Quick! The U.S. Department of Labor has sent you an investigatory letter informing you that they will be auditing your employee health plan. How do you respond?

The Department of Labor has the authority to conduct an investigation of your employee benefits plan to ensure that it conforms to the Employee Retirement Income Security Act (ERISA), and can focus on areas from reporting, to fiduciary obligations, to disclosure requirements. Recently, the DOL’s Employee Benefits Security Administration (EBSA) has expanded its scope to include the enforcement of the Affordable Care Act (ACA) regulations, which are constantly on the rise.

The potential consequences of a DOL audit are manifold. As an example, retirement plan audit reports from the 2013 fiscal state that almost 75% of investigations resulted in the assessment of penalties and required corrective action, such as disgorging profits, paying amounts to restore losses, and ensuring that these claims were properly processed and paid. An audit of your health plan may cause the DOL to look at other compliance issues, such as I9 Reporting or Wage and Hour. We recommend being prepared for all.

Prevention is better than remedy and we’re here to offer you guidance on how to prepare for a DOL audit or how to potentially avoid one.

**Establishing Your Game Plan**

Encountering this sort of bump in the road is certain to disrupt your day-to-day business operations – that is, if you are unprepared. Being required to pay penalties or correct mistakes within your health plan or other reporting is laborious (to say the least) and no one is exempt from a potential DOL audit. If you are selected, however, this doesn’t necessarily mean that your health plan is in violation of ERISA, I9, or Wage and Hour standards. There are common triggers that can provoke an audit and ways to minimize your exposure to this process. Use this knowledge to your advantage!

Some common triggers for a DOL audit include:

- Participant complaints to the DOL about potential ERISA violations. (According to a DOL audit summary, 775 new investigations were opened as a result of participant complaints in 2013 for retirement plans. Data from that same year also show that 236,000 employee complaints resulted in DOL audits.

- Answers on the plan’s Form 5500. Let’s say the form is incomplete, or has been inconsistent from year to year; the DOL may investigate the issue further.

- The DOL’s national enforcement priorities or projects, which target the DOL’s resources on certain issues. Here is an instance under which you might not be at fault, assuming that all employee health plans are ACA and ERISA-friendly.

Again, being selected for an audit does not mean that you have violated employee benefits or employment law. Being “ahead of the game” by making all employee health plans lawfully compliant – and ready to provide the necessary documents will save you major amounts of money and a serious headache. You can minimize your risk of being audited, by reviewing and completing the ERISA, I9, and Wage and Hour checklists included in this guide.
ICE I-9 Audit – Are You Prepared?

The U.S. Immigration and Customs Enforcement ("ICE") is the principal investigative arm of the U.S. Department of Homeland Security (DHS). ICE is charged with a wide array of law enforcement duties aimed at protecting the homeland, including ensuring that all employers employ individuals who are legally authorized to work in the U.S. In order to be more effective in that mission, ICE works collaboratively with federal, state, and local partners to conduct broad sweeping investigations. Employers should implement effective I-9 procedures that result in accurate, consistent and uniform preparation, maintenance and, ultimately, disposal of the forms to prevent potential liability and mitigate many potential violations.

Who has the authority to conduct an I-9 audit?
Every agency involved in the I-9 process has additional funding and resources dedicated to I-9 compliance (DHS, ICE, USCIS, DOL, and DOJ’s OSC). There is increased activity from the DOJ’s OSC, including more charges, fines, and settlements against employers for discrimination. Every employer must have an I-9 Employment Eligibility Verification Form completed for every employee who they employ in the US.

Am I required to use E-Verify?
E-Verify is a voluntary and free online system that allows an employer to take the data completed on the I-9, and run it through the E-Verify system. Federal contractors doing work for more than 120 days with a certain dollar value and some subcontractors are required to use E-Verify. Some states, counties and city govern-ments require employers to E-Verify. Currently, Michigan does not require all employers to E-Verify.

What documentation is acceptable to complete an I-9 Form?
An employer (or its agent verifying the form) is required to review new hires’ original documents to ensure they “reasonably appear on their face to be genuine and they relate to the person presenting them.” An employer must not over document or discriminate during the I-9 process. While E-Verify confirms if Federal documents (passport, passport card, permanent resident card, employment authorization card, and I-94 card) are genuine, it does not confirm if the document matches the person.

Are there preventative measures that employers should take to minimize their exposure?
Employers should conduct self-audits annually. Annual review of I-9 forms and policies and practices for completing I-9s will benefit employers and will minimize the risk for non-compliance and better prepare your organization in the event of an audit by ICE.

