HBKS® Wealth Advisors

New Year's Resolutions for Retirement Plan Fiduciaries

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Americans love making New Year's resolutions at the beginning of the calendar year.

Generally, these self-improvement goals concern health and wellness, weight loss or improving relationships. If you are a retirement plan sponsor responsible for a 401(k) or 403(b), there are some New Year's resolutions you should consider to improve the health of your plan and meet your responsibility as a fiduciary to your plan participants. Fiduciaries understand that they must comply with the Employee Retirement Income Security Act of 1974, better known by its acronym ERISA. That's the federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to protect individuals in these plans.

EXAMINING PLAN FEES

As a retirement plan sponsor under ERISA, you have an obligation to make sure fees are reasonable. In the world of qualified retirement plans such as 401(k)s, it is not just a best practice to make sure that your fees are reasonable as it might be in other business situations. In these plans, the law compels you to *ensure* such fees are reasonable.

Government regulators are particularly concerned about those fees that are passed on to participants because they impact investment performance and ultimately the amount of money available to support the participant during their retirement. Consequently, having a process in place to monitor retirement plan fees is critical. Documenting a prudent process to monitor retirement plan fees is equally important. At some point, a plan participant may challenge your plan's fees for various services, so producing documentation that you were diligent in checking that those fees were reasonable is extremely important.

One best practice for determining whether your fees are reasonable is to prepare a benchmarking study that compares your retirement plan fees for various services such as record keeping, retirement plan administration, investment advice and mutual fund fees to other plans of a similar size. By comparing your retirement plan fees to other, similar retirement plans based on either total plan assets or number of participants, you will have a baseline for identifying areas where your plan's fees might not be in line with

what's available in the marketplace. A formal benchmarking study is a good starting point from which to make a judgment call about whether your plan's fees are reasonable.

REVIEWING THE INVESTMENT OPTIONS

Retirement plan sponsors must have a process in place for reviewing the investment options in their retirement plan. These investment options are often referred to as designated investment alternatives. Retirement plan sponsors are obligated to demonstrate procedural prudence in selecting and monitoring these investment options.

Best practices for selecting and monitoring investment options include defining the process that you're going to use, executing on that defined process on a continuous and ongoing basis and documenting that this was done. Although this sounds deceptively simple and straightforward, many retirement plan sponsors cannot document that they have followed a prudent process.

Consider working with your investment advisor to create an investment policy statement for your retirement plan. Your investment policy statement should define the prudent process that you will follow to monitor your designated investment alternatives. It might reference various benchmarks that you're going to track for each investment alternative such as performance relative to peer group, performance relative to an appropriate benchmark, mutual fund expense ratios or money manager tenure.

As time goes by, it's a good idea to work with your investment advisor to monitor your retirement plan's investment options based on these defined benchmarks. At a minimum, we recommend producing a quarterly report analyzing each respective investment option relative to these benchmarks and, where appropriate, taking action to remove a fund not consistently meeting these defined requirements.

The U.S. Department of Labor enforces ERISA regulations and will require you to produce this documentation in case of an audit. Further, such detailed records will be invaluable to you if a participant challenges the quality of your plan's investment options.

TRACK TIMELINESS OF PARTICIPANT SALARY DEFERRALS

Retirement plan sponsors of defined contribution plans such as 401(k)s or 403(b)s are under the gun to deposit employee salary deferrals into the 401(k) trust as soon administratively possible. There is a misconception, based on a previous Department of Labor safe harbor rule, that retirement plan sponsors have 15 days to make their 401(k) deposits.

Unfortunately, this is no longer the case. In our practice, we have seen cases where the Department of Labor demonstrated, by examining company payroll records, 401(k) trust accounting records and participant statements, that the plan sponsor was capable of

making a contribution within one to three days. Once you've demonstrated an ability to make contributions in three days, they are considered late if subsequently you make them in five days or more. You may be responsible for lost earnings on these late contributions.

