

DOL Audit Trends for Health Plans

Trends, Lessons Learned and Perspectives From a Former DOL Investigator

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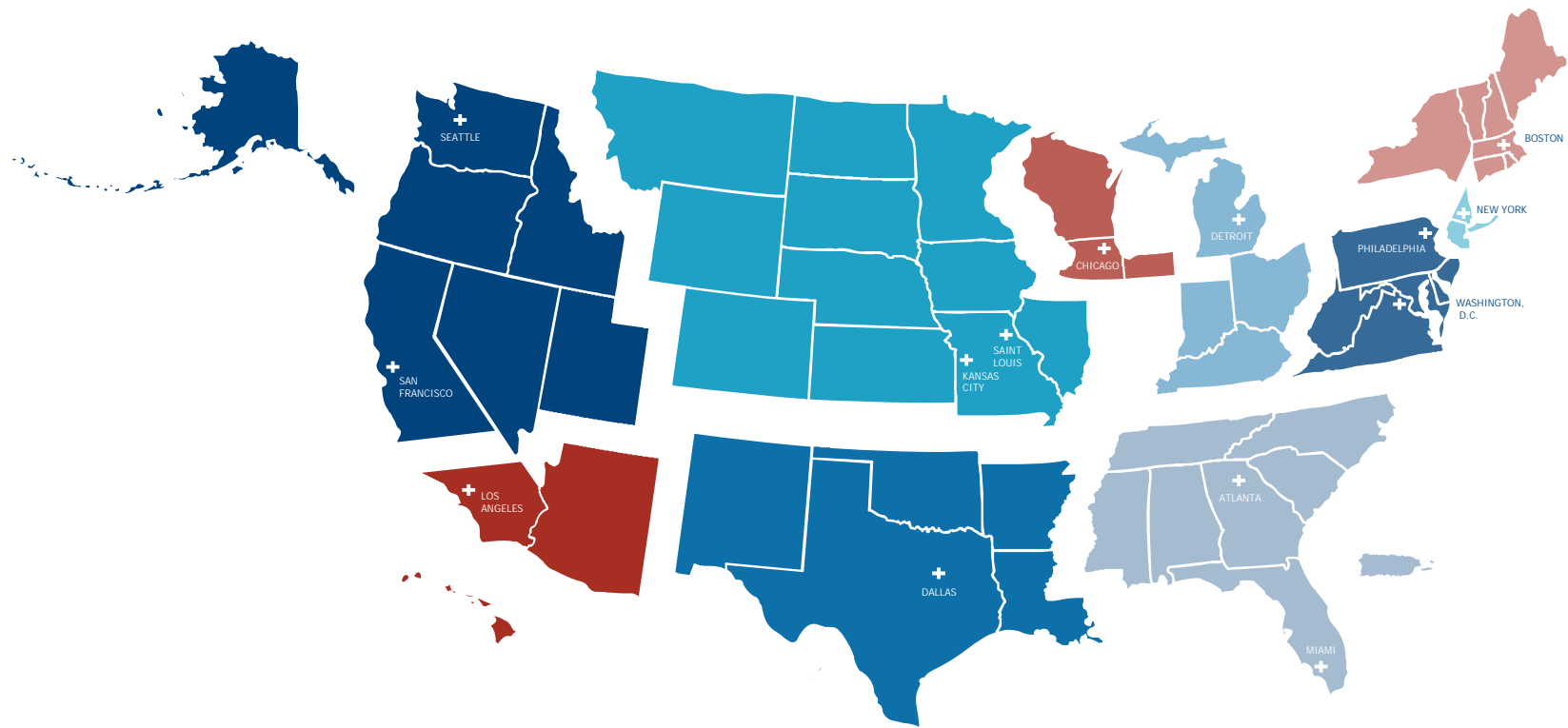
International Foundation
OF EMPLOYEE BENEFIT PLANS 

Housekeeping

- The views expressed within the content are solely my own and do not reflect the opinions and beliefs of Lockton, the International Foundation of Employee Benefit Plans, or the Employee Benefits Security Administration.
- The experiences this content is based upon my own experience from life in the trenches; your experience and mileage will vary based on the particular issues, DOL office, DOL personnel and whether the sun was out that day.

