



DOL AUDIT GUIDE:

Employee Benefit Plans

Presented by **Infinity Benefit Solutions, Inc.**





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This guide is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. This guide may not address all compliance issues with federal, state and local laws or identify all possible requests that may be made in connection with an audit. Compliance with all applicable legal requirements is the responsibility of the health plan sponsor. Using the materials in this guide does not guarantee that a plan sponsor will be able to avoid an audit or is in compliance with all applicable requirements. Use this guide as reference, but contact legal counsel to discuss compliance requirements.



INTRODUCTION

The Department of Labor (DOL) has broad authority to investigate or audit an employee benefit plan's compliance with the Employee Retirement Income Security Act (ERISA). Audits are performed by the DOL's Employee Benefits Security Administration (EBSA). To perform these audits, EBSA employs over 400 investigators working out of field offices, many of whom are lawyers or CPAs or have advanced degrees in business and finance.

DOL audits often focus on violations of ERISA's fiduciary obligations and reporting and disclosure requirements. The DOL may also investigate whether an employee benefit plan complies with ERISA's protections for plan participants, such as the special enrollment rules or mental health parity requirements. Recently, the DOL has been using its investigative authority to enforce compliance with the health care reform law, or the Affordable Care Act (ACA).

Traditionally, DOL audits of employee benefit plans have focused primarily on retirement plans, such as 401(k) plans. However, now that the DOL has started enforcing compliance with the ACA, health plan audits are on the rise.

Being selected for a DOL audit can have **serious consequences** for an employer. According to a DOL audit report for the 2013 fiscal year, almost 3 out of 4 investigations resulted in penalties or required other corrective action, such as paying amounts to restore losses, disgorging profits and ensuring claims were properly processed and paid. In addition, a DOL audit may negatively affect an employer's normal business operations because the audit process can be both stressful and time-consuming. The best time for an employer to analyze whether it is ready for a DOL audit is **before** the DOL comes knocking.

This Guide is your manual for preparing for a DOL audit of your HEALTH PLAN. This Guide is designed to provide you with an overview of why certain health plans are selected for audit and what you can do to prepare for an audit and reduce your risk of being audited. It also describes what is typically required of an employer during a health plan audit. It includes:

- Suggestions on how to prepare for a DOL audit;
- Tips for responding to a DOL audit letter;
- A list of documents that DOL investigators commonly request during an audit; and



PREPARING FOR (AND AVOIDING) A DOL AUDIT

Because a DOL audit can disrupt an employer's day-to-day business operations and possibly result in penalties (or other corrective action), it is important for employers to know how to prepare for, and potentially avoid, a DOL audit of their health plan.

As a general rule, the best way to prepare for a DOL audit of your health plan is to confirm that your plan complies with all applicable federal laws, such as HIPAA and the ACA. It is also important to have documents showing your compliance and to maintain these documents so they are easy to access in the event of a DOL audit. If an employer takes these steps before being selected for audit, it can reduce its exposure to penalties. It can also make the audit process more manageable and less time-consuming.

It is also important for an employer to understand why the DOL selects certain health plans for audit and take steps to minimize that audit risk.

AUDIT TRIGGERS

A DOL audit can be triggered for a variety of reasons. In most cases, the DOL investigator will not disclose to an employer why its health plan was selected for audit. However, there are some common audit triggers that an employer should keep in mind.

Common triggers for a DOL audit include:

- **Participant complaints** to the DOL about potential ERISA violations. In 2013, according to a DOL audit summary, 775 new investigations were opened as a result of participant complaints.
- Answers on the plan's **Form 5500**. For example, if a plan's Form 5500 is incomplete, or if inconsistent information is reported from year to year, the DOL may investigate the issue further.
- The DOL's **national enforcement** priorities or projects, which target the DOL's resources on certain issues. For example, the DOL's Health Benefits Security Project focuses on making sure health plans and health insurance issuers comply with the ACA's mandates.



MINIMIZING THE RISK

As a practical matter, an employer has little control over whether it will be audited by the DOL. **However, an employer can take the following steps to help minimize its exposure to a DOL audit:**

- Respond to participants' benefit questions and requests for information on a timely basis;
- File Form 5500 on time and make sure it is complete and accurate;
- Distribute participant notices required by law (for example, the Summary of Benefits and Coverage) by the deadline; and
- Make timely updates to plan documents and summary plan descriptions (SPDs) to reflect legal and design changes.

