Practical Guidance

Navigating Department of Labor Benefit Plan Investigations

A Practical Guidance® Practice Note by Kathleen R. Barrow, Fox Rothschild LLP

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This practice note discusses what employee benefit plan sponsors and their counsel can do to prepare for and navigate a U.S. Department of Labor investigation or audit (collectively, investigations) of an employer-sponsored employee benefit plan. Investigations often focus on a retirement plan that is subject to the Employee Retirement Income Security Act (ERISA), and its compliance with the statute, particularly ERISA's fiduciary obligations and reporting and disclosure requirements. These investigations can also apply to employee welfare benefit plans, including a group health plan's compliance with the Affordable Care Act (ACA). This practice note will focus on DOL investigations but will also address, to a lesser degree, investigations of retirement plans performed by the Internal Revenue Service (IRS).

This practice note is intended to provide techniques and strategies for helping clients (and their counsel) smoothly and efficiently navigate through DOL investigations that are civil in nature, rather than criminal, and is organized to cover the following main topics:

- Department of Labor Enforcement Authority
- Preparing for an Investigation/Audit
- Managing Agency (and Plan Sponsor) Expectations
- Closing the Investigation

For additional coverage on DOL enforcement actions, see ALI-ABA Course of Study Materials, Department of Labor Investigations and Litigation (SK079 ALI-ABA 691) and ALI-ABA Course of Study Materials, Settling Disputes with the Department of Labor (SW018/SW026 ALI-ABA 189).

Department of Labor Enforcement Authority

The DOL's investigative authority under Title I of ERISA is governed by ERISA Sections 504 and 506.

Specifically, Section 504(a) provides that

> The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder—
>
> (1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this title, and
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> (2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of title or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

ERISA § 504(a) (29 U.S.C. § 1134(a)). ERISA Section 506(b) provides the DOL authority to investigate criminal violations of ERISA. ERISA § 506(a), (b) (29 U.S.C. § 1136(a), (b)).

Under a Memorandum of Understanding with the Department of Justice (DOJ) dated February 5, 1975, the DOL and the DOJ agreed that all cases involving violation of criminal provisions of ERISA would be prosecuted by the DOJ, and cases warranting criminal prosecution that are investigated by DOL would be referred to the Management and Labor Section, Criminal Division, DOJ. This Memorandum of Understanding was modified as a result of enactment of the Comprehensive Crime Control Act of 1984 (Pub. Law. No. 98-473). This allows the DOL also to investigate criminal violations of ERISA. See Dept of Justice, Investigative Jurisdiction, 18 U.S.C. § 1827.

IRS vs. DOL Matters

As regards matters on which the DOL and the IRS may overlap regarding an employee benefit plan investigation, under Reorganization Plan No. 4 of 1978, dated August 10, 1978, the DOL and IRS allocated certain ERISA enforcement duties between them. The IRS enforces and interprets the "minimum standards" provisions of ERISA and the parallel provisions of the Internal Revenue Code (generally, the requirements for tax qualification, such as minimum participation and vesting standards appearing in ERISA, Title III), and ERISA requires the DOL to accept IRS decisions as prima facie evidence of a plan's compliance with ERISA, Title I, Parts 2 and 3. ERISA § 3001(d) (29 U.S.C. § 1201(d)). The DOL enforces the fiduciary, recordkeeping and reporting, and prohibited transaction provisions of ERISA and their IRC parallel provisions.

PBGC Issues

ERISA does not give the DOL authority to investigate violations of Title IV of ERISA. ERISA Section 4003(d) does allow the Pension Benefit Guaranty Corporation (PBGC) to reach agreements with the DOL for assistance in enforcing Title IV of ERISA. ERISA § 4003(d) (29 U.S.C. § 1303(d)).

Enforcement by the National Office and Regional Offices

The Employee Benefits Security Administration (EBSA) investigates compliance with employee benefits law through 10 regional and 5 district offices throughout the country. Each of these offices is led by a regional director, who reports to the Deputy Assistant Secretary for Program Operations in EBSA's National Office of Enforcement. This practice note will use the term "DOL" when referring to investigative activities by EBSA.

