

EVERSHEDS
SUTHERLAND



Bringing details to light

GAO Report Illuminates DOL
Enforcement of ERISA

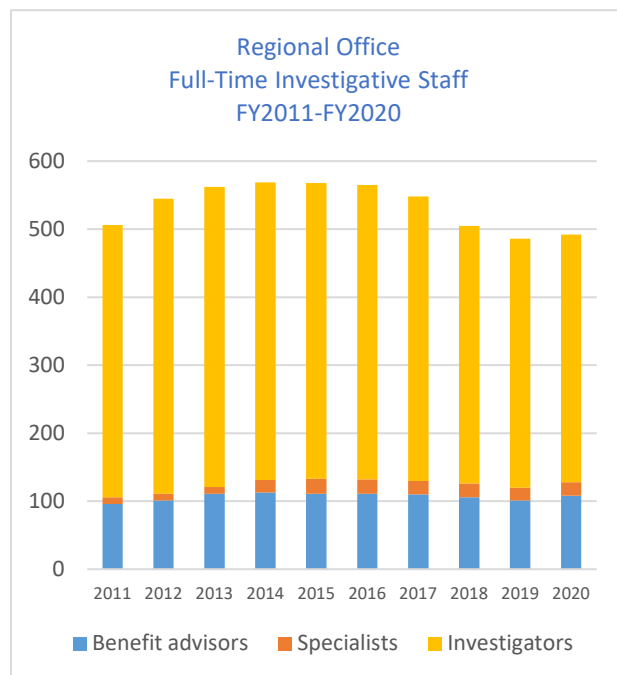
June 10, 2021

GAO Report Illuminates DOL Enforcement of ERISA

In a [report released on May 27, 2021](#), the US Government Accountability Office (GAO) published the results of a 15-month inquiry into the enforcement of the Employee Retirement Income Security Act of 1974, as amended (ERISA) by the Department of Labor (DOL). GAO last conducted such an inquiry in [2007](#). The stated purpose of the inquiry was to examine DOL's management of and strategies to improve the ERISA enforcement process, and the immediate and long-term challenges presented by COVID-19. In the process of doing so, the report elaborates or confirms a number of instructive details about the ERISA enforcement process.

By way of background, DOL's ERISA enforcement activity is primarily conducted out of its 10 Employee Benefits Security Administration (EBSA) regional offices, with support from the EBSA National Office (Office of Enforcement, Office of the Chief Accountant, Deputy Assistant Secretary for National Operations, and Deputy Assistant Secretary for Regional Office Operations) and the DOL Office of the Solicitor and Office of Inspector General. Individual investigators in regional offices have substantial responsibility for identifying and undertaking investigations, subject to priorities established by the National Office and the respective regional office.

DOL Enforcement Staff



EBSA has always been a smaller federal agency, with fewer than 1,000 employees, and its full-time investigative staff is quite modest relative to its regulated community – which currently includes over 700,000 retirement plans, about 2.5 million health plans, and countless service providers.

The regional offices undertake their compliance oversight primarily through three types of staff:

- Benefits advisors, who respond to inquiries mostly from individual participants and undertake to resolve concerns about retirement or health benefits without a formal investigation or, if appropriate, refer the case

for a full investigation. In FY2020, for example, benefit advisors responded to about 69,000 inquires about health benefits and 102,000 inquires about retirement benefits; since FY2013, retirement inquiries have consistently exceeded health inquiries. The number of benefit investigators increased annually from FY2011 to FY2014 and has slightly fluctuated since then. The FY2020 count of 108 benefit advisors just exceeded the 10-year average of 107.

- Specialists are subject-matter experts who sometimes lead investigations and other times act as resources for other investigators in the same or across regional offices. The number of specialists doubled in the 10-year period, primarily during FY2014-FY2015, and stood at 20 in FY2020.
- The number of investigators, who conduct the formal investigations, varied most widely across the 10-year period. Reflecting the proclivities and budget priorities of the presiding Administrations, their headcount grew from 400 in FY2011 to a high of 441 in FY2013, held roughly constant for four years, then declined starting in FY2017 to a low of 364 in FY2020, well below the 10-year average of 411.

