



Benefits Guide_ Basics, Retirement and Pension Plan Administration, EBSA Investigations

Printed By: JLUSTIG8 on Friday, March 6, 2020 - 1:14 PM

Benefits Guide: Basics
Retirement and Pension Plan Administration

EBSA Investigations



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(10) EBSA Investigations-

(10) EBSA Investigations Introduction- —

Fiduciary Breaches: The focus of EBSA investigations is on fiduciary breaches, including violation of ERISA § 404, co-fiduciary liability under § 405, prohibited transaction violations under § 406, and ERISA Part 7 health plan requirements.¹

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¹EBSA Enforcement Manual, Fiduciary Investigations Program.
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EBSA and Subagencies: Department of Labor investigations of employee benefit plans are conducted by the Employee Benefit Security Administration (EBSA), a sub-agency within the DOL. The EBSA Office of Enforcement under ERISA § 504 has authority to investigate Title I violations of ERISA with respect to pension, health, and other ERISA covered plans.² Other relevant sub-agencies of EBSA consist of the following offices, which may provide guidance in an investigation:

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²ERISA § 504; ERISA § 506.
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- Office of Regulation and Interpretation—this office issues advisory opinions with respect to fiduciary duties.
- Office of Exemption Determinations—this office issues exemptions from the prohibited transaction provisions of ERISA.
- Office of Health Plan Standards and Compliance Assistance—this office issues regulations and interpretive guidance with respect to group health plans.
- Office of Policy and Research—this office issues policy analysis and economic research.
- Office of the Chief Accountant—this office also has investigative authority but with respect to the annual reporting Form 5500s and audit requirements.³

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³ EBSA Organization Chart.
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Headquarters and Regional Offices: EBSA's enforcement office is comprised of a national office headquartered in Washington D.C. and 10 regional offices around the United States (Boston, New York, Philadelphia, Atlanta, Cincinnati, Chicago, Kansas City, Dallas, Los Angeles, and San Francisco).⁴ Each office has Pension Benefit Advisors (PBAs) who act as customer service representatives to plan participants and beneficiaries.⁵

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⁴ EBSA Regional Offices.

⁵ Ask EBSA.
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Practice Tip: Note that a call or letter from a PBA is only considered an “inquiry” and is not an investigation.

Practice Tip: Each enforcement office is also comprised of investigators, who are either attorneys or accountants by background. Cleverly ascertain the investigators background and tailor your responses accordingly (that is, attorneys will follow more of a legal argument and the accountants follow more the trail of money).

Office of the Solicitor: The Office of the Solicitor is not a sub-agency of EBSA but of the DOL. This office acts as the DOL's in-house counsel and has authority to initiate litigation when investigations do not get resolved amicably.⁶

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⁶ U.S. Department of Labor Office of the Solicitor (DOL).
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Additional Resources: TM Portfolio 353.III.D.:—Employee Benefit Plans and Issues for Small Employers, Plan Design Operations and Considerations, Regulation of Employee Benefit Plans; TM Portfolio 365: ERISA—Fiduciary Responsibility and Prohibited Transactions; Benefits Guide: *DOL Enforcement*; TPS ¶ 5530.08.A DOL Voluntary Fiduciary Correction Program (VFC), Introduction.

(20) Scope of EBSA Investigative Authority

(10) ERISA § 504 —

ERISA § 504 gives the EBSA the authority to conduct investigations of employee benefit plans.

EBSA under § 504 has “... the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder—

(1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and

(2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.⁷

⁷ERISA § 504.

Most of EBSA's investigations are civil, but EBSA also has authority to conduct criminal investigations under ERISA § 506.⁸ The criminal investigations are conducted with the U.S. Attorney's Office or State Attorney General's Office. Certain of these cases involve labor racketeering, bribery, embezzlement, kickbacks, and false statements.⁹ Other charges such as mail fraud tend to be easier to prove.

⁸ERISA § 506(b); EBSA, Enforcement Manual, Chapter 52 Criminal Investigations Program.

⁹ ERISA Enforcement, Criminal Provisions.

Example: For every participant statements that were mailed out with fraudulent information, there will be a separate count of mail fraud for each statement that was mailed..

Practice Tip: One scenario to be cautious of is in the delinquent contribution context. Delinquent contributions

are basically when the participant contributes to a plan their money, that money should be put into the plan as soon as it can be reasonably segregated from the employer's general assets. See 29 CFR § 2510.3-102. In other words, as soon as reasonable possible. The employer should conduct a study of the timing of employee contributions and determine if it is reasonable. The employer should thereafter periodically monitor that contributions are made within that time frame. If the employer is delinquent because it is using that money to fund payroll and business expenses, this civil violation may also turn into a criminal investigation.

