

What Plan Sponsors Don't Know, May Hurt Them

By Ary Rosenbaum, Esq.

When I worked at a semi-presigious law firm, one of the named partners (whose son was a respectable politician) asked me what my practice was. I told him it was ERISA, said he said didn't know anything about it and walked away. Most people who ask me what I do in practice pretty much have the same response and walk away. The problem that I've always had with clients and potential clients are the ones that think they know something about retirement plans and don't. So this article is about the dangers of retirement plans that plan sponsors who have no experience in the retirement plan world don't understand.

Don't talk about what you don't know

My wife is also an attorney and one of our pet peeves (especially with Facebook posts) is when non-lawyers speak authoritatively about the law and are actually wrong. For example, you don't have a constitutional right of free speech to post on a Facebook group's page. While I get a chuckle from those posts, one of the biggest problems with getting clients is the potential client who thinks they know

about how retirement plans work and are insistent that everything with their plan is fine. Speaking of lawyers, my least favorite clients working as an attorney for a third party administrator (TPA) were other lawyers. Lawyers go through three years of law school and they think they know every

law and they don't. I don't make opinions on criminal procedure, so I would appreciate if other lawyers don't make opinions on ERISA without any training or knowledge.

It's OK not to know

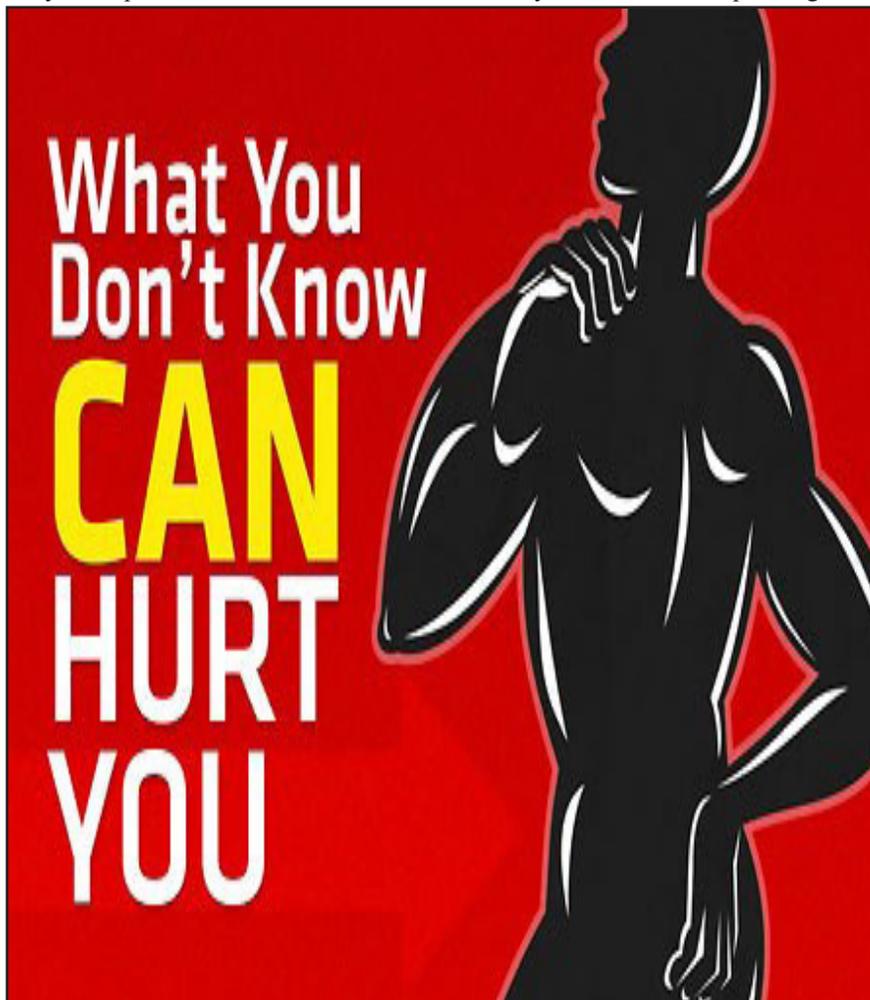
The reason that a plan sponsor hires retirement plan providers is because they don't know how to effectively administer

their retirement plans and understand that there is nothing wrong with that. What's wrong is when plan sponsors think they know about retirement plans and don't. Even the smartest chief financial officer or human resources director may not understand the nuts and bolts of how a retirement plan works or doesn't. Like first responders responding to a car accident, plan sponsors

should get out of the way of the work of plan providers. Administering a retirement plan is a very tedious process requiring lots of correct technical data. It also requires correct information and to make sure what's done in practice is consistent with the terms of the plan. So it's best left to the retirement plan providers to help plan sponsors manage their plan. Plan sponsors should let the experts handle the plan and step to the side. Plan sponsors don't lose credit or points for not knowing the pitfalls and potential liability of sponsoring a retirement plan as long as they have the right team of plan providers to help them.

