

# LEGISLATIVE BRIEF

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

### HOW DOES THE DOL ENFORCE ERISA?

The DOL has broad authority to **investigate or audit** an employee benefit plan's compliance with the ERISA. The DOL's EBSA division handles audits of employee benefit plans. To perform these audits, EBSA employs over 400 investigators working out of field offices, many of whom are lawyers or CPAs or 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. Recently, the DOL has been using its investigative authority to enforce compliance with the Affordable Care Act (ACA).

Traditionally, DOL audits of employee benefit plans have focused primarily on retirement plans, such as 401(k) plans. However, now that the DOL has started enforcing compliance with the ACA, **health plan audits are on the rise.**

**Enforcement Statistics:** During the 2014 fiscal year, EBSA closed 3,928 civil investigations. Of these, 64.7 percent resulted in monetary results for employee benefit plans or other corrective action. In addition, EBSA filed 107 civil lawsuits and closed 365 criminal investigations. EBSA's criminal investigations led to the indictment of 106 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 2014 fiscal year, approximately 5 out of 8 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.



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The DOL has 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 <b>\$1,100 per day</b> for each day an administrator fails or refuses to file a complete Form 5500. 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 <b>\$110 per day</b> 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 <b>20 percent</b> 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. In 2014, according to a DOL audit summary, 687 new investigations were opened as a result of participant complaints. 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.

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- The DOL's **national enforcement priorities or projects**, which target the DOL's resources on certain issues. For example, the DOL's Health Benefits Security Project focuses on making sure health plans and health insurance issuers comply with the ACA's mandates.

## 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 BE PREPARED 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**.

**Example:** If your health plan is "grandfathered" under the ACA, confirm that you have included the notice of grandfathered status in materials that describe the plan's benefits, such as the plan's SPD, and document that you provided the notice at the required times. Maintain this documentation so that it is easily accessible to you in the future.

Because the DOL has increased the frequency of health plan audits, 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

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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.

## **IF AN EMPLOYER DISCOVERS A COMPLIANCE MISTAKE, ARE THERE ANY CORRECTION PROGRAMS AVAILABLE TO CORRECT IT?**

If an employer reviews its health plan's compliance with employee benefit laws and discovers a violation, there may be a way to address the mistake before the DOL discovers it and assesses a penalty. The DOL has self-correction programs for certain violations that an employer discovers prior to being audited. These programs offer incentives to an employer to file delinquent Forms 5500 and correct fiduciary breaches.

- The **Delinquent Filer Voluntary Compliance Program** (DFVCP) encourages plan administrators to bring their plans into compliance with ERISA's Form 5500 filing requirements. The DFVCP gives delinquent plan administrators a way to avoid potentially higher civil penalty assessments by voluntarily filing late Forms 5500 and paying reduced penalties. More than 24,000 annual reports were received through this program in fiscal year 2014.
- The **Voluntary Fiduciary Correction Program** (VFCP) allows plan officials who have identified certain violations of ERISA to take corrective action to remedy the breaches and voluntarily report the violations to EBSA, without becoming the subject of an enforcement action. In fiscal year 2014, EBSA received 1,643 applications for the VFCP.

## **CAN PARTICIPANTS BRING THEIR OWN LAWSUITS UNDER ERISA?**

Participants may sue their welfare benefit plans, as well as the plan administrator and other plan fiduciaries, to enforce their rights under ERISA. ERISA permits lawsuits by participants for benefits under a plan, for breaches of fiduciary duty or to obtain other appropriate equitable relief to remedy an ERISA violation or to enforce the terms of the plan. In addition, participants can sue for intentional interference with their ERISA protected rights.

Benefits litigation (that is, claims by participants seeking benefits under a plan) is by far the most common type of ERISA litigation. When a benefit claim is successful, ERISA limits the remedies that can be awarded by the court. In addition, claims that are based on state law are generally preempted by ERISA. Due to these factors, courts rarely provide any relief to participants other than restoring benefits that were denied under the plan, along with the possibility of awarding interest and attorney's fees.

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