DOL Retirement Plan Investigations: Nine Key Areas

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DOL retirement plan investigations often focus on the nine areas discussed in this article. Conducting a self-review can help retirement plan fiduciaries avoid common ERISA compliance pitfalls.

The U.S. Department of Labor (DOL) has a robust program for investigating (sometimes also referred to as *auditing*) retirement plans and their fiduciaries with respect to the discharge of their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), as amended. These investigations have continued to result in ongoing scrutiny of fiduciary compliance and, in some cases, findings of fiduciary breach and monetary recoveries.

This article discusses nine areas of focus for DOL plan fiduciary investigations that may affect plan service providers, trustees and plan administrators. Plan fiduciaries and their service providers may want to consider a self-review of their ERISA compliance, especially with respect to these nine areas, before investigators come knocking on their door.

Background

As the primary ERISA Title I regulator, the DOL has the power to investigate ERISA fiduciaries—and the service providers that support them—for ERISA compliance. While the Department's regulatory authority technically extends only to findings of fiduciary breach against ERISA fiduciaries, investigations can also target parties that assist ERISA fiduciaries, including third-party service providers, such as custodians, recordkeepers and administrators (TPAs), among others.

The DOL has the power to impose significant penalties for findings of fiduciary breach. For example, it can require fiduciaries to restore amounts lost by a plan due to a fiduciary breach to make the plan and participants whole. The DOL can also charge penalties, such as per-day penalties, for failing to provide disclosures required under ERISA and can impose certain other remedial requirements, such as the disgorgement of profits on nonfiduciary parties (e.g., nonfiduciary TPAs).

This article covers areas that the DOL has focused on when investigating ERISA-covered retirement plans in general but also spotlights issues for multiemployer benefit plans, often referred to as *Taft-Hartley plans*.[1] A joint board of trustees serves as the fiduciary and administrator for most of these plans; however, day-to-day administration is often delegated to third-party service providers.

1. Missing Participants

By far the most common focus of DOL investigations of defined benefit (DB) pension plans in the last few years has been "missing participants." The Department has examined and assessed the policies and procedures implemented by retirement plans to identify and locate missing participants. These participants may be unresponsive, or they may be participants for which the plan lacks accurate contact information. In connection with this initiative, the investigations have focused on determining whether deferred vested participants are being notified that they may commence benefits no later than required and that they are encouraged to commence retirement benefits when available. This area can be challenging for all plans, but multiemployer plans can face particular difficulties because the board of trustees is not the employer of plan participants.

DOL guidance has continued to develop in this area. In January 2021, the Department issued a package of subregulatory guidance aimed at helping plan administrators locate missing participants and distribute retirement benefits to them. This guidance came in three forms—a document known as *Best Practices for Pension Plans,* which describes a variety of best practices that fiduciaries could consider when addressing missing participants; *Compli-*

takeaways

- As the primary ERISA Title I regulator, the Department of Labor (DOL) has the power to investigate ERISA fiduciaries—and the service providers that support them—for ERISA compliance. The DOL can impose significant penalties for a fiduciary breach.
- Missing participants have been the most common focus of DOL investigations of defined benefit pension plans in the last decade. Guidance has continued to develop, and plan fiduciaries could seek to prioritize compliance with this guidance.
- Cybersecurity is another major area of focus for DOL audits, particularly following the issuance of new guidance last year.
- Environmental, social and governance (ESG) investing has long been a subject of regulatory interest by the DOL, but the regulatory landscape for ESG investing remains unsettled. It remains to be seen whether the DOL will return to conducting ESG-related investigations, following the issuance of a proposed regulation that may provide more ease for ESG investing.
- Other areas of focus for DOL audits include fiduciary duties and prohibited transactions, required plan documents and disclosures, bonding, plan policies and procedures, and participant claims-and-appeals procedures.

ance Assistance Release 2021-01, which describes the general investigative approach of the DOL to review voluntary compliance efforts by fiduciaries; and *Field Assistance Bulletin 2021-01,* which serves to replace and supplement previous guidance.

The missing participant initiative does not appear to be going away, and plan fiduciaries could consider this issue to be a high priority when assessing and implementing missing participant policies and procedures.

Multiemployer plans—assisted by service providers, especially plan administrators and recordkeepers—may want to consider additional steps to keep participant information up to date, such as periodically requesting address files from contributing employers, encouraging participants to keep their contact information and beneficiary designations up to date, sending letters to participants when certain plan milestones are reached and engaging service providers to track public records of participants.

