

Whether A Plan Sponsor Should Hire An ERISA §3(16) Administrator

By Ary Rosenbaum, Esq.

Running a business is a complicated activity. You have to be an expert in your field, service, or specialty. In order to get your work, there is a point where you will need to outsource some key employer functions such as payroll and other human resource functions. So it stands to reason that it may be wise to cut back on the headaches and outsource your retirement plan administration. The concerns that plan sponsors should understand is that when it comes to their 401(k) plan, there is a difference between outsourcing and delegation. So this article is going to make 401(k) plan sponsors like you understand what outsourcing your plan administration with an ERISA §3(16) administrator entails and the traps you should avoid if you choose that route.

The usual model of delegation

As a plan sponsor, you're a plan fiduciary and being a fiduciary requires the highest standard of care in equity and law.

So while you have the responsibility to run your plan, there are two major problems. The first problem is that unless you are in the retirement plan industry you will have to delegate the administration of your plan to third-party providers. The second problem is that by delegating the administration of your plan to a third party administrator (TPA) you haven't delegated your responsibility. So by hiring a regular TPA, you are ultimately responsible for their work. So if your TPA has as much administration background as my 9-year-old daughter you're still at fault. So you can delegate some of

your administrative duties in this arrangement, you are still on the hook for liability if your TPA is incompetent or crooked. With the increase in litigation against retirement plan sponsors, there is a need for many plan sponsors who want to eliminate as much as possible their fiduciary liability of running a retirement plan. So that need is met by an outsourcing solution, which can be handled by another provider who that must designate their role as plan fiduciary in order for you to divest yourself of

plan industry who will sell you a nickel and tell you it's a dime. It should be noted that with this outsourcing mode, you could eliminate almost all of your liability when it comes to your plan's administration.

ERISA §3(16) administrator, it's more than a number

The TPA you hire is responsible for your plan's compliance, recordkeeping, and tax filing. You may have two companies do the task such as a separate TPA and record-

keeper, but it's the same tasks being completed by a tandem. Notice that a TPA is a third party, which means that you as a plan sponsor are ultimately responsible for any errors or issues dealing with the day-to-day administration of your Plan. If the TPA fails to file the Form 5500 guess who is responsible for cleaning up the mess or paying those huge penalties? You, the plan sponsor. So if you want to delegate that administration



almost all of that fiduciary responsibility.

The new model of outsourcing

The method of outsourcing your fiduciary responsibility isn't really new. The fiduciaries who will offer these types of outsourcing services have a special designation for their service and you really need to know the differences between the levels of services and to make sure that you are actually buying what you think you are buying and that you are getting the level of protection that you think you are getting because there are enough people in the retirement

responsibility, what do you do? You hire an ERISA §3(16) administrator. So what's the big deal? The "Plan Administrator" of a qualified retirement plan is defined in section 3(16) of ERISA. The Plan Administrator should is not the same as a "Third Party Administrator" because a Section 3(16) administrator is a "first party" administrator. The Plan Administrator has the job of ensuring that all filings with the federal government (form 5500, etc.) are timely made; make the required and important disclosures to plan participants; hire plan service providers if no other fiduciary has

that responsibility; and fulfilling other responsibilities as set forth in plan documents and their contract. The ERISA §3(16) administrator is a plan fiduciary and assumes the liability that comes with it, however, they have no direction in selecting the plan investments. When

it comes to hiring a §3(16) administrator, a contract with any of these potential providers should be fully reviewed to delineate which task they will assume and which tasks you will assume. For example, a §3(16) administrator may or may not take on the task of making sure that 401(k) salary deferrals from employees are remitted on a timely basis. Needless to say, that is an extremely important task and you need to be sure which tasks this fiduciary will assume and take off your

plate. A §3(16) administrator is going to act as blanket protection from liability of the day-to-day plan administration.

You can't eliminate all of your liability, but....

People who are critical about using a §3(16) administrator say that a plan sponsor can't eliminate all of their liability from plan administration. That might be true, but a plan sponsor has a better chance of being struck by lightning. The reason why any potential liability is minimal because the plan sponsor contractually delegated and the §3(16) administrator assumed the liability of the day-to-day administration of the plan. Hiring a §3(16) administrator is a settlor function, not a fiduciary function. The only liability that a plan sponsor actually has with using a §3(16) administrator is the decision to hire that administrator and the duty to monitor. So if a §3(16) administrator causes a major liability issue for the plan sponsor, the plan sponsor is only liable for hiring that administrator and the plan sponsor has a cause of action against the administrator because that administrator contractually



assumed the liability of plan administration. As long as the plan documents and the §3(16) agreement delineate the §3(16) administrator's assumption of liability as a plan fiduciary (not just a co-fiduciary), the liability that a plan sponsor actually retains is very limiting and very remote.

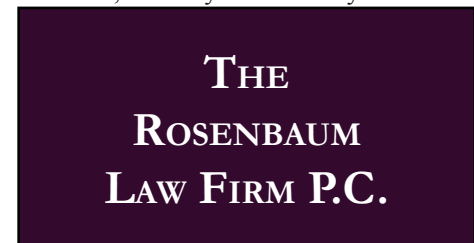
It's not for everyone

No matter what anyone tells you, outsourcing your liability as a plan administrator to an ERISA §3(16) isn't necessarily the right fit for every plan sponsor. The reason that it's not the right fit for everyone is that many plan sponsors are competent in their day-to-day role as plan administrator and there is no need to spare the extra expense in hiring an ERISA §3(16) plan administrator. If a plan sponsor is effectively managing their role as plan administrator, they probably don't want to cede the control and liability for the plan as well as shelling extra money for it. In addition, a plan sponsor may have a relationship with plan providers where ERISA §3(16) fiduciary services may not be available.

Independent ERISA §3(16) vs. Attached ERISA §3(16)

There are really two types of ERISA §3(16) administrators: those that are independent and those that are affiliates of a TPA. Independent ERISA §3(16) administrators can work with multiple providers and multiple TPAs, while the ERISA §3(16) administrator attached to the TPA offers a more seamless integration with what their affiliated TPA is currently doing. Seamless integration comes at the cost of full independence, so a plan sponsor needs to be confident in the competence of the TPA and affiliated ERISA §3(16) administration. There is no right answer to pick, but an independent ERISA §3(16) is the choice if the plan sponsor wants to work with a TPA that for one reason or another, doesn't offer ERISA §3(16) fiduciary services.

Hiring a §3(16) administrator gets the plan sponsor out of a business that they really don't want to be a part of being liable for the day-to-day administration of their retirement plan. As long as the plan sponsor hires a competent provider to serve in that role, liability is basically invisible.



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