



Trustee Pitfalls: What Do I Do If My Plan Gets Audited?

James V. Cole II

Groom Law Group, Chartered

(202) 861-0175

jcole@groom.com

NECA 2015 Labor Relations Conference

March 19, 2015

Overview

- Overview of DOL structure & law
- Anatomy of a DOL EBSA Audit
- What do I do when I get a DOL document request?
- Issues that come up on audit
- What can I do before the plan is audited?

Overview

Why DOL Investigates



- Participant complaints/inquiries
- Referrals from other regulators (e.g., ETA, OLMS or IRS)
- Other information, e.g., news reports
- *National and field office projects*
- Form 5500 / Form 990 desk and edit checks

Overview

ERISA - Breaches of Fiduciary Duty

- Prudence – reasonable expert (know what you don't know)
- Sole & Exclusive Benefit Rule
- Administration expenses reasonable & necessary
- Diversification
- Prohibited Transactions
 - 406(a) – Almost everything is “prohibited”
 - Many exceptions
 - Service provider & fiduciary compensation
 - Related party transactions
 - Self-dealing
 - Acting as Adverse Party
 - Anti-kick back rule

Overview

ERISA - Breaches of Fiduciary Duty

Named Fiduciaries & Plan Administrators

- Trustees of employee benefit plans are fiduciaries

Responsibility for Administration or Discretion

- Third Party Administrators?
- Plan Staff?
- Committees for Multiple Plans?

Overview

Civil Penalties

- ERISA § 502(i) - *Authorizes* Secretary to assess penalty (5% of “amount involved”) against a party in interest who engaged in a prohibited transaction (if plan is not subject to Code § 4975).
- ERISA § 502(l) - *Requires* Secretary to assess civil penalty against a fiduciary who breaches fiduciary responsibility, or against any person who knowingly participates in such breach.
 - Penalty is 20% of “applicable recovery amount” recovered from the fiduciary under a settlement agreement with the Secretary or ordered by court in proceeding instituted by Secretary.
- ERISA § 502(c)(2) - *Authorizes* Secretary to assess civil penalty against plan administrator who fails to file annual reports (Form 5500).
- Equitable Remedies (e.g., bar Individual from serving as a fiduciary)

Overview

Criminal Authority, ERISA § 506(b)

- ERISA § 506(b) - Authorizes Secretary of Labor to investigate and refer criminal violations involving employee benefit plans.
 - 18 U.S.C § 1001 material false statements to executive agency
 - 18 U.S.C. § 1027 - false statements in documents required by ERISA, such as Form 5500 filing
 - 18 U.S.C. § 1954 -solicitation to influence operations of a plan
 - ERISA § 411 - prohibits certain persons from holding plan positions
 - ERISA § 501 - willful violation of Title I
 - ERISA § 511 - coercive interference with participants' rights

- Prosecuted by DOL Inspector General/U.S. Attorney's office.

Criminal Authority – The Taft-Hartley Act

- Taft-Hartley Act
 - Strict payment prohibition
 - Anti-bribery prohibition
 - Exceptions form the rule (but *Demisay* leaves administration to ERISA)
 - Trust Agreement
 - Written method of contributions
 - Annual Audit
 - Equal Representation

Anatomy of a DOL Audit

- Initial document request or subpoena
- On-site document review
 - DOL may take copies of documents
- Key person interviews
- 10 Day Letter – Voluntary Compliance “VC” Letter
- Reply from Plan
- Meeting with Investigator/Supervisor/Assistant Regional Director/Regional Director

Anatomy of a DOL Audit

- Agree to remedies
- Provide additional information
- Agree to disagree
- Review up line at Regional Office
- Review by regional Solicitor's Office
- Possible review by National Enforcement Office and National Solicitor's Office for national or difficult issues (especially with a national enforcement program)

Anatomy of a DOL Audit

- Attorney informal meetings or consultations with Regional Solicitor, National Enforcement, National Solicitor Offices
- Provide additional legal and factual analysis
- Consider request for interpretive advice (especially for widespread issues)
- Enforcement Manual, Advisory Opinions & Information Letters
- Negotiated settlement before DOL suit
- Closing Letters
- DOL files lawsuit – discovery, possible settlement, news release
- Referral to other agency

Sample Document Request



- Trust Agreement & Plan Documents (Including Amendments)
- List of All Trustee & Staff Committees
- Trustee & Committee Meeting Minutes
- Collective Bargaining & Adoption / Participation Agreements
- Union Constitution & Bylaws
- Area Wide Agreements
- Policies & Procedures
- Plan Sponsor Services Documentation, Annual Reports & Contracts with Affiliated Plans for Shared Expenses
- Detailed Documentation of Plan Administrative Expenses

Sample Document Request

- Fidelity Bond and Fiduciary Liability Policies
- General Liability and D&O liability Insurance Policies
- List of Trustees (with Contact & Appointment Information)
- List of Employees (W-2's and 1099's)
- List of Plan Service Provider Contracts
- List of Parties In Interest (Including Contributing Employers)

Sample Document Request

- All Correspondence with Plan Service Providers, or Relating to Any Plan Matter
- Employer Contribution Records & Delinquencies
- Investment Policy
- RFP's for Investment Managers & Service Providers
- Investment Contracts
- Service Provider Contracts
- Leases
- Employment Agreements

