

OPENING THE BOOKS

HOW TO
HELP
YOUR
PLAN
SPONSOR
CLIENTS
PREPARE
FOR A
DOL
AUDIT.

BY JUDY WARD





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hen advisor Doug Prince picked up a new client that had recently been through a U.S. Department of Labor (DOL) audit, he heard for the first time about the agency scrutinizing financial wellness expenses. The sponsor had used \$3,000 of plan assets to pay for a financial wellness program, and the DOL questioned spending participant money on a program that only a portion of participants actually utilized.

"They were looking for money that has been paid out of plan assets that shouldn't be," says Prince, chief executive officer and a principal at ProCourse Fiduciary Advisors, LLC in Carmel, Indiana. "Because the education was not specifically related to the 401(k) plan, the DOL claimed that it was a prohibited transaction." The employer saw it differently but agreed to pay a fine after their attorney advised that it would cost more to dispute that finding.

When sponsors receive a letter from the DOL informing them of a plan audit, it kicks off a process that can be stressful and confusing for them. "I've



heard the letter referred to, ironically, as a ‘love letter,’” says Dave Leising, national employee benefit plan audit director at CPA firm BKD, LLP in Indianapolis. “Their first reaction is, ‘Why me? Did we do something that was a red flag in any of our filings?’”

Pre-Audit Prep

The DOL’s initial letter to a plan sponsor about doing an audit may include the areas to be addressed, but usually won’t specify the reason the plan was selected for audit, explains Kimberly Moore, a Fort Wayne, Indiana-based partner at Summit CPA Group. “There is a reason. They just won’t tell the sponsor why,” she says. “Sometimes it is just out of the blue: Their number is up for a random audit.”

DOL audits can happen because of a participant complaint, because of a national or local DOL investigative initiative, or as part of the agency’s random audit program. Although the DOL generally won’t tell a sponsor which of those three scenarios

motivated the audit, Leising says, “I have heard from a DOL auditor that the No. 1 driver of audits is participant complaints.”

At this point, advisors can help their sponsor clients by explaining how the DOL process works. “Advisors can do a lot to help manage the expectations of the employer,” says Elizabeth Allen, vice president, benefits compliance and counsel at NFP, and a former DOL investigator. She recalls that soon after joining NFP, she heard from an advisor about a sponsor client currently undergoing a DOL audit and worried that it hadn’t heard back from the auditor about the results. She asked the advisor when the auditor’s examination happened, and the advisor said three weeks earlier. “I told the advisor that audits could take as little as three months, while others go as long as three years,” she says.

The examination’s pace can surprise sponsors. “It is not like the auditor just comes in there, examines the documents, then leaves,” Moore says. “The auditor usually doesn’t come in Monday and work all day

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there, then come in Tuesday and work all day there. It can take months (of periodic visits). They are going back and forth between their other auditing projects, so the audit can drag on for a while.”

And it can take months to hear about the findings once the DOL completes its audit, says Daniel Janich, resident partner in the Chicago office of law firm Holifield Janich Rachal Ferrera, PLLC. “So a plan sponsor needs to be patient,” he says. “It doesn’t necessarily mean anything bad will come back from the DOL.”

It also helps to explain to sponsors at the outset that DOL audits aren’t typically an adversarial process. “The end goal of the audits is that the plan operates properly, and that participants get everything that they should,” Moore says. “The DOL understands that people make mistakes.” When an audit reveals a sponsor’s inadvertent error, she says, it’s generally an amicable process to get it fixed to the DOL’s satisfaction. “It’s when an employer, on purpose, is not doing something that it’s supposed to (like remit contributions) that there’s a big problem,” she adds.

Once sponsors understand how the process works, they need to gather the documents the DOL requested in its notification letter. “Usually the letter is pretty self-explanatory about the documents that the DOL wants,” Leising says. “What’s overwhelming to the client is the sheer volume of information that they ask for. It will say, ‘Here are the 32 items that we need when we do your audit.’”

The biggest audit-preparation problem for many sponsors is that they don’t have all the requested documents in one place, Prince says. It can make a big difference when an advisor maintains an online “fiduciary vault” for each client on an ongoing basis. That vault should include all plan documents, plan amendments, service agreements and notes of plan

committee meetings, he says. “We set up documents in the fiduciary vault the way that the DOL wants them,” he adds. “An advisor also can help the sponsor coordinate the additional information it needs to get from the recordkeeper. And the advisor can help identify potential problems in those documents.”