The investigation of delinquent employee contributions, which the EBSA previously designated as a national project, is now designated a national enforcement priority.¹⁰

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¹⁰ Employee Contributions Initiative.
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(20) Events that Trigger an EBSA Investigation —

What triggers the opening of an investigation? The EBSA investigator will likely not tell the target of the investigation why the investigation was opened. The reasons for the opening of an investigation can be:

- A participant complaint:
- Targeted Priority:
- National Office Enforcement Projects (former and current)
- Health Benefits Security Projects—focuses on investigating improper administrative practices or mishandling of funds in connection with a group health plan and compliance with Part 7 of ERISA.
- Employee Stock Ownership Plans (ESOPs)—ESOPs are defined contribution plans designed to primary invest in the stock of the employer. As such, EBSA investigates these plans to ensure the stock is brought or sold at fair market value.¹¹ For more on ESOPs, see *Employee Stock Ownership Plans*.

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¹¹ ERISA Enforcement, Enforcement Manual.
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Practice Tip: Make sure that the stock is appraised by an independent appraiser and that such valuation is not stale. Moreover, in selecting the independent appraiser ensure there are no conflicts of interest and prepare a written analysis addressing the following:

- The reason for selecting the particular appraiser;
 - A list of all the appraisers that the fiduciaries considered;
 - A discussion of the qualifications of the appraiser that the fiduciaries considered;
 - A list of references checked and discussion of the references' views on the appraiser;
 - Whether the appraiser was the subject of prior criminal or civil proceedings;
 - A full explanation of the basis for concluding that the fiduciaries' selection of the appraiser was prudent.¹²; and
 - The reasonableness of the fees charged in light of the services provided.¹³
- Protecting Benefits Distribution (PBD)—these investigations focus on ensuring that participant benefits are expeditiously distributed avoiding the continuation of administrative fees being deducted or the risk of the plan being abandoned.¹⁴
 - Contributory Plans Criminal Project (CPCP)—The DOL is looking into scenarios such as the use of employee contributions for personal use, or to pay for business expenses, rather than forwarded to the plan.
 - Plan Investment Conflicts—focuses on fiduciary service provider compensation and conflicts of interests in regards to plan asset vehicles.
 - Rapid ERISA Reaction Team—these investigations focus on plan participants who are potentially exposed to the greatest risk of loss, for example, participants and beneficiaries of plans whose sponsor has filed for bankruptcy.
 - Abandoned Plan Program—these investigations pertain to the termination of, and distribution of benefits from individual account pension plans that have been abandoned by their sponsoring program.¹⁵
 - Regional Enforcement Project—these vary by office. The Philadelphia Office, for example, has a missing participant enforcement program created to ensure that participants that have left the plan receive their proper benefits.¹⁶
 - Information Reported on the Form 5500s—the following are examples that may lead to an investigation:
 - Schedule H of the Form 5500—Accountant issues anything other than an unqualified opinion.
 - Schedule H of the Form 5500—The plan invests over 20% of its assets in any one type of investment, such as real estate.
 - Schedule H of Form 5500 (Compliance questions)—delinquent contributions, loans in default, prohibited transactions, no fidelity bond or wrong amount.¹⁷

- Referrals from other agencies—the Internal Revenue Service, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission.¹⁸

¹² Agreement Concerning Fiduciary Engagements and Process Requirements for Employer Stock Transactions.

¹³ DOL Adv. Op. 2002-08A.

¹⁴ Enforcement, National Enforcement Projects.

¹⁵ ERISA Enforcement Manual, National Enforcement Projects.

¹⁶ Bloomberg Law News, The Government Wants to Help You Find Your Missing 401(k).

¹⁷ Schedule H (Form 5500) Financial Information.

¹⁸ ERISA Enforcement Manual, Investigative Authority.

(30) KEY ERISA PROVISIONS TO REVIEW DURING AN INVESTIGATION

(10) Who Is a Fiduciary? —

Alleged breaches of fiduciary duty in connection with the administration of employee benefit plans are a key emphasis of EBSA during an investigation.

A fiduciary under ERISA is a person who with respect to a plan:

- exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets;
- renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or;
- has any discretionary authority or discretionary responsibility in the administration of such plan.¹⁹

¹⁹ ERISA § 3(21).

