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Record Retention Best Practices for Employee Benefit Plans: How Much and How Long?

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Eric D. Altholz
ealtholz@verrill-law.com

Anna V. Mikhaylina
amikhaylina@verrill-law.com

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Overview and Goals

- Offer guidance for developing prudent record retention policies that will support compliance with ERISA and mitigate risks that can result from inadequate benefit plan records.

- The presentation will cover:
  - statutory and regulatory requirements
  - select cases involving record retention issues
  - recently announced IRS pre-audit pilot program
  - recommendations and best practices for record retention

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ERISA – Origins and Purpose

- Congress enacted the Employee Retirement Income Security Act in 1974, to provide rights, remedies, and protections to benefit plan participants and beneficiaries. ERISA was passed in response to several high-profile failures to pay benefits and other corporate misdeeds involving benefit plans.

- ERISA includes four broad categories of legal requirements:
  - Reporting and disclosure requirements
  - Participation and vesting requirements for retirement plans
  - Funding requirements for pension plans
  - Fiduciary duties and responsibilities

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ERISA prescribes record retention requirements for employee benefit plans

- **For all types of benefit plans:** ERISA Section 107 states that all records pertaining to agency filings or to participant or beneficiary disclosures must be retained and kept available for examination for at least six years.

- **For retirement plans:** ERISA Section 209 states that an employer must "maintain benefit records with respect to each of [its] employees sufficient to determine the benefits due or which may become due to such employees."

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Section 107 Enforcement and Other Considerations

- No statutory penalties associated with the record retention requirement under ERISA Section 107, but . . .
  - a plan participant may have a claim if rights are impaired due to lack of records;
  - absence of records can weaken employer's defense; and
  - prudent recordkeeping can be considered a fiduciary obligation

- One federal District Court held that an employee who was seeking reinstatement of long-term disability benefits was excused from exhausting administrative remedies prior to filing suit, because the employer had destroyed her claim records, thus making an appeal under the plan's procedures futile. *Medoy v. Warnaco Employees' Long Term Disability Plan* (E.D.N.Y. 1999).

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Records to be retained for at least six years

- Annual Reports (Form 5500)*
- Actuarial statements and valuations
- Determination letter applications and similar filings
- IRS determination letters
- SPDs and SMMs
- Participant benefit statements
- Other notices and disclosures?
- Claims related records (recommended)

* Form 5500 returns filed since January 1, 2010, can be found on https://www.efast.dol.gov/5500search/.

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Open Ended Requirement under Section 209

- Under ERISA Section 209, an employer must "maintain benefit records with respect to each of [its] employees sufficient to determine the benefits due or which may become due to such employees."
- DOL Proposed Regulation § 2530.209-2(d) emphasizes the open-ended nature of the requirement: records must be maintained for "as long as they may be relevant to a determination of benefit entitlements."
- Proposed Regulation allows that "[w]hen it is no longer possible that records might be relevant to a determination of benefit entitlements, the records may be disposed of, unless they are required to be maintained . . . under any other law."

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When are records considered "sufficient"?

- Under Proposed Regulations § 2530.209-2(c), records required to be maintained by a single employer plan will be deemed sufficient if, include all records maintained by the employer for the purpose of determining employee's benefit entitlements under the provisions of the plan.*
- Think about the information necessary to determine:
  - plan eligibility (including expiration of waiting periods)
  - vesting and breaks in service
  - contributions and benefit accruals/calculate benefits
  - forms of benefit payment (e.g., lump sum or annuities)
  - marital status and beneficiaries

* Regulations are still in proposed form. Certain cut off dates may apply.

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Records subject to ERISA Section 209

- Plan documents and amendments, SPDs and SMMs
- Age and service records
- Payroll records
- Marital status records
- Beneficiary designations
- Participant account records
- Claims related records (procedures, denials, appeals)
- Trust documents, custodial agreements, group annuity contracts and other funding instruments
- Notices, election forms, and distribution forms (e.g., written explanation of the QJSA option, special tax notice, distribution election forms, etc.)

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Section 209 Enforcement and Other Considerations

- Civil penalty of $33.00 per affected employee may be imposed on a plan sponsor that fails to retain the records under ERISA Section 209, unless employer can show that such failure is due to reasonable cause.
- The destruction of claims files may prevent a plan from determining when a participant's cause of action for benefits under ERISA Section 502 accrues, which limits employer's ability to invoke the applicable statute of limitations in defending a lawsuit.
- Poor record retention habits will make it more difficult to respond to audit requests from DOL and IRS in audit context.

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What can happen if the plan sponsor does not keep sufficient records?

- Courts expect employers to comply with the record keeping requirements of ERISA, but they consider facts and circumstances.
- Accidental destruction by flood may be a good excuse. *Mastrandrea v. Nassau Land Improvement Co., Inc.*, 1999 WL 461811, at *3 (C.A.2 N.Y., 1999).
- But where a plan sponsor lost records for a particular period, and the participant produced credible records received during the period, benefits may be awarded to the participant. *Estate of Barton v. ADT Security Services Pension Plan,* 820 F.3d 1060 (9th Cir. 2016).

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What can happen if the plan sponsor does not keep sufficient records? (cont'd)

- Plan sponsors often get the benefit of the doubt. Where records from more than 50 years ago were lost, court found that alone does not call into question the validity of the plan administrator's findings. Plaintiff asserting a claim for an enhanced pension did not demonstrate sufficient evidence to support his claim, despite the absence of records maintained by the plan sponsor. *James v. International Painters and Allied Trades Industry Pension Plan,* 407 U.S. App. D.C. 293, 738 F.3d 282 (2013).

