

AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW  
EMPLOYEE BENEFITS COMMITTEE  
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# GOVERNMENT INVESTIGATIONS & AUDITS OF EMPLOYEE BENEFITS PLANS

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# TOPICS

- Investigations And Audits From Government's Perspective
- Recent Trends And Hot Topics In Investigations And Audits
- Process To Prepare For And Navigate Investigation Or Audit
- Overview Of Corrective Actions And Settlement Agreement Process
- Your Experience?

# FY 2019 AGENCY RESULTS

- **\$2.57 Billion in money for plans, participants and beneficiaries**
  - \$2B from Enforcement
  - \$510M Informal Complaints
  - \$33.2 Abandoned Plans & \$14.6 VFCP
- **1,146 Civil Investigations closed**
  - 67% Closed with Monetary Results or other Corrective Action
  - Only 89 referred for litigation
- **275 Criminal Investigations Closed**
  - 80 Guilty Pleas or Convictions
- **166,627 Inquires**
  - 501 resulting investigations
- **20,088 Delinquent Form 5500s Received**

[www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/fact-sheets/ebbsa-monetary-results.pdf](http://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/fact-sheets/ebbsa-monetary-results.pdf)

# EBSA Enforcement Strategy

- Strategic Enforcement Plan (STEP)
  - Describes basic enforcement strategy
  - Last published in 2000
  - [www.federalregister.gov/documents/2000/04/06/00-8504/pension-and-welfare-benefits-administration-strategic-enforcement-plan](http://www.federalregister.gov/documents/2000/04/06/00-8504/pension-and-welfare-benefits-administration-strategic-enforcement-plan)
- Program Operating Plan (POP Guidance)
  - Changes annually
  - Each Regional Office creates its own POP
- National Enforcement Priorities
  - Major Cases & EE Contributions

# National Enforcement Projects

- Protecting Benefit Distribution
  - Vested & Terminated DB Plans, Distressed Sponsors, Abandoned Plans
- ESOPs
- Plan Investment Conflicts
- Health Enforcement Initiatives
  - Mental Health Parity
  - ACA Compliance
  - Provider Self Dealing regarding Fees
  - MEWAs
- Criminal Project
- VFCP & Abandoned Plans

# Sources of Investigations

- Participant complaints
- Form 5500 Reviews
- Referrals from other agencies
- Media
- Other

# Types of Investigations

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- **Civil**

Plan

Service Provider

- **Criminal**

Plan

Service Provider

Employer

Individual

# Recent Trends And Hot Topics In Government Investigations And Audits



# Protecting Benefits – DB Plans

## MISSING and UNPAID Participants on Form 5500

- Must Disclose Participants Who Have Not Timely Received Benefits (Such As Age 70 ½)
- Missing Participants Or Beneficiaries After ***Reasonable Efforts . . . .*** " NOT Reported

## ***WHAT DOES DOL VIEW AS REASONABLE EFFORTS?***

- DOL FAB No. 2014-01 - Minimum Steps to Locate Participant:
  - Send Notice Using Certified Mail
  - Check Records Of Employer Or Any Related Plans Of Employer
  - Send Inquiry To Designated Beneficiary Of Missing Participant
  - Use Free Electronic Search Tools
- IRS October, 2017 Guidance To Auditors On RMD And Diligent Efforts In Finding Participant:
  - Search Plans, Sponsor, Publicly Available Records, Directories For Alternative Contact Info;
  - Use Commercial Locator Service, Credit Agency Or Proprietary Internet Search Tools;
  - Certified Mail To Last Known Address and All Other Appropriate Means Including Email And Cell.

# Breach - Missing Participants

## **DOL View of Duty:**

- Fiduciary Breach for Failure to Maintain Current Address, Actively Locate Lost Participants and Spouses

## **DOL Focuses On Whether Plan Has Process To:**

- Keep Active Records Up-To-Date – How, When
- Notify Terminated Vested Of Benefit At Termination
- Notify Terminated Vested Of Benefit At NRA (NOT REQUIRED)
- Notify Participants At Age 70 ½ - Required Beginning Date Rules
- Locating Spouses/Beneficiaries For Missing Participants
- How Follow Up If Not Found In First Search?
- Special Issues For DC Plans – Able To Make Forced Distributions?