Fiduciaries can be named in the plan documents or can become de facto fiduciaries.²⁰

²⁰ TM Portfolio 365.III: ERISA—Fiduciary Responsibility and Prohibited Transactions, Fiduciary Status Under ERISA.

EBSA investigations include all types of employee benefit plans, such as pension, health apprenticeship, legal, etc. The investigation subjects can be:

- plan sponsors;
- plan trustees;
- named fiduciaries;
- de facto fiduciaries;
- plan administrators; and
- service provider—consultants, investment advisors, custodians, directed trustees, etc.²¹

²¹ EBSA Enforcement Manual, Fiduciary Investigations Program.

EBSA's authority is limited to investigating potential breaches of fiduciary duties under Title I of ERISA. The fiduciary duties are detailed in ERISA § 404. Among other duties, a fiduciary must act for the exclusive purpose of providing benefits to participants and beneficiaries.²² For more, see The Exclusive Benefit Rule and Its Exceptions.

²² ERISA § 404.

In the discharge of fiduciary duties, the fiduciary must act according to how a prudent person would act. Prudence cannot be analyzed in hindsight. A fiduciary must exercise care, skill, and prudence under the circumstances *then prevailing*.²³ According to the DOL, prudence requirements may be met by a process that requires investments to be examined for appropriate factors such as the risk of loss, the opportunity for return, diversification, liquidity, current return, and projected return.²⁴

²³ Katsaros v. Cody, 744 F.2d 270, 279, (2nd Cir.), cert. denied, 469 U.S. 109 (1984).

²⁴ DiFelice v. US Airways, Inc., 497 F.3d 410, 423 (4th Cir. 2007); 29 C.F.R. § 2550.404a-1.

Furthermore, a fiduciary must give “appropriate consideration” to those facts and circumstances that the fiduciary knows or should know are relevant to the investment involved, including the role the investment plays in the plan's investment portfolio.²⁵ Appropriate consideration or alternatively, procedural due diligence, means ensuring investment decisions are reasonable, and applicable to the plan's design.²⁶

²⁵ DiFelice v. US Airways, Inc., 497 F.3d 410, 423 (4th Cir. 2007).

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²⁶ 29 C.F.R. § 2550.404a-1. “[a]ppropriate consideration shall include, but is not necessarily limited to a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action.”

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(40) Prohibited Transaction Provisions

(10) Prohibited Transaction Basics —

A distinct category of transactions between a plan and a party in interest outlawed under ERISA, known as prohibited transactions, are another key focus for many EBSA investigations.

The prohibited transaction provisions under ERISA § 406 are separated by either (a) violations for which certain exemptions may apply and (b) violations for which there are no exemptions. For more on what transactions are prohibited, and what types of exemptions are available from the prohibited transaction provisions, see Prohibited Transactions and Exemptions.

ERISA defines who is a “party in interest” for prohibited transaction purposes. For more, see [Who Is a Party in Interest?](#)

Practice Tip: The number of potential parties in interest under ERISA is great. To be ready to deal with any party in interest conflicts that may arise, create a roster of all the parties in interest and determine if there are any conflicts.

Practice Tip: The typical prohibited transaction provisions triggered in an investigation involve an extension of credit in a delinquent contribution scenario.²⁷

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²⁷ EBSA Fact Sheet Employee Contributions (December 2015). (“EBSA has a long history of protecting contributions withheld from employees’ pay for the purpose of being transmitted to employee benefit plans.”); Employee contributions is a current National Enforcement Priority. In addition, the DOL will keep monitoring the percentage of delinquent employee contribution cases as part of its performance targets for Fiscal 2018—2022. See U.S. Department of Labor FY 2018-2022 Strategic Plan (at pp.24-25)

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ERISA is also violated when goods and services are furnished between a plan and a party in interest. Thus, when a plan contracts with a service provider for services, it is a prohibited transaction. ERISA provides certain statutory exemptions from the § 406(a) prohibited transactions under ERISA. The most common in EBSA investigations is the § 408(b)(2) exemption. This exemption allows plans to contract with service providers if the:

- contract or arrangement is reasonable;
- services are necessary for the establishment or operation of the plan; and

- no more than reasonable compensation is paid for the services.²⁸

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²⁸ ERISA § 408(b)(2).
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There are also class and individual exemptions issued by the DOL.²⁹ For more, see *Prohibited Transactions and Exemptions*.