The DOL and EBSA follow a decentralized method of enforcement. Regional offices are permitted and encouraged to develop their own enforcement priorities, within broad outlines established in an annual Strategic Enforcement Plan. Notice Regarding Strategic Enforcement Plan, 65 Fed. Reg. 18208, 18210 (Apr. 6, 2000). EBSA's Office of Enforcement establishes enforcement policy direction and provides operational review and oversight, program coordination, and technical assistance to the agency field offices. A recent EBSA organizational chart can be found here.

Preparing for an Investigation/Audit

No client likes receiving a DOL notice that the employer's employee pension benefit or welfare benefit plan is being investigated. Because the majority of DOL investigations are prompted by participant complaints or Form 5500 filings, it's natural for clients who receive notices of an investigation to experience anxiety about their level of plan compliance. Clients worry about whether they have sufficient control over benefit department employees and that they will act promptly and deliberately in responding to DOL document requests. The question whether an employee secretly complained to the DOL may arise. Clients wonder, similarly, if the vendors responsible for administering their benefit plans are delivering the value promised. Ultimately, clients are concerned about the cost of responding to and defending against any proposed DOL enforcement action. That concern may include the cost of representation from counsel. In sum, when clients call counsel to assist in these matters, they are typically not having a good day. The most valuable things counsel can do for the client are to help make the process of being investigated less anxiety-producing and time-consuming and placing the client in the position most likely to mitigate the financial impact of any negative findings.

Review Fiduciary Insurance Coverage

Don't forget that fiduciary insurance policies generally pay for the cost of defending plan fiduciaries, the plan sponsor, and the plans themselves, even in an agency investigation, particularly when there are allegations of a fiduciary breach. These policies commonly cover liability resulting from errors and omissions discovered upon a DOL investigation. Once your client receives notice of the investigation, advise the client to review (or undertake a review of) its fiduciary policy to understand the extent of coverage. For a comprehensive discussion on the topic, see ERISA Fiduciary Insurance. In some cases, the plan sponsor may be obliged, in fact, to indemnify a vendor for costs incurred as a result of the investigation. See Wells Fargo Bank v. Bourns, Inc., 860 F. Supp. 709.

Review Internal Controls

The Internal Revenue Service (IRS) and the DOL each commence their respective investigations by surveying the plan sponsor's/administrator's internal controls over plan operation. See, e.g., IRS, IRS Policies, Procedures, and Internal Controls Self-Audit (2019) and DOL, Fiduciary Investigations Program, Memorandum Format for Updated Fiduciary Case Investigative Plan, EBSA Enforcement Manual (January 2020) (Figures 3, 4) (hereinafter, Enforcement Manual). Where internal controls are found lacking, it is common for the IRS and DOL to expand the scope of their investigation, either by (1) including additional plan years in the audit, (2) expanding the substantive focus of the investigation, or (3) both. You can positively impact your client's experience in a DOL investigation by helping your client develop and maintain policies and procedures assuring that internal controls are in place. Doing this in advance of any agency investigation of the client's employee benefit plans is obviously the better position to be in. This advanced preparation not only creates a favorable impression upon investigators that the plan sponsor is properly exercising its fiduciary duties but also makes responding to document requests easier.

As an example, the following foundational practices are critical to the early establishment of the fact that internal controls exist in your client's plan administration.

Adopt, Maintain, and Update Written Plan Documents

The first thing the DOL does in an investigation is review whether an employee benefit plan has been properly established. Enforcement Manual, Part II, Review Procedures. ERISA requires that an employee benefit plan is set forth in a written document. ERISA § 402(b) (29 U.S.C. § 1102(b)). Surprisingly, many clients may have difficulty producing their written plan document. For example, a plan sponsor that uses a third-party administrator (TPA) may fail to maintain plan documents in its corporate records. The plan document(s) then becomes difficult to obtain when the TPA learns a government entity is investigating the plan.

For example, employers who sponsor fully insured group health plans sometimes rely upon the insurance company-provided certificates and benefit summaries to document the employer's official "plan." Such arrangements fail to fulfill ERISA's requirement that a plan be described in a written plan document. This can leave the employer with an arrangement that fails to contain certain ERISA-required notices or rights, such as those provided under ERISA, COBRA, HIPAA, or even medical child support orders. See ERISA §§ 102(b), 104(c) (29 U.S.C. § 1024(b), (d)); 29 C.F.R. § 2520.102-3(o); 29 C.F.R. § 2520.102-3(j)(2); 29 C.F.R. § 2520.104b-1(a).

The DOL is not impressed when a simple request for plan documents cannot be fulfilled by the client who sponsors the plan.

