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This article takes an ERISA health and welfare plan step by step through a DOL audit, from the initial notification and request for documents through the investigative process.

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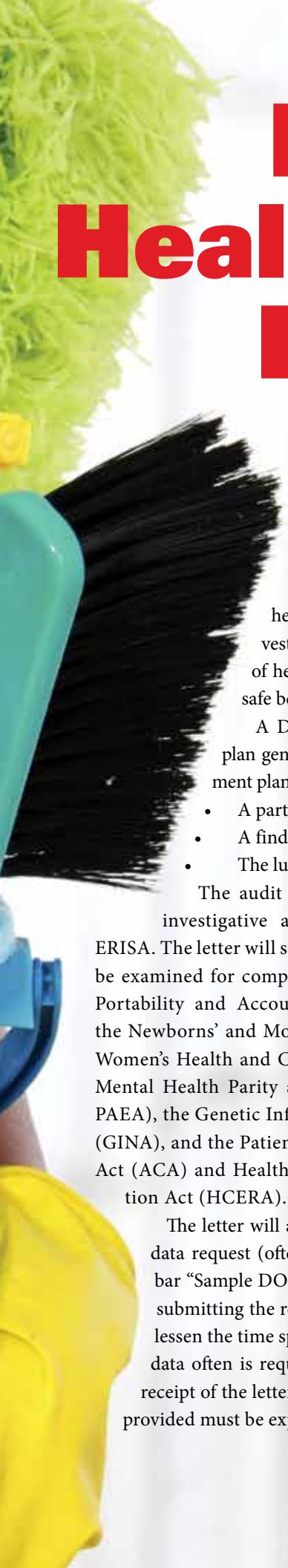
Preparing for a Health and Welfare Plan DOL Audit



The Department of Labor (DOL) is actively auditing Employee Retirement Income Security Act (ERISA) health and welfare plans. As DOL investigators gain more understanding of health care reform compliance, it is a safe bet the audits will increase.

A DOL audit for a health and welfare plan generally begins the same way a retirement plan audit begins—because of:

- A participant complaint
- A finding on the Form 5500
- The luck of the draw.

The audit begins with a letter citing DOL investigative authority under Section 504 of ERISA. The letter will state that the selected plan will also be examined for compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Newborns' and Mothers' Health Protection Act, the Women's Health and Cancer Rights Act (WHCRA), the Mental Health Parity and Addiction Equity Act (MHPAEA), the Genetic Information Nondiscrimination Act (GINA), and the Patient Protection and Affordable Care Act (ACA) and Health Care and Education Reconciliation Act (HCERA).

The letter will ask for documents as outlined in a data request (often three pages long—see the sidebar "Sample DOL Data Request") and indicate that submitting the requested documents to DOL could lessen the time spent on site by the investigator. The data often is requested within ten business days of receipt of the letter. An item that is requested but not provided must be explained.

What Should You Do First?

Ask for More Time

The first thing you should do is to acknowledge receipt of the letter and ask for more time. You will need it. DOL generally will grant an extension.

Identify Key Players

It is important to identify key players, for they most likely will have many of the requested data items. Typical key players include:

- Broker for insured coverages
- Consultant
- Counsel
- Third-party administrator (TPA)
- Payroll
- Human resources
- Finance.

Review the Data Request and Identify Sources of Information

Determine who has overall responsibility for responding to the audit. Identify who will provide each data item. Confirm that the party you identified does indeed have the information. Express the time-sensitive nature of the request and get a commitment regarding a delivery date for the requested item.

Identify a point person whose job it is to follow up with the data sources and assemble the package for DOL.

Think about whom you will ask to review the data before it is sent to DOL.

Assembling the DOL Package

Interactions with DOL tend to be more successful when the package is provided in such a way that it makes the audit

as easy as possible for the investigator. Keep in mind that your plan is not the only plan the investigator is auditing. Organizing the data in the order it is requested and using the same headings as the data request will go a long way to ensure a smooth audit process. Use tabs for easy reference. Offer to send the package electronically as well as in paper format. In fact, some investigators will request electronic submission.

Reviewing the DOL Package

The package should be reviewed before submission to DOL. It is best to have someone familiar with DOL audits help you. Outside counsel or your consultant are prime candidates.

Anticipate Questions

In the course of gathering the data, you may find that you have questions. Rest assured if you have questions regarding the material, so will the DOL investigator. Make sure you know the answers.

The DOL audit is a combination of art and science. The science part is the review of the requested material. The art is the questioning technique used by the investigator. The investigator will assess if the plan sponsor really knows what is going on with the plan. If the data package is sloppy or if the person answering the questions is unsure or uncooperative, chances are the investigation will take more time and might even extend to other benefits (e.g., retirement plans). Conversely, it is not unusual to discover that DOL investigations of late 401(k) contributions often opened the door to investigations of health and welfare plans.

It is important to avoid the "deer in the headlights" look when the DOL investigator asks questions. Identifying in advance who will answer what question will go a long way in demonstrating knowledge of the plan as well as knowledge of the roles of the plan's advisors. An advance meeting of the team that will meet with DOL is strongly recommended. An experienced consultant or outside counsel or both will be very helpful in this regard.