# What To DO Before DOL Audit – Missing Participants:

- Written Procedures For Annual Review Of “Missing” Participants
- Separate Procedures For Age 70 ½ Process
- Mass Mailing Process
- Retain Third-Party Search Services
- Certified Mail Process/When Used?
- Document Everything – Not Just By Process, But By Person

# Trustee Expenses

- DOL Reviews Specific Expenses & Level Of Documentation
- Comparative Info On Alternate Choices
  - Meeting Locations, Airfare, Meals, Hotels, Etc.
- Process to Monitor & Oversee Administration Expense Policy
- Trustee Role in Oversight – Approval vs. Ratification

# Trustee Expenses

- **Airfare Standards for Reimbursement**
- **Hotel Rooms**
- **Car Rental/Usage Meals**
- **Alcohol**
- **Meeting Location** – Local, Regional, National Plans
- **Minimum For Receipts** - 1¢ vs. IRS Business Standard

# Investment Issues

## DOL focus on:

- Due diligence conducted for investments and any conflicts of interest
- Trustee monitoring investments
- All meeting minutes related to discussions about Plan's investments
- Opinions from consultants regarding Plan's investments
- Valuation at purchase including, investment appraisals
- Alternative investments (DOL includes collective investment funds, pooled separate accounts, stable value, private equity, hedge funds, REITs and HFOF) and returns, fees, history, strategies and audited financial statements
- Hard to value assets and how valued, including independent valuation
- Fees – how measured, monitored, benchmarked and ongoing duties to benchmark

# Mental Health Parity

- Mental Health Parity and Addiction Equity Act of 2008
- No Requirement To Cover Mental Health (MH) Benefits Or Substance Use Disorder (SUD) Treatment
- BUT If Cover, Must Offer PARITY Vs. Medical Benefit
- What Does Parity Mean?
  - PARITY Compares MH/SUD Benefits to Medical by Classification
  - Does Plan offer MH/SUD benefits in every classification as medical benefits provided?
  - Does Plan have annual/lifetime limits for MH/SUD benefits?
  - Does Plan impose different financial requirements – example: 20% Co-insurance for medical, 30% for MH/SUD?
  - Does Plan impose different NQTL requirements?
    - Example: pre-authorization for all MH/SUD but only for medical in-patient?
    - Example: Higher standard of research for experimental MH/SUD than for medical

# To Do Before Audit - Health Parity

## What To Do Before DOL Audits Your Fund:

- Review DOL Health Plan Self-Compliance Check List For MHP  
<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide-appendix-a-mhpaea.pdf>
- Consultant & Counsel Review SPD For Issues That May Need Action
- Review Schedule Of Benefits And Summary Of Benefits & Coverages For Differences In Coverage Between Mental Health and Medical/Surgical
- Prepare To Address Non-Quantitative Treatment Limitations (NQTLs)
- Common Issues:
  - Additional Precertification For Inpatient Substance Abuse Coverage Vs. Medical Inpatient
  - Autism Treatment/Leave of Medical Acceptance
  - Exclusion Of Out-Network Treatment
  - Different Treatment Visits/Limits
  - Limit On Number Of In-Patient Treatments Per Year



# Recent ACA Issues

- For grandfathered plans, verify status (plan on 3/23/10, cost sharing, ER/EE contribution rates) and notice of grandfathered status
- If rescinded coverage, list of participants/dependents rescinded, reasons and notice of rescission
- Plan provisions regarding lifetime and annual limits
- Notice of enrollment opportunities for individuals who previously lost coverage due to lifetime limit
- Summary of Benefits and Coverage (SBC) and any 60-day advance notice of midyear material change to SBC
- For non-grandfathered plans, notice of patient protections and selection of providers
- For non-grandfathered plans, information on claims and appeals procedures, notices, agreements with any IRO or TPA providing external review (available upon request to participant)
- Notice describing enrollment opportunities for dependent children up to age 26

# To Do Before Audit - ACA

- Review SPD For Issues that may need discussion and action
- Topics for focus:
  - Co-pay/Deductible for preventive care visits
  - No retroactive removal of benefits
  - COBRA benefits options
  - Annual and Lifetime Limits
  - Timing of SBC Changes (60 days)
  - Practice on Coverage Rescission
  - Coverage of Preventive Services – Updated Each Year
- YOUR EXPERIENCE?
- 49 Questions On DOL's Self-Compliance Tool For ACA (<https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide-appendix-a.pdf>)

