

# 6 Things you Must Know and 3 Actions to Take Immediately

To Avoid Massive Fines, Penalties  
and Even Personal Liability if you  
are a Business Owner

# Preface from Troy Sharpe



My name is Troy Sharpe, and I am a small business owner based in Houston, employing approximately 45 individuals. I hold the credentials of CERTIFIED FINANCIAL PLANNER®, Certified Private Wealth Advisor®, and Certified Tax Specialist™.

Our investment firm, Oak Harvest Investment Services, manages approximately \$1 billion for about 1,000 families across the country.

As someone in the retirement planning industry, I recently became acutely aware of the significant risks that my company and I faced regarding our 401(k) plan. Although I had encountered stories and articles about these issues, I had previously assumed that my 401(k) providers, ADP and Voya, were adequately safeguarding my interests.

Upon closer examination, it became evident that we were inadequately protected and highly vulnerable for years. Despite our 401(k) providers performing various tasks on our behalf, they did not absolve us of the fiduciary responsibilities that remained in our hands. Consequently, it was my legal duty to oversee and manage their performance to ensure they fulfilled their obligations accurately and in a timely manner.

I was unaware that this responsibility could expose my company—and me personally—to litigation along with possible fines and penalties from regulatory agencies. Additionally, if any fraudulent activity occurred due to rogue employees managing our 401(k) tasks, I could have faced criminal charges.

This realization was quite alarming.

Like many business owners, I found myself preoccupied with daily operations, leaving little time to navigate the complexities of 401(k) administration. Since uncovering

this critical risk for both myself and my organization, I have engaged in conversations with fellow business owners and HR managers, many of whom are equally unaware of these fiduciary responsibilities.

The good news is that I am here to share essential insights on identifying your risk levels and efficiently addressing these issues.

Two key benefits I experienced while resolving this matter for my company—beyond mitigating significant personal and professional risk, as well as the day-to-day management requirements inherent in fiduciary duties—are as follows:

1. The process was simple. I was not required to change my 401(k) providers, custodians, recordkeepers, payroll providers, or any other systems, thus avoiding the associated complications. We were able to maintain our existing arrangements while simply offloading the daily management responsibilities of our HR department and our administrative fiduciary duty.
2. By undergoing this straightforward process, I successfully reduced our annual costs by over 30%, saving thousands of dollars each year, which ultimately allows my employees to retain more of their retirement savings for their goals.

The following pages are six things to know and three action steps I wish I would have taken earlier to protect myself and my company. If you choose to act on this information like we did, there is a strong likelihood that you will be able to eliminate these risks and potential liabilities while saving your company significant amounts of time handling mundane tasks and a lot of money—potentially tens or even hundreds of thousands of dollars annually.

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# Six Things to Know

## 1. You are now an Administrative Fiduciary

When you offer a qualified retirement plan to your employees, such as a 401k, 403b, Profit Sharing Plan, ESOP, 457 or Defined Benefit Plan, you assume the role of a fiduciary. This legally obligates you to oversee and manage the plan in the best interest of your employees.

This also means you have legal responsibility with potentially significant financial consequences, personally and professionally, to know and abide by all this entails. While many employers engage Record Keepers, Third Party Administrators (TPAs), and Custodians to perform specific tasks, it remains your responsibility to ensure that these providers execute their duties accurately, promptly, and at a reasonable cost compared to other service options. One big area of concern in many companies' plans we analyze is excessive record-keeping fees. You have a fiduciary duty to monitor these costs and keep them low for your employees. Neglecting to effectively manage these various service providers can result in legal complications and civil liability for costs incurred by your employees that you failed to properly oversee. In addition to overseeing service providers, you have certain administrative responsibilities that must be fulfilled. Below is a non-exhaustive list of some of these key responsibilities:

- Complete and sign the required IRS Form 5500 series.
- Ensure plan documents adhere to operational regulations and requirements.
- Distribute plan disclosure notices to participants via email or postal mail.
- Oversee the plan loan policy.
- Approve participant loans in accordance with the established loan policy and plan documents.
- Authorize participant distributions following plan guidelines.
- Approve hardship withdrawals in compliance with plan documents.
- Manage Qualified Domestic Relations Orders (QDROs).
- Evaluate annual 408(b)(2) fee disclosures from service providers.
- Assist in assessing the reasonableness of fees charged.
- Appoint and oversee the plan auditor, if necessary.
- Manage contribution uploads and data.
- Serve in the role of plan Trustee.
- Process employee contributions within the Record Keeper system.
- Ensure accurate reconciliation of deferral amounts.
- Conduct all necessary testing.
- Properly manage employee forfeitures.

