EBSA Confidential: Understanding the Mystery of Retirement Plan Investigations

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At some point, every retirement and employee benefits plan sponsor is likely to receive a notice of investigation from the United States Department of Labor’s Employee Benefits Security Administration (EBSA). At Lockton, we are often asked by plan sponsors to assess their risk of being selected for investigation, or unfortunately for some, to assist them in navigating a current EBSA investigation. We have found that the investigative process is a mystery to many in the retirement plan and employee benefits community. This article will shed light on what gets a plan sponsor investigated, what it is likely to experience, and offer a few tips to ease the pain if you are selected.

Background

EBSA is granted authority under the Employee Retirement Income Security Act (ERISA) §504 and §506 to conduct civil and criminal investigations of employee benefit plans. An EBSA “investigation” may also be referred to as an “audit.” These terms are distinctions without a difference. The specific term used is based on the background of the EBSA enforcement official conducting the review. Historically, EBSA hired accountants, who were given...
the title “auditor” and conducted audits. In recent years, EBSA has hired a large number of attorneys who are given the title of “investigator,” and conduct investigations. Both the investigators and auditors of EBSA are trained in the same manner and given the same enforcement authority. From a practical standpoint, you would not see a noticeable difference in the scope or process of the review.

EBSA will conduct investigations on plans, plan sponsors, service providers, custodians, consultants, advisors, trustees and any other individual who it believes to be a fiduciary.

### All plans subject to Title I of ERISA may be subject to an EBSA investigation including:

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<tr>
<th>Retirement Plans</th>
<th>Welfare Benefit</th>
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<td>Single Employer</td>
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<td>Multiemployer</td>
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<td>Defined Benefit</td>
<td>Fully Insured</td>
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<td>Defined Contribution</td>
<td>Self-Insured</td>
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<td>Some 403(b), 457 plans, and nonqualified plans</td>
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EBSA investigations are not random. Yes, you read that correctly; no EBSA investigation is random. Other governmental agencies such as the IRS, may conduct random examinations by selecting a certain number of tax returns for review. However, EBSA investigations are triggered by an event or a discovery of specific information. The cause for most investigations is one of the following:

#### Annual Report “Red Flags”

The Annual Report Form 5500 is now submitted electronically to EBSA. Shortly after you submit your Annual Report, EBSA’s enforcement division will have access to its contents. EBSA uses a sophisticated software system that
can manipulate the data going as far back as a decade. Using this system, EBSA is able to target plans on a myriad of different issues. Some of the entries on the Annual Report that would be “red flags” for EBSA include:

- Excessive administrative expenses
- Certain types of plan investments including:
  - Partnership and joint venture interests
  - Real estate
  - Employer securities
  - Employer real property
  - Tangible personal property
  - Loans other than to participants
  - Any listing investments in the category of “other”
- Failure to transmit employee contributions
- Loans or leases in default
- Nonexempt party in interest transactions
- Fraud or dishonesty losses
- Hard to value assets
- Insufficient bonding

This is not an exhaustive list of issues that will trigger EBSA interest in a plan, but this list represents the primary issues that will consistently capture the attention of EBSA and may lead to investigation of your plan.

**Participant Complaints**

Every summary plan description is required to advise plan participants of their ERISA rights and their ability to contact EBSA should they have questions about those rights. When participants contact EBSA, they will speak with an EBSA representative. In 2010 alone, EBSA took nearly 377,000 participant phone calls in addition to letters and e-mails. These calls are answered by EBSA’s benefits advisors, who will attempt to answer the participant’s question, or if the circumstances warrant, refer their issue for potential investigation. As a matter of practice, EBSA will not acknowledge or comment on any participant complaint they receive, thus you would likely never know if this was the source of the investigation.

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Co-fiduciary Referrals

Many service providers are recognized as “co-fiduciaries” to the plans they service.

A co-fiduciary may be liable for another fiduciary’s breach under certain circumstances, including:

- Where a fiduciary knowingly participates in or conceals the breach of another fiduciary
- Where a fiduciary has enabled another fiduciary to commit a breach
- Where a fiduciary has knowledge of a breach by another fiduciary and does not make reasonable efforts to remedy the breach

As a result, there are circumstances in which the co-fiduciary wishes to avoid or mitigate its own potential liability for the breaches of others and will contact EBSA. As with participant complaints, EBSA will not comment on or acknowledge a co-fiduciary referral.

