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Ask Kidder.®

SPECIAL EDITION

Can a Yale Law Professor's reporting on 401(k) plan costs be wrong or misguided?

Over the past few weeks, thousands of plan sponsors received a menacing letter from Yale Law Professor Ian Ayres. In his letter, Ayres states that he has prepared a research study based on 2009 Form 5500 data filed with the Department of Labor, as well as information from BrightScope, Inc., a national data source for 401(k) plan information. He adds that he has "identified your plan as a potential high-cost plan" and that the plan is "worse than a vast majority of comparable plans." He invites recipients to contact him with any questions concerning the study. He also states that he will publish the study in 2014 and provide the names of high cost plans.

So what should you do?

Whether or not you received the Ayres letter, you should always be informed and concerned about the costs associated with your 401(k) plan. Fortunately a growing amount of information and support is available to help you in this effort.

The implementation of ERISA sections 408(b)(2) and 404(a)(5) provided significant disclosure improvements to help plan sponsors and fiduciaries make informed decisions about their plans. As a result of these regulations, most plan sponsors are working closely with their plan vendors and administrators to review costs and services to assure an appropriate match between cost and value. The goal – always – should be to provide the right plan at the right price.

If you have questions, ask us, your financial and tax professionals, or your investment platform provider. Kidder works with hundreds of plans across the country and has access to major national databases that provide fee and service comparisons.

Here are the questions any fiduciary should consider:

1. Is your plan design appropriate?
2. Is your legal plan document up to date and in compliance?
3. Is your plan administration, compliance, testing and tax reporting accurate and timely?
4. Are your investment choices and investment due diligence appropriate and cost effective?
5. Do you have the appropriate level of participant education in place to achieve your overall participant outcome objectives?
6. Are quality and effective communication and services being provided to you and your participants?
7. Are your fees reasonable in comparison to the quality and quantity of services being provided?

Without question, high cost and low service plans exist. In fact, Kidder is often brought in to review, analyze and fix plans. Our mission is to help you satisfy your fiduciary responsibility by providing valuable services, support and expertise tailored to the specific needs and budgets of your plan and your participants.

How has the 401(k) community responded to Ayres' letter?

Unfortunately, scare tactics have often been used to promote sales. The 401(k) community responded swiftly to Ayres' threatening letter, citing the accuracy, timeliness and relevance of his data.

Continued on Page 2

Mike Alfred, CEO of BrightScope, was interviewed on July 16 by 401kWire, a national daily news site for qualified plans. BrightScope data was used in Ayres' study, and according to Mr. Alfred:

- He does not endorse Ayres' use of "vintage data," nor does he appreciate Ayres' menacing tone.
- Until now, BrightScope "has never had our info abused on this scale." The data in question was several years old and used to bully 401(k) plan sponsors without BrightScope's knowledge or consent.
- Not only was he shocked by how "aggressive and threatening" the letters were, he suggests he was caught off-guard by how an institution as prestigious as Yale would be the source of such misinformation.
- BrightScope's general counsel reached out to Ayres.
- Ayres promised that he would not send any more letters, which Alfred "appreciated."

In a recent communication, Brian Graff, CEO/ Executive Director of the American Society of Pension Professionals and Actuaries (ASPPA) and the National Association of Plan Advisors (NAPA), stated:

- The tone of Ayres' letters, frankly, is shocking.
- The threat is based on a study that is built on inherently flawed data.
- The 2009 Form 5500 data is old and insufficient to make any meaningful comparisons.
- The data is incomplete. Since it ignores fees paid directly by the plan sponsors, thus not allowing for a complete assessment of the reasonableness of aggregate fees.
- The data does not take into account the relative complexity of the plan design.
- The data does not factor in levels of service or relative performance, including whether a professional plan advisor is helping the plan sponsor and participants.

Even the Government Accountability Office, in a recent study, recognized the inherent limitation of Form 5500 data on the ability to comprehensively assess plan fees.

According to Jason Roberts of Roberts Elliott LLP, an ERISA attorney and nationally recognized fiduciary governance expert who also works with the Kidder organization, "My primary issue is that the study focuses solely on "costs" arising from ostensibly poor decision-making on the part of plan fiduciaries and participants. There is no mention of value (e.g., the benefits provided in relation to the fees charged). It may be that while some participants incur more "costs" in the form of fees deducted from plan investments, they nevertheless receive more value in the form of education and guidance with respect to retirement planning. In other words, by focusing on costs in a vacuum, the study fails to account for the most important variable – how much are the participants saving towards a timely and dignified retirement?"

What is our view?

The saving grace of Ayres' letter is that it's already creating a broader, more open discussion of plan design, value and compliance.

At Kidder, we're always available to discuss and provide comprehensive information regarding your plan and its performance. Our primary objective is to help you achieve the right plan at the right price.

If you have additional questions, please contact us at your convenience.