

Employee Benefits Security Administration (DOL) Investigations

The following serves as a guide for successfully navigating an EBSA investigation.

Who is the EBSA?

The EBSA is an arm of the Department of Labor that investigates the most basic and fundamental aspects of qualified plan administration. They conduct both civil and criminal investigations. They have 10 regional field offices located across the United States.

What triggers an EBSA investigation?

Their investigations are typically triggered by one of the following:

- Participant complaint(s)
- News articles
- Tips from other regulatory agencies (IRS, SEC, etc.)
- Information gleaned from 5500s

It is important to note that an EBSA investigation does not necessarily mean that evidence of a violation exists, but rather that some fact lead the EBSA to gather further information.

What is the EBSA looking for in an investigation?

The EBSA will typically initially contact the individual that signed the 5500 to inform them of the investigation. EBSA maintains a policy of not disclosing the basis for their investigation or the issue that may be pursued on investigation. However, the EBSA typically focuses their investigation on one (or more) of the following:

- Missing plan assets
- Significant drop in assets
- Investment performance and monitoring
- Required participant disclosures
- Title I of ERISA reporting
- Whether fiduciaries are prudently meeting their prescribed functions
- Whether assets are being used improperly

What to expect from an EBSA investigation?

An EBSA investigator will come on site to review documents relevant to the investigation. The length of the “visit” varies and ultimately depends on the facts and circumstances, but the general rule is one week on site. The plan administrator should receive a letter from the investigator in advance of the onsite visit requesting specific documents. There is no explicit monetary penalty for failing to have a requested document, but the plan administrator may be cited for a fiduciary failure. The following documents are usually requested:

- Plan document and amendments thereto
- Summary plan description (SPD) and summaries of material modifications (SMM)
- Trust agreements
- Summary annual reports (SAR)
- Form 5500s (at least the last 4-5 years, though there is a 6-year document retention requirement for 5500s)
- Fidelity bond
- Payroll records
- Remittance reports
- IRS favorable determination letters
- Service provider contracts
- Fiduciary liability policies
- Trust accounting statements
- Required notices (particularly blackout notices)
- Appraisals on plan assets (if applicable)
- Committee meeting minutes
- Investment policy statement

In addition, the investigator may request interviews with fiduciaries and other individuals relevant to the administration of the plan.

How to survive an investigation

- First and foremost, cooperate with the investigator. This means speaking openly with the EBSA, allowing employees to participate in requested interviews, and producing documents requested. It seems obvious, but initially the investigator will be making requests. If a plan sponsor fails to produce documents or cooperate in the investigation the EBSA has subpoena power and may compel cooperation under oath.
- Do not ignore the requests or delay responses without good cause.
- Have requested documents in a centralized location, and ready for the investigator's review. Have at least 6-years worth of requested documents and make certain they are organized.
- Designate an employee to be "in charge" of the investigation preparation. That means selecting an employee who is the most knowledgeable, and thus best suited to help expedite interviews, assist with interfacing with vendors, etc. *Maintain a single point of contact.*

What results from an investigation?

Following the investigation the plan sponsor will receive a letter from the EBSA. The letter will contain the following:

- Who are the plan fiduciaries
- What breaches (if any) were discovered
- How the plan was affected by the breaches
- Monetary losses suffered by the plan

The letter will provide fiduciaries with the opportunity to correct the breaches voluntarily. If the plan sponsor voluntarily corrects the breaches monetary penalties can be avoided. The plan sponsor always retains the ability to discuss and even contest the EBSA findings. As previously mentioned, either civil or criminal court cases may also result from an investigation depending on the violation discovered.

Can a violation be corrected without an investigation?

The DOL encourages plan sponsors to voluntarily correct violations. To that end they provide two non-investigation compliance programs, the Voluntary Fiduciary Compliance Program (VFCP) and Delinquent Filer Compliance Program (DFCP). Note a plan sponsor may not use either of these programs if they are currently under investigation.

The VFCP (www.dol.gov/ebsa/compliance_assistance.html#section8) provides corrective actions for 19 different violations. Correcting via use of the VFCP avoids imposition of penalties that may be imposed by ERISA section 502. However it is important to note that the correction only meets DOL requirements and the DOL is obligated to report findings to the IRS who may bring investigative actions.

The DFPC (http://www.dol.gov/ebsa/FAQs/faq_DFVC.html) provides plan sponsors with the ability to correct annual 5500 filing errors. Using the program also helps to avoid penalties.