Overall, the size of the full-time regional office enforcement staff started at 506 in FY2011, peaked in FY2014 at 569, and ended in FY2020 at 492 – 97% of where it started. By comparison, the SEC has a staff of over 2,400 personnel engaged in comparable functions.

Training. The report includes an instructive overview of the initial and continuing training program for EBSA investigators, and consequently the procedural skillset and substantive expertise they bring to investigations.

Training type	Topics covered	Frequency
New investigator	EBSA's authority and plan compliance requirements under ERISA	First year hired
	Fiduciary provisions and investigative techniques	
	Employee benefit plan accounting and financial analysis	Second year hired
	Criminal enforcement	One-time
National Office	Advanced issues and techniques for experienced investigators, including complex and detailed material not covered in other courses, such as financial institutions, ESOPs, MEWAs, and health enforcement training	One-time
	Competency training on basic fiduciary provisions, investigative techniques, benefits advisor techniques, employee benefit plan accounting and financial analysis, criminal enforcement, advanced issues and techniques, and health enforcement training	
	Ongoing enforcement issues such as the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008	Ongoing
	Emerging enforcement issues such as new laws, e.g., the CARES Act and the Families First Coronavirus Response Act COVID-19 testing provisions in FY2020	
	Web-based training on specialized topics for health and financial cases	
	Technology training on software products used by EBSA and commercial online research databases, such as Westlaw	
Regional Office	Training from supervisors and specialists to provide investigators with investigation skills and to stay current with emerging compliance issues	Ongoing
	Mentorship program for new employees	
Specialized training	Criminal training courses at the Federal Law Enforcement Training Center	Slots available on first come basis

Performance metrics. According to the report, prior to FY2013, EBSA focused its investigator performance metric on cases closed, which rationally had the effect of incentivizing simple cases that were narrow in scope. Starting in FY2013, EBSA shifted the performance metric to dollars recovered for plans and participants, which supported EBSA’s major case initiative (discussed below) and encouraged more complex investigations that were broader in scope.

Enforcement Priorities

The GAO report also includes useful insights about the enforcement priorities of EBSA at both the national and regional level.

Major case initiative. In a 2012 white paper, EBSA argued that it would best leverage its resources and maximize recoveries for plans and participants if it focused its investigations on “major cases” involving service providers to many plans or plans with systemic compliance problems. EBSA has since steered its enforcement efforts towards these major cases. The GAO report attributes a 62% decrease in the enforcement cases closed annually over the 10-year period, accompanied by a 126% increase in the annual dollar amount of recoveries, primarily to the major case emphasis.

National priorities. While the EBSA enforcement effort is largely decentralized, the national office directs the regional offices in at least two ways.

- EBSA publicly announces national enforcement projects, which are intended to target widespread compliance problems resulting in the greatest hardship for the greatest number of participants, and regional offices are expected to particularly emphasize investigations pursuant to those projects.

National Enforcement Projects FY2011-FY2021

Retirement	Health	Subject matter	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
					ESOP valuations, conflicts and corporate malfeasance								
		Fiduciary service provider compensation and conflicts of interest											
		Abandoned plans, distressed sponsors and missing participants											
		Crimes involving participant contributions, e.g., diversion by employer											
		MEWA fraud and/or solvency*											
		Plan administration, claims procedures, and undisclosed fees											
		Mental health parity, emergency services, service provider self-dealing											

*The report notes that, in FY2020, EBSA devoted an annualized 48 full-time employees to MEWA enforcement and participant assistance, and another 14 to other aspects of MEWA work, for a total of 62.

- EBSA internally publishes an annual operating plan and related guidance that establishes strategic enforcement objectives based on available resources and outlines enforcement priorities for regional office management and investigators. The GAO report notes a number of points from the FY2021 operating plan:
 - The plan recommends that the regional offices focus on (i) missing participants in retirement plans and (ii) inappropriate medical treatment limitations and wrongful denial of services notices in health plans.
 - More specifically with respect to health plans, the operating plan directs attention to “health plans’ compliance with requirements for reimbursement rates for the treatment of mental health conditions or substance abuse disorders (mental health parity), autism treatment limitations, denials of claims for emergency services, and fees paid to insurance companies and other service providers, among other things.”
 - The operating plan calls for regional offices to use selection criteria for investigations that reflect a balance of plan sizes and types, with investigations of smaller plans primarily serving as a means to assess the conduct of fiduciaries and service providers to multiple plans and thus to identify major cases.
 - The plan presses for a steady increase in the amount of time regional offices spend on major cases, and encourages cross-regional projects to leverage resources.

