

FLIP THE SCRIPT:

Turn DOL Audits Into Your Seal of Approval

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DOL audits represent an opportunity for employee benefit plan trustees and administrators to demonstrate adherence to fiduciary standards. This article identifies key steps in preparing for a compliance audit.

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The mere mention of a Department of Labor (DOL) audit can trigger a flash of anxiety for employee benefit plan trustees and administrators. The reaction is understandable given that the investigator's primary mission is to find violations, including admissions from "potential defendants."

But what if we flipped the script? Instead of an ordeal to endure, these audits could be viewed as a golden opportunity to demonstrate the trustees' prudence and fidelity to fiduciary standards. With the right approach and a comprehensive record of due diligence, trustees can be confident that the investigation will validate compliance with the Employee Retirement Income Security Act (ERISA) and that their efforts—for the exclusive benefit of plan participants—have been just and exemplary.

This article addresses methods to navigate DOL audits in an evolving landscape where the DOL is reducing its staff while simultaneously intensifying its scrutiny. The goal is to ensure that trustees are prepared and poised not only to handle the proceeding but also to obtain a well-earned seal of approval from the regulators charged with the authority to discover and remedy fiduciary breaches.

The DOL: Authority, Mission and Current Priorities

The DOL, through the Employee Benefits Security Administration (EBSA), is responsible for enforcing Title I of ERISA. The Secretary of Labor has the power to require production of plan records and interview trustees and key plan professionals. The remedies for violations include mon-

etary restitution, injunctive relief, removal of trustees, criminal indictments or other “equitable relief.”

In addition, the DOL has “sharing arrangements” with other agencies, such as the Internal Revenue Service (IRS), Pension Benefit Guaranty Corporation (PBGC), Office of Labor Management Standards (OLMS) and Department of Justice (DOJ), in the event that violations of other laws are uncovered. In fact, the DOL will advise trustees upon the commencement of interviews that it must report suspected violations of laws to other agencies.

EBSA is responsible for “ensuring the integrity of the private employee benefit plan system in the United States through its enforcement of [ERISA].”¹ It is responsible for overseeing approximately 2.6 million health plans, 514,000 other welfare benefit plans and 801,000 private pension plans. These plans cover 156 million workers, retirees and dependents and hold approximately \$14 trillion in assets.²

Current Priorities

The following are a few of the DOL’s priorities—“National Enforcement Projects” posted on its website.³

- **Health enforcement initiatives:** Compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA), coverage of emergency room services un-

der the Affordable Care Act (ACA) and hidden fees to service providers resulting in self-dealing

- **Protecting benefits distribution:** Focused on ensuring that participants are paid benefits that remain stagnant from distressed plan sponsors and abandoned plans and locating missing participants
- **Plan investment conflicts:** Focused on fiduciary service provider compensation and conflicts of interest in relation to plan asset vehicles

Although the DOL has not explicitly designated them as “enforcement initiatives,” recent experience indicates that the agency is also prioritizing the areas described below.

Health and Welfare

Recent DOL audit request letters for welfare benefit plans show a significant expansion in the scope of its inquiries, going beyond routine plan documents and annual reports to demand more detailed disclosures, including the following.

- EBSA may meticulously examine every claim adjudicated during the audit period with a focus on COVID-19 and mental health/substance use disorder claims. This is particularly important for funds utilizing their third-party administrator (TPA) for claims adjudication.
- Despite the current pause on enforcing the 2024 final rule implementing portions of the MHPAEA regulations, EBSA continues to emphasize compliance with MHPAEA and how plans cover services for autism.⁴

Cybersecurity

Trustees should also expect EBSA to examine cybersecurity protocols and procedures and adherence to the DOL’s *Cybersecurity Program Best Practices*.⁵ Plans must adhere to DOL guidance and maintain clear documentation of compliance, since EBSA will undoubtedly request verification. A mere Q&A prepared by fund counsel will not meet DOL standards. Service provider evaluations must be thorough, be well-documented and demonstrate substantive due diligence.

Alternative Investments

The DOL’s review process will also extend to alternative investments, requiring trustees to maintain thorough documentation of their evaluation and decision to adopt these investments. The DOL will likely ask for all documents encompassing the investment process, including evaluation,

takeaways

- Current enforcement priorities for the Department of Labor (DOL) when conducting audits of health and welfare plans include compliance with the Mental Health Parity and Addiction Equity Act, coverage of emergency room services under the Affordable Care Act and hidden fees to service providers resulting in self-dealing.
- Other key areas of investigation include protecting benefits distribution, plan investment conflicts, cybersecurity and alternative investments.
- Upon receiving notification of an upcoming audit, the plan administrator and trustees should meet with legal counsel to take steps including assigning duties for compiling documents and record-keeping as well as assigning legal counsel as the primary contact with the DOL.
- During interviews with DOL investigators, trustees should be prepared to provide accurate and complete information that clearly demonstrates their active fiduciary role, deep understanding of plan operations and prudence in overseeing significant transactions during their tenure.
- Trustees should view the interview as an opportunity to demonstrate that their decisions align with fiduciary standards.

acquisition, and valuation of gains and losses.

