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Comments

Submitted by the Pension Rights Center

To the ERISA Advisory Council

On the Subject of

Recordkeeping in the Electronic Age

September 20, 2023

The Pension Rights Center commends the ERISA Advisory Council for studying electronic recordkeeping, a technological development that was certainly beyond the ken of those who initially conceived, drafted, and enacted ERISA. It is also a development that profoundly impacts the administration of employee benefit plans and the protection of the benefits of participants and beneficiaries. It provides opportunities to improve plan administration and reduce plan costs, but also poses meaningful challenges for plan participants.

The Pension Rights Center, founded in 1976, two years after ERISA's passage, is a national nonprofit, nonpartisan consumer organization committed to protecting and promoting the retirement income security of workers, retirees, and their families. For the past 47 years, the Center has helped individuals receive and retain the retirement benefits they have earned, educated them about their rights, and worked to improve the nation's retirement programs. In addition, with support from the Administration for Community Living, the PRC provides direct services to more than 2,000 individuals annually, as well as serving as the technical advisor for six regional pension counseling and information projects covering 30 states, which provide

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hands-on help to individuals with retirement income problems. PRC's work helping individuals informs our policy work and helps us to identify systemic problems in the private pension system. We are submitting this statement because it is critical that employee voices and concerns are represented in the Council's consideration of this subject.

The subject of electronic recordkeeping in ERISA is not a niche subject, touching only on a few discrete technical issues. Indeed, electronic recordkeeping is leaving its imprint on almost every corner of ERISA. And while it has made many of the quotidian aspects of ERISA plan administration quicker and less expensive, it has created new issues and sometimes compounded old unresolved ones. Many of these issues touch on the ability of participants and beneficiaries to demonstrate entitlement to benefits they have earned, often decades earlier.

We want to begin with first principles. In the eyes of the 1974 Congress that enacted ERISA, the statute's primary goal was to ensure that participants understood their plans and would receive the benefits they earned through those plans. ERISA required enhanced disclosure and reporting to participants, created vesting and accrual standards, established fiduciary standards for those charged with responsibility for plan administration, management, and investment, and provided for ready access to federal courts by aggrieved participants. Congress's principal goal in 1974 was not to encourage formation of new plans—although this is of course an important part of our nation's retirement policy—but rather to ensure that when an employer established a plan, the employees covered by the plan could understand it and be confident that benefits earned under the plan would be paid to them and their beneficiaries. Thus, we would urge the Council to keep in mind the fundamental purpose of ERISA and not elevate cost and efficiency over the ultimate security of earned benefits.

Having said this, we note that the core issues being studied by the Council are not themselves new, even though the context may have shifted from paper and file cabinets to digitization and cloud storage. The basic principles of record-retention are the same for paper and electronic recordkeeping, but electronic recordkeeping presents a different context for applying those principles. For one, electronic recordkeeping can make the transfer of records from one proprietary system to a different system more challenging than transferring paper documents. Thus, when change occurs—for example, when a plan replaces one recordkeeper with another, or when a corporate reorganization or bankruptcy occurs—ensuring that the records follow the plan and its affected participants presents new problems. And privacy concerns (an issue previously considered by the Advisory Council) are different and potentially more profound with electronic, and thus hackable, records, although paper records also present serious security concerns. Some records—for example spousal consents in which the validity of a signature can be critical—may present evidentiary issues when digitized. On the other hand, electronic recordkeeping and use of the cloud makes it less expensive and more convenient for a plan to retain records for the entire period in which a participant's benefits are payable or might be claimed, a period that can cover the life of the participant and a beneficiary. That period is measured in decades rather than years.

We recommend that the Council read these comments in conjunction with Anna Tabor's written statement on the issues in which lapses in record-keeping issues can force participants to expend considerable time and energy attempting to recreate missing or erroneous records and in some cases depriving them of benefits they had earned over decades of work.[1]

[1] See Written Statement of Anna-Marie Tabor, submitted to the Advisory Council on July 10, 2023. Ms. Tabor is a law professor, but her testimony reflects her five years of experience as the Director of the Pension Action Center, a regional pension counseling and information center that is located at the University of Massachusetts Boston. The

The remainder of our statement will (1) explore and make recommendations for record retention and participant record access; (2) discuss the potential fiduciary status of recordkeepers under Title I of ERISA and the responsibilities of a plan's named fiduciary where the recordkeeper is providing only ministerial services; and (3) and suggest the need to revisit the Department's notice and access regulations to increase the number of participants likely to create their own permanent benefits archive.