DOL Oversight

EBSA Regional Offices



Audits vs. Investigations

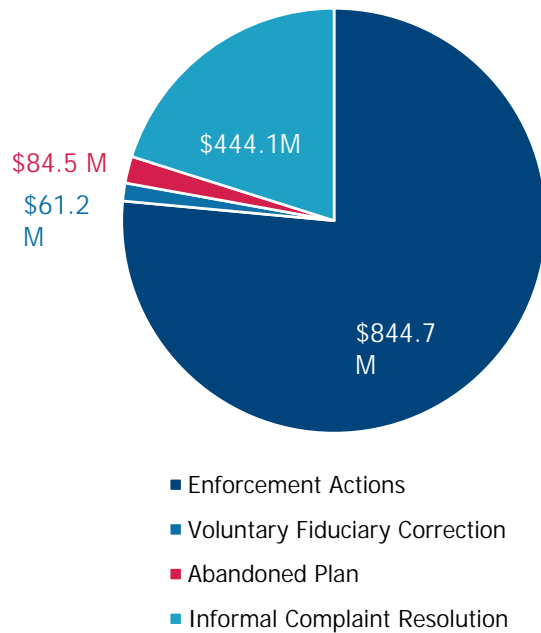


- A DOL examination may be referred to as:
 - Audit or investigation
 - Naming convention results from hiring rules of enforcement staff
 - No distinction in the process.
- Approximately 400 “enforcement folks” nationwide
- Your investigator or auditor may have a different expertise
 - J.D., CPA or M.B.A.

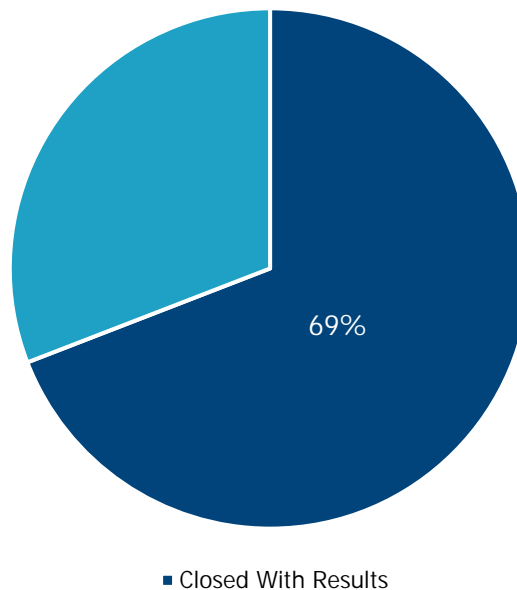
Enforcement Overview

FY2023 DOL Enforcement Results

TOTAL MONETARY RECOVERIES* \$2.4B



CIVIL INVESTIGATIONS*



Civil Investigations Referred for Litigation*: 50 Termed Vested Program*

- Total recoveries: **\$1.548B**

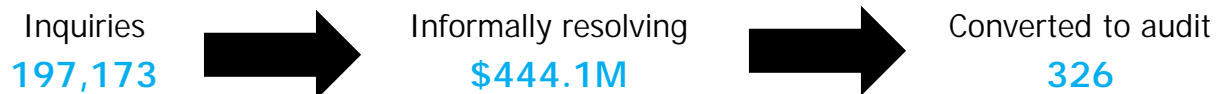
Criminal Investigations*

- Criminal investigations closed: **196**
- Indictments: **60**
- Guilty pleas or convictions: **77**

*FY2021
Source: EBSA Monetary Results, 2023

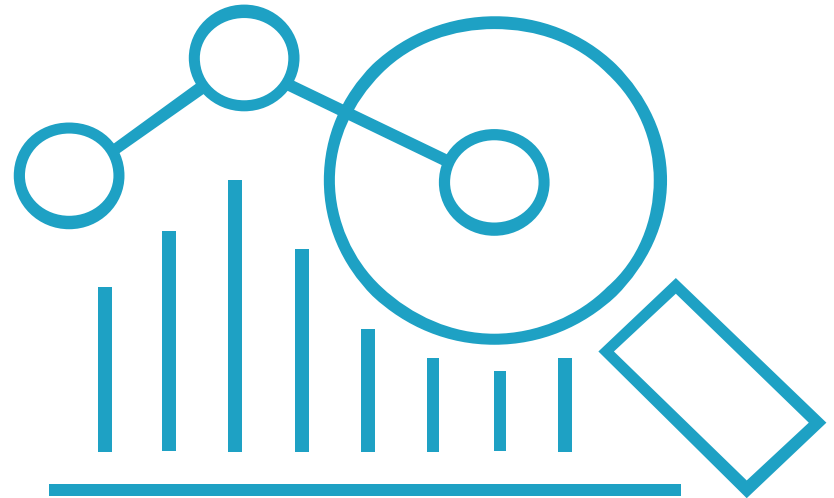
Participant Complaints

- Complaints are vetted
- Anonymity is preserved
- In 2023, the DOL received:



Audit Triggers

- With few exceptions, there are no “random” audits
- Audits arise generally from:
 - Participant complaint
 - Annual report Form 5500 red flags and questions
 - Plan trusts
 - New Form 5500 on the horizon?
 - DOL targeting initiatives
 - Litigation trends
 - “Spin-offs”
 - Service provider referrals
 - The power of the subpoena



DOL Correction Programs = DFVCP

- Delinquent Filer Fiduciary Correction Program (DFVCP)
 - Free!
 - The DOL can impose a \$2,670 per day penalty after the due date that the Form 5500 should have been filed.
 - DFVCP allows:
 - Filings for multiple years
 - Penalties are capped at \$1,500 for “small plans.”
 - Generally, fewer than 100 participants at the beginning of the plan year
 - \$4,000 per submission for “large plans”
 - Generally, 100 participants or more at the beginning of the plan year



The Process

Beginning the Investigation

STAGE 1: APPOINTMENT LETTER

ATTACHMENT

For each document or set of documents that you provide in response to this request, please number and label the front of each document or set of documents to correspond to the item numbers listed below. If any item listed below is not provided, please provide a brief explanation as to why the item is not being provided.

Unless otherwise specified below, this document request covers plan years beginning January 1, 2010 to Present.

01. Trust Agreement and all Amendments thereto;
02. Plan Document and all Amendments thereto that provide detailed descriptions of all benefits and services (e.g. medical, dental, vision, etc.) offered under the Plan and explain any restrictions and costs to participants for such benefits and services;
03. Summary Plan Description ("SPD");
04. A copy of any Employee Handbook that describes the benefits and services offered under the Plan;
05. Documents that set forth eligibility criteria for enrolling in the Plan;
06. Enrollment Form for the Plan;
07. Forms 5500 or 5500-C/R Annual Returns/Reports of Employee Benefit Plan, including all Schedules, Accountant's Opinions, Financial Statements and Notes to Financial Statements;
08. Summary Annual Reports ("SAR");
09. IRS Determination Letter and any subsequent filings;
10. Fidelity Bond (a complete copy including the Declaration Page and all Riders/Endorsements together with documents pertaining to any claims made under the Bond);
11. Fiduciary Liability Insurance Policy;
12. The most recent Asset Statement/Investment Portfolio Statement for the Plan (the statement may not be more than three months old);
26. Documents maintained by the Plan Administrator that relate to any Participant claim that has been denied due to the imposition of a preexisting condition exclusion since January 1, 2010;
27. A sample Certificate of Creditable Coverage for the Plan;
28. Documents (e.g. lists or logs) maintained by the Plan Administrator that identify the individuals to whom Certificates of Creditable Coverage have been issued since January 1, 2010;
29. Documents that set forth the Plan's written procedure relating to Participants' rights to request and receive Certificates of Creditable Coverage;
30. A sample COBRA Notice for the Plan;
31. The Notice of Special Enrollment Rights that is distributed to employees on or before the time they are offered the opportunity to enroll in the Plan;
32. Documents (e.g. lists or logs) maintained by the Plan Administrator that identify the employees to whom the Notice of Special Enrollment Rights has been issued since January 1, 2010;
33. Documents relating to any Wellness Programs or Disease Management Programs offered under the Plan;
34. Documents relating to any breast cancer benefits offered under the Plan;
35. A copy of the Women's Health and Cancer Rights Act ("WHCRA") Notice distributed to Participants upon enrollment in the Plan and annually thereafter;
36. Documents (e.g. lists or logs) maintained by the Plan Administrator that identify the Participants to whom enrollment and annual WHCRA Notices have been issued since January 1, 2010;
37. A copy of the Newborns' Act notice; and
38. Documents (e.g. lists or logs) maintained by the Plan Administrator that identify the Participants to whom Newborns' Act notices have been issued since January 1, 2010.

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Three-year audit period (maximum six)

- Photocopies only • Request receipt • Two Investigators

The Appointment Letter

- **DOL appointment letters ask for a lot of detailed information, and not all of it will apply to the plan.**
 - Requests unique to health and welfare investigations:
 - Claims information, typically a sample
 - Documentation reflecting compliance with various health plan specific laws like HIPAA, ACA, COBRA Newborns Act, WHCRA and MHPAEA
 - A lot will be included in the SPD or Certificate of Coverage
 - Information related to requests for evidence of insurability

