

HUB

HUB University: Department of Labor Audit Preparation

June 5, 2018





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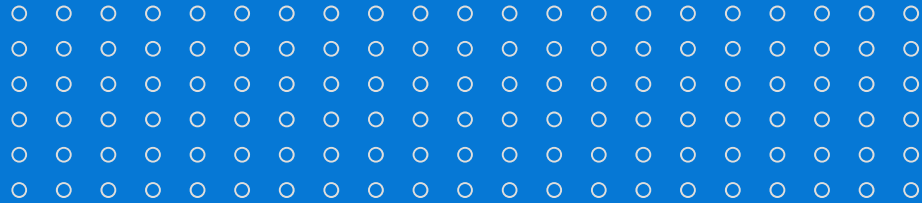
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Agenda

- 1 | Introduction to Audits
- 2 | The Audit Process
- 3 | Surviving an Audit
- 4 | Q&A

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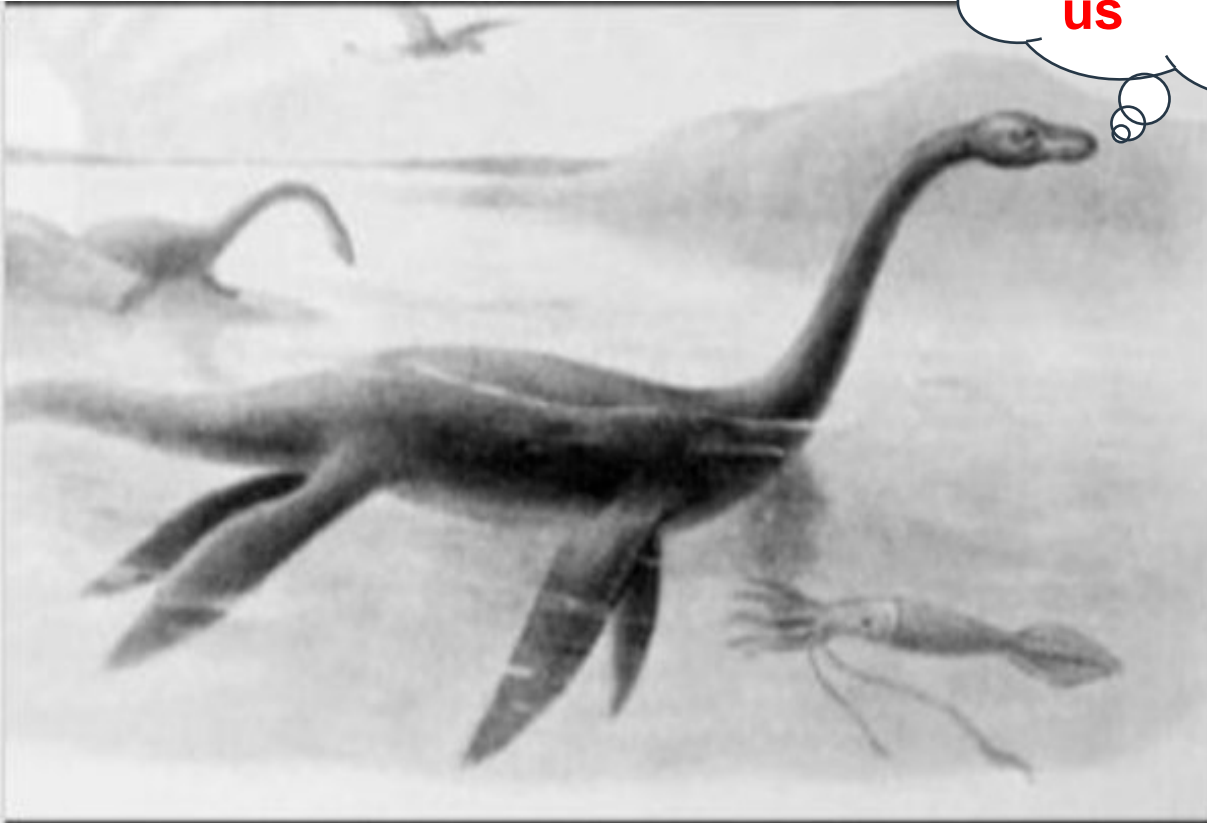


Introduction to Audits



Audits: Fact or Fiction

**Audits are
real, just like
us**



Which Agencies Can Audit My Plans?

