How Long to Retain ERISA Plan Records? Forever

By Jewell Lim Esposito on August 30, 2011

My Employment colleague, Robin Shea, writes about when an employer must start saving electronic evidence in her latest blog entry. Her blog post prompted me to comment on the ERISA requirements regarding paper and electronic retention -- along the lines of "Just how long do we need to keep all of this??"

ERISA has two record retention provisions. They apply to all ERISA employee benefit plans (retirement, health and welfare plans).

ERISA 107 requires anyone who files or certifies certain information (such as a Form 5500) to maintain sufficient records (spreadsheets, email correspondence, plan documents, amendments, work records) to explain, corroborate, substantiate, and clarify what is in the filing or certification. Under ERISA 107, an employer must maintain these records for six years after the filing date (or from the date of any extended date for filing).

ERISA 209, however, requires an employer to maintain all such information for a verrrrrry looooong time. . . the statute provides that the length of time is for "as long as a possibility exists that they [the records] might be relevant to a determination of the benefit entitlements of a participant or beneficiary." 29 CFR 2530.209-(d). This translates into an indefinite duration.

We've seen an instance where an employer had had to rummage through files that had survived several company acquisitions and office moves and to reconstruct service records from three decades back. We've seen instances where employers thought the TPAs had all those records. Remember: the retention obligation is the ***employer's*** responsibility. It is the employer who must ensure that any records produced outside are nonetheless preserved for ERISA purposes.

While there is no monetary penalty for not preserving plan records under ERISA 107 (the 6-year requirement) (though ERISA 209(b) has but a small civil penalty), failing to preserve records means

there may be a fiduciary breach or, worse yet, that an employer may expend much in terms of man hours and litigation fees to defend itself in an unwanted lawsuit (an employer might have to prove the accuracy of how benefits amounts were calculated).