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²⁹ 29 CFR 2570 Prohibited Transaction Exemption Procedures Employee Benefit Plans.
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Note that the plan fiduciaries have personal liability under ERISA § 409. A fiduciary who breaches their duty shall be personally liable to make good to such plan any losses to the plan resulting from the breach.³⁰

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³⁰ ERISA § 409.
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(50) DOCUMENT REQUESTS

(10) Opening Letter —

Upon opening an investigation, EBSA will send the plan sponsor, fiduciary, or administrator an opening letter stating its authority and that the plan is under investigation. This letter will also request many plan documents to be delivered to EBSA's offices or have copies available on the employer's site for the investigator to come and pick up.

Standard Requests:

- governing plan documents;
- plan document/amendments;
- trust document/amendments;
- summary plan descriptions/summaries of material modifications;
- required reporting Form 5500s;
- annual funding notices;

- summary of benefits and coverage explanation;
- participant statements;
- summary annual reports;
- audits;
- fidelity bond/fiduciary liability policy;
- service provider contracts;
- plan contribution records;
- employee contributions;
- collective bargaining agreements;
- meeting minutes;
- participant loan records;
- income/expenses/journals;
- appraisals;
- Part 7/ACA related;
- COBRA/HIPAA/other notices;
- correspondence/e-mails;
- bank accounts/statements;
- investment accounts/statements;
- real property records;
- securities/bonds; and
- claims adjudication records.³¹

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³¹ EBSA Enforcement Manual, Fiduciary Investigations Program.
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Non-standard requests

- Requests that refer to anything specific, such as a specific investment/type of investment; a specific claim or type of claim; specific plan details.

EBSA may compel the attendance of witnesses via a Subpoena Ad Testificandum or to access and the right to copy documentary evidence via a Subpoena Duces Tecum. Generally, to enforce a subpoena, the Labor Secretary need only show that the investigation is for a legitimate purpose, the information is relevant to this purpose, and the information is not already in the government's possession. ³²

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³² Employee Benefits Law, Administration and Enforcement, Ch. 3.II.E. Investigations.
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Practice Tip: Before submitting documents to the DOL or sit in for questioning, request an “Accommodation Subpoena.” This subpoena is easy for the DOL to obtain since each Regional Director has the power to authorize these subpoenas. It essentially is issued to persons or entities who are willing to testify or to produce the documents requested but are concerned about protecting themselves from any potential adverse consequences of doing so without a legal requirement.

(60) INTERVIEWS

(10) Interview Basics —

After reviewing the documents, the EBSA will schedule interviews with the plan administrator, trustee, fiduciary, head of human resources, CFO, benefit personnel. Subjects of an interview can include:

- individuals who have knowledge of a single document or transaction;
- custodians of systems of regularly kept records;
- fiduciaries of employee benefit plans;
- service providers to employee benefit plans; and
- subjects of criminal investigations. ³³

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³³ EBSA Enforcement Manual, Fiduciary Investigations Program, Conducting and Document Interviews.
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The DOL typically will go to the employer's work site to conduct these interviews. The investigator won't object to the presence of an attorney who represents the witness or subject during the interview of a civil case. The investigator will be cautious to avoid disclosing the EBSA's case considering that the attorney may also represent a potential defendant. ³⁴

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³⁴ EBSA Enforcement Manual, Fiduciary Investigations Program, Conducting and Document Interviews.
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Practice Tip: Advise the DOL that the interviewee is willing to travel to EBSA's offices for the interview. When the DOL comes to the employer's site it can be disruptive since employees will be speculating as to why there are federal investigators in the conference room.

The types of questions asked can be direct and closed, open-ended, or leading. Careful attention should be paid to the question ask to formulate a suitable response (that is, for any direct question the answer can only be "yes" or "no," nothing else should be said).

During the interview process, it is critical to set credibility with the EBSA investigator.

Example: A general question that an investigator may ask is "is there anything wrong with the plan?"

Practice Tip: Stating that there is nothing wrong with the plan will not be credible with the investigator as there are always issues with the plans. These issues may not amount to fiduciary breaches, but there are errors that occur in the normal course of operating a plan.

Practice Tip: Conduct mock interviews of the subject interviewees selected by the EBSA investigator. Not only assist in clearing up responses, but also comment on body language. The investigator will take note of body language in their Report of Investigation.

