

DOL Retirement Plan Audit Trends

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International Foundation
OF EMPLOYEE BENEFIT PLANS 

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- The views expressed within the content are solely my own and do not reflect the opinions and beliefs of Creative Planning, the International Foundation of Employee Benefit Plans or the Employee Benefits Security Administration.
- This content is based upon my own experiences 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.

Agenda

- Overview of enforcement
- Trends and themes
- Best practices checklist

Overview of Enforcement

Audits vs. Investigations

- A DOL examination may be referred to as:
 - Audit or investigation
 - Different results from hiring rules of enforcement staff
 - No distinction in the process
- Approximately 400 “investigators” nationwide

Enforcement Manual

- For employees, but the public can view
- Interprets investigative authority given to the Secretary of Labor under ERISA in Section 504 and Section 506
- Electronic
- Includes many sample forms and process rules
- Includes Memorandum of Understandings with other agencies
- Since at least 1996, overseen by an Enforcement Manual Committee appointed and overseen by the Director of Enforcement.

Types of Plans the DOL Audits

Single Employer
and
Multiemployer

Defined Benefit
and Defined
Contribution

Self Funded
and Fully Insured

Major Medical
and Ancillary

403b

Apprenticeship

Audit Triggers

- With few exceptions, there are no “random” audits. Audits arise generally from:
 - Participant complaint
 - Annual Report Form 5500 red flags and questions
 - Service provider referral
 - DOL targeting initiatives
 - Litigation trends
 - “Spin-offs” from your other plans

The ERISA Data System

- How the DOL uses the 5500
 - Sophisticated data mining program that pulls data from 5500s in real time
Accessible by all enforcement personnel
 - “Targeting Runs” developed to identify most common potential violations
 - Sometimes used to fill out assigned cases
- Rumblings of 5500 updates to focus on health/welfare issues
 - Easier targeting for health/welfare cases



New Compliance Questions for 2023

The 2023 Form 5500 adds new IRS plan compliance questions to the return

- More detailed fee disclosures
- Schedules H and I
 - Did the plan trust incur unrelated business taxable income?
 - Were in-service distributions made during the plan year?
 - Provide trust information including trust name, EIN, and name and telephone number of trustee or custodian.
- Schedule R—A new Part VII: Compliance Questions
 - Is the plan a 401(k) plan?
 - How does the 401(k) plan satisfy the nondiscrimination requirements for employee deferrals and employer matching contributions?
 - If the Average Deferral Percentage (ADP) test or Average Contribution Percentage (ACP) test is used, did the plan perform testing using the “current year testing method” for non-highly compensated employees?
 - Did the plan use the ratio percentage test or the average benefit test to satisfy the coverage requirements under Section 410(b)?

New Compliance Questions for 2023

The 2023 Form 5500 adds new IRS plan compliance questions to the return

- Schedule R—A new Part VII: Compliance Questions
 - Does the plan satisfy the coverage and nondiscrimination tests by combining this plan with any other plans under the permissive aggregation rules?
 - Has the plan been timely amended for all required tax law changes?
 - Provide the date of the last plan amendment/restatement for the required tax law changes.
 - If the plan sponsor is an adopter of a pre-approved master and prototype or volume submitter plan that is subject to a favorable IRS opinion or advisory letter, provide the date and serial number of that letter.
 - If the plan is an individually-designed plan and received a favorable determination letter from the IRS, provide the date of the plan's last favorable determination letter.
 - Is the plan maintained in a U.S. territory?

Current Enforcement Projects

**Contributory Plans
Criminal Project
(CPCP)**

**Health Benefit
Security Project
(HBSP)**

Mental Health Parity
Emergency Services
Service Providers

**Protecting
Benefits
Distribution (PBD)**

Terminated Vesteds
Distressed Plans
Abandoned Plans

**ESOP Enforcement
Project**

**Plan Investment
Conflicts (PIC)**

**Rapid ERISA
Action Team
(REACT)**

**Abandoned Plan
Program (APP)**

**Voluntary
Fiduciary
Correction
Program (VFCP)**

FY2023 DOL Enforcement Results

TOTAL MONETARY RECOVERIES*

- Total recoveries: **\$1.4B**
- Recoveries from enforcement actions: **\$844.7M**
- Voluntary fiduciary correction program: **\$84.5M**
- Abandoned plan program: **\$61.2M**
- Monetary benefit recoveries from informal complaint resolution: **\$444.1M**

