

NNHRA – August 20, 2015

How to Survive DOL Audits

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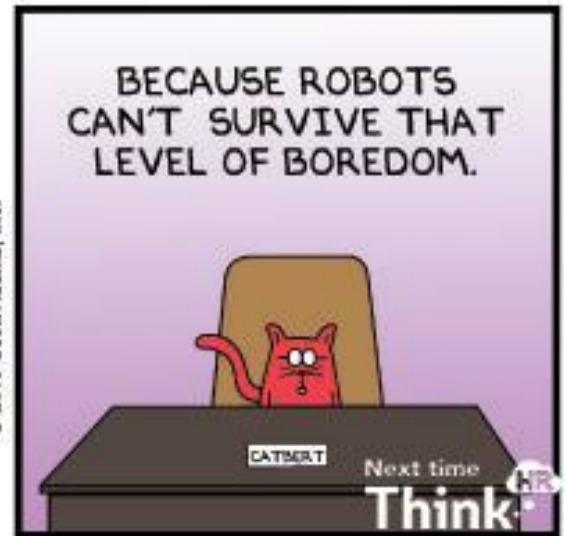
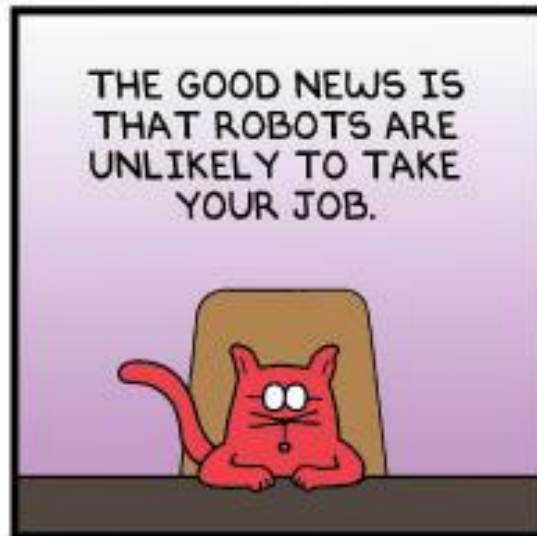


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ACA Update



CATBERT: EVIL DIRECTOR OF HUMAN RESOURCES



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ACA Reporting Requirements

Sections 6055 and 6056 of the internal revenue code authorizes the creation of informational returns by the IRS to support enforcement of the **individual mandate** (so the IRS knows which individuals were covered) and the **employer mandate** (so the IRS can monitor which employers offered affordable coverage)



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ACA Reporting Requirements

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Form 1094- C	4 hours
Form 1095- C.....	12 minutes



Failure to File Penalties

The penalties for failing to file required informational returns have recently increased.

- The basic penalty for failure to file or furnish a correct information return or payee statement will more than double from \$100 to \$250.
- The standard annual penalty cap will double from \$1.5 million to \$3 million.
- If the failure relates to both an information return and a payee statement, the penalties are doubled to \$500 per statement with a \$6 million cap.

How to Survive DOL Audits



Definitions

- **ERISA**: Employee Retirement Income Security Act of 1974.
Federal law that established “minimum standards of conduct” for plan sponsors; requires plan sponsors to protect the interests of employee benefit plan participants/beneficiaries through disclosure and conduct standards and responsibilities, and provides a channel for aggrieved plan participants/beneficiaries to seek redress in Federal court against the plan sponsor for ERISA violations.

Definitions (con't)

- **Plan Sponsor¹:**
 - (B) The term “plan sponsor” means
 - (i) the employer in the case of an employee benefit plan established or maintained by a single employer,...

¹www.law.cornell.edu/uscode/text/29/1002

Definitions (con't)

- **U.S. Department of Labor**: Federal agency ultimately responsible for conducting audits of plan sponsors under ERISA
 - **EBSA**: Employee Benefits Security Administration; this is the sub-agency of the DOL that is actually tasked with the process of executing the audits.
 - **HBSP**: Health Benefits Security Project; another DOL sub-agency recently (2012) formed to “assist” EBSA (with a specific focus on plan sponsor adherence to ACA requirements).

Plan Sponsor Obligations Under ERISA

- Written Notice Requirements: HIPAA Notices, FLSA Notices (not technically ERISA), PPACA Notices, COBRA
 - Plan Sponsors are required to distribute most of the above on an annual basis
- Filing Requirement: Form 5500 for “applicable” employers

“Specifications” for the Plan Sponsor Obligations (con’t):

- Form 5500 Particulars:
 - Annual filing requirement for any applicable component benefit plan that has 100 “plan participants” (i.e., employees) enrolled as of the beginning of the plan year.
 - Filing for said plans due not later than last day of 7th month post-plan year end
 - Also: Summary Annual Report (due not later than last day of 9th month post plan-year end)

“Specifications” for the Plan Sponsor Obligations (con’t):

- WRAP Document
 - **Required** if separately-contracted component benefit plans file (Form 5500) under one singular ERISA Plan Number.
 - Example: ‘Company X’ files totally unrelated and separate Medical, Dental, Vision, and Health Care Flexible Spending Account coverages under plan number ‘501’ on its Form 5500 – ‘Company X’ **needs** a WRAP document for these plans.
 - **“Caution:”** Any component benefit plan that is “wrapped” must be filed for, even if that particular plan, “standing alone” does not have 100 plan participants at the beginning of its plan year.