In addition, many employers forget to formally adopt their plans and keep necessary plan amendments. A properly adopted written plan document or amendment is one that is considered by a company board of directors, managing members, or partners; discussed; and then adopted by formal action or by written consent. You should help the client demonstrate the soundness of its internal controls by assuring corporate records contain documentation that corporate formalities were followed. The client should always have copies of all plan documents, from the plan's initial adoption through its termination, in its files. As an aside, a recent Treasury Department memo indicated that a plan sponsor must retain a validly executed plan document and, upon audit, produce such document to the exam agent to support the plan's qualified status. Chief Counsel Memorandum 2019-002 (Dec. 9, 2019).

An employer who, in a short period of time following a DOL request, produces all relevant plan documents, with evidence that corporate formalities were followed, demonstrates its good internal controls to that agency. This may curb further probing by the agency (or its expansion of the investigation).

Establish and Maintain Good Document Record Retention Policies

Maintain foundational plan documents (i.e., master plan, adoption agreement, wrap plan, etc.) and summary plan descriptions (SPDs) for the tenure of the plan's existence. ERISA requires that administrators retain plan documents, like Form 5500s, for six years from the date they were reported or filed. ERISA § 107 (29 U.S.C. § 1027). Subject to state laws, the Health Insurance Portability and Accountability Act (HIPAA) also mandates that private health information, as is contained in benefit claim records, be maintained for six years by any group health plan that is a "covered entity." 45 C.F.R. § 164.530(j)(2).

For retirement plan participants, ERISA requires that the plan sponsor maintain records sufficient to permit plans to determine benefits due to each participant. ERISA § 209(a)(1) (29 U.S.C. § 1059(a)(1)). Practically speaking, this means employers must maintain benefit-related participant records for the duration of the time during which the plan owes a participant benefits. The plan sponsor or administrator that maintains organized records and has in place the proper document retention policy will find answering requests for documents very easy. As a quick aside, the integrity of the information should be safeguarded if the plan sponsor changes the method by which it retains this information or switches TPAs or recordkeepers. Having an agency investigation begin soon after a merger or other corporate event, and a consolidation of recordkeepers, can intensify the level of a plan sponsor's worry that the investigation will yield negative results.

Additionally, DOL investigators almost always ask for relevant compliance-related records, such as annual plan coverage and discrimination (like ADP/ACP for a 401(k) plan) testing results, documents showing how highly compensated employees were identified, payroll records, and independent contractor agreements. Retain these documents for at least six years from the date a Form 5500 is filed for the year to which these records apply. This allows the agency to see the client's compliance efforts.

Maintain SPDs That Reflect Current Plan Terms

SPDs are an essential element of plan administration because they are the primary document for communicating plan terms and conditions to employees. ERISA § 102 (29 U.S.C. § 1022). ERISA requires that SPDs be supplemented by a summary of material modification (SMM) when material plan terms are changed. Additionally, SPDs must be updated (generally) every five years. ERISA § 104(b) (29 U.S.C. § 1024(b)). DOL regulations require certain plan sponsors and administrators to have SPDs or notices of assistance for translation of participant rights and obligations under the plan, published in languages reflecting the primary language of employed workers. See 29 C.F.R. § 2520.102-2(c). Employers who maintain SPDs with current plan document terms, in appropriate languages, demonstrate to the agency that the employer, as plan sponsor, cares about having their employees understand their rights and benefits.

Written Waivers for Eligible Employees Choosing Not to Participate

In the group health plan world, for applicable large employers, written waivers are virtually the only way that the employer can avoid penalties for failing to make an offer of coverage to those full-time employees that do not enroll in the plan. In the retirement plan world, where waivers are not as common, a written waiver supports the employer's position that an eligible employee was provided the opportunity to enroll in the retirement plan—but chose not to do so. This proof of waiver prevents an agency from determining that an eligible employee is entitled to a corrective contribution because the employee was not offered an opportunity to enroll in the plan in a timely manner. Recommend to your clients that they obtain written waivers from those employees who wish to forgo benefits and that these waivers be renewed each plan year. Open enrollment is the obvious time to do this for health plans. Retain the waivers in a similar fashion to individual participant administration documents.