- **Department of Labor**
 - Employee Benefits Security Administration- ERISA/COBRA Civil and Criminal violations
 - Works in conjunction with the U.S. Attorney Regional Offices to pursue criminal prosecution
 - Joint Enforcement- Contributory Plans Criminal Project
 - MEWA Enforcement Unit
 - OSHA- ACA Whistleblower Protections
- **Internal Revenue Service-** Affordable Care Act/COBRA/Cafeteria Plans
- **Centers of Medicare and Medicaid Services-** Medicare Secondary Payer Rules
- **Department of Health and Human Services-**
 - Office of Civil Rights (OCR)- HIPAA
- **Equal Employment Opportunity Commission (EEOC)-** ADA and GINA

- **DOL, IRS, Health and Human Services (HHS), CMS (Medicare), EEOC (including Wellness) and Lawsuits**
- Money/penalty = revenue
- Justice
 - Agencies must respond to complaints and may assist in lawsuits
 - Individuals don't understand how plans may operate and are told to look to federal agencies for help
 - Federal agencies charged **by law** to conduct regular enforcement
 - Audit arms must validate enforcement efforts, compiling and distributing reports within federal government

What was EBSA's focus in 2017?



Total Monetary Recoveries				
Total Recoveries	Recoveries from Enforcement Actions	Voluntary Fiduciary Correction Program	Abandoned Plan Program	Monetary Benefit Recoveries from Informal Complaint Resolution
\$1.1B	\$ 682.3 M	\$ 10M	\$ 27.9M	\$ 418.7M

Criminal Investigations		
Criminal Investigations Closed	Criminal Investigations Closed with Guilty Pleas or Convictions	Number of Individuals Indicted
307	79	113

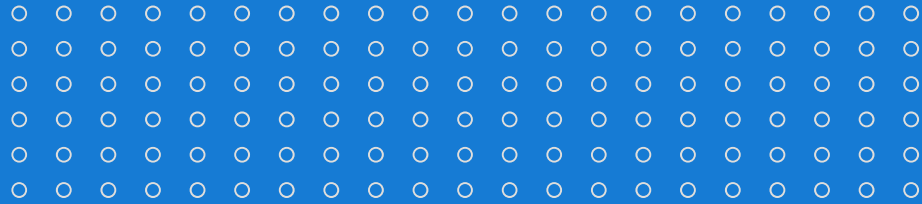
Correction Programs	
VFCP Applications Received	DFVCP Filings Received
1,303	22,139

What was the IRS' focus in 2017?

- Enforcement of the Employer Shared Responsibility Provision of the ACA for the 2015 Calendar Year
 - Anticipated to generate \$13 billion of revenue in 2018 and \$130 billion in the next ten years
 - Hundreds of thousands of employers have received Letters 226J; some are being notified that a lien will be imposed on their business due to failure to pay their ESRP
- Elimination of “double-dipping” tax schemes
 - Wellness programs and fixed indemnity plans
 - HRAs and fixed-indemnity plans
 - Self-funded plans and fixed indemnity plans

How are Companies Selected for Audit?

- Employee Complaints
- Issues Identified Through Other Investigations
- Other Government Agency Referrals
- Field Office Computer Targeting
- Form 5500 Review



The Audit Process



What Happens During an Audit?

