COMPLIANCE OVERVIEW

ERISA Compliance FAQs: Enforcement

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for employee benefit plans maintained by private-sector employers. ERISA includes requirements for both retirement plans (for example, 401(k) plans) and welfare benefit plans (for example, group health plans). ERISA has been amended many times over the years, expanding the protections available to welfare benefit plan participants and beneficiaries.

The Department of Labor (DOL), through its Employee Benefits Security Administration (EBSA), enforces most of ERISA's provisions. Violating ERISA can have serious and costly consequences for employers that sponsor welfare benefit plans, either through DOL enforcement actions and penalty assessments or through participant lawsuits.

This Compliance Overview includes a set of frequently asked questions (FAQs) to help employers understand how ERISA's requirements for welfare benefit plans are enforced.

LINKS AND RESOURCES

Department of Labor resources:

- Webpage on ERISA enforcement
- 2019 fiscal year audit summary
- Voluntary Fiduciary Correction Program
- Delinquent Filer Voluntary Compliance Program

Health Plan Investigations

- The DOL audits employee benefit plans for compliance with ERISA, the Affordable Care Act (ACA) and other federal laws.
- Participants may also sue their welfare benefit plans for violations.
- Noncompliance may result in civil penalties or criminal charges.

Common Violations

- Failures to file complete/correct Form 5500
- Failures to respond to participant requests for information
- Breaches of fiduciary duties

How Does the DOL Enforce ERISA?

The DOL has broad authority to investigate or audit an employee benefit plan's compliance with ERISA. The DOL's EBSA division handles audits of employee benefit plans. To perform these audits, EBSA employs investigators working out of field offices, many of whom are lawyers or CPAs or who have advanced degrees in business or finance.

DOL audits often focus on violations of ERISA's fiduciary obligations and reporting and disclosure requirements. The DOL may also investigate whether an employee benefit plan complies with ERISA's protections for plan participants. The DOL also uses its investigative authority to enforce compliance with the Affordable Care Act (ACA).

Enforcement Statistics: During the 2019 fiscal year, EBSA closed 1,146 civil investigations. Of these, 67% resulted in monetary results for employee benefit plans or other corrective action.

In addition, EBSA referred 89 cases for civil litigation and closed 275 criminal investigations. EBSA's criminal investigations led to the indictment of 76 individuals—including plan officials, corporate officers and service providers—for offenses related to employee benefit plans.

What Are the Possible Consequences of a DOL Investigation?

Being selected for a DOL audit can have serious consequences for an employer. According to a DOL audit report for the 2019 fiscal year, 67% of civil investigations resulted in penalties or required other corrective action, such as paying amounts to restore losses, disgorging profits and ensuring claims were properly processed and paid. In addition, a DOL audit may negatively affect an employer's normal business operations because the audit process can be both stressful and time-consuming.

The DOL has the authority to assess civil penalties for many different types of ERISA violations. Common penalty assessments involve the following:

Form 5500 violations (for example, not filing a Form 5500 when required or filing an incomplete Form 5500)	The DOL has the authority under ERISA to assess penalties of up to $2,233 per day for each day an administrator fails or refuses to file a complete Form 5500. This maximum penalty amount is adjusted each year for inflation. The penalties may be waived if the noncompliance was due to reasonable cause.
Failing to respond to participants' requests for plan information	If a plan administrator fails to respond to a participant's request for plan documents (for example, the latest summary plan description) within 30 days, the plan administrator may be charged up to $110 per day from the date of the failure or refusal to provide the information.
Breaches of fiduciary duty	For fiduciary duty breaches, the DOL will assess a civil penalty against the fiduciary in an amount equal to 20 percent of the applicable recovery amount. If a fiduciary breach has been found, the penalty is mandatory. In general, the penalty is assessed after payment of the applicable recovery amount pursuant to a settlement agreement with the DOL.

In addition, a DOL audit may lead to a **criminal investigation** of a plan sponsor, fiduciary or service provider if criminal activity (such as embezzlement, kickbacks and false statements) is discovered during an audit. Whether a matter is referred for criminal prosecution depends on a number of factors, including:

- The egregiousness and magnitude of the violation;
- The desirability and likelihood of incarceration both as a deterrent and as a punishment; and
- Whether the case involves a person who violated ERISA's requirements before.

Why Does the DOL Select Certain Health Plans for Audit?

A DOL audit can be triggered for a variety of reasons. In most cases, the DOL investigator will not disclose to an employer why its health plan was selected for audit. However, there are some common audit triggers that an employer should keep in mind.

Common triggers for a DOL audit include:

- **Participant complaints to the DOL** about potential ERISA violations. According to the DOL, when it becomes aware of repeated complaints with respect to a particular plan, employer or service provider, or when there is information indicating a suspected fiduciary breach, the matter is referred for investigation.
- **Answers on the plan's Form 5500**. For example, if a plan's Form 5500 is incomplete, or if inconsistent information is reported from year to year, the DOL may investigate the issue further.
- The DOL's **national enforcement priorities or projects**, which target the DOL's resources on certain issues. For example, the DOL's Health Enforcement Initiatives project focuses on making sure health plans and health insurance issuers comply with group health plan mandates, including mental health parity requirements.

How Can an Employer Minimize Its Risk of Being Audited By the DOL?

As a practical matter, an employer has little control over whether it will be audited by the DOL. However, an employer can take the following steps to help minimize its exposure to a DOL audit:

☑ Respond to participants' benefit questions and requests for information on a timely basis;

☑ File Form 5500 on time and make sure it is complete and accurate;

☑ Distribute participant notices required by law (for example, the summary of benefits and coverage) by the deadline; and

☑ Make timely updates to plan documents and summary plan descriptions (SPDs) to reflect legal and design changes.

How Do Employers Know If They Are Selected by the DOL For an Audit?

When the DOL selects an employer's health plan for audit, the DOL will send out an investigatory letter. This letter serves to notify the employer that a DOL investigation will take place. Investigations can be in the form of a "limited review" or a full-scale investigation.

Generally, the initial letter from the DOL will include a request for a list of plan-related documents. Employers that receive audit letters may be surprised and overwhelmed by the number of documents requested by the DOL auditor. Although employers generally have no way of knowing whether they will be selected for an audit, it is important for them to maintain employee benefit documents in an organized fashion so they can respond to a DOL audit request in the event this occurs.

Typically, the audit letter will request that the documents be provided by a specified date. Inadequate or late responses could trigger additional document requests, interviews, on-site visits and even DOL enforcement actions.

How Can Employers Prepare for a DOL Audit?

Just because an employer has been selected for an audit does not mean that the employer has violated an employee benefits law. Even an employer in compliance can encounter an unexpected audit. A DOL audit is not a simple process and being prepared can potentially save an employer a large amount of money, time and stress.

The best way to prepare for a DOL audit is to remain in compliance with the law and establish a recordkeeping system for maintaining all of the important documents relating to your employee benefit plans. Retaining complete and accurate records will help move along the audit process and provide an accurate picture of an employer's benefit package. As a general rule, these records should be retained for **seven years**.

Employers should consider reviewing their health plans for compliance now, before they are selected for audit. It is important for employers to get their health plans' paperwork in order as part of this process. Employers may want to designate one location for maintaining records relating to their health plans, such as plan documents and insurance contracts, SPDs and notices required under the ACA and other federal laws (for example, the Women's Health and Cancer Rights Act). Even though a compliance review will require some time and effort now, it will likely pay off in the future in the event the employer is selected for a DOL audit.