

Guide to Dealing with Department of Labor Investigations of Retirement Plans

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A Note describing the process of a Department of Labor (DOL) investigation, providing an overview of the DOL's enforcement authority and investigative process, a description of what to expect during an investigation, and best practices to help manage and streamline processes and outcomes.

The Department of Labor (DOL) routinely opens investigations of fiduciaries to plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) and service providers to those plans to determine whether any person "has violated or is about to violate" Title I of ERISA. Understanding the process can help reduce the administrative burden and cost as well as reduce stress associated with a DOL investigation.

This Note assists practitioners with a DOL investigation and provides:

- An overview of the DOL's enforcement authority and investigative process.
- A description of what to expect during the investigation.
- Practical tips to manage and streamline processes and outcomes.

ENFORCEMENT AUTHORITY: EMPLOYEE BENEFITS SECURITY ADMINISTRATION AND OFFICE OF ENFORCEMENT

The Employee Benefits Security Administration (EBSA) is an agency within the DOL. It is responsible for administering, interpreting, and enforcing the fiduciary, reporting, and disclosure requirements for retirement plans and the health care provisions of Title I of ERISA. EBSA is headed by an Assistant Secretary of Labor, a political appointee. The DOL is also one of the federal agencies with independent authority to litigate matters under their jurisdiction. The DOL's Solicitor of Labor has litigation responsibility for EBSA investigations and often works with investigators at critical points throughout the investigation.

While Congress enacted ERISA to address concerns regarding the mismanagement of traditional pension plans, its scope is much broader. ERISA has been amended to address the changing employer-provided retirement and health care environment. EBSA's role has been changed as well with increasing emphasis on welfare plans, particularly health care plans, and 401(k) plans.

The EBSA's Office of Enforcement is organized by ten regional offices and three district offices throughout the US. The DOL is empowered under ERISA Section 504 (29 U.S.C. § 1134) to conduct investigations of employee benefit plans to determine whether a person has violated or is about to violate ERISA or regulations under ERISA Section 504.

The DOL has broad authority under the statute to:

- Require the submission of reports, books, and records of the plan.
- Enter places to inspect books and records.
- Question persons deemed necessary to determine the facts relative to an investigation.

The DOL does not have the authority to compel the plan or any service provider to create materials or analyze issues on the DOL's behalf.

The DOL shares enforcement authority with several different federal agencies under:

- Reorganization Plan No. 4 of 1978 (August 10, 1978) under which the DOL and the Internal Revenue Service (IRS) allocate certain ERISA enforcement duties between themselves. The IRS enforces and interprets the requirements for tax qualification (including minimum participation and vesting standards) (ERISA Section 3001(d) (29 U.S.C. § 1201(d))).
- Memorandum of Understanding with the Department of Justice (DOJ) (February 5, 1985) under which the DOL and the DOJ agree that all cases involving violation of criminal provisions of ERISA are prosecuted by the DOJ and cases warranting criminal prosecution that are investigated by the DOL are referred to the DOJ. This memorandum also establishes the DOL's primary responsibility for civil litigation enforcing Title I of ERISA.

ERISA does not give the DOL authority to investigate violations of Title IV of ERISA. However, under ERISA Section 4003(d)

(29 U.S.C. § 1303(d)), the Pension Benefit Guaranty Corporation (PBGC) may reach agreements with the DOL for enforcing Title IV.

The DOL may bring its own enforcement actions in court. ERISA Section 502(a) (29 U.S.C. § 1132(a)) describes the DOL's civil enforcement authority and permits the DOL to sue for:

- Appropriate relief under ERISA Section 409 (29 U.S.C. § 1109) for breach of fiduciary duty.
- Injunctive or other appropriate equitable relief to redress any violation of Title I of ERISA or the terms of an employee benefit plan (ERISA Section 502(a)(5) (29 U.S.C. § 1132(a)(5))).

ERISA empowers (and in some cases requires) the DOL to assess civil penalties against a fiduciary that commits a violation of any of ERISA's fiduciary responsibility provisions and against any person knowingly participating in the breach or violation (ERISA Section 502(l) (29 U.S.C. § 1132(l))).

WHY WAS AN INVESTIGATION OPENED?

With responsibility for enforcing Title I of ERISA for private retirement plans throughout the country EBSA Regional Offices can only investigate a fraction of plans. The first questions that may be asked after receiving a notice of investigation from the DOL are:

- Why me?
- What is the DOL interested in?

