

Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans

Recordkeeping in the Electronic Age

April Mitchell – Written Testimony

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The world has become an electronic one. With the convenience of having everything at our fingertips at all times comes certain challenges. The Advisory Council has recognized the challenges of the shift to electronic/digital recordkeeping and is focusing on the implications of this shift on the maintenance of employee benefit plans. Specifically, the Council is focusing on compliance with ERISA's record retention requirements, the tools and technologies used in electronic data maintenance, the accuracy, completeness, and availability of stored data, and the controls in place to promote reliability of digital records. Of special concern to the Council is the transfer of records when plan level transactions occur. Ultimately the Council's intention is to determine if DOL guidance would be helpful with respect to records retention, the authenticity and reliability of the electronic records, and the data security of electronic records.

ERISA's record retention requirements are found in Section 107 and Section 209 of ERISA. Section 107 requires retention of records for 6 years from the date of filing, including all required notices and disclosures, fiduciary plan documents, contracts and agreements, compliance documents, and various governmental filings like the Annual Report Form 5500. Often, we see 7 years as the record retention time period maintained by service providers. Section 209 of ERISA requires plan sponsors to maintain records sufficient to determine the benefits due, for "as long as they may be relevant to a determination of benefit entitlements." This means the employer must retain all records necessary to determine the benefit that is due (or may become due) to each participant, but there is no specific period of time provided for retention of this information. Therefore, these records should be kept for an indefinite period of time to ensure they are available upon request by the participant or in case of an audit.

Records that must be maintained include, but are not limited to, the following:

- Plan Documents
- Adoption Agreements
- Plan Amendments
- Summaries of Material Modifications (SMMs)
- Summary Plan Descriptions (SPDs)
- IRS Determination Letters
- Form 5500s
- Plan Non-discrimination Testing Records
- Census Data and Demographic Information

- If Applicable, Other Data used to determine eligibility, vesting, benefit calculations (rates of pay, hours worked, deferral elections, employer contribution calculations, participant account records, actuarial accrued benefit records, plan loan documents, withdrawal and distribution records, etc.
- Retirement Committee Minutes
- Board Resolutions
- Trust Documents
- Relevant Financial Records
- Service Agreements

In my experience, plan sponsors often do not fully understand the delineation of their fiduciary, administrative, and operational responsibilities from the responsibilities of their third party service providers. It is the plan sponsor's fiduciary responsibility to make sure their plan's service providers are accurately processing plan transactions. Certain third party service providers, such as payroll companies and recordkeepers, provide SOC1 reports to plan management. Generally, third party administrators do not issue SOC1 reports unless they also provide recordkeeping services. SOC 1 reports enable plan management to identify controls currently in place at their service provider and determine whether or not they are operating effectively.

Many plan sponsors, especially small companies that have never been audited, are not aware of the information available in the SOC1 provider reports, including Complementary User Entity Controls (CUECs), or how this information affects their plan and their responsibilities. If a SOC-1 report has errors noted in the testing, or a qualified opinion, the plan sponsor is responsible for determining the impact on their retirement plan. Likewise, it is critical that plan sponsors are aware of CUECs, which are the controls that service providers want plan sponsors and plan administrators to have in place in order for them to properly use their service. Education is needed for plan sponsor understanding of SOC1 reports and the CUECs necessary to operate effectively and function in coordination with the third party provider's controls. Many plan sponsors often don't realize that, even when they've delegated certain functions to a service organization, they are still responsible for having controls in place and ensuring that policies and procedures are being followed.

The maintenance and storage of historical data is extremely important during times of transition from one provider to another. It is important for plan sponsors to understand the data available to them after contract termination with a service provider, the length of time the data will be available to them, and how to access the data. Often third party providers will charge a fee to provide reports and documents to plan sponsors that they have previously provided. Plan sponsors should have a periodic process for pulling down electronic records and saving them for future reference. Plan Sponsors should be aware of the contents of their service

agreements with respect to the availability of electronic data from third parties during and after their contracted period.

Many different transitions in service providers can affect availability of data and a plan sponsor's ability to maintain necessary documentation. Changes in payroll providers, recordkeepers, investment advisors, and third party administrators all deserve special attention to ensure accuracy and required retention of records. Likewise, internal personnel changes at the plan sponsor should be reviewed to ensure processes are followed, data is stored and accessible, and internal controls remain in place. Sometimes plan sponsors will actively change providers for various reasons; however, transitions outside of the control of the plan sponsor can occur. There has been a lot of consolidation in the retirement plan industry with a slew of third party acquisitions and resulting platform/recordkeeping transitions. We have encountered situations where the historical data of the acquired recordkeeper is not readily accessible under the new platform after conversion to the new recordkeeping system. Plan sponsors should download annual reports to support 5500 preparation, distributions processed, calculations, testing, trust accounting, loans, etc. and not rely on the recordkeeper or TPA to provide access to them for a period of time. Sometimes only 2 years' worth of history is readily available for download from a recordkeeper. It is important for plan sponsors to download and save reports from the recordkeeper periodically to ensure no data is lost or archived before they have saved it. Changes to payroll providers pose similar challenges. Employers should download and store as much historical information as possible prior to the transition in order to protect their data. The historical data should be stored in an accessible format and secured with restricted access to the appropriate parties.

Generally, when plan sponsors decide to transition from one provider to another, the providers communicate with one another and establish the data to be transferred and the secure method for data transfer. Plan Sponsors must be aware of the data being transferred and, as importantly, the data that may not be transferred. Some examples of data that may not transfer from platform to platform automatically are beneficiary forms, loan documents and amortization schedules, support for hardship and other distributions, historical plan documents, defined benefit calculations/certification, etc.

It is becoming more common for data to originate electronically and not from a paper source. In past years much of the electronic data stored for plan administration was as a result of scanned documents. Often source documents would be maintained for a period of time and then discarded. Now, as transactions are going digital, more reliance must be placed on the processes in place and there are no source documents to which we can refer. Special care must be taken to preserve the integrity of electronic files to avoid manipulation. Bad actors can pop up anywhere which makes digital preservation and security even more important now than ever.

Recommendations:

More detailed guidance from DOL on amount of time and types of data to be maintained indefinitely under Section 209, including examples.

Service provider agreements should outline their record retention policies, plan sponsor access to historical records at the time of transition and later, and cost of providing prior documents.

Guidance and education are needed with respect to the plan sponsor's duty to understand and interpret the controls and findings in the SOC 1 and the relevant Complementary User Entity Controls. This should be outlined in the sales and implementation process, as well as within third party provider service agreements.

Consider offering a model data retention policy template for plan sponsors to customize and adopt.