Failure to diligently handle these day-to-day responsibilities, coupled with the effective management of the accuracy, timeliness, and costs associated with service providers, can lead to fines and penalties from the Department of Labor, as well as potential personal civil liability. For me personally, I assumed once I hired outside vendors to handle record-keeping and other administrative tasks that I had no further responsibility. I had no idea that I had to manage these providers, ensure what they were doing was accurate and timely, and annually benchmark their costs against other providers.

# Six Things to Know

## 2. Investment Fiduciary Responsibilities

In addition to the fiduciary responsibilities for administration and management of your plan, it is imperative to recognize that you now also serve as an investment fiduciary. This role entails oversight of costs and performance related to the funds offered in your retirement plan.

As part of your fiduciary obligations, you must identify all fees associated with the mutual funds in your plan and ensure that these charges are reasonable when compared to available alternatives.

It is important to note that many plan sponsors may not be aware that certain advisors might receive commissions from the mutual funds included in your plan, potentially leading to significantly higher costs when more comparable options exist. Eliminating these commissions can significantly help to reduce investment expenses.

Moreover, you are obligated to ensure that the mutual funds offered within your plan demonstrate competitive performance relative to their peers. A recent case involving United Health highlighted the seriousness of these responsibilities; the organization agreed to a \$69 million settlement after allegedly failing to fulfill its fiduciary duty to prudently manage its 401(k) investment options.

United Health was charged with the responsibility of thoughtfully selecting its investment options, continuously monitoring them, and replacing any underperforming investments with better-performing alternatives. The lawsuit alleged that for several years, they offered only one choice of target date fund, which was among the poorest performers in the market, thus violating their fiduciary duty.

This lawsuit, initiated by an employee, has sent significant ripples through the 401(k) industry, not only resulting in actions against United Health but also personal lawsuits against the plan fiduciaries themselves.

Consider this a critical reminder of the importance of your fiduciary duties.

Even as an investment adviser myself, I had no idea it was my responsibility to select the funds in my account, benchmark their costs and performance against alternatives, and ensure what was being offered to my employees was of high quality.

It was my assumption that I had no control over what funds were in our 401(k) and we were stuck with whatever the provider offered. Not surprisingly at all, I've come to find out that other companies we've spoken with in various fields like engineering, drilling, and technology were unaware of this responsibility also.

## Six Things to Know

### 3. Enforcement and Civil Actions due to Mismanagement are Rising

In FY 2023, the Employee Benefits Security Administration (EBSA) made significant strides in safeguarding the interests of American workers and their families, achieving a remarkable total of \$1.435 billion in monetary recoveries. This recovery was primarily attributed to robust enforcement actions and informal complaint resolutions, underscoring EBSA's proactive stance in ensuring adherence to employee benefit regulations.

Central to these efforts was the closure of 731 civil investigations, yielding a notable 505 cases, or 69%, that resulted in monetary outcomes for affected plans.

In parallel to these civil endeavors, EBSA also focused on criminal investigations, successfully closing 196 cases, which led to the indictment of 60 individuals—including plan officials, corporate officers, and service providers—for offenses related to employee benefit plans.

These investigations underscored the agency's commitment to enforcing not only civil but also criminal penalties for violations of ERISA regulations. The combined results of these monetary recoveries and criminal actions reflect EBSA's pivotal role in protecting the integrity of employee benefit plans and ensuring justice for beneficiaries across the nation.

The aforementioned United Health civil suit and settlement resulting in \$69 million of company money going to employees for offering poor-performing mutual funds is one of many similar cases recently.