Pro Tip: Communicate with investigator, ask for extensions

Investigation Process

STAGE 2: ON-SITE AUDIT

The Interview

- Counsel
- Questions
- Who
- Rights
- Subpoena

Areas of Scrutiny

- Corporate governance/plan administration
- Disclosure
- Reporting
- Funding
- Mental Health Parity compliance
- Contributions
- 408(b)(2)/CAA disclosure
- Prohibited transactions
- Claims denials
- Use of plan assets
- Mental health parity compliance and production of comparative analysis

Interview Questions

Individual

- Name/DOB/SSN
- Training
- Expertise

Company

- Related entities
- Bankruptcies
- Leadership

Fiduciaries

- Who maintains discretionary control
- Committee/Trustee structure

Employee Contributions

- How the payroll funding process works

COBRA Notices

- Process
- Third parties
- Monitoring

Claims Payments/ Processing

- Process
- Third parties
- Timeliness

Mental Health Parity

- Plan quantitative and/or non-quantitative treatment limitations

Wellness Programs

- Incentive limits
- Tobacco surcharges
- Reasonable alternative standards

Service Providers

- Process
- Conflicts of interest
- Monitoring
- Fees

Reporting and Disclosure

- 5500 process and participant disclosures
- E-disclosure



Conclusion of the Investigation

STAGE 3:
COMPLIANCE

- Voluntary Compliance Letter (VCL)
- Response
- Negotiation
- Action
- Closing



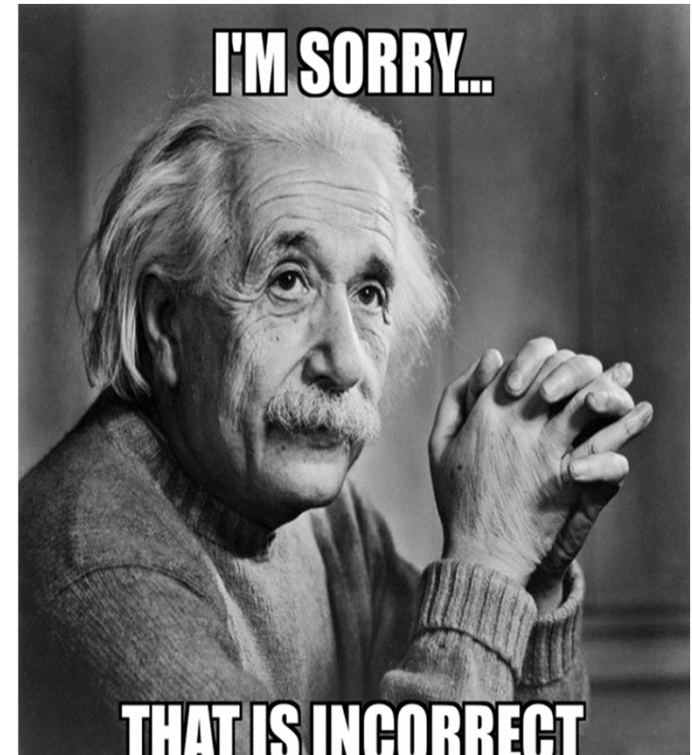
Mental Health Parity Cases: Different Beast



- Mental Health Parity is a little different than the “normal” investigations.
 - Initial request for documentation includes the plan’s comparative analysis of NQTLs
 - **Response due within 10 business days**; availability of extension varies by EBSA office and *sometimes* based on reasonable cause
 - In line with CAA requirements

Mental Health Parity Cases: Different Beast

- **Letter of Insufficiency**
 - The follow-up request stating the original production was **insufficient** and requesting additional information
 - The DOL will provide a list the documents and questions based on the information that was initially provided.
 - The suggestion that the original production was insufficient is not necessarily a finding of violations by the DOL. Instead, it is an opportunity to ask for more detail and poke holes in the initial response.
 - Response due within 5-10 business days.



Corrective Action

- **Types of Corrections**
 - Global corrections
 - Disclosures to participants
 - Plan amendments
 - Claims reprocessing and payment/refund
 - Policies and procedures



The plan sponsor is ultimately liable for violations found in their plan, even if it was the vendor's mistake.

Potential Civil Penalties



- Civil penalty for fiduciary breach
 - 20% of the amount recovered (more on this later)
- IRS coordination
- Fiduciary liability insurance?

Tips During the Investigation



- Involve expert advisors with audit experience
- Notify vendors and consultants
 - Ensure access to any pertinent information
 - Especially if there have been or will be changes to the plan
- Meet deadlines
 - Or ask for an extension but be prepared to wait
- Obtain legal counsel if necessary
- Be organized, be courteous
- Most of all...be prepared by being in compliance

Enforcement Trends

Current Enforcement Trends



- Mental Health Parity Compliance
- ACA Compliance
 - Wellness plans
 - GF status
- Reporting and disclosure
 - Electronic disclosures
 - COBRA notices
 - Form 5500
- Fiduciary Concerns/ Issues
 - Evidence of insurability issues
- On the Horizon
 - Fees and fee disclosure
 - CAA and 408b2
 - Service provider selections

Mental Health Parity Compliance

What's the Rule?