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The Data Request

There may be slight variations in data requests depending on the location of the DOL office, e.g., East Coast versus West Coast. However, many items are exactly the same. See the sidebar "Sample DOL Data Request" for a sample data request from a recent audit.

Keep in mind the investigator questions will vary based on the experience of the investigator together with the completeness of the data provided in response to the data request.

Governing Documents

You'll need to provide numerous documents to satisfy the data request, including plan documents, summary plan descriptions and insurance contracts. One data request went so far as to describe documents or instruments governing the plan to include any document that:

- Provides for one or more entities with any authority to control or manage any aspect of the operation or administration of the plan
- Provides any procedure for carrying a funding policy for the plan
- Describes any procedure under the plan for the allocation of plan responsibilities.

For most plans, a wrap plan document contains this information.

There could be a line item in the data request asking for every document related to amendments and distribution of same to participants and beneficiaries.

Planning point: *Gather all plan-related documents including policies, certificates, TPA contracts for administrative services such as claims processing, ERISA plan documents, amendments, summary*

of material modifications and summary plan descriptions. You may already have these documents in one file if you have a wrap plan, but it is wise to check.

HIPAA

As you can see from the sample data request in the sidebar "Sample DOL Data Request," DOL will ask for various logs and notices. It is important to keep in mind that DOL may not be investigating the current year. While many of the items related to preexisting conditions may not be currently applicable, they might be applicable for the year under audit. The insurance company or TPA typically provides this information. Do not throw anything out!

Planning point: *DOL has a compliance tool called the Health Benefits Advisor available at www.dol.gov/elaws/ebsa/health/employer/index.asp. Using this tool is prudent, whether or not you have been contacted by DOL. It covers:*

- *Consolidated Omnibus Budget Reconciliation Act (COBRA)*
- *HIPAA*
- *MHPAEA and Mental Health Parity Act (MHPA)*
- *Newborns' and Mothers' Health Protection Act*
- *WHCRA*
- *GINA*
- *Michelle's Law*

Claims Appeals Process

DOL's primary focus is protecting participant rights. As a result the investigator is very interested in the claims appeals process. Expect a careful review of the governing documents for compliance with the claims appeals rules as well as review of the claims appeals process provided to participants.

Planning point: *Plan sponsors with insured plans should carefully review the certificate language versus the policy language regarding claims appeals.*

Plan Limits

If your plan limits coverage in any way, expect that DOL will ask if the limits have ever been applied. If they have not been applied, expect that DOL will ask for proof. For example, if a plan recommends prenotification for certain nonnetwork benefits, DOL might ask if benefits have ever been denied because the participant did not prenotify the insurance company. Your insurance company or claims adjudicator is the source for this information.

When Requested Data Doesn't Apply

Don't be afraid to say "not applicable" but be prepared to explain the reason.

Many of the early DOL data requests for health and welfare plans were modeled after the retirement plan data request. As you assemble the package, include a tab for the inapplicable item(s) and explain why it does not apply. We are pleased to note that retirement plan data elements are becoming less frequent.

Data requested that is often not applicable for health plans includes:

- *Fidelity bond*—Many plan sponsors will provide a copy of the fiduciary liability insurance policy, which is not the same as a fidelity bond. A fidelity bond is required when there are "plan assets"; the majority of health and welfare plans, unless they are funded with a trust, do not have plan assets. This is one area where the investigator can assess the plan sponsor's level of knowledge.
- *Plan financial statements*—Unless the health plan is funded through a trust, there will be no plan financial statements. You will have financial statements if your plan is required to attach an Independent Qualified Public Accountant statement to your Form 5500, e.g., if your plan is considered "funded."

Notices

DOL will ask for copies of the required notices and proof of distribution to participants and beneficiaries. If the notices were distributed electronically, be prepared to explain how you satisfied the DOL safe harbor for electronic distribution.

Planning point: *Conduct an annual self-audit. As part of the self-audit, develop a list of the required notices. Identify who is responsible for distribution and verification that the notices were distributed. Inquire as to the delivery method, e.g., mail, electronic, etc.*

ACA

Recent audits have asked about grandfathered status of the plan. If your plan is grandfathered, expect to provide the investigator with a copy of the grandfather statement. It is uncertain how long DOL will ask for this information. Keep

takeaways >>

- DOL gives plan sponsors ten days to provide documents it requests but generally will grant a plan sponsor's request for an extension.
- A plan sponsor should identify persons most likely to have information DOL is requesting and answer questions the investigator will ask.
- The investigator is trying to establish that the plan sponsor thoroughly understands the plan.
- Interactions with DOL are smoother when information is provided in a way that it makes the audit as easy as possible for the investigator.
- Expect a careful review of the governing documents for compliance with claims appeals rules as well as review of the claims appeals process provided to participants.
- Ask the plan's broker, consultant, TPA and/or counsel to attend the on-site meeting with the investigator or be available to join via conference call.