What are the penalties for failing to comply with the I-9 requirements?
Employers determined to have knowingly hired or which continue to employ unauthorized workers will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted. Monetary penalties range from $375 to $16,000 per violation, with repeat offenders receiving penalties, at the higher end. Penalties for substantive violations, which includes failing to produce a Form I-9, range from $110 to $1,100 per violation.

The MBPA can assist businesses with compliance such as providing necessary documents like Summary Plan Descriptions at no charge to members. Call 888-277-6464 to learn more.

– next page for checklist –
ICE I-9 Audit
Compliance Checklist

☐ Ensure that your company is completing a Form I-9 within 3 business days after employment begins. Employers are required to maintain original Forms I-9 for all current employees for inspection.

☐ Develop a companywide compliance policy.

☐ Train those who will be completing the I-9 verification process.

☐ Provide candidates with the I-9 list of acceptable documents.

☐ Be consistent when attaching, or not attaching, copies of work documents.

☐ Ensure that your recordkeeping is in compliance with the federal laws. Destroy old I-9s of ex-employees three years after the date of hire or 1 year after employment ends – whichever is LONGER.

☐ E-Verify is a great (free) tool!

☐ When conducting internal audits, NEVER correct an I-9 without initialing and dating the change – without this there could be a charge of document fraud; different color pen preferred.


☐ Ensure that I-9s are being stored properly (in a separate locked cabinet/drawer). I-9s should not be maintained as part of an employee’s personnel record.

☐ Conduct self-audits early and often. Internal audits are on the ICE Employment Best Practices List. A sample internal audit checklist should at least include the following:
  • Employee name stated incorrectly
  • Date of birth missing or incorrectly stated
  • Social Security number missing or incorrectly stated
  • Address missing or incorrectly stated

Please contact the Michigan Business and Professional Association to learn how your company can ensure compliance with these laws. Call 888-277-6464 to learn more.

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Department of Labor - ERISA Audit
Small Business Guide and Compliance Checklist

In recent years, the Department of Labor (DOL) has increased its efforts to ensure that employer’s welfare plans are in compliance with federal law and regulations. Since there continues to be a substantial increase in the number of employers who are receiving audit requests from the DOL, it is more important than ever for employers to understand who is subject to an audit, what the DOL is looking for during an audit, and what they can do now to reduce their risk upon audit.

Who is subject to a DOL audit?
The DOL has the power to audit and investigate welfare plans of all employers subject to the Employee Retirement Income Security Act (ERISA). This means that private employers, for-profit and non-profit, large and small, who sponsor group health plans (both insured and self-insured) could receive a DOL audit notice.

Why are some employers singled out for an audit?
There are many reasons why an employer is targeted for a DOL audit. The employer could be in an industry or a type of employer that DOL has specifically sought to audit under its National Enforcement Project. Perhaps participants have submitted complaints to the DOL regarding alleged ERISA violations that the DOL believes worthy of investigating. Also, incomplete, inaccurate or other information filed on a welfare plan’s Form 5500 may raise a red flag and trigger an audit by the DOL. Other times, the audits can be random.

When are employers notified of an audit?
DOL audits can occur at any time. Employers generally receive an audit request letter from the DOL with little to no advanced notice. The DOL also typically requires that the requested information be submitted to its office within ten (10) days of receipt of the audit letter. In addition, the DOL provides that the timely submission of compliant documentation may eliminate the need for an on-site visit from a DOL agent. For these reasons, it is crucial that employers be prepare and compliant ahead of time.

What is the DOL looking for during an audit?
The typical DOL audit requests a wide variety of plan-related documents and examines compliance with a broad range of issues under various laws including ERISA, HIPAA, the Newborns’ and Mothers’ Health Protection Act, the Women’s Health and Cancer Rights Act, the Mental Health Parity and Addiction Equity Act, the Genetic Information Nondiscrimination Act, and the Patient Protection and Affordable Care Act. See reverse side for a partial list of the types of welfare plan documentation the DOL may request upon audit.

How can employers minimize their risk during a DOL audit?
A DOL audit can be a time-consuming, disruptive, and anxiety-ridden process. With the number of DOL audits on the rise, there is no better time than now to review benefit plan documentation and practices to ensure compliance with the numerous areas of law that govern employer-sponsored welfare plans and ensure that the audit goes smoothly.

The MBPA can assist businesses with compliance such as providing necessary documents like Summary Plan Descriptions at no charge to members. Call 888-277-6464 to learn more.