- Initial document request and response
- On-site review
- Interviews with plan officials
- Identification of violations, or a closing letter if no violations are found
- Voluntary compliance and/or settlement agreement
- Closing conference
- Closing letter

These steps may be completed in a matter of weeks, or they may take a year or more, depending on (1) the complexity of the plan design and the issues identified by the DOL; (2) the availability of documents and persons; (3) the degree of cooperation between the plan and the DOL; and (4) the number of potential violations identified.

Audit Notice



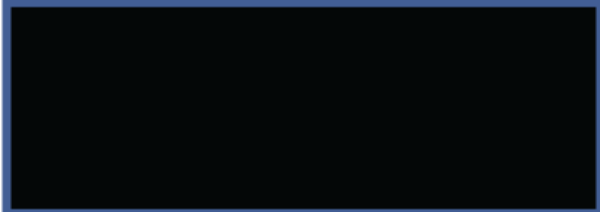
U.S. Department of Labor

Employee Benefits Security Administration
61 Forsyth Street SW, Suite 7B54
Atlanta, Georgia 30303



BY CERTIFIED MAIL

JUL 07 2016



Dear [REDACTED]

The U.S. Department of Labor, Employee Benefits Security Administration ("EBSA"), has been delegated the authority under Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA") to make periodic investigations of employee benefit plans to determine whether such plans are conforming with the provisions of Title I of the Act or any regulations or orders thereunder.

Based upon this authority, [REDACTED] Group Health Plan ("Plan") has been selected for review to determine if the Plan is in compliance with ERISA. On July 6, 2016, I spoke with the HR Director, [REDACTED] whom informed me that you are the administrator for the Plan. Unfortunately, I have been unable to contact you by telephone to schedule a convenient time for the review; therefore, I have made arrangements to begin the review on September 12, 2016 at 1:30 CST. Please contact me as soon as possible to confirm the time for the review.

Initial Document Request



ATTACHMENT A

1. Plan documents, including, but not limited to, the following:
 - a. Summary Plan Description (SPD);
 - b. Benefit booklets;
 - c. Evidences of coverage (EOCs) and Certificates of Coverage for each medical option;
 - d. Enrollment package provided at open enrollment and to new hires, including front and back of all enrollment forms; and
 - e. Documents describing plan coverages, rules, costs, including, but not limited to, documents specifying:
 - i. Eligibility, coverage, reimbursement or payment rates;
 - ii. Out of pocket maximums;
 - iii. Preauthorization requirements;
 - iv. Individual or aggregate dollar limits on claims;
 - v. Hospital stay limits;
 - vi. Deductibles or co-pays under the plan;
 - vii. The members of any network of eligible or preferred providers under the plan;
 - viii. The rules regarding coverage of medical/surgical and mental health benefits, including information as to any aggregate lifetime dollar limits and annual dollar limits; and
 - ix. The rules regarding pre-authorization for a hospital length of stay in connection with childbirth.
 - f. Documents describing changes to any of the above documents.
2. Summary of Benefits and Coverage ("SBC"), Notices of Material Modifications, and Uniform Glossary.

Failure to respond to requests for or provide documents may lead to subpoenas

- **Plan Documents** - focus will be on the various plan documents and agreements that are the basis for the benefits that are paid. Benefits must be paid in accordance with plan documents on behalf of eligible participants and must be properly recorded in the financial statements.
- **Examining Form 5500** - delinquent filings;
- **Medical Claims** - DOL estimates that approximately 20% of all claims are paid incorrectly;
- **Prescription Drug Programs** - is also concerned about unreasonable prescription drug programs (one with unreasonably high fees and a lack of transparency)

- Review plan documents to verify that they sufficiently ***describe the benefits offered*** by the plan and also the process by which a plan participant can ***appeal a denied claim***.
- Also consider ***reviewing agreements with service providers*** for transparency and fee appropriateness.
- Plans with self-funded claims will want to review claims processing procedures to make sure they are appropriately ***designed to address the risk of errors or fraud***.
- Adopt ***claims procedures*** as an employer for eligibility determinations.
- Be prepared to provide a ***medical review for certain wellness plan conditions***.
- ***Monitor your carrier or third party administrator (TPA)s claims and appeals*** procedures. Finally, make sure any external review fees are as narrowly applied as required.