CIVIL INVESTIGATIONS*

- Civil investigations closed: **731**
- Civil investigations closed with results: **505**
- Percent civil investigations closed with results: **69%**
- Civil investigations referred for litigation: **50**

TERMED VESTED PROGRAM*

- Total recoveries: **\$429.2M**

CRIMINAL INVESTIGATIONS*

- Criminal investigations closed: **196**
- Guilty Pleas: **77**
- Number of individuals indicted: **60**

*FY2023
Source: EBSA Monetary Results, 2023

Beginning the Investigation

STAGE 1: APPOINTMENT LETTER

U.S. Department of Labor

Employee Benefits Security Administration
2300 Main Street, Suite 1300
Kansas City, MO 64108-2415
Phone: (316) 285-1800
Fax: (316) 285-1822



CERTIFIED MAIL, RETURN RECEIPT REQUESTED

XYZ, Inc. 401k Retirement Plan
c/o John Doe
1234 S.E. 2nd Street
Overland Park, Kansas 66842-9999

Re: XYZ, Inc. 401k Retirement Plan
Case: 60-183075
EIN: 18-1111111
Plan Number: 001

Dear Mr. Doe:

The Department of Labor, through the Employee Benefits Security Administration (EBSA), has been delegated authority under Section 504 of the Employee Retirement Income Security Act of 1974 (ERISA) to conduct investigations of employee benefit plans to determine if such plans are in compliance with the provisions of Title I of the Act and any implementing regulations. Title I establishes standards governing the operation of the employee benefit plans such as the XYZ, Inc. 401k Retirement Plan (the "Plan"). Pursuant to this authority we have scheduled an examination of the referenced Plan to begin on Monday, June 16, 2008, 9:00 am, at 1234 S.E. 2nd Street, Overland Park, Kansas.

Investigative authority is vested in the Secretary of Labor by Section 504 of ERISA, 29 U.S.C. 1134, which states in part: "The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this title..."

Our examination will consist of, but will not be limited to, a review of the following:

See Attached List

Additional records and copies may be requested during the review and should be readily available. In addition, an interview will be conducted with yourself, and/or other designated Plan or corporate officials familiar with the Sponsor and the Plan during the on-site review.

Thank you in advance for your cooperation. Should you have any questions, feel free to contact me at (316) 285-1832.

Sincerely,

Samuel A. Hanson, III
Sr. Investigator

Attachment
SBR2FA 1/6/08

Attachment

Please have the following documents for the Plan available for review. In addition, in order to expedite our review, please provide copies of those items marked with an "*" as they may be retained in our files.

1. Plan Document and Trust Agreement including all amendments *
2. Summary Plan Description *
3. Signed Form 5500, 5500-C, or 5500-R, Annual Return Report of Employee Benefit Plan, together with all attachments including accountant's opinion, financial statements and notes to the financial statements for 2001 through the present *
4. Plan Investment Policy for 2004 through the present *
5. Internal Revenue Service Determination Letter *
6. Fidelity bond (i.e. declaration page and loss payover rider identifying the plan as a named insured and specifying the amount of coverage and name of the surety company) *
7. Voluntary liability insurance policy (if any) *
8. Identity of all Plan service providers including all contracts, agreements and amendments with any service provider used by the Plan for 2001 to the present *
9. Identity of all Plan Trustees and Administrators of the Plan for 2001 through the present *
10. Minutes of Plan Board of Trustees' meetings for January 1, 2004 through the present, as well as minutes of trustee committees, subcommittees, or other administrative groups *
11. The most recent Annual Balance Sheet/Statement of Assets and Liabilities and Statement of Income/Expenses for the Plan with no items identified as "Other" *
12. Any existing Schedule of Investments held at each year end from 2004 to the present with no items identified as "Other" *
13. Corporate payroll records which indicate employer deferred contributions on a per-accrued basis for the Plan for 2001 through the present *
14. Transaction records relating to the Plan from the Plan Custodian reflective of deposits into the Plan for 2004 through the present *
15. Participant loan files from 2004 to the present *
16. Any existing schedule of loans and related supporting documentation for any loans other than participant loans to or from the Plan including borrower, original date of loan, original cost, current balance, amount delinquent and date of last payment for 2004 to the present *
17. Any documentation regarding real property held, bought or sold by the Plan including

Three-year audit period (maximum six)

