

Pension Plan Fix-It Handbook

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Growing Number of DOL Audits Makes Preparation Critical

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Is it just a matter of time before your company's retirement plan is audited?

IRS and the U.S. Department of Labor have improved their data-mining techniques, which is enabling them to conduct more targeted audits. This column will focus on DOL audits and how plan sponsors can best prepare for them (see November 2013 column for information on IRS audits).

What DOL Is Auditing

Many DOL audits are now being conducted at a variety of employer-sponsored plans. Over the past few months, for example, my benefits consulting practice has participated in several such audits, spanning both health and welfare and 401(k) plans, and we have consulted on audits of insured health and welfare plans with fewer than 100 participants.

In addition, DOL's Office of the Chief Accountant recently contacted by form letter a sample of plan sponsors that filed retirement plan Forms 5500 annual reports but did not file a health-plan Form 5500. The OCA is also auditing independent accounting firms that perform ERISA financial audits, focusing primarily on the 2011 plan year and those firms that do not perform a significant volume of ERISA audits, according to a

September 2013 member alert from the American Institute of Certified Public Accountants' Employee Benefit Plan Audit Quality Center.

Why Do Plans Get Selected For a DOL Audit?

Primary reasons a plan is selected for audit include:

- a participant complaint;
- a Form 5500 issue; or
- random selection.

How an Audit Works

The DOL audit process generally begins with a **data request letter**. Do not hesitate to ask for more time to gather the information the agency seeks; DOL investigators are generally very understanding. It's possible that the auditor will ask for the information in electronic format.

Be prepared to wait (even a few months) before DOL contacts you regarding the submitted information; your plan is but one of many in the DOL investigator's caseload.

It is critical that you **respond to each of the data items requested**; incomplete information or irrelevant answers could raise warning signs to DOL that the plan sponsor doesn't really know what is going on with its plan. One example of this might be providing proof of fiduciary liability insurance in response to a request for proof of a fidelity bond.

In most cases, the next step will be an **on-site meeting** with the DOL investigator. Decide in advance who will attend; don't hesitate to involve external advisers such as your plan's attorney, accountant or other consultants. Your advisers can be present in the room or available by phone as needed. Don't be startled when the

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DOL investigator presents his or her identification and informs you that if a violation relevant to another federal agency (such as IRS) is discovered, the DOL investigator will notify the other agency.

Determine who will answer what question, for example, payroll-related queries should be answered by the person most familiar with the process. Questions regarding the administrative process should be handled by the person who serves as the primary service-provider contact. DOL investigators not only will ask questions about the information provided, they also will be assessing the level of plan knowledge of the responsible parties.

The more you are able to answer questions without hesitation and demonstrate knowledge of the plan and how it operates, the more the investigator's comfort level will rise. In turn, the greater the comfort level of the investigator, the smoother the audit should be.

A word of caution: **Always answer the questions honestly**; if there was a problem and you fixed it, chances are DOL will discover it. Be prepared to discuss how you found the problem, what you did to correct it and what you did to prevent it from happening again. In the

Tip Box

The following is an excerpt from a recent DOL audit request for a 401(k) plan. **Note:** We have excluded requests for basic plan documents, Forms 5500, etc. and highlighted items illustrating the volume of data requested.

- Statements showing date of remittance of contributions for plan years under review.
- Payroll deduction registers, summarized by pay period, for the period under review.
- Statements from the company that maintains the plan showing the date contributions were received for the period under review.
- All documents relating to communication to the plan, from the plan or concerning the plan.
- All documents relating to plan trustee meetings, administrative or other plan committee meetings or presentations.
- All documents relating to the Board of Directors meetings, administrative or other company meetings or presentation in which the plan was discussed.

case of late 401(k) contributions, for one, be prepared to provide your lost-interest calculations.

What Is DOL Looking For?

DOL is concerned with protecting the rights of retirement plan participants. In a nutshell, DOL wants to make sure that participants:

- are brought into the plan when first eligible;
- informed of their benefits rights;
- told where to get information; and
- are receiving information that accurately reflects the plan terms.

In the case of health benefits, DOL wants to ensure that participants:

- know when they are eligible to join the plan;
- understand what their benefits are;
- know how to file a claim; and
- know how to appeal a claim.

The investigator will carefully review insurance contracts, certificates of coverage and wrap plan documents to ensure consistency. You can expect that DOL will note some language that must be fine-tuned. DOL also is interested in COBRA procedures, as well as the various required health and welfare plan disclosures. Affordable Care Act provisions such as waiting periods, annual limits and grandfathering will be examined. The investigator will review the often-voluminous medical plan "booklet" provided to participants; it is not unusual for such self-insured plan documents to approach or exceed 100 pages. Make sure you read the document carefully and question your third-party administrator about anything not clear to you, in anticipation of DOL questioning you on anything in the booklet.

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In the case of retirement benefits, DOL's overarching focus listed above sounds simple but the detail needed to support basic questions in those areas is enormous.

DOL continues to focus on timely deposit of 401(k) contributions; if you have ever been late, the documentation you provide will show it, as mentioned previously, so be prepared to explain what you did to correct the problem.

DOL will ask for **participant communications**. In the case of a 401(k) plan, that can mean hundreds and thousands of pieces (depending on the number of plan participants). You should consider allowing DOL access to certain areas of your recordkeeper's portal; it is probably the most efficient way to handle such a request, and your recordkeeper should be familiar with such queries.

DOL will ask for investment committee meeting minutes and **question your understanding of fees charged for services**. As DOL becomes more familiar with the material elicited by recently mandated fee disclosures, this area of questioning will become more precise. You also should be prepared to answer questions about "ERISA accounts" in 401(k) plans, your handling of lost participants and uncashed checks sent to lost participants.

If you have a large hourly employee population, be prepared to answer questions on how hours are recorded.

Don't be surprised with questions relating to **independent contractor employee status determination**.

Cooperation Is Key

We strongly recommend that you **cooperate with your DOL investigator**. Always remember that his or her mission is to protect the plan participant by ensuring that the rules are followed. Plan sponsors generally want the same thing. Also keep in mind:

The DOL investigator may or may not tell you the reason for the audit. Be prepared for follow-up questions after the on-site visit; answer promptly even if your answer is "we must contact the service provider" (such as the plan's recordkeeper or insurance company). You may have to wait for a final letter closing the audit. There may be only a few people at a particular DOL office assigned to review investigators' findings. **You could wait six months to a year for closure.**

Other Sources of Information

Meanwhile, the IRS website provides a tremendous amount of information, including findings of recent IRS projects as well as the agency's areas of current and future focus. The DOL website also contains information about the agency's enforcement activities, as well as useful self-compliance tools. The *Self-Compliance Tool for Part 7 of ERISA: HIPAA and Other Health Care-Related Provisions* and *Self-Compliance Tool for Part 7 of ERISA: Affordable Care Act Provisions* are very useful tools for health and welfare plans. 🏠



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