

Reproduced with permission from Pension & Benefits Daily, 116 PBD, 6/17/2013, 06/17/2013. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

## View From Groom: Department of Labor Investigations



By JENNIFER E. ELLER

**T**housands of times each year, fiduciaries of plans covered by the Employee Retirement Income Security Act and service providers receive an unexpected letter or phone call from the Department of Labor noticing an investigation “to determine whether any person has violated or is about to violate” any provision of Title I of ERISA. Knowing how the DOL investigation process works and what to expect if you are investigated can greatly ease the strain and lower the cost of having the federal government take particular interest in your ERISA plans.<sup>1</sup>

### DOL’s Investigative and Enforcement Authority

The DOL’s Employee Benefit Security Administration (EBSA) Office of Enforcement has more than 300 investigators working out of 10 regional offices across the country. Under ERISA, the DOL has powers to investigate ERISA violations, including the power to subpoena books and records and compel witnesses to testify un-

<sup>1</sup> *Author’s note:* To ensure confidentiality of client information, only materials that are publicly available on the EBSA website were used to prepare this article, or are quoted or referred to in the article. DOL information on ERISA enforcement is available at [http://www.dol.gov/ebsa/erisa\\_enforcement.html](http://www.dol.gov/ebsa/erisa_enforcement.html).

*Jennifer E. Eller is a principal with the Groom Law Group, Chartered working primarily in the firm’s fiduciary practice group. She helps plan fiduciaries, sponsors, service providers and financial institutions think strategically about fiduciary governance and ERISA compliance issues.*

der oath. The DOL is one of the federal agencies with independent litigation authority—the Solicitor of Labor has litigation responsibility with respect to EBSA investigations.

ERISA empowers (and in some cases, requires) the DOL to assess civil penalties against a fiduciary who breaches his duties under ERISA or commits a violation of any of ERISA’s fiduciary responsibility provisions and against any person who knowingly participates in such a breach or violation. In addition to assessing penalties, the DOL may bring civil litigation against fiduciaries for breach of ERISA duties.

During fiscal year 2012 (October 1, 2011 – September 30, 2012) EBSA closed 3,566 civil investigations. Of these, 2,570 (72.1 percent) resulted in monetary recoveries totaling \$1.27 billion. These recoveries included \$911 million in prohibited transaction corrections, \$188 million in plan assets restored to plans, and \$12.2 million in voluntary fiduciary correction program filings. The Solicitor of Labor filed 100 civil lawsuits (out of 218 referred).

### Why EBSA Investigates

With responsibility for over 700,000 retirement plans and approximately 2.3 million health plans, EBSA regional offices can investigate only a small fraction of plans. As a result, roughly 25 percent of investigations are opened based on participant complaints. During the fiscal year ending Sept. 30, 2012, EBSA fielded over 240,000 inquiries from plan participants, and these inquiries led to the opening of 814 new investigations.

In addition to participant complaints, EBSA has focused its enforcement resources in certain areas, and has developed a set of National Enforcement Projects—areas on which each EBSA Regional Office focuses investigative resources. These include:

- Contributory Plans Criminal Project
- Health Benefit Security Project (primarily ME-WAs)
- Consultant/Adviser Project
- Sponsors in Bankruptcy (REACT)
- ESOPs
- Non-Filer Enforcement Program
- Late Filer Enforcement Program

- On-Site Reviews of Audit Work Papers
- Desk Reviews of Form 5500s

## Investigative Process

A substantial amount of information about EBSA's investigative process is available on the agency's website. This information includes the EBSA Enforcement Manual, and numerous form documents, including subpoenas, reports, checklists and sample closing letters which are used by investigators during investigations.

Please note: the EBSA Enforcement Manual includes a statement of purpose, which provides that the manual is intended solely for use of EBSA employees and does not limit or restrict the agency in any way. Nor is the enforcement manual intended to interpret the law, provide guidance to or confer rights on persons outside the DOL. Nevertheless, the enforcement manual and other materials and information on EBSA's website can be very useful in gaining insight about the DOL's investigative process.