DOL INVESTIGATIVE PROGRAMS

The DOL does not usually disclose why it opens an investigation and the DOL typically refuses to explain why an investigation was opened. However, the notice of investigation itself can provide clues in terms of the issues of interest to the DOL. For example, the Re: line of the initial notice of investigation (Initial Notice) indicates the type of case as:

- Criminal.
- Fiduciary.
- Limited review investigation.

The programs listed on the Initial Notice are as follows:

- Program 52 - criminal matters.
- Program 48 - fiduciary investigations.
- Program 50 - limited reviews.

Checking the Re: line of the Initial Notice for these numbers may provide clues regarding how the DOL is initially reviewing the case. It is important to remember that the DOL can change the case's status if the facts change. If the investigation is:

- A civil investigation, it should be found out whether the investigation is a fiduciary investigation (Program 48) or a limited review matter (Program 50).
- A fiduciary investigation, the DOL may be involved with the plans for multiple years while limited review matters are typically much shorter.

HOW INVESTIGATIONS ARE OPENED

The DOL does not typically open investigation randomly, since like other regulatory agencies, the DOL must employ their limited

resources wisely due to constant budget scrutiny from Congress. Recent enforcement statistics show that the DOL opened over 500 investigations in 2018 based on participant complains. In addition to participant complaints, EBSA may also open an investigation for other reasons, including:

- **Computer targeting.** EBSA may use computer-generated compilations of selected employee benefit plans or service providers derived from Forms 5500 that are filed with EBSA to develop lists of potential investigation subjects.
- **National projects.** EBSA maintains National Projects and Initiatives to investigate specific services or issues within a plan or particular types of issues or areas of exposure (see National Projects).
- **Annual reports and other internal EBSA information.** The DOL may initiate an investigation based on information included in a plan's Form 5500 and accompanying financial statement. For example, the DOL may open an investigation where the plan's Form 5500 indicates that it has been involved in a non-exempt prohibited transaction.
- **Referrals from other agencies.** Information concerning employee benefit plans or service providers from other governmental agencies, such as the IRS, the Securities and Exchange Commission (SEC), and state insurance agencies can provide the basis for an investigation.
- **Other.** The DOL may obtain information from third-party sources, including newspapers, television, industry journals, and magazines or leads from knowledgeable parties which can provide the basis for an investigation.

NATIONAL PROJECTS

The DOL often investigates points of emphasis that are determined by the EBSA National Office in Washington, DC. The National Office establishes its enforcement priorities in National Projects. The Regional Offices open investigations that often focus on the issues specific in the National Projects. The National Projects currently maintained by the DOL are:

- Plan investment conflicts (see Plan Investment Conflicts).
- Protecting benefit distribution (PBD) project (see Protecting Benefit Distribution Project).
- Employee stock ownership plans (ESOP) project (see Employee Stock Ownership Plans Project).
- Contributory plans criminal project (CPCP) (see Contributory Plans Criminal Project).

PLAN INVESTMENT CONFLICTS

The DOL has rebranded its long-standing fiduciary service provider compensation project as the plan investment conflicts project (PICP). Through the PICP, the DOL investigates plan service providers to determine whether they are receiving improper or undisclosed compensation. Targeted service providers often include:

- Third-party administrators.
- Trustees.
- Recordkeepers.

Within the context of these investigations, the DOL scrutinizes plan service provider's compliance with recent disclosure initiatives under

ERISA Section 408(b)(2) (29 U.S.C. § 1108(b)(2)) which require that plan fiduciaries receive comprehensive disclosure about service provider compensation and conflicts of interest. Investigations conducted under this national initiative often focus on the adequacy of disclosures issued by service providers to their ERISA plan clients. For more information on service provider disclosure requirements, see Practice Note, *Service Provider Disclosure Requirements for Pension Plans* ([7-508-2407](#)).

The PICP also involves investigations of plan asset vehicles where the DOL reviews the activities and practices of service providers of plan asset vehicles (including collective investment trusts, certain partnerships and LLCs that hold “plan assets” and separately managed accounts) for:

- Non-exempt conflicts of interest.
- Failure to follow investment guidelines.
- The receipt of excessive or conflicted fees.

