

# “Stuff” Every 401(k) Plan Sponsor Must Keep

By Ary Rosenbaum, Esq.

George Carlin said that all you need in life is a place for your stuff. Carlin said that all a house really is; is a place for your stuff. When it comes to being a retirement plan sponsor, retirement plan sponsors need a place for their stuff. More importantly, they have to know what stuff they really need to keep. Too often they throw out stuff that they thought was garbage and keep garbage they think is stuff. As plan fiduciaries, retirement plan sponsors need to keep their stuff in order to exercise their fiduciary duty diligently and to protect themselves from liability. So this article is about stuff, retirement plan sponsor stuff and what stuff a retirement plan sponsor needs to retain.

## Plan Documents

The Internal Revenue Service (IRS) requires plan documents to be updated to reflect current law. Every 5-6 years, a qualified retirement plan needs to be completely redone, which we call a restatement. Every 1-2 years that plan document must be amended by a tack-on amendment. Your retirement plan documents are not like your wardrobe, you don't throw one out when it's out of fashion and has been restated. Plan sponsors need to keep all of their plan documents and amendments. The reason is that those plan document and amendments are proof that your plan document has consistently complied with the IRS' requirement to update plan documents. If a plan document was ever reviewed under any type of audit or examination, a missing plan document or amendment is all the IRS' proof that you didn't comply in having those documents updated. Even

if a plan sponsor can swear on the lives of their children and grandchildren that they updated plan documents, the IRS won't care. In addition, old plan documents are like a roadmap to show when changes were made and if any errors were made along the way regarding plan provisions I remember a few years ago, having to read a 1976 plan document a few years ago to



determine whether the plan sponsor correctly credited vesting prior to the effective date of ERISA.

## Valuation Reports

Your third party administrator (TPA) prepares an annual report called a valuation. The valuation will include an employee census, participant account balances, as well as the compliance testing done for the plan. These reports are

essential for your plan and need to be an integral piece of plan records. One of the issues regarding plan errors is that sometimes they are only discovered years later so having copies of valuation reports is a good first step in trying to find out what's wrong. I once had a client being sued by the Department of Labor (DOL) because their TPAs never prepared any valuation reports, so the DOL sued the plan sponsor because they thought plan assets were being embezzled. If your plan records are like a library, then consider valuation reports like classic literature or valuable first editions.

## Bond & Insurance Proof of Coverage

At home, you may have a safe that includes your most important papers such as birth certificates and deeds. You have the safe in case of theft, but most likely in case of fire or flood (thank you, Sandy). If you were ever going to have a safe of some sorts for your retirement plan, essential pieces of papers are going to be proof of coverage of an ERISA bond and fiduciary liability coverage. Retirement plans don't have fires or floods; they may have it worse through litigation by plan participants and oversight by the DOL or the IRS. ERISA bonds protect plan assets through theft and are required for all ERISA covered plans. Fiduciary liability coverage isn't required, but is essential for all plan sponsors. You hope you never have to show proof of coverage, but you need those papers in case you have to.

## Fiduciary Records

Retirement plan sponsors are fiduciaries and unless they hired an ERISA §3(38) fiduciary, they are responsible for the

fiduciary process of the plan. The fiduciary process involves development of an investment policy statement (IPS), selection and replacement of investments based on that IPS, regular meetings with the plan's financial advisor, as well as education/advice provided to plan participants. It is essential that as a plan sponsor, you have copies of the IPS, notes from any fiduciary meetings, as well as the materials handed out at plan enrollment/education meetings. These fiduciary records are an essential piece to the puzzle in case a plan participant ever sues you. In addition, DOL auditors have been consistently asking plan sponsors for copies of the IPS and there are quite a few plans out there that don't have a copy. In addition to keeping a record of all the handout materials presented at any enrollment/education meeting, one thing that most plan sponsors don't keep is attendance. If you have a plan participant suing you because they claimed that you didn't hold up your bargain in an ERISA §404(c) participant directed retirement plan, your invitation to a plan education meeting and an attendance sheet maybe one of the major keys in winning a motion for summary judgment.

### **Beneficiary Designation Forms**

Whether we like it or not, the fact is that your employees or former employees who still have an account balance may die before they have the opportunity to transfer their account balances out of the plan. To help facilitate plan administration, eliminate headaches, and help the survivors of deceased participants, it is essential that you have copies of all beneficiary forms. In addition, it is important that these beneficiary forms are up to date because the situation of plan participants change and something like another marriage may make the current beneficiary form invalid. That is why when you have scheduled enrollment meetings, distribute current enrollment forms to participants and ask

whether they need to be changed. You'll be glad that you did instead of trying to track down the relatives of a deceased



participant or get involved in some family soap opera.

### **Deferral Election Forms**

Whether your 401(k) plan has automatic enrollment or not, it's important that you have copies of all the deferral election forms handed in by plan participants to facilitate administration and to avoid any discrepancies. It's even more important when you have automatic enrollment to make sure you have the deferral election forms who affirmatively opt out of deferring into the plan thereby avoiding the plan's automatic deferral feature.

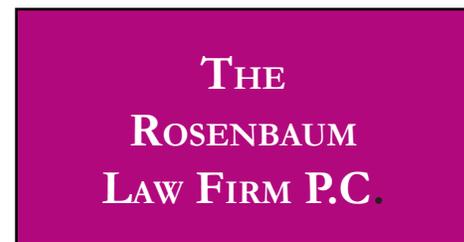
### **Form 5500**

Every year, your ERISA covered plan needs a 5500 that you must file electronically. While you can retrieve the last 2-3 years of Form 5500 online from the DOL's website, you need to maintain copies of

all your Form 5500s as a record of filing. Forms 5500s have relevant information that may be pertinent to current and future plan administration.

### **Keeping all these files**

While file cabinet space is a premium, it is essential that a plan sponsor has all their "stuff"; the plan records that will help facilitate plan administration and limit their liability. While you should keep original, signed plan documents, almost everything else can be stored electronically. Saving pdf copies through your scanner/copier is a great way to store important plan information and save space. In addition, saving these pdf copies on a network drive do far better than pieces of paper that are prone to the elements and prone to being thrown out by an employee who is mistaken about their value. The prices of a good scanner have gone down tremendously over the past 20 years and most decent printers and copiers have that feature. Scanning isn't fun, but it's a lot quicker pulling needed plan information off the network drive than through some filing cabinets.



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