Who does What and Why...

- The Department of Labor's Employee Benefits Services Administration (EBSA) routinely conducts audits of group health benefit plans.
- Health Benefits Security Project (HBSP) was recently established under PPACA to add to EBSA's compliance and enforcement initiatives.
- Smaller groups of fewer than 100 are being particularly targeted since the DOL does not have the ability to monitor them through a Form 5500 filing.
- Audits are anticipated to increase significantly, given increased audit budgets and concerns over ERISA and PPACA violations.

Audit Triggers

The DOL reports common audit triggers include:

- DOL's internal audit initiatives
- Employee complaints
- Press tips and public visibility of a company or its third party vendors
- 5500 filings inconsistencies or suspect information
- Random selection

Areas of Concern

- Summary Plan Descriptions
- HIPAA compliance, particularly notices to employees about special enrollment rights
- PPACA Grandfathered Plan notices and documentation of coverage for adult children
- PPACA lifetime and annual limit requirements
- Exclusion (inadvertent or otherwise) of people who are eligible to participate in the plan, including dependents up to age 26

Likely Future DOL Audit Focus

- Employer communications and documentation
- Employer reporting requirements
- Coverage of essential health benefits, cost sharing and out of pocket limits for applicable plans
- Annual limits, on non-essential health benefits only
- Structure of group health benefit plans and offers of coverage
- Waiting period limitation of 90 days
- Exchange/Marketplace notice documents
- Adherence to PPACA requirements

What Happens?

- Letter sent to Plan Sponsor containing list of documents the DOL would like to review;
- Request typically goes back 3-6 years;
- Upon receipt of the DOL audit letter, an employer should immediately contact the DOL investigator assigned to the case and ask for a 30-day extension.

What To Do

- Index documents as they arrive in a folder according to the DOL request to which each is responsive.
- Designate sections of documents or excerpts from plan documents that may be responsive to a particular request and have those provisions copied *separately*.
 - Auditor does not have to search for the information relevant to the request.
- Provide a log detailing:
 1. the request number;
 2. the item description; and
 3. the responsive documentation including any necessary comments.

What To Do

- Employer should designate individual responsible for contact with EBSA (Employee Benefits Security Administration).
- Break down what the DOL wants...
 - Identify *exactly* what documents and information will be responsive to each request *before* the collection process begins.
 - Create thorough, exhaustive list of **what documents** to obtain and **from whom** to request them.
- Reach out to carriers and relevant third parties to obtain the necessary documentation.

What's Next?

- If no violations, EBSA will send a closing letter indicating that no violations were found.
- If there are violations, it is EBSA's policy to seek voluntary compliance whenever possible.
- Most ERISA violations are resolved through voluntary correction rather than civil litigation.
- Once all corrections are made, EBSA will issue a closing letter detailing all the problems found and all corrective steps taken by the plan sponsor.

Potential Violations

- Failure to timely remit employee contributions.
- Use of plan assets for the benefit of parties related to the plan, such as plan administrator, plan sponsor, and parties related to these individuals.
- Failure to properly value plan assets at their current fair market value, or to hold plan assets in trust.
- Failure to follow the terms of the plan (unless inconsistent with ERISA);
- Failure to properly select and monitor service providers.

Potential Fines

- Employer is solely responsible for ERISA compliance.
- Certain infractions can entail up to \$100/day penalty for every employee that is affected by a violation until corrected.
- The penalty for late delivery of SPD or Wrap can be as much as \$110/day per plan.
- Late filing of form 5500 can result in fines as high as \$1,100 per day.

Outcomes Resulting from the Audit (from “most desired” to “least desired”):

- “Most-desired:” DOL informs Plan Sponsor that no violations found; matter closed.
- “Next desired:” DOL finds “minor violations” (usually in SPDs or EOCs) and will request correction from responsible party; once executed, matter closed.
- “Not desired:” DOL finds “major violations” and, in addition to corrective action by PS, levies fines vs. PS.
- “Whammy:” DOL finds violations so severe that, in addition to the immediately aforementioned, it seeks criminal charges vs Agents of the PS.
 - The above is “rare” for health & welfare audits (one prospective example: self-funded PS Agent who is embezzling money from the Plan assets).

Ensuring Post-Audit Compliance (“Coming Full-Circle”):

1. Ensure dates are correct and Notices/Documents are being distributed, for the following:
 - ERISA/HIPAA/COBRA/PPACA/FLSA Notices (both annual to ongoing employees and one-shots to new hires)
 - Evidence/Certificate of Coverage (Plan Issuer/Carrier Responsibility, but the DOL *will* ask for it)
 - SPDs/WRAP SPDs
2. Ensure timely filing of Form 5500 and distribution of SAR

Questions?

Thank you for your time today!