2. Data Privacy and Cybersecurity

The new kid on the block regarding DOL investigatory topics is cybersecurity. In part, the DOL is focused on this area because cybersecurity breaches (some of which have resulted in the misappropriation of assets and personal information) continue to be widespread as our digital footprint expands and fraudsters and hackers become more sophisticated. The Department stated in an April 2021 press release that "[a]s of 2018, EBSA estimates that there are 34 million defined benefit plan participants in private pension plans and 106 million defined contribution plan participants covering estimated assets of $9.3 trillion" and then expressed concern that "[w]ithout sufficient protections, these participants and assets may be at risk from both internal and external cybersecurity threats."

In response to the growing threats, the DOL issued a package of subregulatory guidance to assist plan sponsors, plan fiduciaries, recordkeepers and plan participants in addressing cybersecurity. The guidance included *Tips for Hiring a Service Provider,* which is to assist plan sponsors and fiduciaries to prudently select service providers; *Cybersecurity Program Best Practices,* which is geared toward assisting plans in managing cybersecurity risks; and *Online Security Tips,* which is a basic set of suggestions to help participants reduce the risk of fraud and loss when accessing their plan accounts online. Following the issuance of this guidance, the DOL started including questions about cybersecurity in many of its investigations.

Plan fiduciaries, administrators and their service providers may want to consider taking steps to address plan-related cybersecurity. This area can be challenging for all plans and may require plan fiduciaries to engage cybersecurity experts. Steps could include evaluating administrative cybersecurity practices, implementing a cybersecurity policy and addressing cybersecurity in contracting with new and existing service providers.

3. Timeliness of Participant Contributions

The DOL has long focused on protecting employee contributions in defined contribution (DC) plans, fixating on making sure these contributions go into the plan (in the first place and on time). Participant contributions are treated as plan assets as of the date that payroll deductions are made and, therefore, such contributions must be deposited in the plan as soon as they can reasonably be segregated from the contributing employer's general assets. This concept holds true for both single employer and multiemployer DC plans. While DOL guidance has identified 15 business days as the maximum amount of time to be considered timely, the Department has informally stated that it expects this window to be much shorter than 15 days, such as three days. An investigation on this topic may attempt to identify a pattern based on typical administrative practice to determine what time is reasonable with respect to the plan under investigation.

Findings of breaches related to the timeliness of contributions make up a high proportion of all DOL enforcement findings (by number), so attention to ensuring timely contributions could be considered an administrative priority for plan fiduciaries and service providers. Additional considerations may be appropriate for multiemployer DC plan trustees, who may not have control over the payroll practices of contributing employers. For example, trustees might consider implementing contributing employer payroll audits, imposing penalties on employers for untimely contributions and engaging the plan auditor to audit payroll remittances at year-end to identify any delinquencies.

4. Fiduciary Duties and Prohibited Transactions

In general, the DOL has consistently focused on enforcing ERISA's core fiduciary duties and prohibited transaction rules. To that end, the Department is always considering whether a plan and its fiduciaries and service providers have been involved in any breaches of fiduciary duty or prohibited transactions.

In the context of plan administration, the focus can include examining whether plan assets are being used to pay unreasonable expenses unrelated to the operation of the plan. ERISA requires that fiduciaries cause no more than reasonable expenses to be paid from plan assets. A breach in this area can take the form of both a breach of fiduciary duty and a nonexempt prohibited transaction.

The DOL has raised concern about unreasonable administrative staff compensation. For example, where more than one plan shares common administrative staff and expenses, the DOL may review whether plan fiduciaries properly analyzed and fairly allocated the salaries of shared staff and expenses among the plans to avoid any cross-subsidization of plan expenses.

A specific area of concern for multiemployer plans can be with the payment of unreasonable trustee expenditures in connection with their service. For example, the DOL has taken issue with using plan assets to pay for trustees to attend overly expensive or an excessive number of educational conferences. Another example is payment of what may be viewed as inappropriate trustee expenses such as high-priced meals or entertainment. This issue arises more often for multiemployer plans because they do not have an employer-plan sponsor that may foot the bill for such expenses.

Because of the focus in this area, care should be taken with plan expenditures, and extra due diligence (such as hiring an independent auditor to conduct review of expenditures) may be helpful.

5. Required Plan Documents and Disclosures

A plan under DOL investigation is typically evaluated to confirm that it is properly maintaining required documents and properly disseminating required disclosures. This includes the maintenance and/or disclosure of documents such as the summary plan description, the annual funding notice (for DB plans), participant-level disclosures for multiemployer DC plans (i.e., the 404a-5 disclosures), the receipt of plan service-provider disclosures (i.e., the 408(b)(2) disclosure) and other disclosures covered by ERISA.

