

Six Ways to Limit Your Chances of a Visit from the DOL

8/9/2011 Jennifer A. Watkins

The Department of Labor (DOL) is in the process of adding hundreds of investigators to its staff. And since DOL investigators are responsible for enforcement of fiduciary, reporting and disclosure requirements for employee benefit plans, that means you had better be following the letter of the law. In 2010, the DOL conducted 3,112 civil investigations, almost 75 percent of which resulted in findings of one or more violations.

Here are six ways to avoid a visit from your friendly local DOL investigator:

1) Deposit participant contributions as soon as possible.

This issue is one of the DOL's top enforcement initiatives.

DOL regulations require that participant contributions, including loan repayments, be deposited to the plan's trust on the earliest date the contributions can reasonably be segregated from the employer's general assets. The DOL's position is that the "earliest date" is determined on a case-by-case basis. Because most companies have the ability to transfer funds electronically, the "earliest date" is often within a few days of pay dates, and sometimes even the same day. It is not acceptable to rely on the maximum time permitted under the regulations, which is the fifteenth business day of the following month.

The Form 5500 Annual Report asks whether the employer failed to transmit any participant contributions within the period described in the regulations. This question must be answered "yes" if there have been late deposits—even if the employer has corrected the violations. If there have been late deposits, very often the DOL will send the employer a follow-up letter requesting confirmation that the employer took appropriate corrective actions. Our experience has been that a DOL investigation will sometimes follow, even if the employer has already corrected the violations and responds to the follow-up accordingly.

The Form 5500 is signed under penalty of perjury and plan administrators must always complete it truthfully. If a late deposit has been discovered, it should be corrected and reported on the Form 5500 as required. The only way to avoid inquiries from the DOL is to avoid making late deposits in the first place. Deposits should be made as soon as possible after each pay date on a consistent schedule.

2) Make sure your plan has a proper fidelity bond.

Another of the DOL's hot-button issues is inadequate bonding of plan fiduciaries and individuals who handle plan funds. A company often has a fiduciary policy or a policy protecting directors and officers, but not a true ERISA bond protecting the plan. Generally, the amount of the ERISA bond should be at least 10 percent of the amount of funds handled, but in no event less than \$1,000 or more than \$500,000 for each plan covered.

The Form 5500 asks whether the plan is covered by a fidelity bond and for what amount. Answering this question "no" would obviously tip off the DOL to an issue, as would a bond below the required level.

Plan sponsors should know what level of coverage the plan has and answer the question accordingly. If the bond is inadequate, the plan administrator should seek to increase it immediately.

3) Promptly respond to participants' inquiries or requests for information.

Certain plan documents must be made available for examination by any participant or beneficiary. These include the latest summary plan description, latest Form 5500, any applicable collective bargaining agreements, the trust agreement and plan document. If a participant or beneficiary submits a written request for these documents, the plan administrator must provide them within 30 days of the request. If a plan administrator does not, it may be liable for a penalty of up to \$110 per day.

The participant or beneficiary may complain to the DOL if the plan administrator does not comply with information requests. These complaints often trigger an inquiry from the DOL and, depending on the response, the DOL may investigate the plan. A large number of investigations are based on participant complaints.

The best practice is to keep plan records updated and organized, and respond to participant or beneficiary inquiries as soon as possible.

4) Distribute regular, accurate participant statements.

Plans must distribute regular benefit statements to participants and beneficiaries. For defined contribution plans, statements generally must be distributed once each calendar quarter if the plan allows participant investment direction, and once each calendar year if the plan does not allow investment direction. For defined benefit plans, statements generally must be distributed at least once every three years. Finally, participants and beneficiaries may also request statements once during any 12-month period.

Just like with routine plan documents, participants may complain to the DOL if they have trouble obtaining accurate statements. Statements should be accurate, easy to understand and distributed in a timely fashion.

5) Ensure that fees are reasonable and do not pay expenses with plan assets.

The Form 5500 requires large plans to disclose service provider fees charged to the plan. Excessive plan fees have become another top investigative issue for the DOL, and investigators are likely to carefully review Schedule C to identify potential red flags. Also, while many administrative expenses may be paid from plan assets, some may not. Contact us for help with determining whether fees are reasonable and sorting out what expenses may be paid with plan assets.

6) Respond promptly to DOL letters requesting information.

No explanation is necessary for this one. Ignoring the DOL's inquiries will do the opposite of making them go away, so please don't try it!

Form 5500 filings are a common source for investigators to select plans for investigation. Red flags include plans with a large percentage of assets in real estate, limited partnerships or the like, noncash contributions, loan defaults, low diversification ratios, unreasonably low rates of return, an adverse accountant's opinion and notes or disclaimers on the financial schedules. Remember, the Form 5500 is signed under penalty of perjury. If you are concerned that any of these red flags may apply to your plan, we can help you fix them, but you must answer the Form 5500 truthfully.

In addition to the above triggers, the DOL will also target a plan for investigation based on other factors, such as bankruptcy filings or media reports that a company is in financial trouble. Too often, plans sponsored by employers experiencing severe financial difficulty are vulnerable to inappropriate behaviors by the employer, such as delaying deposits of participant contributions to the plan, loans to the company or other misbehaviors. Sometimes, investigators target specific industries or simply choose plans at random.

What do you do if you receive a notice that the DOL is investigating your plan? Contact us immediately! The sooner you call us, the more likely we can help make the process run smoothly and take steps to reduce your potential liability.