



Exceptional service. Dykema delivers.

ARE YOU READY FOR A DOL AUDIT?

Prepared By Alice M. MacDermott, Associate General
Counsel, HAP

Presented by Amy M. Christen, Member, Dykema



California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.
www.dykema.com

EBSA - Background

The mission of the Employee Benefits Security Administration (EBSA) is to assure the security of the retirement, health and other workplace related benefits of America's workers and their families.

EBSA does this by developing effective regulations; assisting and educating workers, plan sponsors, fiduciaries and service providers; and enforcing the law.

EBSA has 10 Regional Offices that conduct compliance investigations and provide compliance assistance.

EBSA has a Strategic Enforcement Plan (STEP) that describes basic enforcement strategy. This was last published in 2000 at 65 FR 18207 . Each Regional Office creates its own Program Operating Plan.

ERISA and Fiduciary Responsibility

Who could potentially be a fiduciary of a group health plan?

Any person who has :

- control over plan assets, or
- discretionary authority or
- control over plan administration, or
- gives investment advice.

ERISA and Fiduciary Responsibility

Examples of potential fiduciaries

- Employer
- Insurance Company
- Contract Administrator or “TPA”
- Plan attorney or accountant
- Recordkeeper or utilization reviewer
- Insurance Broker

The Responsibilities of a Fiduciary?

- Fiduciaries act on behalf of participants and their beneficiaries in a group health plan and are responsible for:
- Acting solely in the interest of plan participants and their beneficiaries for the provision of health plan benefits;
- Acting prudently;
- Following the plan documents (unless inconsistent with ERISA);

Selecting a Service Provider

When selecting a “service provider” to provide plan administrative or other services for the group health plan – the fiduciary must make sure not to engage in a “prohibited transaction” with a “party in interest.”

Consequences of Breaching Fiduciary Responsibilities

- Person may have personal liability to restore plan losses
- DOL may bring a civil lawsuit and assess civil penalties
- Person may be barred from being a fiduciary
- Possible criminal prosecution in extreme cases

Investigations

The DOL may conduct civil and criminal investigations.

Investigations may result from

- Participant complaints
- Form 5500 Reviews
- Referrals from other agencies such as CMS, IRS or state insurance departments
- Media reports

Investigations

- An auditor or investigator will reach out to the plan or service provider
- A confirmation letter will be sent and documents will be requested – the plan being investigated – audited will be identified – and dates and times confirmed
- On-site investigations may include interviews - identification of service providers – and gathering information about basic operations

Conclusion of Investigation

If there are no issues a closing letter is issued – otherwise a corrective action plan may be needed.

An investigation or audit of a group health plan may require corrective action by the plan's service providers to close out the audit/investigation.

DOL Investigates ERISA Sec. 7 and ACA

- The Department of Labor is investigating fiduciaries including plan sponsors, service providers and health plan issuers for compliance with requirements under ERISA section 7 and the Patient Protection and Affordable Care Act.
- But the focus of investigations change with time so check the EBSA website for enforcement priorities and strategies.

Current Enforcement Priorities

National initiatives for health enforcement include:

- Mental health parity
- Emergency services
 - Denials based on diagnoses - and appropriate payment for out of network services.
- Service providers' self-dealing
 - Hidden fees – excessive fees

What can you do to ensure that you are ready to respond quickly, completely and accurately?

Six Tips for Issuers and Service Providers

Tip #1

Make Sure You Are Compliant.

- Conduct a self-audit using DOL compliance tools available on the EBSA website.
- Read through the EBSA Enforcement Manual.
- Look at the ERISA Enforcement priorities for EBSA.
- Identify any compliance gaps. 
- Develop any necessary compliance plans.

Tip #2

Let Your Employees and Clients Know About DOL Investigations

- Send Bulletins to Client Employer Groups.
- Send Bulletins to Brokers.
- Educate your staff to recognize a DOL inquiry.
- Establish a point person or lead department to triage all DOL inquiries [Compliance? Legal?]

TIP #3

Know Where Your Documents Are Located

- Most DOL Investigations use template document requests.
- Look at those templates and identify the location of documents, information and reports in your organization.
- Based on what you find develop template responses.

Tip # 4

Establish a Response Team and a Document Site

- Identify a primary and secondary responder for each department that has a role in providing information.
- Establish a shared site to deposit documents and information.
- Establish a form to use to track responses.

Sample Tracking Form*

*See handout for more details

#	Document or Requirement	Owner	Comments
13	Fidelity Bond, including declarations page, and any and all riders/endorsements, if applicable;	Group	Sample response for an insured Plan: HII is exempt from the fidelity bond requirements under 29 CFR 2580.412.31 since HII as an [HMO] [Insured Plan] is subject to the risk based capital requirements and regulation of the [Insert Name of State Insurance Department]. Larger Groups whether self-funded or insured may also have a Fidelity Bond that is part of the fiduciary liability coverage.

Tip #5

Make Sure Your Disclosures Are HIPAA Compliant

- Plan Sponsors/Employer Groups can only receive protected health information if they are compliant with 45 CFR § 164.504(f). 
- DOL Investigators are generally willing to receive the minimum necessary PHI directly if sponsors/groups cannot certify compliance.
- Make sure you are only providing the DOL with the minimum necessary information. 
- Send your documents/information securely.
- Don't forget to track your disclosures.

Tip #6

Communicate Communicate Communicate

- Be transparent with the sponsor/group and the DOL investigator.
- Try to speak directly with the DOL if you need an extension of time, need clarification of necessary documents or need to discuss a HIPAA issue.
- Be quick, accurate and complete.
- Explain any delays or absence of a response.
- Track your disclosures [Use the DOL Sample Request for Information form to track responses].
- Once you have responded, follow up and ask if your response was sufficient. Get closure.

Prepared by:

Alice M. MacDermott
VP- Associate General Counsel
Health Alliance Plan
amacderm@hap.org

Presented by:

Amy M. Christen
395700 N. Woodward Ave, Ste. 300
Bloomfield Hills, Michigan 48304
(248) 203-0760
achristen@dykema.com