- GE settled for \$61 million after 6 years of litigation for offering funds deemed not in the best interest of employees.
- Boeing settled for \$57 million for excessive administrative fees and high-cost mutual funds.
- Verizon settled for \$30 million for prohibited transaction claims
- DST Systems co-settled for \$124 million for breaching their fiduciary duty to properly manage their 3(21) investment managers Ruanne Cunniff & Goldfarb Inc. DST Systems, Ruanne Cunniff & Goldfarb Inc., and the investment firms' co-founder were all part of the settlement.

And while those are large companies which may lead you to believe you can fly under the radar, you should reconsider. According to Ian Morrison, partner at law firm Seyfarth Shaw, "There's been a trend toward pursuing smaller plans and smaller claims," Morrison said, explaining that some firms have focused on 401(k) record-keeping fees alone, which generally have smaller potential payouts than investment-related retirement plan cases. Part of the motivation is that plan sponsors may be more inclined to quickly settle such cases, as the cost of defending against the claims is often higher than the relatively small settlements.

“I think that will continue, as long as people keep paying settlements,” Morrison said.

Attorneys are becoming even more clever going after companies of all sizes according to Daniel Aronowitz, managing principal of 401(k) insurer Euclid Fiduciary, who has had at least 7 clients contacted by law firm Lief Cabraser Heimann & Bernstein.

This novel approach centers around contacting plan sponsors out of the blue and implying that they should settle as the cost of defending in court would be greater.

In 2024, 401(k) litigation surged 35%. A large part of this increase is that the number of law firms expanding into this area is increasing.

We believe the underlying issue is straightforward. The 401(k) industry has been historically opaque and plagued by conflicts of interest, complexity, and an apparent need for transformation.

In our analysis of numerous plans, we consistently identify excessive fees and underperforming mutual funds. Furthermore, many business owners and HR managers may not fully understand their dual fiduciary responsibility to minimize administrative fees while providing high-quality investment options.

This situation creates an environment that is prone to exploitation by opportunistic attorneys seeking quick settlements or significant financial gains. We fully expect this trend to continue until the industry is transformed.

In the 3 Actions to Take section below, I explain what you can do to insulate yourself and your company from these attorneys.

## Six Things to Know

### 4. Know who Signed your Form 5500

The Form 5500 is a set of annual reports that employee benefit plans are required to file with the U.S. Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC). The form is essential for compliance with the Employee Retirement Income Security Act (ERISA) and is designed to provide information about the plan's financial condition, investments, and operations.

#### Key components typically included in the Form 5500 are:

- Basic plan information: Plan name, sponsor, and contact details.
- Financial information: Details about the plan's assets, liabilities, and income.
- Participant information: Number of participants and beneficiaries covered by the plan.
- Service provider information: Identification of plan service providers (e.g., recordkeepers, custodians).
- Compliance information: Confirmation of adherence to regulatory requirements.

Filing the Form 5500 is a critical compliance obligation for companies that offer retirement plans, and failure to file can result in significant penalties. It also serves the purpose of increasing transparency regarding employee benefit plans, providing regulators and the public with essential insights into how these plans are managed and maintained.

I highly encourage you to check your company's 5500 to see whose signature is on this form.

The signor of Form 5500, typically the plan administrator, CEO, HR Manager, or a fiduciary representative, has several fiduciary duties that are legally mandated under the Employee Retirement Income Security Act (ERISA). These obligations require them to act in the best interest of the plan participants (employees) and in accordance with the plan's governing documents.

#### Key fiduciary duties include:

- 1 Duty of Care:**  
The signor must act with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use. This includes ensuring accurate and timely information is provided in the Form 5500 and verifying that the plan complies with applicable laws and regulations.
- 2 Duty of Loyalty:**  
The fiduciary must act solely in the interest of the participants and beneficiaries, with the exclusive purpose of providing benefits to them. This prohibits engaging in any transactions that may involve a conflict of interest.

