

# HR Insights

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## Handling a DOL Audit with Ease

At any given time, your organization may be selected for a U.S. Department of Labor (DOL) civil investigation (commonly known as an audit) to ensure that your employee benefit plans are in compliance. The Employee Retirement Income Security Act of 1974 (ERISA) establishes standards governing the operation of employee benefit plans and grants the DOL investigative authority.

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 Affordable Care Act (ACA), health plan audits are on the rise.

Depending on the complexity of your plan design, availability of documents, degree of cooperation between the DOL and your plan administrators, and the number of potential violations, an audit can take anywhere from several weeks to over a year.

### Typical Steps during a DOL Audit

The following steps often during the DOL audit process:

- Plan receives an initial document request via a letter from the regional or district office of the Employee Benefits Security Administration (EBSA), a division of the DOL.
  - The letter advises that an investigation is underway and requests documents to be provided by a specific time.
  - Often, EBSA inquiries are sent first to the plan service providers (third-party administrators, insurers, banks, trust companies, etc.) prior to contacting the plan sponsor. Therefore, you should establish a solid relationship with your service provider to ensure that they contact you in the event of an audit request.
  - Document requests can vary from only a few pages needed to volumes of documents, depending on the nature of the audit. EBSA may seek one or more of the following types of documents:
    - Insurance policies and riders
    - Service provider agreements
    - Summary plan descriptions
    - Summaries of material modifications
    - Form 5500s for the last two or three plan years
    - Plan financial statements
    - Trustee and corporate minutes
    - Summary annual reports
    - Participant records
    - Bonds
    - Open enrollment communications
    - ACA required notices
    - HIPAA portability notices and privacy and security documents
  - After receiving an initial request, you should respond promptly. It is in your best interest to contact the EBSA investigator and inquire about the purpose, scope and timing of the investigation while establishing a nice rapport.
  - You may want to request an extension. The DOL may grant an additional two to three weeks; this will give you more time to gather documents and consult an attorney.

- Select a representative from your company to serve as the contact person for the investigation. He or she will handle all communication, document requests and meetings with the EBSA investigator.
- Make a copy of all requested documents, rather than allowing direct access to the originals.
- Contact legal counsel for assistance with assessing the validity of any claims, reviewing documents before they are given to the investigator and sorting out any other legal issues. You may want to conduct an internal audit at this time to remedy any problems prior to the onsite investigation.
- Notify senior management that an investigation is underway and the potential ramifications.
- EBSA conducts an onsite investigation.
  - After receiving the initially requested documents, the EBSA investigator may also want to review more documents at your location. This may include, but is not limited to, employee booklets and forms, plan enrollment records, payroll records, evidence of electronic fund transfers, insurance company financial experience reports and investment records.
- EBSA investigator will interview multiple individuals to validate facts. Individuals should be cooperative and project confidence during interviews.
- EBSA identifies potential ERISA violations.
  - If the EBSA investigator identifies potential ERISA violations, the regional office will issue a Voluntary Compliance (VC) Notice Letter outlining the violations and allowing the plan sponsor a chance to rectify the problem. Typically, the investigator will first present these problems to you orally and will then submit the letter.
  - It is your obligation to investigate the validity of DOL's findings and determine if you agree with them. If you do not agree with these findings and will not take action to rectify the situation, you run the risk of a lawsuit from the DOL.
  - If you agree with the violations highlighted in the VC Notice Letter, take action immediately to fix the problem. If you fix a fiduciary breach before the issuance of a VC Notice Letter, you may save yourself from a 20 percent penalty required under ERISA.
  - If the violations concern the civil provisions of ERISA, EBSA will take action to correct all violations and restore plan losses. This may include paying back to the plan or participants to cover losses, paying penalty amounts and giving up profits.
  - If no violations are found by the EBSA investigator, EBSA will issue a closing letter explaining that it has finished the investigation, without further action.
- EBSA creates a settlement agreement.
  - You and the EBSA may create a settlement agreement after negotiating how you will voluntarily make corrections to rectify violations. The following actions may be detailed in this agreement: amount of funds to be credited, timing of each step to rectify problem, corrective actions and communications about the investigation.
- EBSA issues a closing letter following voluntary compliance.
  - After the VC Notice letter is issued and all problems have been rectified, the EBSA will send a closing letter explaining that compliance has been achieved.

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## DOL Audit Suggestions

Though this may appear to be a trying process, it does not need to be. Consider these best practices:

- Treat the investigator with the utmost respect and the investigation as a major priority.
- Consult with your legal counsel as soon as a document request arrives.
- Keep senior management apprised of the progress on the investigation.
- Obtain as much information about the investigation as possible from the EBSA investigator.
- Arrange a time to deliver documentation to the investigator that allows you enough time to gather all the requested documents, while also accommodating his or her schedule.
- Consult with your service providers when receiving a document request to ensure they will be involved in rectifying any noncompliance issues.
- Gather materials for an onsite investigation in an orderly fashion and have them ready for the investigator when he or she arrives.
- Have your legal counsel work with interviewees to familiarize them with the scope and purpose of the investigation.
- If your investigation yields a violation, learn as much about the violation as possible before the VC letter arrives. Discuss these violations with your legal counsel.
- If you determine that you will make changes to the alleged violations, have your legal counsel work with the DOL to ensure that there is an understanding of exactly what needs to be changed.

Generally it is advisable to cooperate with the DOL and resolve the matter as favorably and quickly as possible. You will save both internal time spent on the matter as well as legal fees.

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