



3(16) Plan Administrator Essentials

A WHITE PAPER BY

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“Plan administrator” of a retirement plan is a legal duty that few employers wish to undertake once they understand the obligations that come with the title, but historically there has been no alternative

Employers can now hire a professional ERISA Section 3(16) plan administrator to be the principal named fiduciary responsible for operating the plan in accordance.

Hiring a 3(16) administrator helps the employer in multiple ways:

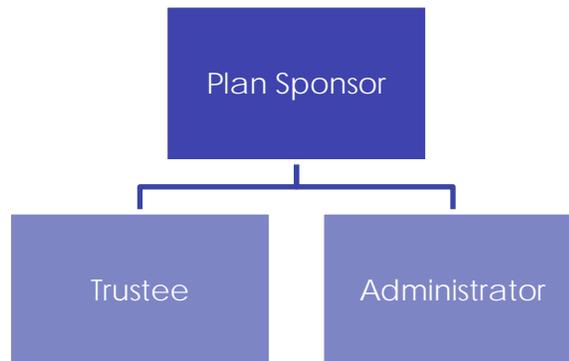
- Saves time spent on governance chores
- Transfers legal and regulatory risk
- Reduces liability
- Allows the employer to focus on other priorities
- Saves money because a professional can do compliance chores faster, more efficiently, and more reliably than a typical amateur fiduciary.

Employers can now hire professional 3(16) administrators to save time, save money, reduce liability and risk, and focus on the things that matter most to the organization.

The Need

The Three “Jobs” in a Retirement Plan

In most plans, there are three legal roles or “jobs” that impose fiduciary duties on the people who hold those jobs.



High level oversight is the plan sponsor’s job. The trustee manages the assets and keeps them safe. **The administrator is responsible for everything else**

If You're Not Sure Who the Administrator is, It Might be You

Many employers mistakenly believe that the “plan administrator” is the recordkeeper or TPA. This is rarely the case. To find out who the administrator is, check the plan document. In most plans, the employer is named as the administrator in the document, and the legal responsibility of the role is vested in one or more human resources (HR) or finance department employees.

What are the Chores of a Plan Administrator?

It is possible to identify hundreds, if not thousands, of separate regulatory, statutory, or common law fiduciary duties of the plan administrator, as well as numerous practical duties—such as payroll and census validation—that are necessary to fulfilling legal duties. Below is a sample of administrator duties or “chores.”

Sample Chores of the Plan Administrator

- Sign and File Form 5500
- Keeping Plan Document Current
- Mandatory Interim Amendments
- Summary Plan Description (SPD)
- Summary Material Modification (SMM)
- Optional Plan Amendments
- Summary Annual Report (SAR)
- Hardship Withdrawals
- Qualified Domestic Relations Orders
- Service Provider Fee Disclosure
- Compliance Testing
- Track Eligibility and Manage Enrollment
- Respond to Notices of Claims & Appeals
- Records Retention
- Overall Operational Compliance
- Safe Storage of Key Plan Documents
- Interpret Plan Provisions
- Hardship Distributions
- Participant Notices
- Loans
- Distributions
- Participant Fee Disclosure
- Government Reporting
- Forfeitures and Suspense Accounts
- Track Vesting
- Force-outs
- Enrollment
- Notice and Document Delivery

As a practical matter, there are scores of items needing attention and, things often go wrong.

Finding and Plugging the Gaps

Retirement vendors (recordkeepers and TPAs) provide help with many of the administrator's chores. For example, virtually every retirement plan vendor combination will include completion of the ADP (average deferral percentage) nondiscrimination test.

Recordkeepers and TPAs help, but there are many gaps that the employer is left to fill. The problem is that things go wrong anyway, sometimes because the client does not provide the right information (e.g., on the annual census verification, or about ownership percentages). In other words, it is not enough that a solution includes “completing the ADP test.” The administrator's job is not to check the “includes ADP test” box on a proposal; the job is to ensure the plan is compliant. **There is a need for help**—help understanding the rules, a second set of eyes to look at the tests for obvious errors (obvious if you know what to look for), help reviewing the data to help prevent “garbage in, garbage out” problems.

The process requires leadership. A professional 3(16) administrator can help provide that leadership.

The Educational Burden of Knowing the Rules

There is an enormous body of retirement plan law and regulation. Naturally, employers are not expected to be legal experts, but the volume of knowledge they are expected to have is still daunting.