Sample Document Request

- Annual Audit
- Bank Statements (with List of Authorized Signatories)
- Loan Due Diligence
- Loan Documentation
- List of All Personal and Real Property Owned by Plan
- Petty Cash Records
- Investment Consultant Plan Performance Reports
- Appraisals

Sample Document Request

- One time filing with DOL for exemption from Form 5500
- Form 5500's if there is no one time filing
- Form 990's
- Sponsoring union's Form LM-2
- Plan's IRS Determination Letter showing tax exemption
- Plan's IRS Determination Letter Request
- Accountant SAS 115 and internal control letters
- Correspondence with taxing authorities (e.g., property tax)

Sample Document Request

- Reciprocity Agreements
- Summary Plan Description (SPD)
- Participant Communications
- List of Participants
- Apprenticeship Standards & Apprentice Applications
- Participant Benefit Appeals / Discipline
- Correspondence with DOL ETA/BAT
- Correspondence with IRS & DOL

Sample Document Request



- Law Suits
- Settlement Agreements
- Employee Handbook / Office Policies
- Graduation / Skills Competitions / Joint Meeting Records
- Office Event Expense & Attendance Lists (e.g., Christmas Office Parties)
- Charitable Contributions

Sample Document Request

- Meals, Entertainment, Mileage & Conferences – Reimbursements
- Form LM-30's & LM-10's
- Credit Card Statements (current & expired cards)
- Vehicle Records
- Plan receipt and disbursement journals
- Conflict of Interest Disclosure Forms

What Do I Do When I Get the Document Request from DOL?

- Call your lawyer (I don't care if it's expensive, call him anyway)
- Identify your insurance policies that may provide coverage
 - D&O Policy with ERISA Fiduciary Endorsement
 - Pension Fiduciary Policy that may name multiple plans as insureds
 - Union Leadership Policy
- Draft a claim letter to your insurers
- Establish a claim date as soon as possible and invoke the insurer's obligation to pay for defense costs
- Check for "Gap Coverage" – Pre-Claims Investigations

What Do I Do When I Get the Document Request from DOL?

- Establish a single point of contact with DOL (preferably your attorney)
- Keep a separate copy of all the documents DOL reviews
- Keep a separate copy of all the documents DOL copies
- Isolate investigator while on premises
- Do not let investigator talk with anyone without an attorney present
- Consider whether to request subpoenas
- The investigator will be friendly but is not your friend
- Speak only when spoken to and only answer the question asked

Issues that Have Come Up on Audit

- Meals for trustees and employees or their families
- Travel expenses for trustees and employees
- Alcohol expenses
- Graduation / Event / Office expenses:
 - Who is attending? Family members? Union Officers? Dignitaries?

Issues that Have Come Up on Audit

- Fidelity bonding
- Personal vehicle use
- Form 5500 filings
- Building purchase and/or leasehold improvements.
 - Market value?
 - Updated lease arrangements

Issues that Have Come Up on Audit

- Fiduciary status of plan employees / Training Directors & co-fiduciary duty
- Trustee and staff entertainment (e.g., golf, duck tours & in-town meals)
- Advertisements (e.g., clothing, hole sponsorships, retirement dinners)
- Gifts from service providers

Issues that Have Come Up on Audit

- Gifts to charities, trustees, employees, participants or family (e.g., funeral flowers, attendance at events, or charitable events)
- Transactions between plan, employers or union
- Allocation of plan expenses between plans
- Investment losses or failure to diversify
- Late Fees and interest on receivables

Issues that Have Come Up on Audit

- Bonuses – post retirement & current employees
- Failures to recuse on expenses and compensation
- Automobile Leases – Who has one, focus on necessity of automobile
- Food –
 - Assets used to purchase food for participants or staff on site?
 - What is the reason for doing this?

What Can I Do Before an Audit?

Internal Review (with counsel is best)

- Review your fiduciary insurance policies
- Review your indemnification policy
- Update trust agreement & policies
- Review service provider agreements
- Update market value of property and adjust lease accordingly

What Can I Do Before an Audit?

Internal Review (with counsel is best)

- Review & document delegations of authority
- Review need for employment agreements
- Review Forms 5500 & 990 prior to filing
- Address points in and preview accountant letters
- Document all investment decisions with consultant recommendation, due diligence, and monitoring

What Can I Do Before an Audit?

Internal Review (with counsel is best)

- Adopt / Revise Trustee and Employee Expense Policy
- Adopt / Revise Conflict of Interest Policy
- Adopt / Revise Employee Handbook
- Adopt / Revise Expense Allocation Policy
- Adopt / Revise Check and Expense Authorization Procedures

What Can I Do Before an Audit?

Internal Review (with counsel is best)

- Understand the fiduciary exception to attorney-client privilege
- Prepare “Governing Documents Binder”
- Counsel review of minutes
- Adopt Budget
- Consider “Plan Review” by counsel (with caveat)



Trustee Pitfalls: What Do I Do If My Plan Gets Audited?

James V. Cole II

Groom Law Group, Chartered

(202) 861-0175

jcole@groom.com

NECA 2015 Labor Relations Conference

March 19, 2015