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PR agency owners, execs must be mindful of unexpected 401(k) risks

Many PR firms sponsor the ever-popular 401(k) plan, aimed at helping employees save money for a financially secure retirement. However, PR agency owners and executives are often surprised to learn they may be exposed to certain 401(k) financial risks that extend beyond financial-market risks.

These additional risks arise from the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 (ERISA), including regulation that certain individuals, called fiduciaries, bear personal responsibility in case things go awry. For example, a fiduciary can be liable for the investment losses for failure to adequately monitor plan investments. With so much money in these plans, even small errors might bear costly consequences.

Owners, executives, and other employees of PR firms may be deemed fiduciaries under the company 401(k) plan and therefore subject to personal liability. Additionally, it is a mistake to believe that utilizing the services of third-party providers insulates fiduciaries from risks. Third-party providers and plan record-keepers assist with some compliance burdens, but they are ultimately not responsible for protecting plan fiduciaries. Nor are annual CPA plan audits designed to address these types of compliance issues. They will generally fail to alert management of all regulatory shortcomings.

If your firm sponsors its own 401(k) plan, it must manage the compliance risks. Consider obtaining your own independent ERISA counsel, as a small investment in this area can pay big dividends down the road. To start, talk to experienced ERISA counsel about the following issues:

■ **Fiduciary structure.** Plan documents sometimes name the employer as fiduciary, which may generate unwanted fiduciary liability. Counsel can recommend an appropriate fiduciary structure and provide other supporting materials.

■ **401(k) plan fees.** A growing number of plan participants are suing companies regarding fees paid to plan service providers. Understand your plan's fee structure, including any revenue-sharing arrangements, and try to minimize fees.

■ **Layoffs.** Significant layoffs may cause a partial termination of the 401(k) plan, requiring full vesting of affected participants.

■ **Plan amendments.** Be aware of amendment deadlines, as plans must be amended on a regular basis. Also, evaluate whether your plan properly addresses the eligibility of temporary employees.

■ **Controlled group.** Consider whether your company has common ownership with another. Certain benefit obligations and nondiscrimination testing applies on a combined basis to employees at both companies, but only under specified conditions. ■

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