- 3 Compliance with ERISA:**  
The signor must ensure that the information reported on the Form 5500 is accurate and complete, and that the plan operates in accordance with ERISA's requirements.
- 4 Prudent Management:**  
The fiduciary is responsible for overseeing the plan's operations, including the management of investments, selecting service providers, and ensuring that the plan's administration aligns with its terms and federal regulations.
- 5 Monitoring Service Providers:**  
The fiduciary must monitor the performance of service providers and ensure that they are fulfilling their obligations effectively and efficiently. This includes regularly reviewing fees and services to ensure they are reasonable and in participants' best interests.
- 6 Disclosure Obligations:**  
The signor must provide relevant disclosures to participants regarding significant changes to the plan, fees associated with the plan, and any conflicts of interest that may arise.
- 7 Document Maintenance:**  
The fiduciary must ensure that all plan documents, including the Form 5500 filings, are properly maintained and accessible, as they are subject to audit by regulators.
- 8 Risk Management:**  
The fiduciary should be aware of any potential risks associated with the plan and take steps to mitigate these risks to protect the interests of participants.

Failure to adhere to these fiduciary duties can result in significant legal consequences, including potential lawsuits from participants and penalties from regulatory agencies for violations of ERISA or other applicable laws.

## Six Things to Know

### 5. Common Mistakes That May Compromise Your Fiduciary Duty and Result in Enforcement Actions or Civil Suits

- 1 Corrective Distributions:**

This issue often indicates inadequate plan management, particularly when highly compensated employees wish to contribute more to the plan but face limitations due to testing failures. These excess 401(k) contributions require correction during testing and are refunded to the participants.
- 2 High Percentage of Retirees:**

Retired participants who have left their accounts with the plan can incur unnecessary fees within the plan. To protect the interests of active plan participants, it is advisable to facilitate the rollover of these accounts into Individual Retirement Arrangements (IRAs).
- 3 Deposit Timing Failures:**

Timely deposits of 401(k) contributions to the custodian are critical. Delays can lead to compliance issues.
- 4 High-Cost Funds:**

Providing expensive mutual funds when there are comparable, lower-cost alternatives can negatively impact participants' returns.
- 5 Poor Performing Funds:**

Offering mutual funds that consistently rank in the bottom quartile of their peer group can hinder participants' investment growth.
- 6 Mismanagement of Forfeitures:**

When an employee departs before becoming fully vested, forfeitures occur. Current litigation is significantly growing regarding this issue. Many companies incorrectly allocate these forfeitures to offset employer contributions instead of using them to lower plan expenses, which can be considered a breach of fiduciary duty.
- 7 Inaccurate Data on Form 5500:**

As the signatory of this form, you attest under penalty of perjury that all information provided is accurate, making it imperative to ensure its reliability.
- 8 Failure to Timely and Accurately File Forms:**

You hold significant responsibilities in overseeing the filing of accurate and timely forms by your providers. As the fiduciary, you are accountable for this oversight.

While this list is not exhaustive, it highlights some of the most prevalent mistakes that could lead to severe repercussions.

# Six Things to Know

## 6. Difference between a 3(16), 3(21), 3(38), and 402(a) Fiduciary

The most effective way to minimize 99% of daily responsibilities and potentially eliminate all fiduciary duties is to adhere to the Department of Labor’s guidance and engage outsourced fiduciaries.

The designations 3(16), 3(21), 3(38), and 402(a) refer to different fiduciary roles defined under the Employee Retirement Income Security Act (ERISA). These roles outline the responsibilities that various fiduciaries have with respect to employee benefit plans, particularly in the context of retirement plans.

However, it is important to recognize that not all fiduciary professionals are created equal; some assume greater responsibilities and fiduciary duties than others.

The primary challenge for employers lies in understanding the roles played by their vendors and identifying which responsibilities remain with them. Even when fiduciaries are hired, they often delineate their specific responsibilities in their agreements without clearly outlining what remains for the employer to manage. This ambiguity can create risks; if tasks are not clearly assigned, they may inadvertently go unaddressed.

Selecting the right fiduciaries based on your desired level of daily management and fiduciary responsibility is a crucial consideration in this process.