PROTECTING BENEFITS DISTRIBUTION PROJECT

The Protecting Benefits Distribution Project (PBDP) scrutinizes the payment of retirement benefits. The Philadelphia Regional Office initially launched the PBDP but it has since grown into a national project. Underneath the PBDP, the DOL maintains three different components that are described below. The PBDP has been a source of significant investigative activity by the DOL during the last few years, including:

- **Terminated vested participant project (TVPP).** Investigations conducted under the TVPP focus on defined benefit plans and on the plan’s records as well as the procedures for contacting terminated participants with vested account balances. Under the TVPP, the DOL reviews whether the plan maintains up to date records and census data and whether the plan effectively communicates to plan participants near or at normal retirement age. The DOL also conducts reviews of the plan’s lost and missing participant procedures.
- For more information on locating missing participants, see Practice Note, *Locating Missing Participants in Terminating Plans* ([8-611-4826](#)) and *Steps to Locate Missing Participants in Terminated Retirement Plans Checklist* ([W-001-3604](#)).
- **Custodial abandoned plans project (CAPP).** The CAPP is similar to the TVPP in that its focus is to help with the payment of benefits to plan participants. However, unlike the TVPP, the CAPP focuses on financial institutions with many plans that are without a responsive plan fiduciary or sponsor (otherwise known as abandoned plans). The DOL identifies service providers with many abandoned plans and often seeks the return of fees to affected abandoned plans and encourages the service provider to use the Abandoned Plan Program.
- For more information on abandoned plans, see Practice Note, *Abandoned Individual Account Plans* ([W-016-7908](#)).
- **Distressed plan sponsor project (DPSP).** The DOL has maintained the DPSP since 2001, previously identified using a different name (the REACT project). The DPSP involves employee benefit plans the sponsor of which has filed for bankruptcy. EBSA’s investigations under the DPSP focus on contributions owed to the plan when the plan sponsor is entering bankruptcy.

- For more information on distressed plans, see Practice Note, *Defined Benefit Plans: Distress and Involuntary Terminations* ([9-502-5005](#)).

EMPLOYEE STOCK OWNERSHIP PLANS PROJECT

The ESOP project reviews ESOPs for potential violations of ERISA. Since the DOL began this enforcement project in 2005, the DOL has focused particular attention to the valuation of the stock that the plan purchases from the plan sponsor. These investigations normally include a review of stock purchase or sale transactions for potential conflicts of interest, which can arise when the person selling plan sponsor stock to or buying plan sponsor stock from the plan also serves in a fiduciary capacity over the plan itself.

EBSA has recently paid greater attention to the roles of institutional trustees in connection with ESOP transactions. In particular, EBSA has focused on whether the trustees have sound procedures and practices in place given their often instrumental roles with many plans.

For more information on ESOPs, see Practice Note, *Employee Stock Ownership Plans (ESOPs)* ([7-525-4818](#)).

CONTRIBUTORY PLANS CRIMINAL PROJECT

The CPCP is EBSA’s only criminal project and targets persons and employers committing fraud against defined contribution plans. These investigations generally focus on employers or others with authority over the plan and the employer’s payroll system that may retain employee payroll contributions to pay business expenses. These investigations often begin as a routine investigation involving delinquent contribution issues that turn into a criminal investigation involving both the DOL and the DOJ.

For more information on delinquent contributions, see Practice Note, *Contributions to a Defined Contribution Plan: Overview* ([0-608-6785](#)).

CYBERSECURITY AND DATA PRIVACY

While not a current initiative, the DOL is likely to follow the footsteps of other regulators and focus its investigative resources on data privacy and cybersecurity matters. This new area is likely to receive the focus of the DOL as it has from the SEC, Financial Industry Regulatory Authority (FINRA), and others.

INVESTIGATIVE PROCESS

A typical DOL investigation begins with a letter from the investigator 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.
- Describes the time-period covered by the request for documents.
- Often:
 - includes a broad request for documents; or
 - requests that the plan or service provider provide documents responsive to the information request within a matter of weeks from the date of the initial letter.

Sometimes the DOL's initial letter requests that that documents are provided on-site for inspection by the DOL investigator. It is often more efficient and less disruptive to the ongoing business operations of the plan sponsor or service provider to provide documents to the investigator electronically, rather than have the investigator on-site for the initial document review. The DOL is often, but not always, amenable to this request.