Before the audit begins, an advisor also can help the key point-person working on a plan at an employer to review the plan’s main provisions. “Most of the time, for the people working on the plan at an employer, that is not their full-time job. They should refresh their memory,” Moore says. “Also, the key person should ask around to the other people at the company who work on the plan, and find out if there is anything they need to know about a problem. And if there is, they should be upfront with the auditor about it.”

If time permits, an employer can work with its advisor and its audit firm to do an internal review of plan operations. “If you have the time to do a ‘mock audit,’ there’s no downside to that,” Leising says. “It gives you the ability to look at what ‘skeletons’ your plan has. If the auditor brings something up, it is better to say, ‘We’ve identified that problem, and here is our plan to fix it.’ It is better for the DOL auditor to have a sense that the plan sponsor is taking ownership of the plan. They don’t want to see employers washing their hands of their fiduciary responsibility.”

Fixing Problems

A sponsor that has received a Labor Department audit notice and then identified a plan problem may have the inclination to utilize the DOL’s Voluntary Fiduciary Correction Program (VFCP) or Delinquent Filer Voluntary Correction Program (DFVCP) to fix it before the auditor does the examination. But most of the time, sponsors can’t utilize a self-correction program once they’ve gotten the audit notice, says

Jeffrey Holdvogt, a Chicago-based partner at law firm McDermott Will & Emery. "Even if you can't use that program, it's still better to try to identify a problem before an agent finds it," he says.

Holdvogt recalls a sponsor client with a looming DOL audit that found an obvious error on its Form 5500 filing. The sponsor told the auditor upfront that it planned to fix the error and submit a corrected filing. "When the audit was completed, the DOL noted in its letter that the Form 5500 issue was brought up and resolved by the sponsor," he says. "There was no penalty assessed, and no finding that the sponsor was not in fiduciary compliance."

When it comes to counseling a sponsor on fixing something the DOL might find problematic, it's best for an attorney rather than an advisor to take the lead role. "When the plan sponsor gets the notification letter, they should immediately contact their ERISA attorney," Janich says. "An attorney has the benefit of attorney-client privilege that consultants or accountants don't have. So the client can be candid with its attorney about any plan deficiencies without risking public disclosure. A DOL audit is not adversarial, but it is a legal investigation: It relates to whether the plan is, in its documentation and operations, in compliance with the law."

Advisors should avoid anything that gets them to a decision-making point about the audit, Allen recommends. "I'd suggest that the employer find ERISA counsel that has dealt frequently with DOL audits," she adds. "If the employer retains an attorney

who has not been through the process much, it's not going to be much help to the employer."

An ERISA attorney needs to take on the lead role at some key points of the audit, such as helping a sponsor prepare for an interview with the auditor, or negotiating with the DOL, Holdvogt says. "Advisors definitely have a role in terms of counseling a plan sponsor on what they have seen happen when other clients have gone through an audit," he says. "But when you are under the threat of an audit, you want to at least get a confirmation from an ERISA counsel that what you are doing to resolve an issue is appropriate."

Setting the Right Tone

When the audit examination time comes, a sponsor can help itself by ensuring a smooth process. "I had a couple of times when an employer basically put me in a closet, or did things to make the process unpleasant for me," Allen remembers about her time as a DOL investigator. "The employer needs to see the DOL investigator as a human being, and someone who is dealing with multiple investigations at different stages. And when the investigator has questions, the employer should respond quickly. You don't want to make it difficult for an investigator to do his or her job."

After the examination, the sponsor can only wait for the Labor Department's findings. "The DOL finds issues in about 60% to 70% of the plans that it audits," Prince says. "At the end of the day, for plan sponsors that are following good prudent processes, it gives them reassurance if they go through the audit and there are little or no problems. And if there are problems, the DOL gets those sponsors to improve what they are doing."

Research has found that an employer interviewing a job candidate decides in the first 45 seconds if the candidate will get the job, Leising says. "To some extent, I think it's the same with a DOL audit: It's all about setting the right tone," he says. "When the auditor arrives, the employer needs to say something like, 'Here are three boxes that have all the documents you requested, and each is labeled in the order of the documents that you requested.' If you set a tone that, 'We've got this under control,' it helps the auditor understand that you're on top of this. The time that a sponsor invests upfront in getting this information together will save time on the back end." **N**

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