– next page for checklist –
Department of Labor - ERISA Audit
Compliance Checklist

- Summary plan descriptions, including any changes in plan benefits and entitlement to benefits
- Summary annual reports for the past three years
- List of all service providers to the plan for the past three years
- All contracts with insurance companies for the provision of health benefits
- If the plan is fully insured, a copy of the most recent monthly bill, premium request/invoice
- If self-insured, all contracts for claims processing, administrative services, and reinsurance
- A copy of a plan’s terms for eligibility to enroll under the terms of the plan
- Plan enrollment forms
- Portions of the employee handbook that relate to the plan
- A sample of a certificate of creditable coverage
- A sample COBRA notice and election form
- A copy of the plan’s rules regarding coverage of medical/surgical and mental health benefits
- The plan’s Newborns’ Act notice
- A copy of the written description of benefits mandated by the Women’s Health and Cancer Rights Act
- Materials describing any wellness programs
- A health plan’s grandfathered notice, if the plan is claiming grandfathered status under the Patient Protection and Affordable Care Act
- The plan’s provisions regarding dependent coverage, if any
- A copy of the plan’s internal claims and appeals and external review processes

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Department of Labor Wages and Hour Audits – Are You Prepared?

The Fair Labor Standards Act (FLSA) establishes standards for the basic minimum wage and overtime pay, recordkeeping and the payment of wages for full-time and part-time workers. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. In recent years, the Department of Labor (“DOL”) Wage and Hour Division (“WHD”) has increased its efforts to ensure that employers are in compliance with federal law and regulations. As the WHD has the authority to conduct record audits and on-site inspections, and the DOL has broad investigative authority, it is critical for employers to ensure that they are in compliance with the FLSA.

Who is subject to a DOL audit?
The DOL has the power to audit and investigate employers in both the private and public sectors. This means that private employers, for-profit and non-profit, large and small, could receive a DOL audit notice.

Are there preventative measures that employers should take to minimize their exposure?
Employers should conduct self-audits annually. Check current 1099s as well as all 1099s going back at least three years. Examine very closely all written job descriptions to ensure they (i) accurately reflect the work done; (ii) have been updated as appropriate to fit the actual job duties being performed; and, (iii) justify any applicable exemptions, also ensure payroll records and written policies are current, accurate and compliant.

What are the most common violations?
The most common violations involve misclassifications. This includes, improperly classifying someone as an independent contractor, as well as improperly classifying an employee as exempt from over-time pay. Employers also regularly get tied-up on calculating the “regular rate” and not including all pay in this calculation. This error is then carried over as the regular-rate forms the basis for the overtime rate.

What is the DOL looking for during an audit?
The typical DOL audit requests a wide variety of pay-roll records, including time-cards and job descriptions. The DOL also regularly conducts on-site interviews of employees to ensure that the job descriptions and classifications fit the actual work being performed. Aside from management interviews, employers (and counsel) are typically not permitted to sit-in during the on-site interviews of employees.

What should an employer do if a DOL investigator arrives unannounced?
Employers should familiarize key employees with the DOL's inspection rights. The DOL investigator must have a search warrant. An employer may request a period of 72 hours to comply with any investigative demand. Employers may also request that the interviews and on-site investigation take place during reasonable times. A representative of the employer should escort the WHD Investigator through the inspections of the workplace and request to sit-in during any management interviews.

The MBPA can assist businesses with compliance such as providing necessary documents like Summary Plan Descriptions at no charge to members. Call 888-277-6464 to learn more.
Department of Labor Wage and Hour Compliance Checklist

- Familiarize key employees with the basics of overtime and record keeping.
- Familiarize non-exempt employees with procedures to protect their wage rights.
- Establish employment policies, including a “safe harbor” policy, which provide the avenue for employees to address any payroll concerns.
- Conduct wage and hour training for management employees.
- Conduct annual external or internal wage and hour audits.
- Establish DOL inspection procedures and familiarize your DOL inspection “Team” with these protocols.
- Adhere to best practices for document retention. Preserve payroll records, collective bargaining agreements, sales and purchase records for at least three years. Records on which wage computations are based should be retained for two years, (including time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages). These records may be kept at the place of employment or in a central records office.
- Review and update job descriptions regularly to ensure that exempt and non-exempt classifications are properly identified.
- If your Company utilizes independent contractors, ensure that these individuals are properly classified. Consult the IRS 20 factor test on employment status. See www.irs.gov. Michigan has its own economic reality test which should also be consulted. See www.michigan.gov.
- Ensure that your company displays an official poster outlining the provisions of the FLSA, available at no cost from local offices of the Wage and Hour Division.
- Ensure that your employees are clocking-in and out properly and that all time spent “donning” and “doffing” gear is included as paid time, as required under the FLSA.

Please contact the Michigan Business and Professional Association to learn how your company can ensure compliance with these laws. Call 888-277-6464 to learn more.

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