SUBPOENAS

The DOL also has the authority to issue administrative subpoenas at the outset of the investigation. Federal courts generally enforce the subpoenas where the DOL establishes that it has a demonstrable reason to believe its inquiry is legitimate and a reasonable belief that the documents requested in the subpoena are relevant to the inquiry. Whether the DOL issues a subpoena or seeks voluntary cooperation generally depends on the facts and circumstances including:

- The subject of the investigation.
- The types of issues that the DOL plans to investigate.

For certain matters, it may also be preferable to request a subpoena from the DOL. For instance, the DOL requests for data often include materials that are highly confidential in nature or include personally identifiable information that should not be shared absent the receipt of a subpoena. Moreover, plan service providers often maintain confidentiality provisions within their contracts that preclude the sharing of information absent the DOL's issuance of a subpoena.

SCOPE OF INVESTIGATION

After receiving and reviewing the DOL's notice of investigation, consideration should be given to the scope of the investigation. Typical information requests are broad and can include dozens of separate requests for documents and information. Often, information requests ask for all documents (for example, correspondence, agreements, policies, procedures, guidelines, and manuals) regarding a certain subject. For example, the DOL often requests the following records during retirement plan investigations:

- Plan and trust documents.
- Summary plan descriptions (SPDs).
- Summary annual reports (SARs).
- Summary of material modification (SMMs).
- Meeting minutes, resolutions, and other correspondence.
- Plan policies and procedures.
- Benefits statements.
- Participant disclosure documents.
- Recordkeeper, third-party administrator, and other service provider agreements.
- Investment management agreements.
- Investment documents (collective fund, partnership, and joint venture documents).
- ERISA Section 408b-2 disclosures.
- Fiduciary liability insurance.
- Trust statements.
- Payroll data.
- Fidelity bonds.

- Insurance contracts.
- Forms 5500 and attachments.
- Approvals and valuations.
- Participant records.
- Plan census data.
- Records of uncashed checks.
- Evidence of plan loans and schedules.
- Individual exemptions obtained by the plan.
- Results of internal audits or reviews.
- Participant data.
- Claims data.
- Claims decisions.

DOCUMENT REQUESTS TO THIRD PARTIES

Document requests that the DOL issues to entities that provide services to plans covered by ERISA typically ask for similar information. However, investigations of service providers can become complex. In some circumstances, the DOL seeks:

- Client lists.
- Client specific information.
- Internal audits.
- Information on products and services provided to ERISA plan clients.
- Client facing documents relied on by the service provider in contracting with ERISA covered plans.
- How the plan compensates the entity for providing services.
- Whether and how the service provider disclosed its fees.

Some contracts may limit disclosure of information to third parties. These limitations may require that the plan or service provider issue notice to the client and respond 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. 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

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.
- Specific entities, lines of business, or geographic areas covered.

It can be useful to prioritize documents that are of immediate interest to the investigator. This can streamline the process and potentially limit the scope of information requests by the DOL.

It is routine for the DOL to ask for additional documentation after the initial document request. These requests can be redundant and

frustrating for the subject of the investigation. While frustrating, these requests may provide useful clarify regarding the issues identified by the DOL during its investigation.

POINT OF CONTACT FOR INVESTIGATOR

A point of contact should also be established for the investigator. The contact typically is an in-house or outside lawyer serving as the conduit of all information exchanged with the DOL and coordinates the process. Maintaining one individual or a small team as a point of contact for the DOL:

- Avoids confusion.
- Unnecessary disruption.
- Provides a unified and organized message to the investigator.

INTERVIEW PROCESS

While the DOL has the authority to notice depositions, most DOL investigations involve voluntary interviews with persons with knowledge of information relevant to the investigation. The investigator should be asked about the topics that they intend to cover during the interview so that the most appropriate person can be produced for the interview. Otherwise, the DOL may request several interviews that are not productive to resolving the investigation. When the interview's focus is narrowed to a particular subject, it should be confirmed with the investigator that the investigator does not plan to raise other subjects with the interviewee during the interview itself.

Before beginning an interview, DOL investigators must identify themselves and show their credentials when asked (most do this as a matter of course). Investigators must read a preliminary statement to interviewees that if they discover information involving violations of laws other than ERISA, EBSA refers the matter to another relevant agency (including the DOJ). 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.

ENFORCEMENT MANUAL

The DOL investigation is typically professional and friendly during the interview. The DOL Enforcement Manual (Enforcement Manual) instructs investigators:

- To "conduct interviews in a courteous manner, free of personal prejudice or preconceived notions to the culpability of the interviewee, and without making any threats or promises whatsoever to elicit any information."
- Not to engage in arguments "as to the interpretations of the law, the facts of the case, or matters of procedure."