While it can be a challenge for plans to maintain all required disclosures, multiemployer plans may have the added challenge of coordinating various service providers—including TPAs, investment providers, legal counsel and others—in order to prepare and furnish the disclosures. Moreover, while multiemployer plans are not precluded from using electronic delivery, plans that elect to do so must comply with complex requirements for electronic disclosure under ERISA and the Internal Revenue Code.

If an investigation reveals gaps in a plan's required documents, the DOL typically requires the gaps to be fixed. It may impose statutory penalties for failure to provide required disclosures.

6. Bonding

The DOL will almost always request evidence of a plan's required bond and the administrator's bond (if an administrator handles plan assets in a manner that requires a bond). ERISA Section 412 requires that every fiduciary and any person who handles plan assets be bonded for at least 10% of the amount of funds the person handles, up to a maximum of $500,000 per plan ($1 million for plans that hold employer securities). There are a few exceptions, such as certain financial institutions serving as trustees/custodians. The bond must protect the plan from the theft of plan assets. Typically, when investigators discover that a plan lacks a bond, they will require the plan to obtain a bond before closing the investigation.

Because bonding is a core (and statutory) requirement, care should be taken to ensure that bonding required under ERISA is in place.

7. Plan Policies and Procedures

Although not necessarily required under ERISA, the DOL may also examine whether a plan operates under policies and procedures intended to satisfy fiduciary obligations. Such policies and procedures may include an investment policy statement, expense reimbursement policy, missing participant policies and procedures (as discussed above), electronic device usage and cybersecurity policies. For multiemployer plans, these policies may include payroll audit and delinquent contribution collection policies as well as withdrawal liability policies in the case of DB plans. The DOL may seek to confirm that trustees are following operational procedures such as meeting regularly, complying with trustee notice and quorum requirements, and memorializing meetings and formal actions in writing.

The lack of policies and procedures may be cited as proof of an inadequate fiduciary process (even though the law may not require these formal documents) and, as a result, plan fiduciaries may want to consider dusting off their policies and procedures to identify any gaps or updates that should be addressed as well as any noncompliance.

8. Participant Claims-and-Appeals Procedures

The DOL will often review a plan's process for handling plan participant claims and appeals to confirm that such claims and appeals are processed in accordance with the DOL regulations (which set content and timing requirements for claims and appeals). For example, plans under investigation are typically asked to produce recent claims-and-appeals response letters, which are reviewed against the regulatory requirements.

For that reason, plans may want to seek to implement a program to comply with DOL regulations and ensure that participant claims-and-appeals documents comply with that program.

9. Environmental, Social and Governance Investing

Environmental, social and governance (ESG) investing has long been a subject of regulatory interest by the DOL. Over the last few decades, the Department has issued guidance on how the use of ESG factors in retirement plan investment decision making can be squared with ERISA's fiduciary duties (especially the duty of loyalty, which requires a fiduciary to put the interests of the plan participants ahead of its own interests). ESG investing may be particularly relevant in the context of multiemployer plans because of the history of ERISA litigation and DOL actions challenging plan investment decisions that deliver a benefit to the associated union (or its members), which arguably may fall under the "social" category of ESG.

Near the end of the Trump administration, the DOL issued a regulation that was largely viewed as cautious on ESG investing and could impact a multiemployer plan's ability to choose pro-union investments without exposing trustees to potentially higher fiduciary risk. In conjunction with this regulation, the DOL started conducting ESG-focused investigations. In 2021, under the Biden administration, the DOL issued a nonenforcement action and vowed to revisit the Trump-era ESG regulation. On October 14, 2021, the DOL issued a "Notice of Proposed Rulemaking on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" in the *Federal Register*. The proposed regulation is still in limbo, but if it is finalized in the current form, there is some thought that the proposed regulation will provide more ease for ESG investing (which again could encompass prounion investing).

Until the proposed regulation is finalized, the regulatory landscape for ESG investing remains unsettled. As such, it remains to be seen whether the DOL will return to conducting investigations around ESG investing.

Conclusion

The DOL's retirement plan investigatory program remains active; thus, fiduciaries, as well as the service providers that support them, may want to consider a compliance self-review based on the nine areas of focus highlighted in this article. Sometimes the best defense to the DOL's investigatory power is a good offense, such as conducting a proactive compliance self-review before the DOL makes an inquiry. This type of proactive review can be invaluable to avoiding a fiduciary breach and an adverse finding in a DOL investigation.

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Endnote

1. *Multiemployer plans* are employee benefit plans established generally for unionized employees of more than one employer that are required to contribute to the plan pursuant to one or more collective bargaining agreements between the employers and the union(s).

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