## Initial Contact and Information Request

A typical investigation begins with a letter (or a preliminary phone call followed by a letter) from the EBSA Regional Office conducting the investigation. The letter includes a case number, names the entity under investigation, outlines the DOL's investigative authority and includes a request for documents. The letter also should describe the time period covered by the request for documents. Often, the letter will request that documents responsive to the information request be provided as of a certain date—usually within a matter of weeks from the date of the initial letter.

**Practice Tip:** Sometimes the DOL's initial letter will request that documents be provided on-site for inspection by the DOL investigator. It is often more efficient and less disruptive to the ongoing business operations of the entity being investigated to provide documents directly to the investigator, rather than have the investigator on-site for the initial document review. This approach also allows the entity under investigation to keep accurate records of the information provided to the investigator.

For plan sponsors under investigation, the DOL may review areas such as:

- Bonding
- Employer contributions
- Reporting and disclosure
- Loans (including participant loans, employer loans and ESOP loans)
- Employer securities/real property
- Missing participants/unclaimed benefits
- Receivables
- Income/earnings
- Fees and expenses
- Investments (including securities, stocks, bonds, mortgages, and alternative investments)
- Blackout procedures

The records requested by the DOL may include some or all of the following:

- Plan and trust documents, SPD / SAR / SMM
- Meeting minutes, resolutions and correspondence
- Benefits statements
- Participant disclosure documents
- Service provider agreements
- Investment documents (e.g., collective fund, partnership and joint venture documents)
- COBRA notices
- Fiduciary liability insurance
- Fidelity bond
- Insurance contracts
- Forms 5500 and attachments
- Appraisals/valuations
- Participant records

Document requests that the DOL issues to entities that provide services to ERISA-covered plans may ask for similar information, and may also seek client lists and client specific information, as well as internal audits and information on products and services provided to ERISA plan clients.

**Practice Tip:** Some service providers are contractually limited from disclosing client information. These limitations may include requiring prior notice to the client and/or responding only to a subpoena (rather than an information request). It is important to keep these limitations in mind when considering the steps necessary to address a request for information.

Upon receiving an investigation letter, consideration needs to be given to the initial scope of the investigation. Information requests can cover a limited data set, or be very broad. Typical information requests can range from a few items to dozens of separate requests for documents and information. Often, information requests ask for all documents (e.g., correspondence, agreements, policies, procedures, guidelines and manuals, etc.) regarding a certain subject. In addition to the breadth of the document request, consider the time period covered by the request.

**Practice Tip:** Another key item to consider at the outset of an investigation is whether it is advisable to contact the fiduciary insurance carrier covering the plan or provider (if any).

Identifying and collecting documents requested by the EBSA investigator can take significant time. By coordinating with the investigator at the outset of the investigation it may be possible to narrow, or at least prioritize, the requested information. It is often helpful to have an initial conversation regarding the precise scope of the issue or subject of the investigation, the time period under review, the priority of documents for production, and specific entities, lines of business or geographic areas covered.

It is also important to establish a point of contact for the investigator. Typically, the contact person is an in-

house or outside lawyer, who serves as the conduit of all information exchanged with the DOL, and coordinates the process.

## Interview Process

While the DOL has the authority to notice depositions, most DOL investigations involve voluntary interviews with persons the investigator believes to have information relevant to the investigation. According to the EBSA Enforcement Manual, the objectives of an interview include, “to develop credible information that is relevant and material to the investigation and to ascertain the interviewee’s version of the facts.”

Before beginning an interview, DOL investigators are required to identify themselves and to show their official credentials when asked (most do this as a matter of course). Investigators also are supposed to inform interviewees that if the investigator discovers information involving violations of laws other than ERISA, EBSA will refer the matter to another relevant agency (including the U.S. Department of Justice). The initial formality of the interview process can come as a surprise to some interviewees, as can the scope and range of the questions asked.