I. Record Retention

Record retention has been a statutory issue almost from the beginning of the ERISA era and even before, since it was also a subject dealt with in the Welfare and Pension Plans Disclosure Act, as amended in 1962.[2] The concern can be stated simply: how long does a plan (and its associated representatives) need to retain records? This is a core issue for participants, for if such records are not retained indefinitely, a participant's benefit eligibility and benefit amount may not be ascertainable. As Anna Tabor's July statement to the Advisory Council indicates, because of missing or inaccurate records, participants sometimes cannot prove benefit eligibility or establish vested rights or show they qualified for subsidized early retirement benefits or refute plan claims that their benefits have already been paid. Beyond that, civil cases involving fiduciary breaches under ERISA and state-law negligence claims against non-fiduciary plan actors, sometimes involving benefit miscalculations and misrepresentations, are often dependent on the availability of accurate historical plan records.[3]

Center provides no-cost legal services to plan participants and beneficiaries. Ms. Tabor will co-present the Pension Right's Center's oral testimony before the Advisory Council.

[2] Congress amended the Welfare and Pension Plan Disclosure Act in 1962 to include a record retention requirement identical to section ERISA ß 107, except that the retention period was "at least five years" rather than six years. Public Law 87-420-Mar.20, 1962, page 38 (adding Section 11 to the WPPDA).

[3] ERISA enforcement depends not only on the DOL, but also participant monitoring of their plans, which is facilitated by plan record retention and participant access to such records.

As written statements submitted by others to the Advisory Council on this issue have indicated, Title I of ERISA includes two sections that specifically reference record retention: section 107 and 209. In addition, ERISA's fiduciary exclusive benefit and prudence duties also have implications for record retention.

Section 107 of ERISA provides that every "person" required to file a "report" or "certify any information" under Title I of ERISA must maintain certain records for a period of *"at least"* six years. These are records that "provide in sufficient detail the necessary basic information and data from which the documents thus required [to be disclosed] may be verified, explained, or clarified, and checked for accuracy and completeness." Some regard this as a simple six-year and discard provision, but it is not. It is an "at least" six-year "maintain records" provision. It does not displace the separate requirements of Section 209, nor does it negate any general fiduciary obligations to retain records.

Section 209, in contrast, requires "every *employer* [to] maintain records with respect to each of his employee sufficient to determine the benefits due or which may become due to such employees." Also under Section 209, the employer must furnish to the plan administrator the information necessary for the administrator to make a report to a participant on request, on termination of service, or following a one-year break in service.[4]

Section 107 thus imposes a limited record maintenance obligation on any person who is obligated to file a report or disclosure under Title I, while Section 209 imposes a record maintenance requirement on employers to maintain records "sufficient to determine the benefits

[4] When ERISA was enacted, section 209 provided that "every employer shall, in accordance with regulations prescribed by the Secretary, maintain records . . .." Some employers took the position that their obligation was contingent on the Secretary publishing final regulations." Congress amended section 209 in 2008 by replacing the "in accordance with regulations prescribed by the Secretary" with "in accordance with such regulations as the Secretary may prescribe."

due or which may become due to such employees.”. Section 404(a), in turn, requires that a fiduciary administer a plan for the exclusive purpose of providing benefits to participants and their beneficiaries (and defraying reasonable expenses of administering the plan), and subject to ERISA's prudence requirements. In our view, this also imposes an obligation on the appropriate plan fiduciaries to maintain records sufficient to determine the benefits due to participants and beneficiaries.

The Department of Labor proposed regulations in 1980 fleshing out the requirements for maintaining records sufficient to determine benefits that are due or may become payable.[5] The proposed regulations required that records be maintained by the employer with respect to each plan participant and be sufficient to determine the benefits which are, or may become, due to each employee. The regulations specified that such records must be retained so long as “any possibility exists that they might be relevant to a determination of an individual's benefit entitlements under a pension plan.” Although the regulations were not finalized, the Department wrote an information letter to a plan sponsor in 1983, which said the following:

> While the . . . recordkeeping regulations . . . have not been adopted by the Department to date and therefore merely represent proposals of the Department, the [regulations'] principles may serve as a general guide for plans in maintaining and retaining records that may be relevant to a determination of an individual's benefit entitlements under a pension plan.[6]