Adopt and Maintain Written Policies and Procedures for Plan Loans, Hardship Distributions, Qualified Medical Child Support Orders, National Medical Support Notices, Qualified Domestic Relations Orders, Tax Liens, and Garnishments

It's common for plan TPAs or insurers to handle claims and benefit disbursements for both retirement plans and health and welfare plans. Many plan sponsors and administrators also outsource plan loan administration, including loan repayments. They may also outsource orders for spousal or child support, tax liens, and garnishments. Sponsors may also adopt missing participant policies in order to timely pay plan benefits. The presence of policies and procedures for these transactions, and review of governing vendor contracts, supports the position that the plan sponsor has thought about compliance given the applicable legal environment and has developed appropriate responses to them. Review these procedures (or governing contracts) to see that a process exists and is followed. Review how special situations are resolved. For example, how is a military leave handled when the participant has an outstanding loan or what happens if a participant defaults on a 401(k) plan loan? Being clear that operations follow the plan and policies is assuring when the investigator asks the same question.

Demonstrate That Vendors Are Diligently Selected and Vendor Agreements Contain Essential Terms

The requirements for exemption from ERISA's prohibited transaction provisions, ERISA § 406(a)(1) (29 U.S.C. § 1106(a)(1)) and ERISA § 408(b)(2) (29 U.S.C. § 1108), as well as ERISA's fiduciary provisions, compel plan sponsors and administrators to choose vendors via a due diligence process. See ERISA Fiduciary Duties. Vendor agreements must call for the vendor to be paid reasonable compensation to fall within the exemption to the prohibited transaction rules. 29 C.F.R. § 2550.408b-2. Your client's files concerning retention of vendors should evidence both a due diligence effort in choosing the plan vendor and some research into competing vendors, and vendor prices, in the marketplace. Vendor agreements must address the production of plan records in the event of an agency investigation, the return of records to the employer as plan sponsor at the close of the agreement's term, and the vendor's obligations regarding the privacy and security of the participants' private information.

For Practical Guidance content on the selection of plan vendors, see Service Provider Agreement Negotiation for Qualified Retirement Plans and Service Provider Request for Proposal Checklist (Qualified Retirement Plan). For a discussion regarding the "reasonable compensation" requirements of ERISA § 408(b)(2) (29 U.S.C. § 1108(b)(2)), see Service Provider Disclosure Rules (ERISA § 408(b)(2)).

Conduct Periodic Internal Audits or Due Diligence Surveys

The IRS and DOL both state that periodic internal audits or reviews of plan operational aspects is an essential element of internal controls. See, e.g., IRS Webpage: 401(k) Plan Fix-It Guide; EBSA Webpage: ERISA Fiduciary Advisor. Through periodic self-audit or review of plan operations, plan administrators can discover errors quickly and correct them before the employer must avail itself of the DOL or IRS formal plan correction programs. Where these audits or reviews identify discrepancies, use agency programs, like the IRS's Employee Plans Compliance Resolution Program (EPCRS) or the DOL's Voluntary Fiduciary Correction Program (VFCP), which can eliminate or reduce the greater fees that may be imposed on an agency investigation. Proof of the corrections provides the agency with proof of the sponsor's compliance efforts. These correction programs are discussed further below in "Using Agency Correction Programs" under Managing Agency (and Plan Sponsor) Expectations.

Early detection of errors involving welfare benefit plans facilitates the employer's ability to protect employees from plan errors that may result in additional taxes or excise taxes being assessed as, for example, when a plan fails to meet the requirements that apply to high deductible health plans. That error could result in having to communicate to employees that their pre-tax contributions to a health savings account (HSA) are excessive and subject to taxation. See I.R.C. § 223(b)(8)(B). Of course, it would be better to discover and correct this error outside an agency investigation.

Managing Agency (and Plan Sponsor) Expectations

Once your client receives a notice of investigation by a government agency, such as the DOL, take action to set the tone for the client's interactions with the investigator and vice versa. Particularly if you have not been retained on benefit matters for the client on any prior occasion, as the plan sponsor's representative, it's vital that you explain to your client that the client has a fiduciary duty to administer the plan for the exclusive benefit of the plan participants. ERISA § 404(a)(1) (29 C.F.R. § 1104(a)(1)). This is true, even to the point where such administration may harm the company sponsor. See Varity Corp. v. Howe, 516 U.S. 489 (1996) (action which harms participants to save money for the employer company violates fiduciary's duty of loyalty under ERISA § 404(a)(1)).