### Here’s a breakdown of each designation:

Designation	Responsibilities	Role
<p><b>3(16) Fiduciary</b></p> <p>A 3(16) fiduciary is defined in ERISA as a plan administrator. This designation can encompass individuals or entities that manage the day-to-day operations of the retirement plan. Some 3(16) fiduciaries take on all the administrative fiduciary responsibility while others do not.</p>	<ul style="list-style-type: none"> <li>Oversee the administration of the retirement plan.</li> <li>Ensure compliance with ERISA requirements.</li> <li>File necessary reports and forms (such as Form 5500).</li> <li>Manage participant communications.</li> <li>Ensure timely payment of benefits and contributions.</li> </ul>	<p>A 3(16) fiduciary is often the party who has direct operational control over the plan. They may retain other service providers, but they bear ultimate responsibility for the plan’s administration. They are not responsible for the investments, and some carve out specific duties they will cover while leaving the rest to you. For you, if you hire a 3(16), it’s critical you understand which administrative responsibilities are left on your plate.</p> <p>If you have a 3(16), it is important to identify whether they sign your 5500 or leave that to you. If you, or someone in your organization signs the 5500, you retain tremendous fiduciary responsibility and potential liability.</p>

Designation	Responsibilities	Role
<p><b>3(21) Fiduciary</b></p> <p>A 3(21) fiduciary is typically an advisor or consultant who provides investment advice and recommendations to the plan sponsor but does not have discretionary authority over the plan’s assets.</p>	<ul style="list-style-type: none"> <li>• Offer advice regarding the selection of investment options for the retirement plan.</li> <li>• Help the plan sponsor understand their investment obligations.</li> <li>• Provide insights on compliance with fiduciary requirements.</li> <li>• Ensure that investment decisions are made prudently and in the best interests of plan participants.</li> </ul>	<p>The 3(21) fiduciary assists and advises the plan sponsor (employer) but does not make final investment decisions. They share in the fiduciary responsibility, but the plan sponsor retains the ultimate decision-making authority regarding investments. This means you and the 3(21) are co-fiduciaries.</p>
<p><b>3(38) Fiduciary</b></p> <p>A 3(38) fiduciary is an investment manager that has been granted full discretionary authority to manage and control the plan’s investments.</p>	<ul style="list-style-type: none"> <li>• Make investment decisions on behalf of the plan without needing to consult the plan sponsor.</li> <li>• Select and monitor investment options to ensure they serve the best interests of the participants.</li> <li>• Assume full fiduciary responsibility for investment selections and strategy, relieving the plan sponsor of that responsibility.</li> </ul>	<p>By engaging a 3(38) fiduciary, the plan sponsor significantly reduces its fiduciary liability concerning investment management because the 3(38) fiduciary takes on full responsibility for investment performance and compliance.</p>
<p><b>402(a) Fiduciary</b></p> <p>A 402(a) fiduciary is designated as the named fiduciary, or listed trustee, for the entire plan.</p>	<ul style="list-style-type: none"> <li>• To manage and be accountable for all aspects and strategic decisions of retirement plan</li> <li>• Oversight of all administrative functions</li> <li>• Oversight of all investment decisions</li> <li>• Ensure compliance with ERISA regulations on behalf of the plan as a whole</li> </ul>	<p>The 402(a) fiduciary bears the full responsibility for the fiduciary duties outlined in ERISA, including the duties of loyalty and prudence. This fiduciary is responsible for the plan’s broader compliance and can delegate certain functions to other fiduciaries but must monitor and be responsible for those delegated to ensure compliance and performance. They take on the full and complete fiduciary duty from the employer.</p>

**Summary of Differences:**

<p><b>3(16) Fiduciary</b></p> <p>Responsible for the overall administration of the plan and compliance with ERISA requirements. Some 3(16) fiduciaries will bear all fiduciary responsibility and financial liability for plan administration and others will not.</p>	<p><b>3(21) Fiduciary</b></p> <p>Provides investment advice and recommendations, shares fiduciary responsibility, but does not have authority to manage investments. The plan sponsor, signor of form 5500, and other plan fiduciaries become co-fiduciaries with a 3(21), equally sharing fiduciary duty. See DTS systems as an example above.</p>
<p><b>3(38) Fiduciary</b></p> <p>Holds full discretionary authority for managing the plan’s investments and assumes all related fiduciary responsibilities.</p>	<p><b>402(a) Fiduciary</b></p> <p>Bears the full fiduciary responsibility for management and decisions of the entire plan.</p>

These distinctions are critical for plan sponsors as they determine the level of fiduciary responsibility they retain and how those responsibilities are shared with advisors and managers.