Questions to be ask surrounding the plan center on the who, what, where, when, and how? ³⁵ Questions will begin generally with statistics of the plan (that is, how many participants, how much plan assets, how many employee, etc.). The questions will center among the following broad categories:

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³⁵ EBSA Enforcement Manual, Fiduciary Investigations Program, Conducting and Document Interviews.
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- Plan Administration—Who handles participant complaints and how do you monitor resolution of such complaints?
- Plan Expenses—What are the procedures for monitoring payment of expenses?
- Plan Investment—What was the process for selecting “alternative investments” for the plan?
- Service Providers—How were they selected? Was an RFP issued? How are they monitored?³⁶

³⁶ *Tibble v. Edison*, 135 S. Ct. 1823, 1829 (2015) (“This continuing duty exists separate and apart from the trustee’s duty to exercise prudence in selecting ... at the outset”); DOL Adv. Op. 2002-08A (“Soliciting bids among service providers is a means by which a fiduciary can obtain the necessary information relevant to the decision-making process, including information about contractual provisions such as those identified in your letter relating to limitations of liability and indemnification.”); Understanding Retirement Plan Fees and Expenses, page 2 (“Understanding and evaluating plan fees and expenses associated with plan investments, investment options, and services are an important part of a fiduciary’s responsibility. This responsibility is ongoing. After careful evaluation during the initial selection, you will want to monitor plan fees and expenses to determine whether they continue to be reasonable in light of the services provided.”).

During the interview, the investigator may take an administrative deposition of the interviewee, recorded by court stenographers and taken under oath. The deposition may proceed without the presence of a government attorney after prior consultation with the Office of the Solicitor.³⁷

³⁷ EBSA Enforcement Manual, Fiduciary Investigations Program, Conducting and Document Interviews.

After the initial interviews, there may be follow up interviews or request for more documents.

(70) VOLUNTARY COMPLIANCE

(10) EBSA Response Following Conclusion of Investigation —

Following the conclusion of the investigation, the EBSA will issue:

- a no findings letter and close the file; or
- a voluntary compliance letter stating that EBSA believes a violation has occurred and lays out the particular circumstances and provides 10 days for a response.³⁸

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³⁸ ERISA Enforcement Manual, Voluntary Compliance Guidelines.
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Practice Tip: At any stage of the investigation, including this one, it is fine to request for additional time to adequately respond to the DOL.

If there is a voluntary compliance request that involves money, be mindful of ERISA § 502(l) which imposes a 20% penalty on the amount involved.³⁹ In addition, if any of these amounts involve prohibited transactions, the IRS may assess excise taxes under I.R.C. § 4975.⁴⁰

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³⁹ ERISA § 502(l).
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⁴⁰ I.R.C. § 4975.
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(80) REFERRALS TO THE SOLICITOR'S OFFICE

(10) Referrals From Regional Director —

If voluntary compliance is not achieved at the investigation stage with EBSA, the matter will be referred by the particular regional director to the Solicitor's Office (SOL) for litigation, acting either through its Plan Benefits Security Division or Regional SOL.⁴¹ EBSA will act in the role of a client and the SOL will be their attorney. Note that not every referral will be accepted by the SOL.

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⁴¹ U.S. Department of Labor Office of the Solicitor Division of Plan Benefits Security (PBS).
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If the SOL decides to take on the case, the SOL will receive all investigation materials, interview reports, documents, and EBSA report describing the investigation and findings.⁴² However, in addition, the SOL will conduct an independent review of the facts and will re-interview the subjects of the investigation and assess the merits of their claim or claims.

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⁴² EBSA Enforcement Manual, Fiduciary Investigations Program. (Figure 10) Format for Regional Directors Cover Memorandum to an Action Report.
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Typically, the SOL will need additional time to assess the merits of their case and may request:

- a tolling agreement, which is a commitment by the DOL not to commence litigation until a specified date in exchange for the plan sponsor's pledge not to assert a statute of limitations defense if the DOL eventually sues it;

- additional documents; and
- face-to-face meeting(s) to discuss the various issues involved in the case.

If a settlement is not reached, the SOL will file a complaint in Federal Court alleging, among other things, breach of fiduciary duty under ERISA. If a settlement is reached thereafter, the SOL will file a negotiated consent judgment. Note that the SOL usually does not negotiate the following:

- no denials of liability;
- DOL will issue a press release; and
- DOL will assess ERISA § 501(l) penalties.⁴³

⁴³ ERISA § 502(l) provides: (1) In the case of—(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary **shall** assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount. (emphasis added) See EBSA Enforcement Manual Civil Penalties, chapter 35 (“ERISA was amended effective December 19, 1989, to provide for a mandatory civil penalty under ERISA section 502(l).”).

Practice Tip: Try to negotiate in the consent judgement language to state that the defendants neither admit nor deny liability. If an agreement cannot be reached on this point, then negotiate the decree be silent on the issue of liability.