Practically speaking, acting as the plan sponsor's counsel means that actions designed to obstruct the DOL investigation, such as hiding errors in plan administration or stonewalling responses to requests for production of documents and information, are inappropriate. It is important that the client maintain a positive relationship with the investigator in DOL civil investigations. An aggressive, adversarial posture in response to a DOL investigation will raise the expense of defense for your client and is not likely to yield positive results.

Representing the Client Plan Sponsor or Plan Fiduciary

Another conversation that should take place with the client involves who you represent. Typically, counsel in plan audits represents the plan sponsor and plan administrator because the company frequently holds both titles. If, in the course of a DOL investigation, it becomes apparent there are serious issues, such as the misappropriation of employee contributions or serious delays in depositing 401(k) or other employee contributions, advise your client that the plan will need to retain separate counsel. See Model Rules of Professional Conduct R. 1.16, 3.7. For a treatise discussion about the ERISA fiduciary exception to the attorney-client privilege, see WHOSE PRIVILEGE IS IT ANYWAY: HOW THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE PROTECTS ERISA PARTICIPANTS AND BENEFICIARIES, 30 ABA Journal Lab. & Emp. Law 121.

Handling the Written Notice of Investigation

The written notice of investigation is the initial DOL communication that your client will receive. It sets forth the investigator's name and contact information and typically comes with a request for documents and information that the DOL wants produced within 30 days. Typical documents requested are:

- The plan and trust documents
- Plan policies and procedures
- The SPD
- Investment or administrative committee meeting minutes
- Form 5500 annual reports

Customarily, the initial notice also contains a request for an in-person interview of your client's representative (the on-site visit). In response, you should call the DOL investigator, introduce yourself and your client, and set a tone which informs the investigator that your client takes plan administration seriously and wants to cooperate in the investigation. In advance of this contact, you should have your client provide you with a letter written on company letterhead appointing you as the company's counsel for purposes of the DOL investigation. When you contact the DOL investigator, you can provide the authorization letter via facsimile or email. This will permit the DOL investigator to speak with you concerning the investigation.

In the same call where you promise cooperation, you should ask the DOL investigator if the in-person interview may take place following the response to requests for information and the production of documents. This tactic avoids you having to produce your client representative twice, once at the outset and again after the DOL has reviewed produced materials and developed questions. The tactic also provides you the opportunity to conduct some of your own review of the client's internal controls in plan administration, which is particularly important if you have not been retained on employee benefit matters for the client prior to delivery of the investigation notice.

Agency Penalties

ERISA § 502(c)(6) (29 U.S.C. § 1132(c)(6)) provides for a penalty that is currently in the amount of $156 per day if your client fails to produce documents within 30 days of the DOL's request. ERISA § 104(a)(6) (29 U.S.C. § 1024(a)(6)); 29 C.F.R. §§ 2575.2(e), 2575.3. However, the DOL customarily grants at least an additional 30 days to respond to requests for documents and information that are at all numerous. Propose to the investigator that your client's response to requests for information and document production take place in segments of one or two weeks, over a period of 45 to 60 days or more (depending upon the number of DOL requests) commencing with the production of basic plan documents. Securing the DOL's agreement to this proposal is critical. The segmented production gives the client time to identify and organize responses and documents and allows you time to review the client's responsive materials prior to production. If errors in plan administration, or plan document failures, become evident, the segmented production provides you time to strategize how you are going to present these errors and failures to the DOL.

Finally, in your initial communication with the DOL investigator, always ask whether the investigation was prompted by a participant or employee complaint or whether your client was randomly picked for investigation. Not all DOL investigators will provide this information, but the content of the response may provide you with an indication about whether the DOL investigation is part of a specific enforcement proceeding. Asking the DOL to provide you with a list of any third parties that the DOL is going to interview or approach for documents will also give you a sense of whether your client was randomly chosen for investigation or is the subject of a focused enforcement proceeding.

Being Proactive

Remember, your DOL investigator is human. The easier you make the investigator's job, the less likely the investigator is to go looking for something in the produced materials that make the investigator's life difficult. Documents that are produced should be organized and date stamped. Explanatory information should be provided when you determine it is needed, in advance of the DOL making a request.

If, as you review documents and information provided by the client, you discover plan document or operational errors, consider proactively communicating the errors to the DOL in advance of the production of documents and information that revealed the error to you. Proactive communications regarding errors discovered during the investigation facilitate a discussion about how the errors may be corrected.