COMPLIANCE REVIEW

Just because an employer has been selected for an audit does not mean that the employer has violated an employee benefits law. Even an employer in compliance can encounter an unexpected audit. A DOL audit is not a simple process and being “ahead of the game” can potentially save an employer a large amount of money, time and stress.

The best way to prepare for a DOL audit is to remain in compliance with the law and establish a recordkeeping system for maintaining all of the important documents relating to your employee benefit plans. Retaining complete and accurate records will help move along the audit process and provide an accurate picture of your employee benefits. As a general rule, these records should be retained for seven years.

Example: If your health plan is “grandfathered” under the ACA, confirm that you have included the notice of grandfathered status in materials that describe the plan’s benefits, such as the plan’s SPD, and document that you provided the notice at the required times. Maintain this documentation so that it is easily accessible to you in the future.

Because the DOL has increased the frequency of health plan audits, employers should consider reviewing their health plans for compliance now, before they are selected for audit. It is important for employers to get their health plans’ paperwork in order as part of this process. Employers may want to designate one location for maintaining records relating to their health



plans, such as plan documents and insurance contracts, SPDs and notices required under the ACA and other federal laws (for example, the Women's Health and Cancer Rights Act). Even though a compliance review will require some time and effort now, it will likely pay off in the future in the event the employer is selected for a DOL audit.

This Guide includes a list of available resources and sample documents that employers can use as part of their health plan compliance review.

CORRECTING MISTAKES

If an employer reviews its health plan's compliance with employee benefit laws and discovers a violation, there may be a way to address the mistake before the DOL discovers it and assesses a penalty. The DOL has self-correction programs for certain violations that an employer discovers prior to being audited. These programs offer incentives to an employer to file delinquent Forms 5500 and correct fiduciary breaches.

- The Delinquent Filer Voluntary Compliance Program (DFVCP) encourages plan administrators to bring their plans into compliance with ERISA's Form 5500 filing requirements. The DFVCP gives delinquent plan administrators a way to avoid potentially higher civil penalty assessments by voluntarily filing late Forms 5500 and paying reduced penalties. More than 23,000 annual reports were received through this program in fiscal year 2013.
- The Voluntary Fiduciary Correction Program (VFCP) allows plan officials who have identified certain violations of ERISA to take corrective action to remedy the breaches and voluntarily report the violations to EBSA, without becoming the subject of an enforcement action. In fiscal year 2013, EBSA received 1,535 applications for the VFCP.

PENALTIES FOR NON-COMPLIANCE

On top of dealing with the disruption of an audit, employers that are found to be not in compliance with applicable requirements can be subject to penalties. The DOL assesses a **20 percent civil penalty** for breaches of fiduciary duty, and may bring civil litigation against fiduciaries for ERISA breaches. In extreme cases, criminal actions can significantly increase the overall amount of any penalty.



A DOL audit can be a lengthy and time-consuming process, causing disruptions in day-to-day business operations. Thus, it is important for employers to know how to prepare for, and potentially avoid, a DOL audit.

Enforcement Statistics: During the 2013 fiscal year, EBSA closed 3,677 civil investigations. Of these, 72.8 percent resulted in monetary results for employee benefit plans or other corrective action. In addition, EBSA filed 111 civil lawsuits and closed 320 criminal investigations. EBSA's criminal investigations led to the indictment of 88 individuals—including plan officials, corporate officers and service providers—for offenses related to employee benefit plans.



NAVIGATING A DOL AUDIT

Every year, thousands of employee benefit plan fiduciaries (including plan sponsors) are selected by the DOL for audit. Knowing how the DOL audit process works will help an employer successfully respond to and navigate an audit.

AUDIT LETTER

When the DOL selects an employer's health plan for audit, the DOL will send out an investigatory letter. This letter serves to notify the employer that a DOL investigation will take place. Investigations can be in the form of a "limited review" or a full-scale investigation. Regardless of the scope, the next steps are crucial to reducing an employer's liability and making the investigation as seamless as possible.