- Plans must ensure adequate parity (both in the plan as written and in operation) between med/surg and MH/SUD benefits with respect to:
 - Annual or lifetime limits
 - Financial and quantitative treatment limitations (QTLs)
 - Nonquantitative treatment limitations (NQTLs)
 - Any sort of non-numeric limit or restriction placed on the scope or duration of benefits
- DOL MHPAEA self-compliance tool
- Must provide a comparative analysis

What are the Issues?

- Limits/exclusions on ABA to treat autism spectrum disorder and nutritional counseling for eating disorders
- Additional pre-authorization requirements being applied to residential treatment services than to medical/surgical services
- Limits/exclusions of medication-assisted treatment (generally methadone) for opioid use disorder
- Specialist copay, visit limits, age limits
- Telehealth
- Network adequacy
- Provider reimbursement rates

Be Prepared

- Have the required NQTL comparative analysis on hand
- Review plan for any varying quantitative treatment limitations
- Work with carrier/TPA to review MHPAEA compliance
- Patience is a virtue

Fiduciary Governance in Welfare Plans

What's the Rule?

- Plan must be administered in accordance with ERISA Section 404
- Fiduciary duties
 - Loyalty
 - Prudence
 - Follow the plan document
 - Monitor plan service providers
 - Monitor claims processing and payments by the plan
 - Disclosure

What are the Issues?

- Claims offsetting issues
- Life insurance conversion
- COBRA failures
- Paying claims in accordance with plan document
- Fees

Be Prepared

- Formal fiduciary/trustee committee
- Set out plan procedural framework and follow it!
- Monitor your service providers, conduct RFPs
- Comply with plan document requirements
- Ensure proper handling of all plan assets
- Determine reasonableness of fees paid from trusts
- Document, document, document...

On the Horizon: J&J, Wells Fargo Litigation— Fiduciary Oversight

- Current lawsuit trend claiming fiduciary breach with regards to PBM contract and benefits.
 - Mismanagement and breach of fiduciary duties with respect to prescription drug plan
 - Resulted in higher costs and fees
 - Current cases looking at large employers with plan *trusts*.
 - Multiemployer plans?
- How did we get here?
 - Fiduciary rules are not new, but recent ACA and CAA transparency rules “open the curtains” a little as to fees and admin costs



Wellness Plan Compliance

What's the Rule?

- HIPAA/ACA rules set basic framework
 - Type of wellness program: participatory or health contingent
 - Health contingent:
 - Limits on awards/penalties (30%, or 50% for smokers)
 - Reasonable alternative required for outcomes-based wellness programs
- Awaiting updated EEOC guidance
 - 2016 regulations paused based on litigation

What are the Issues?

- Appropriate reasonable alternative standard
- Tobacco surcharges
- Appropriateness of incentive
- Wellness plan gatekeeper to health plan
 - Never ok

Be Prepared

- Ensure incentive limits appropriate under ACA/HIPAA rules
- Establish appropriate RAS
- Keep an eye out for updated EEOC guidance
 - Coming soon (hopefully)

Reporting and Disclosure

Types of Issues Typically Identified

- Failure to file Form 5500
- Failure to provide required notices
- Inadequate COBRA notices
- Electronic disclosure issues
- Failure to include all required information in the annual notices
- Transparency?

What Should Employers Do to Prepare?

- The value of a wrap plan
- Follow the DOL electronic disclosure safe harbor, obtain consent as needed.
- Enroll in delinquent filer program
- Confirm COBRA notices include all required information
- Work with TPA/carrier to ensure compliance with transparency rules



Key Takeaways/ Best Practices

Best Practices Checklist

Formalize Plan Governance

- Charter
- Minutes
- Regular meetings

Fee and Service Review

- Use third-party benchmark and document
- Conduct RFPs, consider market checks

Put an ERISA Wrap Plan in Place for Administrative Ease

Have a Trustee/Fiduciary Committee in Place to Oversee Plan Administration and Operations

Have Plan Policies and Procedures in Place with Regards to Plan Operations and Follow Them

- COBRA notices
- Claims processing
- Wellness programs
- Eligibility audits

Ensure You Have a Non-Quantitative Treatment Limitation Comparative Analysis in Place

Document, Document, Document

Your Feedback Is Important. Please Scan This QR Code.

Session Evaluation