Regional priorities. As discussed in the report, each regional office annually prepares a program operating plan with an analysis of its region, including issues, plan types, industries, and services specific to it. The regional director then assesses current enforcement activities, trends, and areas of noncompliance within the region’s jurisdiction, and incorporates risk assessment into the identification and implementation of any regional priorities. (Regional offices may not have a priority project every fiscal year.) Regional projects may also serve as pilot programs for national projects; for example, the national missing participant project began as a regional office project.

The GAO report details the current regional office projects.

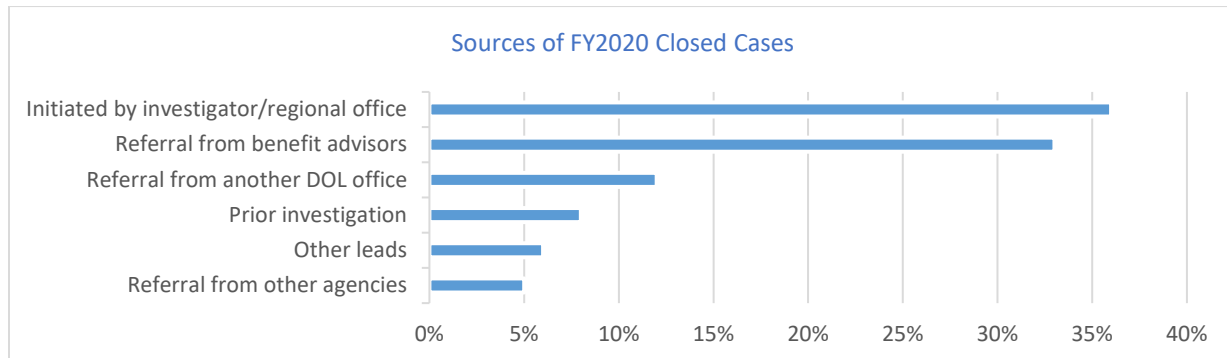
FY2021 Regional Office Projects

Project	Region	Description
Network accuracy and adequacy for mental health and other areas	Philadelphia	Test the accuracy and adequacy of networks for mental health providers and other providers offered by health plans to ensure compliance with the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) rules on non-quantitative treatment limitations as well as to ensure that provider directories offered by plans are accurate. Seek to ensure that the mental health benefits and other benefits advertised to participants in their plan documents accurately reflect the availability of those benefits.
Nutritional counseling	Boston	Focus on self-funded plans whose benefits wrongfully exclude or limit coverage for nutritional counseling for the treatment of behavioral health conditions. Evaluate the plans’ compliance with the applicable provisions of the MHPAEA, specifically requirements for non-quantitative treatment limitations applicable to mental health or substance use disorder benefits.
Opioid parity analysis	Kansas City	Focus on disparity in benefits available for mental health and substance use disorder conditions, such as opioid addiction, compared to medical and surgery benefits. Examine any barriers to treatment that impede ability of participants and beneficiaries to overcome addiction.