DOCUMENT REQUEST

Generally, the initial letter from the DOL will include a request for a list of plan-related documents. Employers that receive audit letters may be surprised and overwhelmed by the number of documents requested by the DOL auditor. Although employers generally have no way of knowing whether they will be selected for an audit, it is important for them to maintain employee benefit documents in an organized fashion so they can respond to a DOL audit request in the event this occurs.

DEADLINES

Typically, the audit letter will request that the documents be provided by a specified date. It is critical to respond by this deadline. Inadequate or late responses could trigger additional document requests, interviews, on-site visits and even DOL enforcement actions.

ACTION ITEMS

Once an employer knows that it's being audited by the DOL, there are a number of things it can do to prepare for the investigation:

- ☐ Establish a contact person at the company for the investigation
- ☐ If desired, secure legal counsel for assistance with the audit process



- ☐ Negotiate or clarify the scope of the document request and, if necessary, ask for an extension to the response deadline
- ☐ Make copies of all the requested documents for the DOL and review them for accuracy
- ☐ If a discrepancy is found while compiling the documents, consider providing an explanation
- ☐ Prepare your staff for on-site visits and interviews



CHECKLIST OF REQUESTED DOCUMENTS

This checklist includes documents that are commonly requested by the DOL during an audit of an employer's health plan. In addition to maintaining these documents in an easily accessible location, employers should keep records showing that participant notices and other required disclosures are provided in a timely fashion.

As health plan sponsors, employers should ideally confirm that they maintain these documents and records, and should not create them in response to a DOL audit letter. The "Sample Documents" section of this guide contains some model documents that health plan sponsors may use. Contact Infinity Benefit Solutions, Inc. for help in gathering other compliance documents.

Also, keep in mind that, during an audit, the DOL may request fewer documents or an employer may be subject to a more expansive document request, depending on the scope of the audit.

Type of Document	Maintained by Employer
Plan document (or insurance booklet/certificate for an insured plan)	<input type="checkbox"/>
Summary plan description (SPD), including updates or summaries of material modifications (SMMs)	<input type="checkbox"/>
Forms 5500 and attachments, including supporting documentation (if applicable)	<input type="checkbox"/>
Summary annual reports (if required for plan)	<input type="checkbox"/>
List of all plan service providers and related contracts	<input type="checkbox"/>
All contracts with insurance companies	<input type="checkbox"/>
Open enrollment materials, including documents describing cost responsibilities for the employer and employees	<input type="checkbox"/>



Newborns' and Mothers' Health Protection Act notice (may be included in the SPD)	<input type="checkbox"/>
Women's Health & Cancer Rights Act notice	<input type="checkbox"/>
Annual Children's Health Insurance Program (CHIP) notice	<input type="checkbox"/>
Materials describing any wellness programs or disease management programs offered by the plan, including rewards based on a health factor	<input type="checkbox"/>
Documents showing compliance with HIPAA's portability rules, including certificates of creditable coverage, pre-existing condition exclusions and special enrollment rights	<input type="checkbox"/>
Documents showing compliance with COBRA, including general notice, election notice, notice of COBRA unavailability, notice of early termination and notice of insufficient payment	<input type="checkbox"/>
If the plan has grandfathered status under the ACA, documents that verify the plan's status and the notice of grandfathered plan status	<input type="checkbox"/>
If the plan has rescinded coverage, a list of those participants and dependents whose coverage has been rescinded, the reasons for the rescission and the notice of rescission	<input type="checkbox"/>
Plan provisions regarding lifetime and annual limits and the notice describing enrollment opportunities for individuals who previously lost coverage due to a lifetime limit	<input type="checkbox"/>
Summary of Benefits and Coverage and any 60-day advance notice of a mid-year material change to the plan	<input type="checkbox"/>
Exchange notice	<input type="checkbox"/>
For non-grandfathered plans, notice of patient protections and selection of providers	<input type="checkbox"/>
For non-grandfathered plans, information on the plan's claims and appeals procedures	<input type="checkbox"/>
A notice describing enrollment opportunities for children up to age 26 for plans with dependent coverage	<input type="checkbox"/>