Using Agency Correction Programs

Commitment to correction may involve a mere change in company procedures. The commitment may require you to take the client through the DOL's Voluntary Fiduciary Correction Program (Voluntary Correction Program, 71 Fed. Reg. 20261, § 7) or the U.S. Treasury's Employee Plan Compliance Resolution System, Voluntary Correction Program (Rev. Proc. 2019-19). All of these measures demonstrate to the DOL that your client is serious about fulfilling its fiduciary responsibilities and making sure that participants are receiving the benefits they are entitled to receive under the plan terms. Further, there is no question that a proactive commitment to correction, communicated to the investigator with a voluntary disclosure of an error, **before** the DOL investigator has found the error, has a significant mitigating impact on the DOL's decision whether or not to propose sanctions in an investigation, as well as the amount of the sanction. For information about these programs, see EPCRS Correction Rules and Procedures and Voluntary Fiduciary Correction Program.

Consequences of Noncompliance

Some clients question why it is important to bring plan administration errors to a DOL investigator's attention. Some also ask why it is necessary that the client correct the errors at all. The answer is that many of the most common errors in plan administration can involve prohibited transaction rules, can expose the client or the client's employees to tax penalties, can result in disqualification of the plan, and may constitute a breach of fiduciary duty for which ERISA provides redress. For example, the following common operational errors have the consequences shown below:

- An unreasonable delay (generally, more than three business days where funds are transmitted electronically) in the deposits of employee elective deferral contributions constitutes a nonexempt prohibited transaction. I.R.C. § 4975(c)(1)(D); 29 C.F.R. § 2510.3-102. This must be reported to the IRS and DOL and likely will result in the assessment of excise taxes. See IRS Form 5330.
- Failing to properly interpret and apply the plan's definition of "compensation" to employee elective deferral contributions in a 401(k) plan may result in eligible employees missing an opportunity to make elective deferrals on the portion of the compensation omitted. This results in a breach of fiduciary duty for failure to follow the plan document and, on occasion, a plan disqualification. Rev. Proc. 2019-19, Sec. 5.01(b) (defining an operational failure for failure to follow plan documents).
- Failing to account for contract or leased workers who render services to your client for 1,000 hours or more in a plan year may result in the plan appearing to pass coverage testing, when it does not. This may result in plan disqualification under I.R.C. §§ 410(b), 414(n). For reference, see IRS, Employee Leasing.
- Failing to include the current year minimum deductible amount in the group high deductible health plan will result in the disqualification of participant health savings accounts and subjects employees to income taxes and penalties and results in a breach of fiduciary duty. I.R.C. § 223(b)(8)(B); Employee Benefits Law § 12.10.

Most importantly, it's highly unlikely the client's plan participants will remain unaware of any notable plan error. Section 504(a) of ERISA (29 U.S.C. § 1134(a)) allows the DOL to provide information to any person who is affected by a plan error, including participants, beneficiaries, and fiduciaries, unless such disclosure is prohibited by another federal law. Moreover, typical DOL investigations include interviews of participants, third-party administrators, trustees, and custodians. The DOL may notify plan participants that operational failures have occurred in plan administration and that they may be entitled to additional benefits. See, for example, Delinquent Plan Contribution Notice (401(k) Plan), which a plan sponsor may use where it has failed to transmit participant contributions to a trust within the prescribed period under 29 C.F.R. § 2510.3-102. The DOL may also file suit and litigate civil cases arising from errors that occur in plan administration. See ERISA § 502(a)(5), (6) (29 U.S.C. § 1132(a)(5), (6)).

Serious errors in plan administration that a DOL investigator discovers during an investigation, and which the client is reluctant to correct, may result in the investigator referring the matter to the IRS, the Department of Health and Human Services (HHS) (group health plans), or, for very serious errors, the Department of Justice (DOJ). As described above in Department of Labor Enforcement Authority, these entities have entered into a Memorandum of Understanding with the DOL that permits them to refer cases to the other for investigation and to share information between them.

The DOL, IRS, DOJ, and HHS have joint and several authorities with regard to employee benefit plans that permit them to collaborate on a case or defer to one another in enforcement. A client is much better off getting ahead of a plan error and correcting an error during the investigation process than finding itself the subject of a multiagency investigation and enforcement action. EBSA Enforcement Manual, Authority and Coordination, § 13.

