



Managing Service Provider Agreements

The 408(b)(2) disclosure is only one part of the service provider arrangement that requires review; service provider contracts are complicated given that other areas of negotiation also require a keen eye, understanding, and often negotiation.

ERISA is a law of process and documentation and is not outcome-focused. There are two key concepts for plan fiduciaries to keep in mind when reviewing arrangements with service providers. First, it is not enough under ERISA to take the approach that “bigger organizations are using this service provider so you can too.” ERISA requires that you follow a prudent process, and the act of going through the process helps you fulfill your fiduciary obligations in prudently selecting and monitoring a service provider. Looking around the marketplace and seeing that XYZ mega-company also uses XYZ mega-recordkeeper falls short of your due diligence on XYZ recordkeeper because their process might have rendered different negotiations.

Second, in some cases, it might seem fruitless to negotiate a certain provision in an agreement because the other party may be the larger service provider. However, the act of negotiating will provide documentation of your attempts at a certain outcome – even if you are unable to attain them because of a bigger service provider’s leverage.

When reviewing service provider agreements, plan fiduciaries are always encouraged to work with competent counsel, versed in both basic contract law but also ERISA. Areas for consideration when reviewing contracts beyond fees, services, and fiduciary status include:

Additional services: In some cases, there may be an opportunity to generate additional revenue beyond the fees for servicing retirement plans for which the relationship (and contract) was originally created. In these instances with a recordkeeper, for example, there may be additional services included in the agreement for managed accounts, financial wellness, and other services, which may or may not require a fee. Plan sponsors should watch for additional services that are added to the contract to determine if they are within the spirit of the agreement and if they should be properly paid from plan assets. In other words, do the plan and its participants require these additional services? If not, these additional services should not be included.

Privacy and cybersecurity: Given the DOL’s April 2021 guidance related to cybersecurity, plan sponsors should monitor and negotiate accordingly to ensure that to the extent possible, the DOL’s cybersecurity guidelines are met. Along with these provisions, to the extent applicable, there are often guarantees or warranties to make a participant whole (e.g., by restoring funds to a participant’s account after a cybersecurity breach) depending on the steps the plan sponsor and participant take when a breach occurred; plan sponsors should evaluate these warranties and make them as liberal to the plan and its participants as possible.

Plan data considerations: Plan sponsors should review their agreements with service providers with an eye toward their plan data to determine how their participant data might be utilized and if it will be provided to third parties or used to sell additional services from the service provider or other third parties.

Service level guarantees: As a result of service provider consolidation, routine service becomes more challenging for plan sponsors and participants. Plan sponsors may want to more closely review service level guarantees in their agreements for participant response times, for example.

This is not an exhaustive list of service provider agreement terms, but this is a snapshot of considerations to review in addition to basic contractual terms such as venue, indemnification, and many others. In all instances, working with competent counsel will be helpful initially and on an ongoing basis.

This information is provided for informational purposes only. It is not intended to provide authoritative guidance or legal advice. You should consult your own attorney or other advisor for guidance on your particular situation.