

# You Should Fear No One, But You Should Fear DOL Retirement Plan Audits

By Ary Rosenbaum, Esq.

I have a fear of heights, the water, and a Department of Labor (DOL) audit/investigation. Perhaps, the order is the opposite, but you catch my drift. I have been an ERISA attorney for 25 years and I have seen a lot of things and been involved in a lot of crazy things. It is no coincidence that the craziest things I've seen were investigated by the DOL as part of an audit or investigation. This article is all about DOL audits and investigations and some of the greatest retirement plan horror stories, out there.

## The DOL and the job they do

The Employee Benefits Security Administration (EBSA) is a part of the DOL, that is responsible for administering, regulating, and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). EBSA wears a lot of hats when it comes to ERISA. Among its hats: processing requests for individual and class exemptions from ERISA's prohibited transaction provisions; conducting EBSA's national and field enforcement program; providing policy analysis, economic research, and tracking of all benefits policy-related developments and activities; developing analysis and implementation of pension and health care policy issues by providing technical assistance and support to the Assistant Secretary, external groups and other offices within EBSA; being responsible for annual reporting (Form 5500) and audit requirements by employee benefit plans, and enforcement of those provisions through the imposition of civil penalties against a plan administrator whose annual report is rejected, and providing participant assistance

by answering inquiries and complaints received by phone, mail, electronically or in person. A retirement plan can be audited by the DOL or the Internal Revenue Service (IRS). The IRS is concerned about tax qualification and trying to make sure that a retirement plan abides by the Internal Revenue Code. The DOL is concerned about a retirement plan avoiding the terms of ERISA and dealing with participant rights.

sor and/or plan provider. The DOL audit can occur because it's just a random draw of plans filing a Form 5500. Sometimes, the DOL will audit a plan because of a glaring mistake on Form 5500. Sometimes, it's because of a complaint by a plan participant. You won't know what prompted the DOL audit until it's begun. Regardless of the reason, you need to be fully prepared.

## Call an ERISA attorney if you're being audited

I always say that I know why people hate lawyers because I went to law school. Joking aside, attorneys don't have the best reputation as an occupation, but when there is smoke, there is fire. I worked at two law firms for 3 years and I will never do that again because it was more about billing by the hour than about doing a great job for the client. That being said, when you find out the DOL is auditing you, call an ERISA attorney. I had an advisor once who referred me to a client. Being audited by the IRS. The client demurred, claiming that they didn't want the DOL audit to become an adversarial process. By nature, the DOL is an adversarial process because the DOL agent's job is to ensure voluntary compliance

under ERISA. Plan sponsors that represent themselves have fools for clients. It's not a friendly process, the DOL agents aren't your friends, and their job is to review your plan. Plan sponsors tend to over answer any questions from the DOL, they end up volunteering information that wasn't asked and can lead to more investigation and issues. Instead of digging yourself a hole with the DOL by handling things yourself, hire an ERISA attorney (cough, cough).



## The DOL Audit

The Internal Revenue Code and ERISA are based on the concept of voluntary compliance. The IRS and DOL use audits as a mechanism to ensure that there is voluntary compliance. If a plan is to stray from the rules, then there could be penalties and consequences. For the DOL, failure to comply with ERISA could lead to enforcement action where the DOL might sue a plan spon-

Years ago, I was able to bail a defined benefit plan sponsor out of trouble by representing them in a matter that started because two employees claimed they were improperly excluded from the plan. That led to a DOL audit and it also happened the defined benefit plan invested all their assets with a financial advisor by the name of Bernie Madoff. I will attest that no textbook in law school or my LLM tax program prepared me for that. Thanks to my help, the plan sponsor fixed the problem without any DOL penalties and litigation.



### The 5500 error

While many audits are random, many are not. I assure you, that some answers you make on Form 5500 under penalties of perjury will help ensure that some audits aren't random. If you admit you aren't properly bonded with an ERISA bond, you will increase your chances of an audit. The same if you admit that the plan committed a prohibited transaction, as well as admitting that you were late in depositing participant salary deferrals. If your plan's administration is leading you to answer questions that might lead to an audit, it's a good idea to contact an ERISA attorney and see how you can reform your wayward ways.

### The participant complaint

I've had many audits, where it results from a participant complaint. They're usually from former employees and while some have credence, some are just harassment by a former employee. Former employees can be aggrieved and anything may set them off. Failing to provide a benefit or taking too long to process distributions, may result in a DOL complaint. A family feud over a family-owned business and its retirement plan may lead to a complaint as well. Hiring an ERISA attorney can help in pinpointing the complaint and identifying whether the claims of violating ERISA, can be substantiated.

### The DOL investigation

A DOL audit could lead to a further investigation with both civil and criminal penalties. I always am not proud to say that I know two plan providers currently sitting

in Federal prison for embezzling money from retirement plans where they served as a plan fiduciary. These two plan providers were caught because of a DOL investigation, one of which I, unfortunately, had to be a part of, because of the lies told by a plan fiduciary who stole millions of dollars from several retirement plans. Another audit I was involved with, led to a \$3 million lawsuit by the DOL against a plan sponsor. The audit of a defined benefit plan sponsor that I was involved with, led the DOL to assume the defined benefit plan was because of a \$3 million embezzlement by a plan sponsor. Quite honestly, there was no embezzlement, just bad advice by a plan actuary who for 25 years, compiled no valuation and actuarial reports, and told the plan sponsor there was no issue to write a check from the plan representing an owner's benefit to another affiliated company. While I begged the plan sponsor to settle, she had litigating attorneys that were more concerned with how much they could bill her. Two years later, she settled for the same amount that the DOL sued her for, don't know how much she paid in litigation expenses and I don't want to know. Another horror story was the plan sponsor who didn't take my advice. The man owned a family-run business of fast-food franchises that went belly up. By failing to file further Forms 5500, this man was contacted by the DOL, as part of a investigation. When I asked him where the money was, he told me that he used plan assets for home renovations and placed some of the proceeds into a joint checking account, which he shared with his wife, who was an attorney. While that nugget of information hastened his di-

voice, I brought in a criminal attorney to discuss his predicament. We advised that since the DOL was on to him, fessing up could help his cause of minimizing his confinement in a Federal prison, because of Federal sentencing guidelines. The plan sponsor ignored our advice, was arrested within 6 months, and sentenced to 3 years in Federal prison.

### What you should do

After hiring an ERISA attorney, you need to be prepared for a plan audit. You should conduct a full review of your Form

5500, Summary Plan Description (SPD), and other plan documents that could contain glaring compliance headaches under ERISA. After reviewing the plan, you should compile a list of compliance headaches that the DOL investigators could find during their audit. If you find issues, you need a process to fix the most immediate problems with corrective steps, that will allow you to show the DOL you're trying to get the plan back in compliance. You will need to communicate with the DOL agents to answer questions and report corrective actions being taken during the audit process to get your plan in compliance. The most important is going forward, you will develop strategies and procedures to keep your plan compliant in the future.

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