The general rule of thumb is that these payroll deposits should be made absolutely as soon as administratively possible, and once you have demonstrated an ability to do so, you must then continue to make these deposits consistently over time. Otherwise, plan sponsors run the risk of being responsible for a participant's lost earnings.

REVIEWING PLAN DESIGN

The beginning of the year is an excellent time to review plan design. Consider making modifications to retirement plan provisions to allow participants to better use the plan and maximize their contributions over the long term. Also, by reviewing plan provisions, you may be able to allocate more money to reward top-performing participants.

There are several ways to reward employees who contribute the most to the success of your company by reallocating your profit-sharing contributions. For example, you can allocate proportionally more profit sharing to participants that are generally older, on average, than the group by using an age-weighted, profit-sharing allocation. You may also be able to allocate more of a profit-sharing contribution based on age, compensation and employment classification by using another allocation formula referred to as either "cross-tested" or "new comparability."

Further, there are methods of safe harboring a retirement plan that require making certain employer contributions to participant accounts to meet nondiscrimination requirements. This safe-harbor plan design allows participants to make the maximum 401(k) salary deferral ($19,000 in 2019) without worrying about a refund due to failure of a nondiscrimination test such as the average-deferral percentage test.

A detailed discussion of retirement plan design options is beyond the scope of this article. But it's a worthwhile discussion to initiate with your retirement plan administrator or other consultants.

PLAN FOR ANNUAL REQUIRED PARTICIPANT NOTICES

The law requires you to provide a variety of annual plan notices to participants. Some are mandatory and must be provided each year to each eligible participant, while others must be sent only for certain fiduciary protections. Annual notices that plan sponsors need to pay attention to include:

- **QDIA Notice** (Qualified Default Investment Alternative) — This notice provides protection to plan sponsors if a participant doesn't make an investment decision. The QDIA is the default investment in which they will be placed.

- **Safe Harbor Notice** — If your plan is designed to avoid nondiscrimination testing as defined above in this article, you must provide an annual notice to your employees that the plan intends to meet the safe harbor guidelines.

- **404a-5 Notices** — In order to meet fee-disclosure regulations, retirement plan sponsors must provide an annual notice to their participants generally summarizing the fees associated with participating in the plan. These include mutual fund fees and other fees passed on to participants such as record keeping or administration.

You may need to send other notices. For example, you may be required to send automatic enrollment or automatic escalation notices to participants in plans that have these features.

The bottom line is this: Plan sponsors should have a conversation with their record-keeping and administrative firms and other consultants and make sure they meet the deadlines for sending required notices.

CONSIDER OUTSOURCING FIDUCIARY LIABILITY

One more New Year's resolution: We strongly suggest that retirement plan sponsors request that various service providers acknowledge their fiduciary responsibility to the plan and define that fiduciary responsibility very specifically **in writing**.

For example, your investment advisor may be willing to act as a non-discretionary, co-fiduciary to the plan under ERISA section 3(21) or may even be willing to act as a discretionary investment manager under ERISA section 3(38). By working with an investment consultant willing to assume fiduciary responsibility for selecting and monitoring investment options, you have taken a significant step toward meeting your responsibility in this area.

Further, some third-party administrative firms are also willing to provide fiduciary outsourcing services for the administrative aspects of the plan. These include reviewing and approving profit-sharing allocations, making certain that the required notices are sent on time, approving participant loans and approving hardship distributions. Third-party administrators offer these services under ERISA section 3(16) and they typically market them as 3(16) administrative services.

CONCLUSION

As with many aspects of our lives, the first of the year is a good time to develop some New Year's resolutions in your capacity as a retirement plan sponsor. A qualified retirement plan is often an employee's way to build their nest egg. But when employers become retirement plan sponsors and offer this benefit to their participants, they also assume significant responsibility and liability. In order to meet these various responsibilities, it's critical to have a plan in place to do so, document a prudent process and hire consultants willing to shoulder this responsibility and liability.

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