# Three Actions to Immediately Take

## 1. Identify Whether You Have a 402(a) Listed Trustee or 3(16) Administrative Fiduciary

The initial step is to contact your plan administrator to determine whether they serve as a 402(a) listed trustee or a 3(16) fiduciary.

Ideally, they will confirm that they serve as a 402(a) listed trustee, which indicates that they bear full fiduciary responsibility for the entire plan.

If they do not serve as a 402(a) fiduciary, you should inquire whether they are acting as a 3(16) administrative fiduciary. If they are functioning in this capacity, inquire whether they sign the Form 5500 annually.

If they do not, and you or someone within your organization signs this form, it indicates significant fiduciary responsibility has been retained.

Secondly, request a copy of their service agreement. Your objective is to clarify which tasks they manage and which responsibilities remain with you. Given that their agreement likely delineates their specific responsibilities, it is important to ask them to clarify the administrative tasks for which you are still accountable.

Furthermore, review any agreements you have with your 3(16) fiduciary to assess whether they have limited their financial liability through specific contractual provisions. It is possible for them to have signed the Form 5500 and accepted full fiduciary responsibility while requiring you to sign a contract that indemnifies them from substantial financial liability.

As you can see, not all 3(16) fiduciaries are the same, and there are numerous potential pitfalls that should be avoided.

Once you have gathered this information you should have a pretty good understanding of your administrative responsibilities and fiduciary duty you have. You must decide whether to retain this responsibility along with its potential consequences or to outsource the fiduciary duty and management in accordance with the Department of Labor's guidance.

# Three Actions to Immediately Take

## 2. Identify Whether You Have an Investment Fiduciary

It is not uncommon to be uncertain about whether your plan has an investment advisor managing its investments.

To gain clarity, the most effective approach is to contact your plan administrator. They can provide you with essential information regarding the existence of an investment advisor and outline their specific role within the plan.

If your plan does have an investment advisor, ask whether the advisor operates as a 3(21) or a 3(38) fiduciary. If the advisor is classified as a 3(21), you will share co-fiduciary duties, meaning you remain ultimately responsible for overseeing all aspects of the investment options and management of your plan. Conversely, if the advisor is a 3(38), they assume full fiduciary responsibility for overseeing and managing the investment costs and performance of the available options within your 401(k) plan.

If you do have a 3(38) investment fiduciary, it is important to ascertain their fee structure and the specific services they provide. You should compare their stated offerings with your actual experience to evaluate their effectiveness. Additionally, there may be alternative options available that could deliver the same level of fiduciary protection alongside a greater value for both you and your employees.

In the absence of a 3(38) investment manager, you bear all or some of the fiduciary duty to oversee all investments, costs, and performance of the funds within your plan. It is your responsibility to annually benchmark these investments against their peer groups and make decisions to replace any underperforming funds as necessary.

After gathering this information, you must determine whether you wish to retain this responsibility along with its potential consequences, or if you prefer to outsource the fiduciary duties and management in accordance with the Department of Labor's guidance.

## Three Actions to Immediately Take

### 3. Receive an Analysis of your Current Plan to Uncover all the Above and Identify Your Risk Level and Total Plan Costs

Much of your plan information is publicly accessible, allowing anyone to identify errors that may have been made and consistently repeated over time. These issues can serve as significant red flags, potentially exposing you to penalties and litigation. This includes aspects such as your mutual fund lineup, fund performance, common mistakes that may lead to audits, and the risk of predatory attorneys soliciting employees to take action against your organization.

The only documents that are not publicly available are your Adoption Agreement, Summary Plan Description (SPD), and the 408(b)(2) fee disclosure.

The Adoption Agreement is the document adopted by your company from the Base Plan Agreement, and it is not provided to employees. Instead, employees receive the Summary Plan Description. Both documents can be requested from your plan administrator for your records.

The 408(b)(2) fee disclosure outlines all costs associated with your plan. It is essential to retain this document and conduct an annual benchmarking of your plan costs against other options available in the market. However, it is common for employers and HR managers to be unaware of the location of this document and to neglect benchmarking their plan costs or renegotiating with vendors whose fees are above market rates. This document can also be requested directly from your plan administrator.