Trustees will need to provide offering memoranda, recommendations, determinations and any relevant (non-privileged) communication between the trustees and service providers. In addition, comprehensive records related to fees, commissions and expenses—including investment management and consulting fees—must be readily available.⁶

Preparing for an EBSA Audit: Key Steps

Plans should consider the following steps upon learning that they have been scheduled for a compliance audit.

1. Commencement of the Audit

Upon receipt of the DOL's letter announcing that the plan has been scheduled for audit, coupled with a list of "documents and information requested," the plan administrator and the trustees should meet with legal counsel and take the following actions.

- Discuss the anticipated progress of the audit.
- Review the fiduciary insurance policy for its notice provisions. Some policies require notice upon commencement of the audit, while others require notice when and if findings are issued.
- Assign duties for compiling documents and recordkeeping.
- Assign legal counsel as the primary contact with the DOL. Upon receipt of the audit letter, legal counsel should reply that all communication should be directed through its office. This keeps the document production orderly and centralizes communication.

Heightened Oversight: The DOL's Expanding Audit Scope

A fact sheet from the Employee Benefits Security Administration (EBSA) details the agency's enforcement activities during the 2024 fiscal year.

EBSA enforcement actions have been on the rise since approximately 2017. In fiscal year 2024, the DOL recovered \$1.384 billion in direct payment to employee benefit plans, participants and beneficiaries through the actions displayed in the table.

In that same year, EBSA closed 729 civil investigations, with 71% resulting in corrected violations and 53 cases referred to litigation, and 177 criminal investigations resulting in 63 guilty pleas or convictions and 49 indictments. While the monetary recoveries were substantial, the nonmonetary penalties were significant: 12 trustees were removed, 27 individuals were barred from ever serving as fiduciaries, 23 independent fiduciaries were appointed and 59 global corrections involving service providers for multiple ERISA-covered health plans were implemented.

Fiscal Year 2024 Employee Benefits Security Administration (EBSA) Enforcement Activities

Action	Amount Recovered
Enforcement Actions	\$741.9 million
Informal Complaint Resolution	\$544.1 million
Abandoned Plan Program	\$53.5 million
Voluntary Fiduciary Correction Program (VFCP)	\$44.3 million

Source: "EBSA Restores Nearly \$1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries." Employee Benefits Security Administration (EBSA) fact sheet. December 2024.

- Identify transactions with unfavorable results despite the due diligence undertaken.

2. Recordkeeping—Production and Management

The initial document production and interaction with the DOL should not be taken lightly. It is the first opportunity for trustees to demonstrate their professionalism and provides the necessary momentum for the final stage of the DOL audit: the trustee interview. It is critical to manage the production and maintenance of plan records to achieve an orderly presentation to the DOL (its enforcement manual directs the investigator to report disorderly or incomplete records).

It is also important to keep track of documents provided to the DOL. Investigators often send follow-up requests informally via email, and it can be difficult to ascertain which requests remain open. Thus, it is critical to keep a spreadsheet showing the documents requested and produced.

Silence from investigators should never be mistaken as the impending conclusion of an audit. Funds may not receive additional requests for months, and the DOL's scrutiny may then resume without warning. Therefore, counsel and trustees must remain vigilant and make sure that they are prepared to respond to requests and maintain compliance throughout the process.

3. Preparing for Trustee Interviews: Responsibilities and Expectations

The DOL's purpose is to gather evidence through both documentation and interviews with trustees. During interviews, trustees must be prepared to provide accurate and complete information that clearly demonstrates their active fiduciary role, deep understanding of plan operations and prudence in overseeing significant transactions during their tenure. The sheer volume of activity can be summarized, with the assistance of counsel, as follows.

- **Trustee roster:** Counsel should compile trustee rosters that cover the audit period. Trustees should know when their tenure began and the board composition during their tenure.
- **Chronology of significant events:** A chronology of significant events and fund performance during the audit period should be compiled. All meeting dates, attendance and noteworthy items should be included. This will refresh the trustee on important transactions and provide context for various events, especially those with outcomes that may prompt an in-depth examination.
- **Review of basic plan operations:** A summary of basic plan operations, identity of providers and governing documents should be created, including the following.
 - a. **Basic plan facts:** Trustees should be able to articulate the type of fund (e.g., defined benefit (DB) or defined contribution (DC) retirement plan, welfare), how it was created (e.g., established by collective bargaining/trust agreements) and the benefits provided. Trustees should know the year the plan was established, number of participants, plan year (e.g., calendar year or a different 12-month period) and number of contributing employers. In addition, trustees should know approximate assets, benefit expenses and administrative expenses.
 - b. **Administrative office:** If the plan is self-administered, trustees should know the number of staff, their duties, and general terms and conditions of employment. If the plan uses a TPA, trustees should be familiar with the general terms of the contract, such as compensation, duties and termination.