Prototype plan review	Los Angeles	Review publicly available prototypes of fully-insured health plans marketed to large and small group health plans in an effort to obtain global correction of ERISA non-compliance. Reviews include evidences of coverage, certificates of coverage, group agreements, and summaries of benefits.
Taft-Hartley medication treatment assistance	Boston	Evaluate health plans' and service providers' compliance with MHPAEA by focusing on self-funded Taft-Hartley plans whose benefits exclude or restrict treatments for opioid use disorder, including FDA-approved medication assisted treatments.
Group life insurance	Kansas City	Review group life insurance for compliance with ERISA, with a specific focus on premiums wrongfully retained by life insurance carriers on policies that were never active due to Evidence of Insurability requirements.
At-risk midsize plans	Dallas	Focus on mid-size pension plans (those with 100-500 participants) that are holding investments that have historically created violations due to fiduciaries unwittingly engaging in a prohibited transaction or by being imprudent. Where possible, focus on plans that have fiduciary investment control of pooled assets, such as profit sharing plans, and aim to open cases that meet multiple at-risk areas.
Collectively bargained plans	Chicago	Review imprudent or conflicted investment products and strategies, service provider selection and monitoring, and fees charged by multiemployer plan service providers. Also review cost allocation, trustee expenses, and leases, focusing on large plans that have not been investigated recently, or at all.
Plan sponsor compensation	Cincinnati	Identify plan sponsors that are wrongfully receiving compensation from their own plan(s), paid to either the plan sponsor, its employees, or affiliates.
Plan sponsor investment incentive	Kansas City	Investigate the alternative investments portfolios of large defined benefit plans and master trusts, including fiduciary due diligence; investment monitoring; valuation; management, performance, and other fees; and conflicts of interest.
Collective investment funds	Kansas City	Focus on CIFs, which are tax-exempt, pooled investment funds maintained by a bank or trust company. Examines potential issues such as excessive operating expenses; imprudent investments; conflicts of interest in securities transactions; and accounting or investment transaction irregularities.
QPAM criminal conviction	New York	Target investment managers acting as a QPAM, including affiliates and more than 5 percent owners, who have unwittingly acquired an entity or hired an individual who has been convicted or released from prison as a result of certain felonies involving the abuse or misuse of plans and their assets within the last 10 years.
Stop filer	New York	Identify plan fiduciaries who have stopped filing the required annual report, which can suggest a broader pattern of mismanagement or an intentional effort to conceal wrongdoing.
Federal facilities contractors	Philadelphia	Focus on companies or unions that provide ERISA-covered benefits to contractors, such as security guards or janitors, at federal facilities. The objective is to protect the benefits of these workers by ensuring that promised retirement and health benefits were provided in accordance with ERISA and the documents governing the plans.
Government contractors	Boston	Investigate pension and health benefit plans established by government contractors for the benefit of workers on government-funded construction projects to ensure that (1) the plan fiduciaries are taking action to collect all "fringe benefit" contributions owed to the plan, and (2) the plans operate in a fashion that actually benefits the participants rather than the service providers whose fees are paid from plan assets.

The priorities of the regional offices for FY2021 reflect an interesting range of concerns and investigative strategies, with particular points of overlap among them.

Sources of Investigations



While the various leads for EBSA investigations have been generally known (but are not disclosed by EBSA in the conduct of a particular investigation), the report quantifies those sources for investigations closed in FY2020. About 80% of those cases arose from:

- The initiative of the investigator or regional office, based on analyses of Forms 5500 compliance issues (such as, inadequate diversification of investments or contributions to retirement plans not made in a timely fashion), bankruptcy filings, media reports, private litigation, industry data and other sources;
- The benefit advisor function. According to the report, on average less than 0.5% of inquiries to benefit advisors result in open investigations, but that still generates about one-third of the caseload for investigators; or
- Referrals from the EBSA Office of Enforcement or Chief Accountant, DOL Inspector General or other DOL divisions. Among other things, the report notes that “the Office of Inspector General and EBSA have agreed to exchange information in investigations involving matters of interest to both agencies in order to strengthen the protection afforded to plan participants and their beneficiaries. EBSA and the Office of Inspector General may also conduct joint criminal investigations.”

Enforcement Results

Criminal cases. The report enumerates the ERISA criminal cases closed over the 10-year period, because either no criminal violation was found, the Justice Department declined to prosecute, or the prosecution was completed. The outcomes of criminal investigations are not comprehensively disclosed, although the report notes that, out of the 230 criminal cases closed in FY2020, 70 individuals were indicted and 59 individuals entered guilty pleas or were convicted.

FY2011-FY2020 Criminal Cases Closed

Year	Retirement Plans	Health Plans	Other Welfare Plans	Total
2011	217	54	31	302
2012	218	73	27	318
2013	240	53	27	320
2014	276	67	22	365
2015	190	56	29	275
2016	218	101	14	333
2017	202	88	18	308
2018	166	84	18	268
2019	105	140	31	276
2020	109	111	10	230

Civil monetary recoveries. As noted above, total monetary recoveries for plans and participants more than doubled during the period studied by GAO. According to EBSA, 67% of the cases closed in FY2020 resulted in monetary recoveries or other corrective actions, and 7% (82 cases) were referred to the Solicitor's Office for litigation.

