



20 Items You Should Know About DOL ERISA Investigations

	Item to Know	Faegre Drinker Comments
1	The U.S. Department of Labor (DOL) has primary jurisdiction for enforcing violations of Title I of ERISA, including breaches of fiduciary duty and prohibited transactions.	<ul style="list-style-type: none"> The DOL's Employee Benefits Security Administration (EBSA) is charged with investigating ERISA violations. Most EBSA investigations are civil, but EBSA has authority to conduct criminal investigations as well. EBSA has developed a set of national enforcement projects on which it focuses resources.
2	The level of DOL investigative activity and recovery was very high in 2020 and is expected to remain high.	<p>The DOL has reported the following data for its 2020 fiscal year:</p> <ul style="list-style-type: none"> 1,122 civil investigations closed. 230 criminal investigations closed. 171,863 informal complaints closed. Total recoveries of \$3.124 billion (including \$2.602 billion from enforcement actions).
3	The best strategy is to work diligently to avoid any DOL investigation, if possible. Strong fiduciary process can prevent or detect and correct common violations the DOL investigates.	<ul style="list-style-type: none"> This strategy requires a vigilant focus on legal compliance to minimize potential problems. This should be coupled with periodic compliance checks to identify possible problem areas. Any identified problems should be corrected on a voluntary basis before any DOL enforcement activity materializes. Complete regular fiduciary training with fiduciaries to help ensure compliance.
4	It is helpful to assemble all plan-related documents, including plan documents, trust agreements, third-party service agreements, summary plan descriptions, Forms 5500, actuarial reports and plan audit reports, as applicable. See examples of additional items in Item 7 below.	Catalog all of these documents and keep them in a safe and immediately accessible place.
5	The DOL has very broad investigative authority over ERISA-covered employee benefit plans, including subpoena powers.	The DOL is not required to explain why it has selected a particular plan for investigation, the scope of the investigation or when it will likely be concluded.

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6	The initial contact from the DOL is likely to be a somewhat standardized letter advising the plan sponsor of the commencement of the investigation.	That letter will typically cover such topics as the DOL's jurisdiction and powers and the initial documents being requested as part of the investigation.
7	The list of initial documents requested by the DOL can be very voluminous.	Possible items include plan and trust documents (and amendments); most recent summary plan description (SPD) and summary annual report (SAR); latest ERISA bond and any fiduciary liability insurance policy; plan financial statements; participant disclosures and communications; Forms 5500 and audit reports; committee minutes; payroll documents (relating to employee contributions, etc.) and service provider contracts (plus many other potential items).
8	Engage the services of an ERISA law firm or similar adviser experienced in defending clients in DOL investigations before responding to the DOL. Do not delay in addressing the situation — being nonresponsive likely will make the investigation more difficult to resolve.	Obtain that firm's insight in such matters as likely DOL areas of focus, possible strategies to limit the scope of DOL document requests, preparation for possible later interviews, and other matters within the overall defense strategy.
9	It is often advisable to notify the fiduciary insurance carrier covering the plan of the investigation early in the process.	Coverage terms vary but generally require prompt notification of possible claims.
10	The standard DOL document request may be overly inclusive even if the investigator's area of actual interest is limited.	Discuss the scope with the DOL investigator, if possible. A small subset of the documents originally requested may suffice.
11	Take the DOL's stated deadline to respond (sometimes as little as 10 business days) seriously, but recognize that you may often be able to negotiate an extension.	Do not miss the deadline. If more time is needed, seek an extension from the DOL. Offer to send what you can by the original deadline and apply any extension only when needed. Keep the DOL apprised at all times.
12	Appoint a single point of contact with the investigator.	This person should coordinate the entire defense process with appropriate input from the outside defense firm.
13	Review all documents with your legal team or other adviser assisting you before they are provided to the DOL.	<ul style="list-style-type: none"> ▪ Try to be prepared to address any problems before they are found by the investigator. ▪ Do not try to hide requested information, but don't disclose information that has not been requested. ▪ Provide information only for the plan under review. You may be able to redact information relating to other plans (i.e., in committee minutes).
14	After initial document review, the DOL often requests to interview various related parties, such as plan fiduciaries.	Such interviews are "voluntary" (though it is rare for interviewees to refuse). They are not recorded by court stenographers and not taken under oath, but they should be taken seriously. It is advisable to have counsel present and to take notes during the interview.

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15	Prepare committee members and other individuals carefully for all interviews (with the assistance of ERISA counsel).	<ul style="list-style-type: none"> ▪ Prepare interviewees by explaining the process and what to expect. ▪ Answers should be direct, honest and succinct. ▪ Avoid discussing rumors and hearsay. ▪ Do not volunteer information if not responsive to the question.
16	After the DOL has reviewed the information received during the investigation, the investigator writes up an internal report to his/her supervisors.	The EBSA office's regional director will decide whether to take further action.
17	Do not worry about the length of the examination process or if no DOL activity seems to be occurring for significant periods of time.	<ul style="list-style-type: none"> ▪ Both of these developments are very common in DOL investigations. ▪ Investigations often take more than one year.
18	The DOL typically issues a findings or closing letter in which it states its conclusions about whether ERISA has been violated. The DOL typically provides a short period of time for the plan to respond to findings — a plan response may not be necessary to a closing letter. Do not assume the DOL is correct regarding alleged violations — discuss these findings with counsel. If there are any issues that the DOL alleges need correction, consult with your legal team or other adviser on whether, how and when to make any such correction. Do this before responding to the DOL.	It is possible to correct certain issues that arise during the investigation. However, how they are corrected, when they are corrected, and how those corrections are communicated must be done to avoid any penalties. (See Item 20)
19	Work with your defense counsel on how the investigation is closed. It is often best to resolve any alleged violations in a voluntary and informal manner if possible, rather than through a court or a formal DOL settlement agreement.	<p>Such findings or closing letters take one of several forms, which include:</p> <ul style="list-style-type: none"> ▪ Voluntary compliance (VC)/10-day notice letter: The DOL finds violations have occurred and need to be corrected. A written response is requested within 10 days. Plans may dispute the findings, negotiate an alternative correction, or make the recommended correction. ▪ Findings/No-further-action letter: De minimis problems detected, or problems alleged in the VC/10-day notice letter have been adequately corrected. The investigation is closed. ▪ No findings/No-action letter: No problems detected and no further action required. The investigation is closed.
20	Keep Faegre Drinker's five P's of the audit process (as listed in the right column) firmly in mind at all times.	<ul style="list-style-type: none"> ▪ Don't Panic ▪ Act Professionally at all times ▪ Be Patient ▪ Be Prepared ▪ Rely on your Professional advisors throughout the process