This is the correct standard: that records related to benefit amount or benefit eligibility must be retained so long as “any possibility exists that they might be relevant to a determination

[5] A 1979 proposed regulation on record retention for both single and multiemployer was withdrawn because the Department decided to issue separate regulations for the two types of plans.
[6] Letter dated August 23, 1983, from Robert J. Doyle, Acting Chief, Division of Plan Standards, Labor Management Services Administration, Department of Labor, to Gregg M. Goodman, Director of Personnel, TIC International Corporation. We have included the letter as an Appendix to this statement.

of an individual's benefit entitlements under a pension." The IRS agrees, having published a fact sheet for retirement plan sponsors on record retention, which provides:

> You should retirement plan records until the trust . . . has paid all benefits and enough time has passed that the plan won't be audited. Retirement plans are designed to be long-term programs for participants to accumulate and receive benefits at retirement. As a result, plan records may cover many years of transactions. The Internal Revenue Code, Income Tax Regulations and the Employee Retirement Income Security Act of 1974 (ERISA), as amended, require plan sponsors to keep records of these transactions because they may become material in administering pension law."[7]

ERISA was enacted in a different era and the differences go beyond the near ubiquity of plans using electronic rather than paper recordkeeping. (In the 1960s and the 1970s, the hot new technology for plan recordkeeping was was microfilm!)[8]

In 1974, most plans were either defined benefit plans or defined contribution plans with pooled investments, with few plans requiring employee contributions. Most plans today are 401(k) plans, with self-directed investments. Some of them have Roth-features. QDROs were not a thing in 1974 and neither were notarized spousal consents for married participants choosing a benefit form other than a qualified joint-and-survivor annuity. And some plans now accept transfers from a participant's former plans.[9] These features have exponentially increased the type of records that plans must maintain to determine an individual's benefits.

Section 209 provides that the ultimate keeper of such records, with the responsibility for record retention, is the employer. In 1974, when ERISA was enacted, the employer generated the bulk of information related to the determination of an individual's entitlement to benefits under a retirement plan. But in today's world that is no longer the case. In a self-directed 401(k)

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[7] IRS, Maintaining Your Retirement Plan Records, https://www.irs.gov/retirement-plans/maintaining-your-retirement-plan-records.

[8] This was more than 100 years after microfiche was invented.

[9] This is likely to increase because of the interest in pension portability and the provisions in Secure 2.0 to facilitate pension portability.

plan, a plan's recordkeeper and an employer's payroll agent will generate much of the relevant records that need to be retained. As a result, coordination and responsibility for records are, as a practical matter, more complex now than they were when ERISA was signed into law.

Our specific recommendations on record retention follow:

1. **Department of Labor Guidance.** Almost fifty years after ERISA was enacted, the Department has not yet issued guidance on the recordkeeping obligations of plan sponsors, plan administrators, and plan recordkeepers. Our experience helping participants with lost and inaccurate records suggest that the Department should publish an interpretative bulletin or information letter to make clear that records should be retained so long as "any possibility exists that they might be relevant to a determination of an individual's benefit entitlements under a pension plan," as provided in the 1980 proposed regulations and as confirmed by the Internal Revenue Service in its document retention fact sheet for plan sponsors. The Departmental guidance should also note that section 107 and section 209 are separate rules and records that overlap the two sections are subject to the retention requirements of both sections, i.e., they must be retained for at least six years and if relevant to benefit entitlement must be retained indefinitely.

   In addition, the Department should consider publishing a non-exhaustive list of documents that are potentially relevant to an individual's entitlement to benefits under a retirement savings plan. The power-point presentation of Waldon Lloyd during his Advisory Council testimony provides a good list of essential documents, to which we would add historical summary plan descriptions and summaries of material plan modifications, internal memoranda and outside correspondence on plan benefit and plan interpretive issues, benefit statements and benefit estimates, QDRO instruments, spousal consents to benefit choices and loans where relevant, and recordings of any

remotely notarized spousal consent, statement of relative values of optional benefits in a defined benefit plan, deferred vested statements, and records of any benefit payments.