What Plan Documentation Should I Retain?

EBSA

- Plan documents (self-funded plans): medical, dental, vision, HRAs, health FSAs, disability and pharmacy.
- Wrap Summary Plan Descriptions
- Summary Plan Descriptions
- Summary of Material Modifications
- Summary of Benefits and Coverage
- Evidence of Coverage booklets (carrier booklets for insured plans)- Life, disability, AD&D, EAP, voluntary plans, etc.
- All policies/contracts/service agreements for insured and self-insured plans, including third party administrators
- [Benefit plan elections and contributions](#)
- [5500 Forms, SARs](#), and if applicable, M-1 Forms
- Annual notices (WHCRA,CHIPRA,ACA)

IRS

- Cafeteria Plan (POP) Documents
- Healthcare and Dependent Care Plan documents
- Transportation Fringe Plan documents
- [Form 5500 Forms and SARs](#)
- [Benefit plan elections and contributions](#)
- Adoption Assistance Plan Documentation
- Life insurance/Table I calculations
- Results of nondiscrimination tests
- Forms 1094/1095-C/B
- Payroll records used to administer measurement periods

On-Site Review and Interviews with Plan Officials

- May be required depending on circumstances
- Advance notice will be provided, including list of those to be interviewed
- Control the process
 - Prepare those who will be interviewed
 - Treat the auditor with respect, but don't make them too comfortable
 - Provide a meeting room rather than an office
 - Don't allow them to walk around freely
 - Resist the urge to overshare
- Consult with counsel?
- Notify liability carriers

Identification of Violations/Voluntary Compliance

- If the investigator believes that violations exist and is not satisfied by the explanation or defenses a [VC Notice Letter](#) will be issued
- Identifies the violations and invites the party to voluntarily correct the situation
- Breaches of fiduciary duties require an additional 20% penalty on top of any settlement amount – early correction before the VC Notice Letter *may* help avoid these penalties
- Not all cases are eligible for voluntary compliance –
 - Potential fraud or criminal misconduct,
 - Where removal of a fiduciary is warranted,
 - Where individuals have previously been determined to have violated ERISA or other federal statutes, or
 - Where the proposed correction of violations will exceed a one-year period.
 - Cases involving novel legal issues or cases that involve complex fiduciary violations as appropriate for voluntary compliance

DOL Announces Inflation-adjusted Penalties for 2018



Infraction	Max 2017	Max 2018
Failure by an employer to inform employees of CHIP coverage opportunities	\$112/each employee	\$114/each employee
Failure of a group health plan or insurer to satisfy the requirements with respect to genetic information	\$112/each employee, unintentional failure maximum cap \$558,078	\$114/each employee, failure maximum cap \$569,468
Failure to provide Summary of Benefits Coverage	\$1,105	\$1,128
Failure/refusal to properly file plan annual report	\$2,097/day	\$2,140/day
Failure to disclose certain documents upon request under ERISA ; Failure to furnish notices	\$1,659/day/statutory recipient	\$1,693/day/statutory recipient
Failure to file annual report for MEWA	\$1,527/day	\$1,558/day
Failure to provide DOL requested documentation	\$149/each failure, not to exceed \$1,496 per request maximum	\$152/each failure, not to exceed \$1,527 per request

- Penalties had been fixed, now adjusted for inflation each year
- Often presented as “worst case scenario” – listed amounts are generally the maximum
- Actual penalties might be considerably less
- Facts and circumstances play an important consideration
- Good faith efforts to comply vs willful neglect