Expanding Scope of DOL Audits

A recent Department of Labor compliance audit request letter for a welfare benefit plan, available at www.ifebp.org/docs/default-source/pdf/resources---news/articles/exhibit-a.pdf, reveals a significant expansion in the scope of inquiries, going beyond routine plan documents and annual reports to demand more detailed disclosures.

- c. **Payment of expenses:** Who has check writing/signature authority? How are invoices approved? Trustees should know the schedule of expenses.
- d. **Trustee expense reimbursement policy:** What is the process for approving trustee expenses? Is there a limit on conferences? What expenses must be substantiated?
- e. **Trust agreement, plan documents, summary plan description and notices to participants:** Trustees should be able to speak to the plan's governing documents and reports that provide participants with information about the plan.
- f. **Form 5500:** The DOL, IRS and PBGC jointly developed the Form 5500, which is an annual report that sets forth details on plan administration and financing.
- g. **Trustee meetings and minutes:** What is the frequency of board meetings? What is the authority of any committee established by the board of trustees? How are minutes taken, reviewed and approved?
- h. **Contributions/collection policy:** Trustees should be familiar with the amount of contributions coming into the plan, methods of collection and any significant failures to contribute/collect. What is the approximate number of contributory employers and approximate dollar amount of contributions per month? What is the procedure for collection and reconciliation?
- i. **Service providers:** Trustees should know the plan's service providers, services performed, and compensation and termination provisions in the contracts.
- j. **Investments:** Trustees should be familiar with the fund's asset allocation, investment lineup and whether the investment managers are ERISA fiduciaries (trustees should know the difference between

3(21) and 3(38) fiduciaries). The investment policy statement (IPS), which describes the investment goals and parameters of selecting investments, should be reviewed.

k. **Insurance and bonding:** What are the limits of insurance and amount of premiums? Who pays the waiver of recourse? What types of insurance does the fund have (e.g., cyber, fiduciary)? Trustees should understand the difference between insurance and bonding.

4. Navigating Trustee Interviews: Mechanics

Navigating the interview process can be daunting, and trustees should be well-prepared to understand its structure and expectations.

Counsel should request that the interview take place in a familiar setting, such as the plan office or fund counsel's office. The DOL is often amenable to such arrangements. It is preferable that both counsel and the interviewee are physically in the same room. Trustees should understand that fund counsel's role is limited at the interview: Excessive interference can cause mistrust or even termination of the interview.

Most importantly, trustees should approach the interview not as an inquisition but as an opportunity to substantiate that their actions conform to fiduciary standards. Trustees should:

- Use the question-and-answer format to educate and inform the investigator
- Explain their analysis and judgment amidst the pressures and uncertainties that existed at the time of the decision, not in the luxury of perfect hindsight
- Expound on the due diligence of transactions that had less than optimum results
- Promote plan successes, specifically in light of obstacles that existed at the time.

Conclusion

Audits conducted by the DOL serve as a valuable opportunity for trustees to showcase their commitment to compliance, operational excellence and fiduciary responsibility. A well-managed audit should demonstrate more than just adherence to regulations: It highlights the trustees' strategic approach to governance and dedication to participants' best interest. By interview time, the DOL should be already

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impressed with the quality of plan operations, and the trustees should be prepared to address the many matters that have transpired during their tenure. The stage will be set for a well-earned seal of approval. 🎯

Endnotes

1. "EBSA Restores Nearly \$1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries." Employee Benefits Security Administration (EBSA) fact sheet. December 2024.

2. Ibid.

3. "National Enforcement Projects." EBSA website.

4. On May 15, 2025, the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury announced a nonenforcement policy applicable to certain portions of the 2024 Rule implementing portions of the Mental Health Parity and Addiction Equity Act (MHPAEA). The nonenforcement period will last until 18 months following the date a final decision is issued in litigation brought by the ERISA Industry Committee that challenged certain provisions of the 2024 final rule.

5. In April 2021, the DOL announced new cybersecurity guidance for plan sponsors and fiduciaries, recordkeepers and plan participants. This included cybersecurity program best practices. This was updated with Compliance Assistance Release No. 2024-01 to confirm the cybersecurity guidance applies to all employee benefit plans, including health and welfare.

6. On August 7, 2025, President Trump issued an executive order (EO) entitled "Democratizing Access to Alternative Assets for 401(k) Investors." While the EO instructs the DOL to reduce regulatory barriers that have historically limited defined contribution plan participants' access to alternative investments, and for the Secretary of Labor to review and update the DOL's guidance on fiduciary responsibilities under ERISA, the authors do not believe that, at this time, it will change the DOL's scrutiny of such of investments in a compliance audit.