The rules are complex and learning even the basics imposes a substantial burden on employers.

Personal Liability of Fiduciaries

ERISA has been described as a “personal liability statute” because fiduciary responsibility generally affixes to one or more individuals, not the companies they own or work for. It is a legal liability that “pierces the corporate veil.”

ERISA fiduciary liability is a personal liability, not a corporate liability. Plan fiduciaries are personally liable.

Liability is not the Real Risk for Plan Administrators

The more common risk for plan administrators is compliance failures and the burdens they bring, both in correcting them and in the efforts required to attempt to prevent them.

Compliance failures are not merely common, they are a fact of daily life. Errors occur regularly, and come from many directions, as one would expect in a complex, detail-oriented enterprise. Think about retirement plan problems or “defects,” as the IRS commonly refers to them, in terms of the “problem pyramid”:

The Retirement Plan Problem Pyramid



Audit Closing Agreement Program (CAP) is how an employer settles a plan defect with the IRS during an audit. CAP is usually the most expensive and least pleasant way to fix a problem.

Programs like VCP—the **Voluntary Compliance Program** at the IRS—allow employers to “turn themselves in” so they can fix a defect less expensively than if the IRS caught it during an audit.

Known plan defects are fixed via self-correction (an annoyance, inexpensive), "voluntary" correction through IRS or DOL programs (unpleasant, modestly expensive), or are found and fixed during IRS/DOL investigations (very unpleasant, very expensive).

Many problems are never found or fixed, and this can cost workers money.

Unnoticed and uncorrected problems present a strong argument for hiring a professional 3(16) administrator. A professional fiduciary must follow a prudent process, and prudent processes tend to reduce this sort of problem. A prudent process:

- Can reduce errors
- Tends to find errors more reliably when they do happen
- Insists on fixing errors once found.

Learning Point: a professional 3(16) administrator must follow a prudent process, which protects workers and employers by helping reduce, find, and fix errors more reliably.

Statistics on Plan Defects from the Department of Labor

Every year the DOL reports data on the results of its retirement plan enforcement efforts. Here are excerpts from the 2018 data¹:

- 1,414 applications for the Voluntary Fiduciary Correction Program (VFCP) (this is the DOL's program for fixing prohibited transactions such as late deposits)
- 19,937 applications for the Delinquent Filer Voluntary Compliance Program (DFVCP) (this is the DOL's program for
- 1,329 civil investigations closed
- 64.7% resulted in payment or other corrective action
- The DOL restored over \$1.6B to employee benefit plans, participants and beneficiaries
- 268 criminal investigations closed; indictment of 142 individuals
- Learning Point: compliance failures are extremely common and the DOL reports many thousands of them annually.

Plan qualification defects are very common, so the IRS has a program for plan corrections that consists of an escalating series of steps or sub-programs.

The Employee Plans Compliance Resolution System (EPCRS)

Self-Correction Program (SCP). Allows employers to correct certain defects as long as they are not too severe or long-running. The employer must still make a correction and document what was done and how, but a proper SCP protects the employer during subsequent IRS investigations.

Voluntary Correction Program (VCP). Allows employers to turn themselves in to the IRS to fix problems that do not qualify for SCP. There are IRS user fees, and often an employer must engage legal counsel as part of the effort, as well as paying for the actual research and calculations with respect to the correction itself.

¹ From the DOL website at dol.gov

Audit Closing Agreement Program (Audit CAP). When the IRS does an investigation (people usually say “audit” but in employee benefits the IRS and DOL calls them “investigations”), any problems they find must be fixed at a cost that is generally significantly higher than what would have been possible under VCP. Once a plan is “under investigation” (i.e., they have received notification that there will be one) VCP is no longer available.

The IRS Top Ten List of Most Common VCP Filings

The IRS, unlike the DOL, does not publish statistics about its enforcement efforts, but it does offer this list of the most common VCP filings:

1. Failure to amend for tax law changes
2. Incorrect definition of compensation
3. Failure to include eligible employees or exclude ineligibles
4. Loan Errors
5. Impermissible in-service withdrawals
6. Required Minimum Distribution (RMD) errors
7. Employer eligibility failure
8. ADP/ACP nondiscrimination failure not corrected timely
9. Failure to provide minimum top heavy benefit
10. Exceeding maximum contribution limits

This list is useful for plan administrators because it allows them to focus additional resources on solving for the most common defects.