- But in extreme cases, where there is an indication that a plan sponsor was imprudent or a bad actor, the "burden of proof" may shift from the plaintiff participant (alleging that benefits are due) to the plan sponsor (asserting that benefits are not due).

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Documents requested in DOL pension plan audit letter

- Current plan documents and amendments – signed and dated!
- Current trust agreement and amendments
- Most recent SPDs and SMMs
- Most recent SAR (if applicable)
- Forms 5500 for last three years (with all attachments)
- IRS determination letter (if applicable)
- Investment Policy Statement
- ERISA bond and fiduciary liability insurance policy
- Documents showing identities of trustees, committee members, and others who exercise management and control over plan assets and administration (i.e., key plan fiduciaries)
- Documents relating to meetings of Board of Directors and fiduciaries (meeting minutes, exhibits, and presentation materials)

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Documents requested by DOL (cont'd)

- Copies of service agreements and fee disclosures
- Copies of service provider invoices
- Employee census data
- Actuarial reports
- Notices to participants explaining how to start benefits
- Sample copies of participant notices regarding RMDs
- List of missing participants
- List of participants who have not started benefits by age 72
- Participant records for all terminated vested participants, including SSN, DOB, spouse DOB, current address, pay status, and monthly benefit amount

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Documents requested in IRS pension plan audit letter

- Plan document, trust agreement, and all amendments that relate to the years under examination
- Most recent determination letter
- SPDs, SMMs, and SARs*
- Minutes of trustee or plan administrative committee meetings
- Actuarial reports and AFTAP certifications
- Employee census reports
- Annual administrative reports, including coverage and nondiscrimination tests

*For plan years beginning after December 31, 2007, the SARs are no longer required for defined benefit pension plans to which Title IV applies, and which instead provide the annual funding notices.

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Other information the IRS may request in audit

- Brief description of plan sponsor
- List of plan trustees, fiduciaries, administrators, consultants, outside advisors, trust custodian and summary of services they provide
- Description of procedures for maintaining personnel records and how far back personnel records are maintained
- Lists of people responsible for day-to-day plan administration, employee census records, and personnel records
- Organizational charts (showing relationships within controlled group)
- Results of nondiscrimination and coverage testing
- Description of how plan information is provided to outside recordkeepers and advisors

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IRS Pre-Audit Pilot Program

- In June, the IRS announced a new “pre-examination retirement plan compliance program” designed to help plan sponsors identify and address issues that could otherwise create problems if discovered by the IRS upon audit of the plan.
- The IRS may formally adopt the program if it produces the desired results (i.e., self-correction of problems in a way that is less burdensome to employers and the IRS).
- Under the Pilot Program, the IRS will provide advance written notice to a plan sponsor that its retirement plan has been selected for audit.
- The pre-audit letter may identify a specific focus of the audit, such as required minimum distributions.

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IRS Pre-Audit Pilot Program (cont'd)

- The Pilot Program gives a plan sponsor 90 days to review plan documents and operations, determine whether they meet applicable legal requirements, and correct identified failures if eligible for self-correction under EPCRS (Rev. Proc. 2021-30).
- If the plan sponsor responds to the pre-audit letter, with an explanation of the corrective actions taken, the IRS may issue a closing letter based on the information provided by the plan sponsor or may choose to conduct a limited scope audit.
- If the plan sponsor does not respond in a manner satisfactory to the IRS, the IRS will schedule the full scope audit.

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IRS Pre-Audit Pilot Program - Observations

- Great opportunity but may be challenging for some employers.
- If you receive a pre-audit letter, immediately contact legal counsel, accounting firm, and recordkeeper to get them involved.
- Conducting a detailed review to identify errors and then correcting those errors could take longer than 90 days but make the effort even if correction cannot be fully implemented.
- Note that correction of retirement plan operational failures under EPCRS must be made for all years, not just years open to IRS audit.
- Well organized plan files and a robust record retention policy will support future correction activity.

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Record retention considerations

- Duration of recommended record retention depends in part on the type of benefit plan involved (e.g., health plan, defined contribution retirement plan, defined benefit pension plan, etc.).
- Six-year record retention period under ERISA Section 107 is an absolute minimum.
- Note that ERISA also has a six-year limitations period for lawsuits that begins when a participant (or the DOL, for enforcement purposes) has notice of circumstances creating a claim.
- Electronic data storage should make record retention much less burdensome and expensive than it was in the old days, and many required disclosures and notices can (and commonly are) provided in electronic form.
- The DOL has established requirements for electronic records.

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Record retention recommendations

- Organize records by category
  - reporting and disclosure (six-year minimum retention period)
  - benefits determination records category (open ended)
- It may be helpful to keep agency filings and disclosures to beneficiaries and participants for more than six years after the filing or distribution date – ERISA cause of action may not arise until later in some cases.
- For benefits determination records:
  - age, service, and compensation records are likely to be critical
  - maintain these records (and consider keeping claims processing records) until "it is no longer possible that records might be relevant to a determination of benefit entitlements."

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DOL requirements regarding electronic record retention

- The record keeping system must have reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form.
- Electronic records must be maintained in reasonable order and in a safe, accessible place and in such manner as they may be readily inspected or examined.
- Electronic records are readily convertible into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title 1 of ERISA.
- The electronic recordkeeping system must not be subject to any restriction that would directly or indirectly, compromise or limit a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title 1 of ERISA.

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Questions?

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