To conduct a thorough analysis and assess your risk level, we require either the Adoption Agreement or the SPD, as well as the 408(b)(2) fee disclosure. The remainder of your plan information is publicly available, which we can access to complete the analysis.

## Example of What we Recently Found

I recently performed this analysis on a company with a 401k plan that had about \$8 million invested by employees. They were paying \$20,000 annually to the recordkeeper, \$30,000 to the 3(21) investment advisor, and several thousand more to various parties involved in the plan.

Despite this 401k plan having a 3(16) administrative fiduciary, a representative from the company signed the 5500 retaining fiduciary duty.

Even with the 3(16), there were several red flags for basic filing requirements that were not completed even though they were required by law. And since the company signed the 5500, these mistakes put them in clear breach of their fiduciary duty.

The plan had a 3(21) investment advisor, but their mutual fund lineup had an average cost of 0.50% and an average 5-year performance of 8.00%.

Nearly identical funds could be offered at an average cost of 0.20% and an average 5-year performance of 9.30%. It could be argued that this employer, and their 3(21), were costing their employees 0.30% extra per year in fees and 1.30% extra per year in potential performance.

Since the company had a 3(21) advisor rather than a 3(38), they bore responsibility for the higher fees and subpar fund performance available to employees. These investment fees and performance discrepancies present a straightforward target for any determined attorney.

Overall, this represents a hidden cost of 1.60%, totaling about \$128,000 annually, for which the company could

face legal action or settlement demands. Alongside these issues, the \$20,000 spent on recordkeeping was excessive and could be significantly reduced.

Not to mention they were paying \$30,000 annually to the 3(21) which they hadn't heard from in several years. The 3(21) also doesn't take full fiduciary responsibility and because they have limited ability to make unilateral improvements they weren't able to adjust the mutual funds in the lineup without the plan sponsor's permission. They didn't bring the issue up and the plan sponsor was unaware.

In this case, the 3(21) is actually a well known firm that has limited capability because of they are beholden to certain funds and are unable to make any significant changes.

In summary, despite having both a 3(16) and a 3(21) in place, the company was fully responsible for the plan and investments and was breaching its fiduciary duties in both administration and investment management. Consequently, employees were losing approximately \$125,000 to \$150,000 each year over multiple years due to the company's failure to address fundamental retirement plan obligations.

If I were an attorney, this plan would be a prime candidate for litigation, and I would be confident in securing at least a \$500,000 settlement once all fiduciary breaches and associated costs were clearly outlined in a demand letter. Fortunately for this firm, I am not an attorney; I am here to assist them in rectifying these mistakes, alleviating their fiduciary responsibilities, and substantially lowering the overall costs of the plan.

# Act Now and Receive

## What You Will receive:



### Fee Analysis

We provide a detailed breakdown of your current plan fees and commissions—identifying how much you pay and to whom—while comparing them to industry averages.

We will also show you a list of comparable, but lower cost alternatives.



### Plan Benchmarking

We evaluate the fees and services of your plan against similar plans in the industry to give you a clearer perspective.



### Recommended Corrective Actions

A listing of red flags and items that need to be addressed to comply with your fiduciary duty from an administrative respect.



### Investment Analysis

You will receive an assessment of the quality and expenses of your current investment lineup, comparing it to industry benchmarks while highlighting lower cost alternatives.

Additionally, we will identify the worst performing funds in your lineup and propose alternatives that are in the top quartile of their peer group.

## Contact Us Today!

Phone: (346) 666-6845 | Email: [401k@oakharvestfg.com](mailto:401k@oakharvestfg.com)

Schedule Appointment: <https://click2retire.com/401kdiscoverycall>



## Next Steps

To take advantage of this complimentary analysis and receive a proposal to eliminate your fiduciary duty, and potential liability, and remove the headache of the day-to-day management responsibilities of administering your 401k, simply email your 408(b)2 and either your Summary Plan Description or Adoption Agreement to 401k@OakHarvestFG.com.

You can request the 408(b)2 and SPD or Adoption Agreement from your current plan administrator if you do not have them on hand.

Optionally, if you'd like to simply schedule a phone call to discuss your plan before receiving the complete analysis, you can reach out to us through that email or call (346) 666-6845.