Investigation Process

STAGE 2: ON-SITE AUDIT

The Interview

- Counsel
- Questions
- Who
- Rights
- Subpoena

Areas of Scrutiny

- Corporate Governance/Plan Administration
- Disclosure
- Reporting
- Funding
- Investment Selection and Monitoring
- Cybersecurity
- Contributions
- 404(a)(5)
- 408(b)(2)
- Prohibited Transactions
- Use of Plan Assets

Interview Questions

Approximately 120 questions on the standard interview template, additional 30 questions related to cybersecurity

- **Individual**—Name, DOB, SSN, training, expertise
- **Company**—Related entities, bankruptcies, leadership
- **Fiduciaries**—Who maintains discretionary control, committee structure
- **Employee contributions**—How the payroll funding process works
- **Investments**—Process, IPS, third parties, diversity, participant interests
- **Special investments**—Conflicts of interest and valuations
- **Fees**—Process, fees paid by plan, benchmarking, conflicts, third party fees
- **Service providers**—Process, conflicts of interest, monitoring
- **Reporting and disclosure**—5500 process and participant disclosures

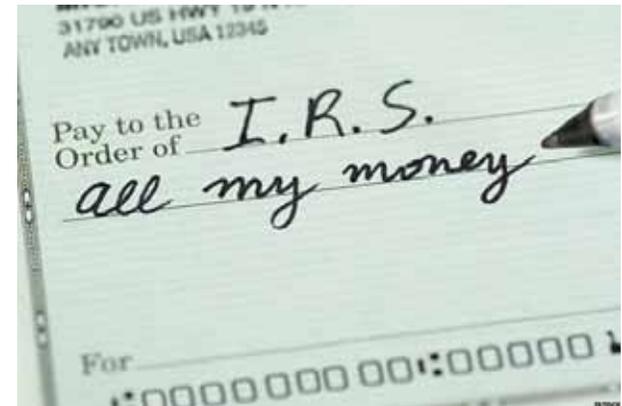
Conclusion of the Investigation

STAGE 3: COMPLIANCE

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

IRS Coordination

- The DOL and IRS have a congressional mandate to work together.
- DOL refers to the IRS:
 - Prohibited Transactions (PTs)
 - Special rules for PTs of \$20,000 or more
 - Referrals sent to the Employee Plans Classification Department
 - The IRS is looking for qualification issues and excise taxes.



Trends and Themes

Fees and Fee Disclosure

What Is It?

- DOL requires fiduciary analysis of all plan paid expenses to be necessary and reasonable (Sect. 408(b)(2)) and for participants to receive fee information regarding investments and plan expenses (Sect. 404(a)(5)).

What Is Your Risk?

- Failure of the plan's committee to analyze plan expenses for necessity and reasonableness can result in a prohibited transaction under ERISA Sect. 406.
- Failure to properly disclose fees and expenses to plan participants can result in a loss of the ERISA Sect. 404(c) defense.
- Most highly litigated area of ERISA class action claims.

How to Prepare

- Review all direct and indirect plan expenses in a committee meeting.
- Run 3rd party fee benchmarking on recordkeeping and consulting expenses.
- Review investment pricing and discuss availability of new share classes and CITs.
- Ensure that all required participant notices are timely distributed including 404(a)(5), fund changes, blackouts, website, comparative charts, and 404(c) disclosures.
- Consider routine RFI or RFP processes (3-5) years.

Missing Participants

What Is It?

- Investigations focus on ensuring that participant benefits are protected and expeditiously distributed, avoiding losses resulting from languishing plan assets.
 - DB plans maintain adequate records and procedures for contacting terminated participants with vested account balances.
 - Target participant benefits placed at risk by a plan sponsor's financial distress, including bankruptcy, state court receivership or the company's poor financial condition.
 - Target service providers charging unreasonable fees and draining the remaining participants' accounts.

What Is Your Risk?

- Missing participants are generally being cited as a violation of ERISA Sect. 404 prudent administration requirements.
- Corrections can be highly time consuming and costly.

How to Prepare

- It is live now.
- Products will quickly come to market.
- Congressional pushback.
- Work with the investment manager to document their capabilities and process.

Use of Plan Forfeitures

What Is It?

- Historically plans are designed such that any plan forfeitures could be used at the discretion of the plan sponsor to pay plan expenses or to offset employer contributions.
- IRS guidance supports.
- The DOL has targeted plans that use language that is not clear or inconsistent with use.
- Plaintiffs' attorneys have taken a much more aggressive approach.