However, it is the investigator's job to find violations of ERISA. Therefore, interviewees should respond to the questions asked but be mindful of the DOL's objectives. The DOL trains investigators in interview techniques, such as how to:

- Develop and frame questions.
- Use different techniques to elicit information.

The Enforcement Manual also encourages investigators to:

- Begin investigations by employing a general to specific questioning strategy. The general questions are designed to develop the setting of an event before exploring the details.

- Employ "free narrative" questioning techniques, which are used to obtain a summary of what the interviewee knows or is willing to share about the subject matter.
- Begin with questions "not likely to cause hostility" when posing a series of questions designed to bring out descriptions of an event or incident.
- Remember that "almost every subject or interviewee possesses more information than he or she initially admits knowing."

PRESENCE OF COUNSEL

DOL investigators typically interview only one person at a time and are instructed to assure that only the interviewee is present during interviews. Counsel may and should attend the interview. According to the Enforcement Manual, investigators "should offer no object to the presence of an attorney representing the interviewee during the interview of a civil case witness or subject." Investigators are encouraged to end the interview if "the attorney seeks to take charge and control the scope and progress of the investigation."

REPORT OF INTERVIEW

DOL investigators usually take notes during an interview but the DOL forbids investigators from recording the interviews without consent of the interviewee or authorization via court order. Once the investigator has completed the interviews, the investigator uses notes from each interview to create a Report of Interview (ROI). The investigator keeps the ROI and the investigator's notes from the interview in the case file.

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. This phase of the investigation can last several months and during that time, the investigator may not be in contact with the party being investigated. This does not mean that the investigation has ended, but that the investigator is completing the investigator's report of investigation and potentially drafting a letter describing the DOL's findings.

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. The letter generally:

- Provides a description of the DOL's enforcement authority under ERISA.
- Identifies the facts gathered by the DOL during the investigation and the DOL's position on violations that may have occurred based on the DOL'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 DOL may furnish information to parties affected by investigation and notes that the target of the investigation remains subject to suit by private parties, even if the DOL takes no further action.
- Discusses the Secretary of Labor's rights and obligations regarding assessing civil penalties.

VOLUNTARY COMPLIANCE LETTER

- Receiving a VC Letter from the DOL can be particularly problematic for service providers. This is because many VC Letters state the DOL has concluded its investigation and determined that the service provider has violated ERISA. Many VC Letters are incorrect regarding the facts and law making these proclamations problematic. This can be an issue when responding to Requests for Proposal, which commonly ask whether a Federal agency has found the service provider in violation of ERISA.
- A response to a VC Letter is typically requested within ten days. It is often unrealistic to prepare a full response to the DOL's allegations within ten days. If more time is necessary to prepare a response, it is important to contact the investigator promptly to discuss any additional time that may be necessary to respond.
- For certain matters, EBSA does not seek voluntary compliance. Instead the agency refers those cases to the Solicitor of Labor or another appropriate entity that can and may threaten litigation to gain a settlement. Types of matters in which EBSA does not typically seek voluntary compliance, include:
 - A lengthy proposed correction of a violation.
 - Potential fraud or criminal misconduct.
 - Removal of a fiduciary.
 - Particularly novel or complex violations or violations of other laws.

While ultimate resolutions of an investigation vary, the DOL typically insists on the payment to the plan of losses with interest or lost opportunity cost and the drafting of policies and procedures to prevent the alleged violations of ERISA from occurring in the future.

The DOL may also insist on entering into a written settlement agreement. Importantly, the DOL may issue a press release regarding any settlement. The Enforcement Manual provides a brief description of the process used by the agency in issuing press releases. The DOL archives press releases on the DOL website. When entering into a settlement agreement, the DOL may impose civil penalties up to 20% of the settlement amount. This makes resolution using the voluntary compliance process appealing.

CLOSING LETTER

The DOL may issue a Closing Letter when any alleged violations in the investigation are de minimis or have been adequately corrected. The Closing Letter may note the potential violations, but also state that the DOL does not intend to take any further action. To the extent that EBSA identifies a prohibited transaction of \$20,000 or more, EBA is also required to provide the IRS with their findings and the IRS may choose to impose excise taxes, if applicable.

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