Moreover, in serious cases, such as those involving misappropriation of plan assets or fraud relating to a plan, civil, and criminal investigations may run concurrently, or a criminal investigation may be triggered by findings in the civil matter. EBSA Enforcement Manual: Criminal Investigations Program. Should you discover evidence suggesting criminal activity has taken place in your review of the client's plan documents and information, advise the person or persons you believe might be the target of a criminal investigation to hire experienced counsel. You should also recommend to the client plan sponsor that it retain separate counsel to represent the employee benefit plan.

Closing the Investigation

When the investigation is coming to a close, discuss what closing document the DOL investigator intends to provide to your client. Most DOL investigations end with a closing letter. This may include a settlement agreement concerning certain violations or may be a mere letter giving notice that the DOL is not taking further action. The latter is obviously preferable. If issues have been raised in the investigation, you should try to negotiate a closing letter, rather than a mere "walk-away" letter providing no action will be taken, even where some violations were discovered. Customarily, an investigator that believes ERISA violations exist, and who has not found the client to have volunteered a correction, will issue a voluntary compliance notice before issuing a determination letter. EBSA Enforcement Manual, Fiduciary Investigations Program, § 17. That letter (a 10-day voluntary compliance letter) requires action within 10 days. See Sample VC Notice Letter.

The determination letter identifies the violations, proposes their method of correction, and sets forth a formal settlement of the investigation. If you require time to evaluate the DOL's findings and proposed action, consider requesting an extension or a tolling agreement. In complex circumstances, you may wish to elevate the settlement to the DOL Regional Office Director or to the National Office. If the DOL proposes sanctions, consider negotiating down the amount of the sanctions by promising that the client will implement additional plan administration controls to assure the same errors will not reoccur.

Avoid a Settlement Agreement If It Means the Sponsor Pays a 20% Penalty

Notwithstanding the discussion above, you may wish to avoid entering into a formal settlement agreement if the DOL investigation involves allegations of a breach of fiduciary duty. This is because a 20% penalty will likely apply, based on the "applicable recovery amount." See ERISA § 502(l)(2) (29 U.S.C. § 1132(l)(2)). The penalty may be avoided if you avoid entering into a formal settlement agreement, where the fiduciary agrees to take remedial action and informs the DOL that the fiduciary has done so (or will soon do so). The risk is that the DOL will conclude that the remedial action is insufficient. There are limited provisions for waiver of the penalty: for example, if the DOL determines that the fiduciary or other person acted reasonably and in good faith or that payment of the penalty will result in a severe financial hardship. See Citywide Bank v. Herman, 978 F.Supp. 966 (D. Colo. 1997) (where the district court held that the penalty requires, in the voluntary compliance context, that there be «a settlement agreement» or «meeting of the minds» between the parties, which did not occur). Careful handling of the voluntary settlement process can avoid an «offer and acceptance» and thus the triggering of a settlement agreement.

Letter to Client Terminating Representation on the Matter

Finally, regardless of any commitment made to the DOL regarding efforts to establish greater internal controls, close your representation of the client with a debriefing about what you and the client learned from the investigation and discussing steps that need to be taken to avoid the DOL's future enforcement action. Prepare a letter that also confirms to the client that your representation is concluded. In the event your client is audited or investigated regarding future plan operations, this correspondence will protect you, preventing any ambiguity that may arise whether the client intended you to continue to represent it in on-going plan compliance, or that you are responsible for monitoring future plan operations.

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Kathy Barrow has nearly three decades of experience helping employers correct tax and fiduciary issues with payroll, executive compensation and employee benefits.

Her national practice includes strategic assistance with ERISA matters, compliance programs and corrections of documentation and operational errors.

Kathy has a keen understanding of how and when to work with state and federal agencies, which contributes to her successful resolutions of tax issues with the U.S. Treasury and state and local tax authorities. Even with matters that involve millions of dollars in payroll and income taxes, her focus is to find solutions that mitigate burdens on impacted employees and avoid requirements to amend their personal tax returns.

Kathy's clients include employers across a range of industries, nonprofit organizations, health care providers and school districts. She has handled cases that involve the U.S. Treasury Office of Tax Policy; the Department of Labor, Employee Benefit Security Administration; massive payroll corrections involving thousands of employees; and has led representation before the U.S. Tax Court, various U.S. District Courts and Courts of Appeals throughout the country.