EBSA Enforcement Projects

EBSA seeks to focus its enforcement resources on areas that have the greatest impact on the protection of plan assets and participants' benefits. Each fiscal year, EBSA will identify certain national enforcement projects in which field offices are to place particular investigative emphasis. Past retirement-focused projects have emphasized:

- Settlor fees
- Delinquent employee contributions (civil and criminal)
- Plans affected by bankruptcy
- Abandoned plans
- Prevailing wage-funded plans
- Apprenticeship plans
- Consultant/advisors
- Nonfilers

The EBSA Investigative Process

Most EBSA investigations begin with an appointment letter which states its legal authority to conduct the investigation. The letter will announce the date and location of the investigation, and will include a list of documents that should be made available to the investigator. Failure to comply with the requested appointment and document production may result in the plan sponsor’s receipt of a federal subpoena. The document production will normally request
information for the previous three years, but EBSA has the authority to request information for up to the prior six years. Depending on the type of plan, most appointment letters will request copies of the:

- Plan document and amendment
- Summary plan description
- Signed annual reports and schedules with auditor’s reports
- Investment policy statement
- IRS determination letter
- Fidelity bond
- Fiduciary liability
- Service provider contracts
- Lists of plan trustees/administrators

Plan sponsors should only provide EBSA with photocopies of these documents, document what has been shared with EBSA, and request a receipt for the documents provided. It is best to have all of the documents ready and organized when the investigator arrives in order to minimize the amount of time they will need to be at your place of business. It is also advisable to tab or index the documents to correspond to the numbers on the investigators appointment letter. If your business is unable to accommodate the investigation, you are permitted to request that the document review be conducted at the offices of one of your service providers.

Many plan sponsors ask if ERISA counsel should be present during the investigation. This is a question to be answered on your particular circumstances, but in most instances, ERISA counsel is not necessary during the on-site investigation process. In reality, not much will occur during the early stages of the investigation, as the investigator is simply looking to become familiar with the documents and how your plan operates. At this stage, service providers can assist with the document production and answering questions. However, if you are aware of significant violations prior to the investigation, then it may be beneficial to have ERISA counsel involved early.

Typically, EBSA will send one person on-site to conduct the investigation; in some cases, two will be present. EBSA has a relatively small enforcement staff and will normally only send two investigators in a training situation. However this is not always the case, and may be an indication of a criminal investigation. As a matter of practice, when EBSA conducts a criminal investigation, it will send two investigators to conduct an interview. EBSA does not inform plan officials as to the source of its investigations, but its Enforcement Manual requires that the investigator be forthright in stating that EBSA is conducting a criminal investigation. However, you should not wait for a formal announcement to determine if you are under a criminal investigation. If two investigators arrive, you should immediately ask if the case is criminal. If you get an affirmative response, immediately stop the investigation and contact an attorney.

The on-site EBSA investigation may take from one day to two weeks depending on its size and complexity. The investigation may include several interviews, including an opening interview with plan officials,
fiduciary interviews and a closing interview. You have the right to have counsel present, and you have the right to decline to answer any question asked by the investigator. You should be prepared to make available all parties who are fiduciaries and those employees who are involved in the day-to-day administration of the plan. In addition, your service providers should be aware of the investigation and reachable throughout the on-site review.

During the interview process, you should be prepared to provide detailed answers. The interview process can be exhausting, depending on the size and scope of the investigation. If you are unsure of the answer to a question, it is always best to refrain from answering until you have enough information to answer. Most interviews will focus on the following areas:

- Corporate governance/plan administration
- Reporting and disclosure
- Bonding
- Funding
- Investment selection/monitoring/retention/fees
- Service provider selection/monitoring
- Participant loans
- Remittance of employee contributions

If EBSA discovers a violation during the investigation, it may share the findings in a closing conference. More than likely, the investigator will leave no indication of their findings and will issue a “Voluntary Compliance Letter” at a later date. The time frame for when you can expect this letter can range from weeks to years, depending on the workload of the investigator and the complexity of the issues involved. When the letter does arrive, you will typically have ten business days to acknowledge your receipt and what action you propose to take with respect to the specific matters discussed. Depending on EBSA’s findings, you may request an extension of the time to reply in order to properly prepare a response or consult ERISA counsel. If you do not wish to negotiate the findings of the letter, you should contact the EBSA to clearly understand what steps you should take to make the corrections and what documentation they will need to see. If you ignore EBSA’s letter, you should prepare for litigation and penalties.

**Best Practices**

Plan sponsors should be proactive and diligent in their fiduciary processes. A positive outcome from an EBSA investigation will result from a documented process that demonstrates consistent review of your plan. An investigation will no doubt be a great test of your fiduciary and administrative processes, but it can be an opportunity to test yourself as a fiduciary. The best advice we can give you is to “investigate” your plan regularly with the scrutiny you can expect from EBSA. It is in your best interest, it is in the best interest of your participants, and will make compliance with the standards of ERISA much easier.