

# The Small Stuff That Retirement Plan Sponsors Can't Afford To Neglect

By Ary Rosenbaum, Esq.

They often say that you shouldn't sweat the small stuff, but you should never ignore the small stuff because small things have a tendency to mushroom into larger things. How many times have we heard of plan crashes and other disasters than only happened because of the failure of a small bolt or tube? While retirement plans don't have the same disasters like a building collapse, but there is enough small stuff that can be neglected to the plan sponsor's and plan participant's peril. So this article is about the small stuff that plan sponsors should take care of before they become a larger problem.

## Beneficiary Designation Forms

As participants enroll into your retirement plan, it's at that point that they designate the beneficiary of their benefit under the plan. If they are married, a participant can only designate a beneficiary other than their spouse with their spouse's consent. What's the problem? Most plan sponsors never check whether they have received beneficiary designation forms from all plan participants or whether these forms need to be updated because of a change in a participant's family status.

What's the problem with that? On some occasions, participants die while still participants in a plan sponsor's retirement plan. If there is no beneficiary and the plan sponsor has no idea of the participant's next of kin, then the plan sponsor has the duty to locate possible beneficiaries. If the beneficiary form wasn't updated, then the plan sponsor is going to have seek

the advice of counsel to determine who is the rightful beneficiary. The last thing a plan sponsor wants to be is to be the Judge Judy of declaring beneficiaries; all of which can be subject to an appeal by an aggrieved family member through litigation. I'll never forget the case of a law firm partner who was widowed and designated his children as beneficiaries. When he re-

the benefit so her stepchildren could inherit the money as she had agreed to under the pre-nup. Had she not, it's likely the law firm would have been dragged into a lawsuit even though declaring the surviving spouse as the valid beneficiary was the right thing. Every family is a soap opera, some are good and some are bad (don't get me started about mine). There is no reason

a plan sponsor should get involved in a family soap opera. Every time there is an enrollment meeting, plan sponsors should ask all plan participants whether there has been a change in their family life that requires them to update their beneficiary form (especially now if the participant married someone of the same sex in light of the recent Supreme Court decision).

## Upping the coverage of an ERISA Bond and Fiduciary Liability Coverage

Insurance is all about insuring risk. If you insure yourself less than your potential liability, you maybe out of pocket if you receive pecuniary damage to the thing you insured. How many parents left their family high and dry because the life insurance wasn't enough to replace the future

income of the deceased. How many car owners were liable for damages because their policy didn't have enough coverage? Retirement plans grew in size over time, especially in participants and assets. Coverage for ERISA bonds and fiduciary liability insurance are based on the size of plan assets. That's why it's important for a plan sponsor to determine whether they



married, his new wife waived the right to be a beneficiary of his 401(k) plan balance in a pre-nuptial agreement. The law firm partner never updated his beneficiary form before he died. The problem was that the pre-nuptial agreement is not a valid consent by a spouse (it must be on the beneficiary form), so the surviving spouse was entitled to the benefit. Luckily, she waived

have the right amount of coverage for the plan to insure any loss to the plan's assets or protecting plan fiduciaries. There is nothing worse than finding out you don't have enough coverage when you really need it.

### Reviewing mutual fund share classes

Actively managed mutual funds in 401(k) plans offer different share classes denoted by a letter, it's more like alphabet soup at times to determine the difference between the A share class and the Z share class. There is a difference between share classes of mutual funds in 401(k) plans, based on the size of the assets in the plan. Larger plans will have less expensive; "institutional" share classes

while smaller plans will have the more expensive "retail" share classes of the very same fund in their investment option lineup. The problem is that often plans have qualified for the retail share class pricing, but the plan sponsors and their advisor maybe unaware. The problem? A recent court case in California held that a plan sponsor has violated their duty of prudence if the plan was using retail share classes when institutional share classes of the very same funds were available. So plan sponsors can get into hot water if they get mutual funds in the plan at retail when they could have gotten the same funds at wholesale. That's just another thing that plan sponsors have to look out for.

### Reviewing plan providers

Plan sponsors are a fiduciary to their plan and being a fiduciary is the highest duty in law and equity. While a plan sponsor needs to hire providers to delegate the bulk of the work such as financial advice and plan administration, the bulk of the liability still rests with the plan sponsor. So even if a plan provider is negligent,

the plan sponsor breached their fiduciary duty because they hired this incompetent provider. I had a client who was sued by the Department of Labor just because the plan provider never did a valuation report for 28 years and told the plan sponsor that it was a good idea for one of the owners in the company to have her benefit go

by either using a service or by shopping the plan around to other providers. Plan sponsors have a duty to pay reasonable expenses and the only way to determine that is to see what is out there in the retirement plan marketplace. Not only are ERISA litigators looking for plans that pay excessive fees, the Department of Labor



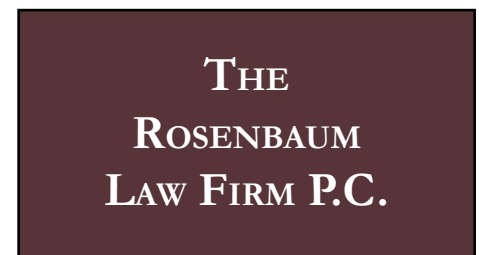
has indicated that they will start auditing plans to determine the compliance with the fee disclosure regulations. Plan auditors are also asking retirement plans that require an annual audit for their Form 5500 filing on whether they are reviewing their fees for reasonableness. So the good old days where plan sponsors could neglect the fees that the plan paid for administration are long gone, like the days of

leisure suits. Plan sponsors can neglect their duties as a fiduciary by not looking at their fees, but they ran a very large risk of being sued or being sanctioned. Just add plan expense shopping to the other house-keeping duties of a plan sponsor. directly from the plan to another affiliated company that was in distress. So without any valuation reports and checks from the plan that suggested embezzlement, the plan sponsor was sued for millions of dollars. The plan sponsor claiming that it was fault of the TPA; which may sound good for a lawsuit by the plan sponsor against the TPA, but the fact is the plan sponsor is still on the hook for hiring that negligent provider. Plan sponsors need to evaluate their plan providers for competence, to make sure they are doing the job as promised and as required to keep the plan out of harm's way. Hiring an ERISA attorney (cough, cough) or an independent retirement plan expert to review their plan providers will go a long way in avoiding some major heartbreak later.

### Reviewing fee disclosures

Making sure that they received fee disclosures from their plan providers isn't enough; plan sponsors need to actually determine whether the fees they pay are reasonable for the services provided. Plan sponsors need to benchmark their fees

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