If you send us an email, you will receive an automated response with a calendar link to schedule the review of your current plan and proposal. Typical turnaround times are 24-48 hours.

After reviewing your current plan, we will show you what it takes to remove 99% of the day-to-day responsibility of the plan management and 100% of the administrative and investment fiduciary duty.

You have several choices of how to proceed, but the most important choice is to remove the fiduciary duty you currently retain.

### Option 1:

Keep everything the exact same and simply transfer your fiduciary duty.

In this instance you don't have to change any providers or relationships, you simply transfer your fiduciary duty to our approved 402(a) listed trustee and 3(16) fiduciaries. They will sign your 5500, take corrective action, automate processes, ensure all administrative tasks are complete, and adjust your fund lineup to minimize costs and maximize performance potential.

If you like your advisor, you can keep them. If you like your vendors, you can keep them.

Our fee will come from the savings created for you.

## Option 2:

Transfer your fiduciary duty while also replacing some of your current providers. If you are unhappy, don't have the right people, or don't have a 402(a), 3(16), or 3(38) in place currently you probably want to add them.

You can make as little change or as much as you want while still removing the fiduciary duty you currently retain. These options will be explored as we discuss your situation but rest assured wholesale change is not required if that is not your preference.

There is no obligation with this offer. If you choose to retain administrative and investment fiduciary duty as well as the daily management of your plan you can keep your reports to take corrective action on your own.

There is no cost other than your time for this review. We are simply confident that the logical decision for the majority of business owners and HR managers is to follow the DOL guidance and hire a 3rd party fiduciary to handle these duties on your behalf. If we are able to do that at an equal or lesser cost it should be an easy decision for you. A true win-win.

Thank you for your time and we hope this report and information is as powerful for you as it was for me.

Respectfully,

**Troy Sharpe,**

CFP®, CPWA®, CTS™

CEO Oak Harvest Financial Group

## About Us



### Oak Harvest Investment Services

Oak Harvest Investment Services is a SEC Registered Investment Advisor that is part of the Oak Harvest Financial Group retirement planning firm based in Houston, TX since 2010.

Troy Sharpe, CEO, is a CERTIFIED FINANCIAL PLANNER®, Certified Private Wealth Advisor®, and Certified Tax Specialist®. [Click to see bio.](#)

Troy has hosted the Retirement Income Show® on KTRH 740am for the past 15 years and has over 500 educational videos on YouTube for those in or approaching retirement regarding the topics of Investment, Income, Tax, Healthcare, and Estate Planning.

The Chief Investment Officer of Oak Harvest is Chris Perras, CFA. [Click to see bio.](#)

The Director of Investments is Charles Scavone, CFA. [Click to see bio.](#)

Oak Harvest Investment Services manages approximately \$1 Billion of client assets as a Registered Investment Advisor.



### Admin316 (Proposed 402(a) and 3(16))

Admin316, a full-service plan fiduciary that will take on 99% of the administrative duties and all of the fiduciary responsibility. In 27 years of business they have not had a plan they administered incur any fines from the DOJ or any judgements from civil suits.

Your only administrative responsibilities that you retain are to provide timely and accurate census data when required and ensure timely contributions from payroll to your 401k.

We will act as the 3(38) and take on the full fiduciary responsibility of your plan's investments.

# Sources and Disclosures

## Sources:

EBSA numbers in enforcement section: [U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC, 20210](#)

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Daniel Aronowitz statement in enforcement section <https://www.investmentnews.com/retirement-planning/new-strategy-in-401k-litigation-ask-for-settlement-before-suit-is-filed/243673>

35% surge in lawsuits in 2024 <https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/>

## Disclaimers:

Advisory services and pension consulting services are provided through Oak Harvest Investment Services, LLC, a registered investment adviser. Insurance services are provided through Oak Harvest Insurance Services, LLC, a licensed insurance agency. Oak Harvest does not provide legal or tax advice. The information herein is general and educational in nature and should not be considered legal or tax advice. Tax laws and regulations are complex and subject to change, which can materially impact results. Consult an attorney or tax professional regarding your specific legal or tax situation.

Oak Harvest Investment Services, LLC is not affiliated with Admin316.