What Is Your Risk?

- Bad plan drafting (or even good drafting) can lead to a potential violation of the duties of prudence and loyalty under ERISA Sect. 404, the anti-inurement provision, and prohibited transactions under Sect. 406(a) and (b).
- To date, 19 class action lawsuits filed against large plan sponsors alleging such violations of ERISA.
- DOL's September 28, 2023 "Sypris" press release.

How to Prepare

- Review and address your plan's language regarding the use of forfeitures and include language clearly granting discretion to the plan administrator, or consider prioritizing offsetting employer contributions first.
- Monitor the litigation and guidance in this area.

Electronic Disclosure

What Is It?

- On May 21, 2020, the DOL issued a final safe harbor rule allowing employers to post retirement plan disclosures online or deliver them by email, as a default.
- The DOL is actively testing administration to ensure bad addresses are not preventing participants from receiving communications.

What Is Your Risk?

- Requires covered individuals the right to receive paper and opt out.
- Requires an initial notification on paper.
- Requires an annual Notice of Internet Availability each time a new document is available.
- Requires documents to be retained for 1 year.
- Requires system check for bad addresses and at termination.

How to Prepare

- Consult your recordkeeping partner or third-party administrator to determine their ability to implement the new safe harbor and formulate a timeline that includes each of the safe harbor requirements.
- Pay special attention to how electronic addresses will be captured and how the new safe harbor system requirements will be carried out.

Lifetime Income Disclosure

What Is It?

- On Aug. 18, 2020, the DOL issued a rule mandating changes in defined contribution plans provide participants with lifetime income illustrations using prescribed assumptions intended to show how much monthly retirement income participants could expect to purchase with their account balances.
- DOL is reviewing these disclosures.

What Is Your Risk?

- Must explain their use of five assumptions: account balance, payment start date, the age when the annuity starts, the interest rate and an estimated end date for the payments.
- Plans must provide explanations about what the lifetime income illustrations mean.

How to Prepare

- Check with your plan recordkeeper or TPA.
- The rule includes model language.
- Rely on the assumptions and the model language, in order to qualify for a safe harbor and not be held liable in the event participants are unable to purchase equivalent monthly payments.

Private Equity Investment

What Is It?

- On June 3, 2020, the DOL issued an information letter ruling on the use of PE in defined contribution plans (the Partner's Group Letter).
- DOL indicates PE investments in DC plans' professionally managed asset allocation investments, such as a target date, target risk or balanced fund is ok under certain conditions.
- DOL is actively reviewing analysis on fund selection.

What Is Your Risk?

- Must compare them to alternative funds without PE.
- Must assess diversification and investment returns.
- Must review investment manager's capabilities, experience, and stability to manage a fund including private equity.
- Must ensure liquidity and proper valuation.
- Must provide participants adequate information regarding the character and risks.

How to Prepare

- Products will quickly come to market.
- Congressional pushback.
- Work with the investment manager to document their capabilities and process.

ESG Investment

What Is It?

- DOL final rule released November 2022.
- Clarifies that plan fiduciaries can consider climate change and other environmental, social, and governance (ESG) factors when they make investment decisions and when they exercise shareholder rights, including voting on shareholder resolutions and board nominations.

What Is Your Risk?

- Likely removes certain barriers for ERISA plans to select ESG investments so long as those selections are otherwise consistent with a prudent and loyal investment decision process.
- Acknowledges that ESG factors may be material to the risk-return analysis of a portfolio and that a fiduciary's analysis may often require an evaluation of the economic effects of climate change and other ESG factors.

How to Prepare

- Significant political pushback from Congress, first veto.
- Four current lawsuits against DOL.
- Chevron deference is gone.
- Plans should have thorough investment due diligence to support.
- Do not sacrifice cost and returns to incorporate.
- Consider an ESG tier or brokerage window option.

Cybersecurity

What Is It?

- In April of 2021, the DOL issued tri-part guidance on cybersecurity in retirement plans:
 - Tips for hiring service providers
 - Cybersecurity program best practices
 - Online cybersecurity practices
- DOL is actively reviewing plan analysis in all audits.

What Is Your Risk?

- Clearly articulates that there is a fiduciary duty.
- The DOL has begun incorporating many of the related questions in their enforcement process.
- This may serve as a measuring stick for prudent process for both DOL enforcement and potential litigation claims.