<< bio

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in mind that if you claim grandfathered status you will be asked for a copy of the plan as in effect on March 23, 2010 and proof the plan has retained its grandfathered status (e.g., documentation relating to cost-sharing increases, employer contributions, etc.). Once again, don't discard the proof!

The Investigative Process

The DOL investigator will come on site and ask general questions regarding the experience of the people responsible for plan oversight. The investigator will gauge how well the people responsible for the plan know the plan's provisions and administrative procedures. As noted previously, planning for the meeting with the DOL investigator is imperative. Do not hesitate to ask your broker, consultant, TPA and/or counsel to attend the meeting or be available to join via conference call during the on-site visit.

Our recent experience is that the on-site visit usually lasts three to four hours. The investigator will return to the DOL office, consolidate the information gathered during the investigation with the information previously submitted and prepare a report for review by his or her supervisor. Depending on the caseload, you can expect to wait a few months before you hear anything. Often you will be asked for further clarification on certain items that may require you to contact your insurance company or TPA.

Remember that your plan is but one plan in the stack of cases the particular DOL office is investigating.

It is quite possible that from start to finish, your review will span 12 months or longer. You should receive a letter indicating DOL's findings.

Conclusion

Plan sponsors have a fiduciary responsibility to ensure that a plan is administered in accordance with its terms. A plan sponsor cannot outsource its fiduciary responsibility. To the extent that certain functions are outsourced, the plan sponsor retains the obligation to monitor the service provider.

If you are selected for a DOL audit, try to find out what triggered the audit. It is possible DOL will not tell you. If the trigger was a participant complaint, take steps to ensure that any future complaints are handled appropriately or avoided. If the trigger was a finding on Form 5500, you may need to correct the Form 5500 in question. If the audit is the result of luck of the draw, take comfort in the fact that the trigger was neither a complaint nor a mistake.

Consider periodic self-audits as a risk mitigation technique. It is better that the plan sponsor discovers an issue before DOL gets involved.

Sample DOL Data Request

1. Plan document
2. Trust agreement
3. Summary Plan Description, including any changes in plan benefits and entitlement to benefits
4. Form 5500 Annual Return/Report of Employee Benefit Plan for the past three plan years, together with any attachments required to be attached, including accountant's opinion, financial statements and notes to the financial statements
5. Summary Annual Report for the past three years
6. All documents relating to any fidelity bond policy (i.e., declaration page and loss payover rider identifying the plan as a named insured and specifying the amount of coverage and name of surety company) if the plan holds assets in trust
7. All contracts with insurance companies for the provision of health benefits
8. If self-insured, all contracts for claims processing and administrative services
9. Documents that describe the responsibilities of both the employer and employees with respect to the payment of the costs associated with the purchase and maintenance of health and welfare benefits
10. In accordance with the Health Insurance Portability and Accountability Act of 1996, please provide the following records:
    a. A copy of plan's rules for eligibility to enroll under the terms of the plan (including continued eligibility)
    b. A sample of the certification provided to those employees who have lost health care coverage since June 1, 2003 or to be provided to those who may lose health care coverage under this plan in the future, which certifies creditable coverage earned under this plan
    c. A copy of the record or log of all Certificates of Creditable Coverage for individuals who lost coverage under the plan or requested certificates
    d. A copy of the written procedure for individuals to request and receive certificates
    e. A sample general notice of preexisting condition, informing individuals of the exclusion period, the terms of the exclusion period and the right of individuals to demonstrate creditable coverage (and any applicable waiting or affiliation periods) to reduce the preexisting condition exclusion period or proof that the plan does not impose a preexisting condition exclusion
    f. Copies of individual notices of preexisting condition exclusion issued to certain individuals per the regulations (including any lists or logs an administrator may keep of issued notices) or proof that the plan does not impose a preexisting condition exclusion
    g. A copy of the necessary criteria for an individual without a certificate of creditable coverage to demonstrate creditable coverage by alternative means
    h. Records of claims denied due to the imposition of the preexisting condition exclusion (as well as the plan's determination and reconsideration of creditable coverage, if applicable) or proof that the plan does not impose a preexisting condition exclusion
    i. A copy of the written procedures that provide special enrollment rights to individuals who lose other coverage and to individuals who acquire a new dependent, if they request enrollment within 30 days of the loss of coverage, marriage, birth, adoption or placement for adoption, including any lists or logs an administrator may keep of issued notices
    j. A copy of the written appeal procedures established by the plan.
11. A copy of the plan's rules regarding coverage of medical/surgical and mental health benefits, including information as to any aggregate lifetime dollar limits and annual dollar limits
12. The plan's Newborns' Act notice (this should appear in the plan's SPD), including lists or logs of notices an administrator may keep of issued notices
13. A copy of the plan's rules regarding preauthorization for a hospital length of stay in connection with childbirth
14. A sample of the written description of benefits mandated by the Women's Health and Cancer Rights Act (WHCRA) required to be provided to plan participants by January 1, 1999
15. A sample of the written description of benefits mandated by WHCRA required to be provided to participants and beneficiaries upon enrollment.