FY2011-FY2020 Recoveries

	Cases closed	Total recoveries	Major cases		Recovered by benefit advisors		Recovered by investigators/specialists	
			Amount	% of total	Amount	Per advisor	Amount	Per investigator/specialist
2011	3,774	\$1,380,000,000			\$478,000,000	\$5,000,000	\$902,000,000	\$2,300,000
2012	3,884	\$1,270,000,000			\$261,000,000	\$2,600,000	\$1,009,000,000	\$2,300,000
2013	3,998	\$1,690,000,000			\$281,000,000	\$2,500,000	\$1,409,000,000	\$3,200,000
2014	4,293	\$600,000,000			\$356,000,000	\$3,200,000	\$244,000,000	\$600,000
2015	2,716	\$696,000,000			\$403,000,000	\$3,600,000	\$293,000,000	\$700,000
2016	2,338	\$778,000,000	\$277,000,000	36%	\$394,000,000	\$3,500,000	\$384,000,000	\$900,000
2017	2,014	\$1,100,000,000	\$609,000,000	55%	\$419,000,000	\$3,800,000	\$681,000,000	\$1,600,000
2018	1,598	\$1,600,000,000	\$1,056,000,000	66%	\$443,000,000	\$4,200,000	\$1,157,000,000	\$3,100,000
2019	1,422	\$2,570,000,000	\$1,938,000,000	75%	\$510,000,000	\$5,000,000	\$2,060,000,000	\$5,600,000
2020	1,411	\$3,124,000,000	\$2,492,000,000	80%	\$456,000,000	\$4,200,000	\$2,667,000,000	\$7,300,000

Values have been rounded to the nearest \$1 million or \$100,000 as applicable

Starting in FY 2014, EBSA redefined its total recovery metric to include only direct recoveries to plans and participants.

The benefit advisor program operated on a consistent basis over the 10-year period and, until very recently, its recoveries per advisor compared very favorably with the per head results for full investigations. The results for full investigations and thus the total results reflect the transition to the major cases initiative starting in FY2014 and the longer processing time to bring more substantial investigations to conclusion, leading initially to a lag in results and then to increased outcomes starting in FY2017.

- The jump in per head results for full investigations in FY2019-FY2020 also reflects the decrease in the investigator headcount.

- Starting in FY2018, the recoveries from full investigations outside of major cases has been less than \$200 million annually.

Most common civil violations. The report concludes with an appendix of the ten most common violations, by statutory subsection, identified in cases closed in FY2020. The top ten account for almost 97% of the overall violations found in these closed cases. Predictably, violations of the fiduciary prudence and exclusive purpose standards most commonly are found, followed by section 406(b)(1) fiduciary self-dealing and section 406(a) prohibited transactions with parties in interest. The remaining six of the top ten seem somewhat less predictable, and thus instructive:

- Failure to follow the plan documents (perhaps conceived more commonly as a tax qualification issue)
- Improper benefit to the plan sponsor (which may explain certain of the regional projects)
- SPD and other disclosure violations
- Bonding violations
- Form 5500 violations
- Failure to hold plan assets in trust

That is, violations of routine operational requirements – reporting and disclosure, bonding, and the trust requirement – are being identified regularly in the enforcement program. Overall, about 88% of the violations occurred in retirement plans, 10% in health plans and 2% in other plans.

EBSA Enforcement Challenges Identified by Stakeholders and DOL	
Short-Term <ul style="list-style-type: none"> – New legislation – New health plan processes – Mail delays – Delayed investigations – Remote work/modified investigation processes – Closed courts 	Long-Term <ul style="list-style-type: none"> – Reporting deadlines – Economic consequences of the pandemic for retirement and health plans – Missing participants – Financially distressed plan sponsors – Increased fraud – Travel restrictions for investigators
<p>Also, the pooled employer plan and other provisions of the SECURE Act are expected to materially increase the enforcement workload of the regional offices, according to the FY2020 operating plan.</p>	

eversheds-sutherland.com

© Eversheds Sutherland Ltd. 2021. All rights reserved. Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, visit eversheds-sutherland.com. 060921