How to Prepare

- Incorporate into all future service provider RFPs/RFIs and selection process.
- Review existing contracts, insurance policies, and plan rules.
- Clearly determine the role and liability that your service provider accepts.
- Consider a participant education campaign.

Cryptocurrency Investment

What Is It?

- Executive Order on Ensuring Responsible Development of Digital Assets and DOL Compliance Assistance Release No. 2022-01.
- Summarizes a number of concerns that may be relevant to a plan fiduciary's decision to include cryptocurrencies, including issues related to volatility, administration, valuation, and the regulatory environment.
- DOL actively targeting this form of investment.

What Is Your Risk?

- The discussion is not intended to be a balanced portrayal of the benefits and risks associated with an investment in cryptocurrencies.
- The DOL expresses "serious concern" with investment of plan assets in cryptocurrency.
- DOL expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants.

How to Prepare

- DOL is currently facing litigation.
- Plan fiduciaries would be advised to take a wait-and-see approach.
- Note that the DOL believes allowing such investments through brokerage windows should expect to be questioned about how they can justify their actions with their duties of prudence and loyalty in light of the risks.

Multiemployer Enforcement

Missing Participants

- DOL 2021 Guidance on missing participants.
- Terminated Vested Participant Enforcement Project (TVPP).
- Ensures DB plans maintain adequate records and procedures for contacting terminated participants with vested account balances.

Apprenticeship Plans

- DOL FAB 2012-01
- Apprenticeship and training programs that are covered by ERISA—Typically those that run a multiyear training program registered with the U.S. Department of Labor, Office of Apprenticeship or a recognized State Apprenticeship Agency—are subject to ERISA.
- Targets expenses that do not qualify as allowable training or administration.

Settlor Fees

- DOL Adv. Op. 2001-01A and DOL Adv. Op. 97-03A
- Does the plan document permit (or at least not prohibit) the payment of this expense?
- Is the expense (and therefore the goods or services purchased) related to the fiduciary's administration of the plan and not related to the plan sponsor's "settlor" function?
- Is the expenditure prudent and is the amount reasonable?
- Is the service being provided by a party in interest or by the plan fiduciary (*e.g.*, the plan sponsor or an affiliate)?

Timing of Contributions

What Is It?

- ERISA provides that employee contributions (deferrals and loan payments) are due as soon as administratively feasible, but no later than the 15th business day of the month following the month in which the participant contribution amount is received by the employer.
- Employer contributions are due under the terms of the plan or by the end of the plan year following the year of the contribution.

What Is Your Risk?

- Failure to timely remit contributions results in a violation of ERISA Sect. 404 and 406.
- The plan sponsor will be responsible for restoring participants to the position they should have been including the deposit of principal and interest.

How to Prepare

- Consider correcting through the DOL's VFCP program.
- Consider the new DOL self correction program.
- In circumstances where the timely remittance was not possible, have a detailed memo to the file explaining.
- Understand the difference between late contributions and missed opportunity to defer.
- Participant loans may have broader correction needed.
- BE CONSISTENT!

Form 5500 Incomplete/Late Submissions

What Is It?

- Large plans find themselves faced with a critical decision if the auditor's opinion is not yet available by the 5500 filing deadline.
- Timely, but incomplete filing—Filing Form 5500 by the due date but without the auditor's opinion.
- Late filing—Not filing Form 5500 by its due date but instead waiting to file until the auditor's opinion is available.

What Is Your Risk?

- Failure to timely file a 5500 can be met with up to a \$2,586 per day DOL penalty.
- Typically penalties are enforced at \$50/day for late filings, \$150/day for deficient filings, and \$300/day for non-filers.

How to Prepare

- It is best to file as completely and accurately as possible in a timely manner. EFAST will accept Form 5500 filings without the auditor's opinion.
- Filing timely but incomplete does not guarantee no penalties or the least amount of penalties, but it does provide protection against the highest potential non-filer penalties.
- Engage your auditors and provide requested information timely.



Best Practices Checklist

Best Practices Checklist

1. Formalize Plan Governance—Charter, minutes, regular meetings
2. Formalized Fee Policy—Written policy and detailed records
3. Annual Fee and Service Review—Use third party benchmark and document
4. Document actions related to Funding, Cybersecurity, Missing Participants, and Certain Investments
5. Drafting of minutes should be a focus
6. Consider fiduciary liability insurance
7. Consider a year fiduciary calendar
8. Deploy counsel early
9. Document, document, document

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Session Evaluation