Just because things look good, doesn't mean they are

When I was dating my wife, she asked me if I had good credit. Since I always paid my bills in full and on time, I told her it was. The problem is that I made that statement when I didn't see my credit report. Months later when I got the credit report, I found out that my mother had a \$17,000 credit card balance on a credit card that I opened



their retirement plan on their own and there is nothing wrong with that. I have used my mechanic Ralph for 18 years and 6 cars because other than starting a car and filling it with gas, I have no idea how cars work or don't. It's important for a plan sponsor to understand the limits of their knowledge of

up with her when
went to college and
this was a card I had
not used since I grad
uated law school My
wife wasn't happy
that I affirmatively
made a statement
based on knowledge
that I didn't have. An
nually, I write an arti
cle criticizing the role
of payroll provider
working as the TPA
for 401(k) plans. It's
always the most wide
ly read article I write
because non-payroll
provider TPAs dis
seminate it. A month
or so ago, I got a
very weird phone call
about these articles.
The caller wanted to
talk about the article
and actually didn't
know who the two
largest payroll provid
ers are in this country
that happen to also
be in the 401(k) TPA

business. Regardless of his limited knowl
edge of the TPA business, I get a rather
long and disjointed email from this person.
This person says he's the part-time chief fi
nancial officer for several companies and
he's never had a problem with payroll pro
viders doing the TPA work for his clients. I
suspect this individual got my article from
a TPA and his diatribe criticizing my article
was his form of justification that he wasn't
doing anything wrong with his clients. My
opinion articles are just opinions based on
my experiences, so I wasn't going to try to
debate with someone who doesn't have any
experience in the retirement plan business.
The problem here is that most administra
tive problems are only discovered when
there is a governmental audit or when there
is a change of providers. Bad retirement
plan providers who make a lot of mistakes
aren't going to be the ones to alert retire
ment plan sponsors about the errors they
created because they never caught these er
rors in the first place. Just because a plan
sponsor assumes that their payroll provid
er TPA is doing a great job doesn't mean
that's the case, these errors are usually
only discovered when there is a change to
a more competent TPA. I have consistently



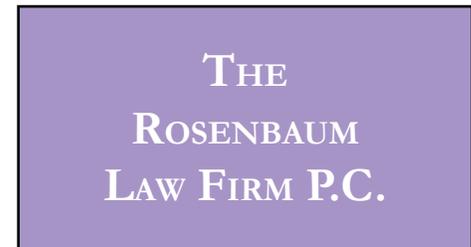
repeated the story of a former client who
used the same actuary for only 25 years and
only realized that the actuary provided bad
advice and didn't perform their job of pro
viding annual valuation reports until this
client was sued by the Department of La
bor (DOL) for \$3 million dollars because
the DOL was under the impression that
the plan sponsor was embezzling money
from the plan. Had the actuary not died
and/or the DOL did not investigate, they
too would think there was nothing wrong
with their plan. Just because a plan spon
sor thinks there is nothing wrong with their
plan doesn't make it so. Most plan errors
are only discovered years after the fact on
an audit or provider change. That's why
it's important for plan sponsors to hire
independent counsel or other retirement
plan professionals to review their plan's
administration to make sure that the plan
is running correctly and that the plan pro
viders in place are doing a competent job.

**Plan sponsors are always on the hook,
no matter what**

When he DOL and/or the Internal Re
venue Service penalizes the plan sponsor
because of bad work by their plan provid
ers, plan sponsors will tell the government

auditor that they had
no knowledge and it
wasn't their fault. The
problem is that no mat
ter what the plan pro
vider does; the plan
sponsor is always at
fault. The plan spon
sor is a fiduciary,
which they have the
highest duty of care
in law and equity. So
despite the plan spon
sor's inexperience
in handling a retire
ment plan, hiring third
party plan providers
isn't going to do that
much in limiting li
ability for the provid
ers' poor work. Plan
sponsors can always
hire plan providers
that assume most if
not all the liability of
being a plan fiduciary,
but the plan sponsor
is at fault for negli
gent hiring if they hire
incompetent provid
ers who serve in that

fiduciary function. Being a plan sponsor
is a thankless job because of the poten
tial liability that goes with it, but that's
what happens when you're responsible
for holding someone else's money. Plan
sponsors can never fully eliminate their
liability; they can just practice good prac
tices in minimizing that threat of liability



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The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

<http://www.therosenbaumlawfirm.com>
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