Pension Plan Fix-It Handbook

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Effective Record Retention May Save Plan Sponsors From Costly Penalties

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Document, document, document; you have read it many times in this column. The necessity to document applies not only to policies and procedures, but also to the information necessary to calculate a benefit.

A recent decision by the 1st U.S. Circuit Court of Appeals, *Central Pension Fund of Int'l Union of Operating Engineers v Ray Haluch Gravel Co.* No. 11-1944 (1st Cir. Sept. 12, 2012), highlights the importance of maintaining plan records.

Haluch Gravel Co. is a landscape supply company that entered into collective bargaining agreements with the International Union of Operating Engineers, Local 98. The company contributed to various benefit funds primarily on behalf of one employee. In 2007, the union audited the company's books and discovered that the company should have contributed for other employees performing work covered under the collective bargaining agreements. The funds sued for unpaid contributions and attorneys' fees.

The 1st Circuit found in favor of the funds for work performed by only one other employee and subsequently for the attorneys' fees. The funds appealed on the grounds that there should have been additional payments for other unidentified employees. Upon review, the court agreed with the funds.

During testimony, the company acknowledged the work the other employee had performed, as well as that of other employees who continued to perform similar duties after he left the company. The company further indicated that there were no records of hours worked or equipment other employees used.

Here is where the case gets interesting, especially for plan sponsors. Generally, the burden of proof is on the plaintiff. There is a concept known as burden-shifting in which the burden of proof is shifted from one party to another.

In the appeal, the funds contended that the burden was on Haluch Gravel to show which hours worked were covered under the collective bargaining agreement and which were not. Noting ERISA Section 209, which requires that every employer maintain plan records for each employee sufficient to determine benefits due, together with the company's statement that there were no records, the court ruled for the plaintiffs. In this case, the court presumed that the other employees worked the same hours as the employee in question and therefore the company must remit the required contributions for them.

This burden-shifting also appeared in other court cases[1] where the burden of proof was placed upon the defendant (here, Haluch Gravel) to produce evidence of the precise amount of covered work performed by the plaintiffs.

What Records Should You Maintain and for How Long?

Let's look at some basic rules.

Code Section 6001 provides the general rule for recordkeeping for federal tax purposes. The IRS, U.S. Department of Labor and Pension Benefit Guaranty Corp. also have record retention rules (see accompanying boxes on page 3 for more detail).

[1]https://bulk.resource.org/courts.gov/c/F2/839/839.F2d.1333.85-5821.85-5812.85-5803.html
http://www.ipsn.org/court_cases/michigan.htm

See *Andersen,* p. 2

Andersen (continued from p. 1)

In addition, the IRS website indicates that records for retirement plans should be kept until all benefits have been paid, the trust has been dissolved and sufficient time has passed that the plan will not be the subject of an audit.

Develop a Record Retention Policy

It is prudent to develop an employee benefit record retention policy for all your benefit plans, not just retirement. However, it might be helpful to think in the context of the major ERISA requirements when focusing on retirement plans.

The following list is meant to be illustrative and not all-inclusive. You may want to use the IRS guide to documents that will be requested during an audit as a starting point.

At a minimum, you should maintain the following.

Plan qualification records

- plan documents and all amendments;
- qualification letter;
- summary plan descriptions and summary of material modifications; and
- specific qualification demonstrations:
  - coverage;
  - nondiscrimination;
  - HCE determinations;
  - 415 limits;
  - vesting; and
  - service records

Participant records

- critical dates (hire, termination, rehire, retirement, etc.);
- hours worked or years of service;
- distribution amounts and dates;
- supporting documentation for distributions;
- spousal consents;
- 1099s; and
- W-4Ps

Plan reporting and disclosure requirements

- Form 5500 and related schedules;
- PBGC forms; and
- summary plan descriptions and summary of material modifications

Other documentation

- actuarial valuations and
- accountants' reports

The amount of paper is staggering, and many employers now maintain records electronically. ¶850 of the *Pension Plan Fix-It Handbook* provides a discussion regarding paperless reporting and disclosure as well as record retention.

Why Is This So Important?

Let's look at some practical applications that highlight the importance of complete plan records.

Form 5500 requires that terminated participants with deferred vested benefits be reported on Form 8955-SSA. This information is sent to the U.S. Social Security Administration. When an individual applies for Social Security benefits, the Social Security Administration will remind the employee of a benefit payable from a former employer.

It is not unusual for employers to forget to remove a terminated deferred vested participant who has received a benefit on a subsequently filed Form 8955-SSA. Should a former employee approach the employer for benefits, the employer must provide proof of the distribution or face possibly being sued for duplicative benefit payments.

Over the years, many companies have merged, leaving human resources and benefits personnel with legacy records on index cards or other paper documentation stored in boxes that are moved from filing space to filing space. It is imperative that your record retention policy address how to handle legacy records (for example, digitize them, find an environmentally safe filing space, etc.). As the court cases noted above show, the burden of verifying whether an individual worked for your company and is entitled to a benefit could very easily fall to the plan sponsor.

Many plan sponsors outsource administration of qualified plans. Over time, the service provider becomes the company historian and keeper of many of the participant plan records. As you know, a plan sponsor cannot, however, outsource its fiduciary responsibility for administering the plan in accordance with its terms. It is imperative that the plan sponsors know what records are maintained by the service provider and that any service

See *Andersen,* p. 3

Andersen **(continued from p. 2)**

contract includes a provision for the return of the accumulated data, should the service provider change.

Next Steps

1) Determine if your company's record retention policies apply to your employee benefit programs.
2) If yes, determine if your company's record retention policies regarding employee benefits are in compliance with ERISA and related regulatory requirements.
3) Inventory your plans and ensure that if you are subject to government audit, you will be able to provide the necessary documents.
4) As you review your service provider contracts for fees, keep an eye out for what happens to plan records upon termination of the contract.

ERISA Section 107 Retention of Records

Every person subject to a requirement to file any report or to certify any information therefore under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) of this shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 104(a)(2) or (3).

ERISA Section 209 Recordkeeping and Reporting Requirements

(a) (1) Except as provided by paragraph (2) every employer shall, in accordance with such regulations as the [DOL] Secretary may prescribe, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who —

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service ERISA 203(b)(3)(A).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be in the same form, and contain the same information, as periodic benefit statements under section ERISA 105(a).

(2) If more than one employer adopts a plan, each such employer shall furnish to the plan administrator the information necessary for the administrator to maintain the records, and make the reports, required by paragraph (1). Such administrator shall maintain the records, and make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a) of this section, to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.