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Do 401k Plan Sponsor Have Fiduciary Responsibilities For Employees In Retirement?

October 12 00:03 2021 | by Christopher Carosa, CTFA | 0 Comments | Print This Article | Share it With Friends

Lately, there's been a lot of ink has been spilled about the decumulation phase of retirement. That's the part where you actually start spending your savings. There's a good reason for this. Up until now, the emphasis for 401k plan sponsors and the retirement industry has been saving for retirement. We can blame Baby Boomers for this.

We can also blame Baby Boomers for the recent interest in the "what happens when I retire?" question. It's opened the door for certain products and even gotten Washington to address it.

But how does this impact 401k plan sponsors? Should they reconsider how plans are designed to accommodate retired employees? And if they choose this route, what impact will it have on their fiduciary liability?

"Whether working or retired, plan sponsors have a fiduciary responsibility to make plan decisions in the best interest of participants," says Jeff Coons, Director of Institutional Services at High Probability Advisors in Pittsford, New York. "A plan document that allows participants to remain in the plan after retirement means that fiduciaries need to ensure that costs are reasonable for participants living on benefit payments from the plan. As a result, fee due diligence should include reviewing the competitiveness of participant-level fees like benefit disbursements."

If you think the web of fiduciary duties is complex in a 401k plan that focuses on getting employees to save for retirement, imagine how much more intricate it becomes if the plan also has to cater to retired employees.

"Fiduciary responsibilities do not end when a participant retires," says Julian Schubach, Vice President of ODI Financial in Long Island, New York. "If their savings remain in the retirement plan, sponsors still may have 3(16) responsibilities as well as 3(21) and 3(38) if they have not been outsourced. Sponsors must continue to provide fee disclosures, plan updates, and access to educational documents active employees receive. At retirement, a plan sponsor will have to process the retired participants' distributions as well as RMDs if applicable, as well."

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Even if you outsourced, it doesn't necessarily alleviate your liability.

"Hiring someone to execute fiduciary tasks is a fiduciary act in and of itself and does not relieve your company of its fiduciary obligations," says Donny Gamble, CEO of Retirement Investments in Miami, Florida. "The ultimate responsibility for the plan lies with the company sponsoring it."

Designing a plan to serve both in-service employees and retirees has always been a possibility, albeit a double-edged sword. Until recent legislation, the options for the latter were limited.

"From a plan sponsor's perspective, keeping retirees can be seen as protective or paternalistic, particularly if the plan has established some sort of retirement transition services," says Jeffrey B. Hale, Senior Vice President, ERISA Plans at Odingard Capital Management in Tulsa, Oklahoma. "The passage of the SECURE Act provides fiduciary protection to plan sponsors that now provide a lifetime income option with their 401k plan. Sometimes, keeping retirees helps the plan build assets and scale which allows access to lower fee share classes for investment. The downside of keeping retirees increases the administrative burden of the 401k plan. You also increase the risk of creating lost participants."

Needless to say, adding this level of service to the plan will require that plan sponsors either obtain increased services from existing service providers or hire new service providers. In either case, plan sponsors will also have to familiarize themselves with this new set of services in order to meet their fiduciary obligations.

"People need help and advice during the decumulation phase," says Viktoria Wilson, a financial advisor in Ann Arbor, Michigan. "And advice itself is a responsibility. Usually, plan sponsors can't give people advice, so they would need staff that can and is properly licensed. People like to feel that others care about them and want to help them. With the added responsibility of advice comes also added liability. It's a big risk because advice can be very subjective and not suitable for everyone."

And when plan sponsors take on these additional risks, well, you know what that means.

"While there are some possible advantages to leaving retirement plan assets in the plan, this can be a major liability to plan sponsors," says Chris Gure, Investment Consultant at Fortress Financial Partners in Raleigh, North Carolina. "By definition, the investment options are going to have some limitations and the plan rules may restrict the way they access their funds."

The unique needs of retirees impact some of the basic assumptions of plan sponsors regarding their 401k plan. Think about something as standard as the investment menu. Employees saving for retirement are looking for growth. Plan sponsors are used to that. Are they used to what retirees will want?

"As their workforce starts to retire and maintain their savings within the company plan, the plan sponsor has a couple of roles as a fiduciary," says Mark Minder, Vice President of Retirement Plans & Benefits at Darden Wealth Group in Ann Arbor, Michigan. "The first one being that the plan offers diversified investment options within the plan and one could argue that a company retirement plan has been traditionally built for the accumulation phase and not for the purpose of generating an income stream for employees like a defined benefit (pension) plan would. Then as a fiduciary, it is your duty to seek out and evaluate advice on items that are not within their particular proficiency."

It's not just investment options, it's a whole slew of possible service needs.

"In general, the fiduciary obligations of serving retired participants is the same as the responsibilities associated with serving actively employed participants," says Rich Rausser, Senior Vice President – Thought Leadership and Practice Management at Pentegra in White Plains, New York. "More and more, we see progressive plan sponsors doing more for their retired employees. Retirees can benefit from keeping their money safer from fraud and theft from the plan, plus the added benefit of a fiduciary who oversees the plan investments. Another obligation plan sponsors and fiduciaries have is to keep investment fees reasonable and fees low. One thing that all plan sponsors should consider is permitting more flexibility with respect to how and when participants can draw money out of their qualified plan. Rather than simply permitting lump-sum distributions, progressive employers are permitting partial distributions, periodic distributions, and distributions over the participant's lifetime or over a fixed period of time. Offering in-plan or out-of-plan, cost-effective, institutionally priced annuity solutions are other options that should be considered."

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The question, then, is not whether 401k plan sponsors have fiduciary responsibility for retirees that remain in the plan (they do). The real question is whether plan sponsors want to take on this additional burden.

We'll address this question next week.

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Mr. Carosa is available for keynote speaking engagements, especially in venues located in the Northeast, MidAtlantic, and Midwestern regions of the United States and in the Toronto region of Canada.

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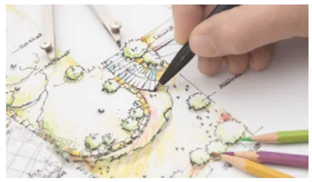

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