Investigators are trained in interview techniques, such as how to develop a line of questions, how to frame questions, and how to use different questioning techniques to elicit information. For instance, when posing a series of questions designed to bring out description of an event or incident, the EBSA Enforcement Manual encourages investigators to “begin with questions not likely to cause hostility.” The manual reminds investigators that “almost every subject/interviewee possesses more information than he/she initially admits knowing.” Investigators are also instructed by the manual to “conduct interviews in a courteous manner, free of personal prejudice or preconceived notions as to the culpability of the interviewee, and without making any threats or promises whatsoever to elicit any information.”

DOL investigators will typically take notes during an interview. Once the investigator has completed the interviews, he or she will use the notes from each interview to create a Report of Interview (“ROI”). The ROI will be maintained in the case file, as will the investigator’s notes from the interview.

**Practice Tips:** EBSA investigators typically interview only one person at a time. However, counsel is permitted to attend interviews. According to the EBSA Enforcement Manual, investigators “should offer no objection to the presence of an attorney representing the interviewee during the interview of a civil case witness or subject.”

EBSA’s policy, as expressed in the enforcement manual, is not to discuss with the news media or members of the public whether an investigation is underway or even under consideration, although exceptions may be made where circumstances warrant.

## Closing the Investigation

Once the investigator has gathered and analyzed the necessary information, the EBSA regional office must decide whether to take any further action. For certain matters, such as those involving a lengthy proposed correction of a violation, potential fraud or criminal misconduct, the removal of a fiduciary, or particularly

novel or complex violation or violations of other laws, EBSA will generally not seek “voluntary compliance.” Rather, the agency will refer those cases to the solicitor’s office or other appropriate entity.

The vast majority of EBSA investigations are resolved without litigation. In these cases, the closing of an investigation, like the opening of an investigation, takes place with a letter. EBSA regional offices issue a number of types of closing letters. Where the investigation detected no ERISA violations, a letter closing the investigation and indicating that no further action will be taken is usually provided.

When any potential violations that are identified in the investigation are *de minimis* or have been adequately corrected, the closing letter may note the potential violations, but will also state that no further action will be taken. EBSA may also choose to refer a potential violation to the Internal Revenue Service. Under these circumstances, the IRS may impose excise taxes, if applicable.

To the extent EBSA concludes an investigation and determines that violations of ERISA may have occurred, the regional office may issue a “Voluntary Compliance Letter” (VC letter). A sample VC letter is available on the EBSA website. In general, the letter:

- Provides a description of facts identified during the investigation and the Department’s position with respect to violations that may have occurred based on the Department’s understanding of the facts;
- Invites discussion regarding correction of the identified potential violations;
- Advises that without correction, the matter may be referred to the Solicitor of Labor for possible legal action;
- Advises that the Secretary of Labor may furnish information to parties affected by the investigation and notes that the target of the investigation remains subject to suit by private parties, even if the Secretary takes no further action; and
- Discusses the Secretary of Labor’s rights and obligations with respect to assessing civil penalties.

**Practice Tip:** A VC letter typically requests a written response within 10 days of the day the VC letter is received. Should more time be necessary to prepare a response, it is important to contact the investigator promptly to discuss.

While ultimate resolutions of an investigation vary, one important thing to be aware of is that EBSA will likely issue a press release regarding any settlement with EBSA following an investigation. The EBSA Enforcement Manual provides a brief description of the process utilized by the agency in issuing press releases. Press releases are also archived on the DOL website.

## Conclusion

Knowing what to expect from a DOL investigation is a necessary step in preparing for one. Thinking about the process the DOL might use, and the likely areas of focus during an investigation can also help identify areas of legal and operational compliance where additional effort might be warranted. After all, the time to identify and fix problems is before the DOL comes calling.