Settlement Agreements



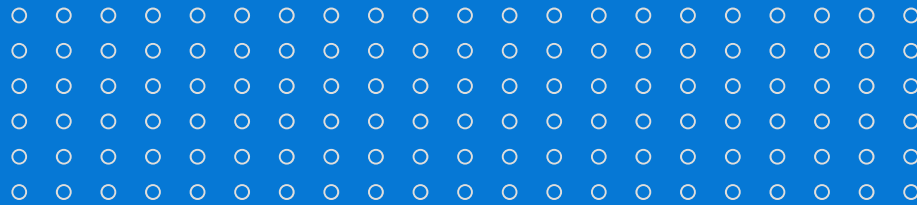
- An agreement between the DOL and the person who is alleged to have violated ERISA under which the claim for the ERISA violation is released in return for cash or property tendered to a plan, participant, or plan beneficiary
 - Steps that need to be taken and timing for completion
 - How much needs to be paid, deposited or credited and to whom
 - What additional documentation is needed
 - Are any participant communications required
- EBSA generally insists on full recovery by the plan, including losses, disgorged profits, and amounts necessary to achieve correction – one year to complete

Closing Letter/Conference



- After corrective action has been taken and confirmed, and applicable payments have been made, EBSA will send a closing letter indicating that compliance has been achieved.
- Sometimes, a closing conference takes place between the investigator and the party under investigation before a closing letter is issued. While not required, it can be helpful as a last attempt at negotiating an acceptable course of action.
- Documentation of closing is important as it removes the potential liability

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Surviving an Audit



Look Your Best, Every Day



- Start with document compilation and reviews
 - Focus on same list of documents as agencies
- Focus on administration and actual practices
 - Make sure administrative processes (and those of service providers) are in order
- Hold internal compliance discussions, focusing on any failures to follow plan documentation, systematic failures (such as missing of deadlines), or other compliance gaps that may exist
 - “Shoot the gaps”
- Avoid paper trails that may create **red flags** on compliance gaps
- Correct failures as found
- Focus on avoiding lawsuits
- Document **good faith compliance** on questionable issues/gray areas

- Adopt best practices – five examples
 - Designate employee status
 - Develop a three-to-five-year strategic plan
 - Review and adopt corresponding wording in all internal and employee-facing materials
 - Train managers on what they must and cannot do
 - Beta test your reporting for bad/wrong codes
- Manage change with employee communication
- Review all third-party agreements
- Create action plan for: 1) investigations, penalty demands, audits; 2) employee appeals; and, 3) employee complaints and lawsuits
- Use technology – it's your friend

Create a Fiduciary File



- Objectives
 - Locate documentation required for compliance and audit
 - Shoot the gaps/upgrade
 - Update as needed
- Very detailed approach
- Format – electronic or paper

Additional Audit Tips



- Contact the investigator as soon as possible and establish a positive and cooperative relationship.
- As soon as the initial document request is received, consult with legal counsel that is experienced in the employee benefits area.
- Designate a point person to be the single point of contact between the investigator and the party under investigation.
- Obtain as much information from the investigator as possible, including whether the investigation is a limited review, a fiduciary investigation, or a prohibited persons investigation.
- Consult with any service providers that may be involved in the investigation and establish a method to ensure that responses are coordinated, timely, and consistent.
- Make copies of the requested documents (other than any that counsel advises should not be produced) for the investigator and retain a set of copies.
- Obtain an inventory and copies of any documents that service providers turn over to the investigator.
- In negotiating any voluntary corrections, pay particular attention to the mandatory 20% penalty on amounts attributable to a fiduciary breach and recovered by the DOL under settlement agreements or court actions; be sure that the party under investigation understands whether the penalty will apply.

When to Seek Expert Advice

- Samples of Issues to Escalate:
 - Controlled group issues
 - Employee vs. independent contractor status
 - Coordination of reporting across entities
 - Possible exemptions
 - Notices from state or federal insurance exchanges (2016 or later)
- Who to Contact:
 - CPA/accountant
 - Broker/consultant
 - Legal counsel

Q&A

Thank you.