you and your business without exposing you to unnecessary liability and administrative hardships.

Ask questions so you fully understand the delegation of responsibilities and who holds specific liabilities. This can save you an enormous amount of time, energy, and money. **A**



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