# Process To Prepare For And Navigate Government Investigation Or Audit

# Process To Prepare For Government Investigation/Audit

- DOL/IRS usually initiate audit with letter to Fund with tight deadline for response
- Alert trustees when letter arrives
- Typically covers several years PLUS years during which audit continues
- Prompt notice to fiduciary insurance carrier
- Document request often voluminous and requires significant resources
- Fund Counsel usually point of contact with DOL - - avoid Fund Office or TPA being point of contact
- Counsel should review all documents before transmittal to DOL/Be Transmitter

# Preparing Government Investigation/Audit

- Overall process for Administrator and Trustee review and approval of expenses
- Procedures and policies in place and followed
- Reasonableness of provider/manager fees and method to benchmark
- Timely payment of pension benefits and notice to deferred vested participants of eligibility to receive benefits
- Required minimum distributions to age 70-1/2 participants
- Locating missing participants

# Process For Government Investigation/Audit

## Tolling Agreements & Interviews

- Failure to agree to toll statute of limitations could result in referral to solicitor's office to commence litigation
- Tolling agreement may be requested of all individuals who are, or were trustees and alternate trustees, for all periods under review
- DOL Enforcement Manual permits counsel during trustee interview, but role limited
- DOL auditor generally will not allow counsel to answer questions
- Interview preparation
  - Familiarize Trustee with basic plan procedures and operations
  - Roles performed by Trustees and service providers

# Trustee Interview

- Basic witness rules: do not volunteer or speculate; clarify unclear questions
- Correction of questions answered incorrectly or supplementation of incomplete answers
- Record/Summary of Interview

# Navigating The Process

- Whether to Permit copies - public may have access to documents through FOIA requests.
  - Individual written request that DOL keep all information confidential as proprietary and request notification if FOIA request made ON EVERY SUBMISSION
- Consider approach if DOL auditor wants to communicate directly with “missing” participants
  - Consider search and communicating with participants and beneficiaries first
- Is there potential third party liability to Fund? Who? Notice?
- Discussion of pros and cons concerning indemnity by third parties
- Agreement by fiduciary insurance carrier to resolve third party claims
- Have Trustees identified any weaknesses in governance and control procedures?
- Discussion of headline risk and correction before DOL completes audit



# Quality of DOL Auditors

- DOL Auditor's Length of Experience
- Lawyer vs. Investigator
- Regional Differences – Truth or Myth?
- OUR EXPERIENCE
- YOUR EXPERIENCE

# Overview Of Corrective Actions And Settlement Agreement Process

# Corrective Actions and Settlement Process

- DOL statistics show that well over half of audits result in monetary correction
- DOL can issue Voluntary Compliance Letter (VCL) identifying fiduciary breaches
- Report VCL to fiduciary insurance carrier
- Room to negotiate over correction of alleged breaches
- Must get buy-in from fiduciary insurance carrier on correction
- VCL usually requires go forward changes in procedures

# Corrective Actions and Settlement Process

- WHO FOR DOL HAS SETTLEMENT AUTHORITY
- WHAT DOL TYPICALLY REQUIRES:
  - Fiduciary v. Service Provider Bars (injunction vs. agreement)
    - Fiduciary training
  - All “Losses” plus lost opportunity costs (interest)
    - Expert Issues
  - 502(I) Penalty – 20% or ??
  - Compliance
- WHAT DOL TYPICALLY WON'T NEGOTIATE:
  - Press
  - Exculpatory Language
  - Indemnity & Offset for ESOPs
  - Scope of Release
  - Criminal or other referrals

# Corrective Actions and Settlement Process

- **WHAT YOU MIGHT NEGOTIATE**

- Who pays
  - 502(l) and other implications
- Plea w/ cooperation
- Scope & Length of Bar
- Lost opportunity costs (interest)
- Inability to Pay
- Leverage investigation for lower provider fees
  - Is DOL looking at provider (global resolution)
- Enhancements not available through Litigation
  - New procedures or fiduciary
- Other Ideas?

Questions?????