The Pain of Correction

Compliance defects are common, corrections are therefore common, and employers tend to find the correction process to be painful in several ways:

- IRS or DOL fees, penalties, and excise taxes
- Attorney fees
- Fees for calculations and research by recordkeeper or TPA
- Interest on corrective contributions
- The surprise factor—having to pay for contributions for employees for a prior year after that budget year has closed
- Time spent understanding the problem and engaging with the various parties in working to resolve it
- Time spent examining the process and working to improve it so the problem does not recur.

Plan corrections cost money, can involve big and unwelcome surprises, and require an unpleasant and time-consuming process that can leave employers feeling overwhelmed.

The Solution

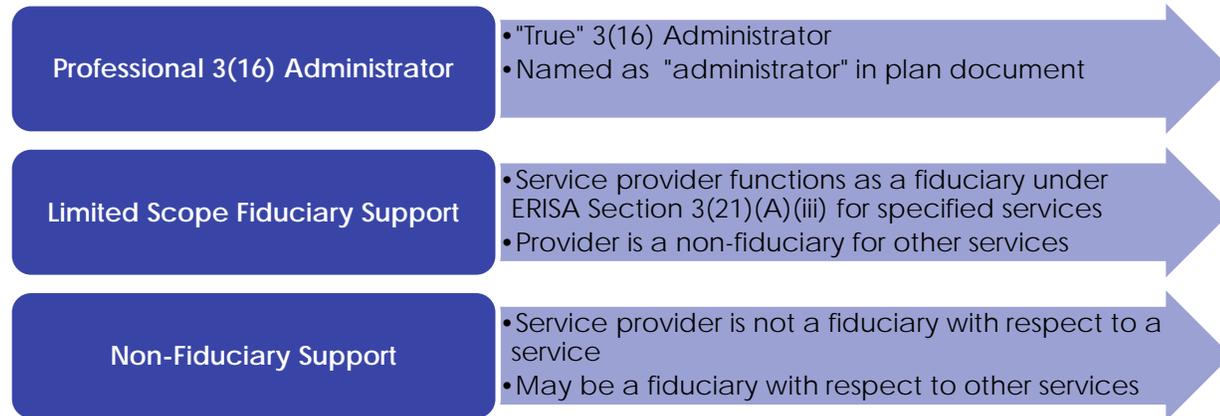
Employers who are willing to accept the legal responsibility of the plan administrator fiduciary role, and who understand their duties and have a prudent process for fulfilling them, can be the plan administrator with confidence.

Others can outsource to a professional 3(16) administrator.

And for small employers who cannot afford the services of a professional 3(16) administrator, there are meaningful fiduciary support services to help ease the burden.

The Three Basic Flavors of 3(16) Support

An employer who recognizes the named fiduciary nature of the plan administrator role may wish to outsource to a professional 3(16) administrator. But there are many variations of 3(16) service, which can be segmented into the following broad categories.



Scope of Service

Once you have established whether a service provider is or is not the plan administrator, there are several other layers of question:

- What is the list of services that the service provider is offering?
- Is the service provider a fiduciary with respect to a particular service item? Distinguish fiduciary services from ministerial or non-fiduciary services.
- What is actually included with each service item?

The service agreement will be the source for answers to these questions.

The scope of services can be very broad or very narrow, but will always be limited in some way. Read the service agreement to determine the scope of services.

A 3(16) service whereby the service provider accepts fiduciary status involves some degree of genuine liability transfer.

ERISA fiduciary liability is transferable, and 3(16) fiduciary services effectively transfer liability.

Hiring a professional 3(16) administrator offers significant protections against liability.

Conclusion: Two Perspectives

The two ends of the spectrum with respect to hiring a professional 3(16) administrator are well-represented by these responses from two different employers:

The owner of an 80-employee business asked his advisor, **"Why would I not do this?"** when asked if he wanted to include a professional 3(16) administrator service.

Another business owner who is highly cost-focused said, **"I only care what it costs."**

There is a clear trend today toward outsourcing of non-core functions. Not all employers will outsource the plan administrator role, but the trend is growing rapidly. More and more employers are asking for 3(16), recordkeepers are rolling out “3(16) services,” and TPAs are doing the same.

The only wrong choice among the various 3(16) options, including the choice to do it all yourself, is to neither hire help nor follow a prudent process. The law and the regulators are unforgiving on this point.

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