2. **Creation of Electronic Shoebox[10] for Participants.** Electronic recordkeeping should make it possible for the recordkeeper to prepare for each participant an electronic shoebox, which would include for each plan participant documents relevant to their benefit entitlement, which could be downloaded annually for updates. An electric shoebox would give participants and beneficiaries easy access to relevant records, and would potentially reduce the need for participants to contact the recordkeeper to obtain historical documents. It could also provide a potentially important back-up source for documents in the event of accidental document deletion by the plan or its recordkeeper or some unexpected disruption in the electronic recordkeeping system.
3. **Education on Recordkeeping Responsibilities.** Some plan sponsors and plan fiduciaries, particularly those for smaller plans, do not have awareness of the responsibilities that ERISA places on them for record retention. The Department of Labor should consider an informational campaign to make plan sponsors and fiduciaries aware of their record-keeping obligations.
4. **Penalties for Non-Compliance.** Section 209 provides a civil penalty for an employer who fails to maintain records in accordance with its provisions. The penalty is "$10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause." Inflation has reduced that penalty today to about $1.50 in terms of 1974 dollars. The Department should consider asking Congress to increase the penalty to reflect both inflation and the critical importance of accurate and complete recordkeeping in today's world. Such an amendment might also extend explicit record maintenance responsibilities to third-party, non-fiduciary recordkeepers.

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[10] We first heard the idea for an electronic shoebox from Kendra Isaacson, then Pension Policy Director and Senior Tax Counsel to the Senate Committee on Health, Education, Labor, and Pensions, who also coined the term.

Moreover, the Department of Labor should in guidance and enforcement actions make clear that a fiduciary's failure to adequately maintain records necessary for determining benefit entitlement can result in a breach of ERISA fiduciary duties.

5. **Missing Records and Claims for Benefits.** Participants and beneficiaries should not have to bear the risk of lack of documentation when a plan has failed to maintain benefit records. We believe that under current law, a plan has the burden of proving that a person was not a plan participant or that benefits have already been paid when an individual produces some credible evidence that the individual was a participant and/or is entitled to additional benefits under the plan. The Department should consider revising its regulations on claims procedures to reflect this basic evidentiary principle.

6. **Multiple Employer Plans and Recordkeeping**. The issue of recordkeeping in multiple employer plans presents some distinct issues for allocating record maintenance responsibilities between the principal plan sponsor and employers who have adopted the plan.

II. Fiduciary Status of Third-Party Recordkeepers.

In many plans today, the primary interface between a participant or beneficiary and a plan is with a third-party recordkeeper. By contractual arrangement between the plan and the recordkeeper, the recordkeeper may agree to prepare and retain plan records, calculate benefits or benefit estimates, respond to participant document requests and queries about the plan and its provisions, provide investment education, implement participant investment instructions, process QDROs, superintend distributions and rollovers, and perform other plan administrative functions. Particularly in small plans, the employer and the plan's named fiduciary sometimes do little more than select the plan's recordkeeper and in a best-case scenario, regularly monitor its performance. The third-party recordkeeper, who typically performs many plan administrative functions, sometimes takes the position that it is not a

plan fiduciary and that its actions, even when it is clearly negligent, are outside of ERISA's jurisdictional reach.

The position that a third-party recordkeeper is not a fiduciary is based on a 1975 DOL interpretative bulletin, which provides that the performance of purely ministerial service does not result in fiduciary status.[11] The modern third-party recordkeeper, however, typically provides more than ministerial services and thus should be considered a plan fiduciary.

The interpretative bulletin states that people who provide certain specified services to a plan are not fiduciaries if the services are "purely ministerial functions . . . within a framework of policies, interpretations, rules, practices and procedures made by other persons . . . because such person does not have discretionary authority or discretionary control respecting management of the plan . . .." The Department of Labor emphasized this point in an amicus brief filed two years ago in support of a rehearing of a case in the Ninth Circuit, where it wrote that "[t]he interpretive bulletin merely assures individual plan employees and service providers to ERISA plans—*to the extent they lack discretionary power in their own right*—that they will not become ERISA fiduciaries by following rules *set by someone else*."[12] While line employees of a recordkeeper generally operate within such a framework, whether the recordkeeper itself operates within a framework made by other persons is a question of fact in every recordkeeping arrangement. A recordkeeper often has considerable discretion in how its services are performed and may not be acting in accordance with "a

[11] IB75-8, 29 C.F.R. §2509.75-8, D-2.

[12] Amicus Brief of Secretary of Labor in Support of Appellant's Petition for Rehearing, Bafford v. Northrup Grumman Corp., at pages 2-3 (emphasis added). .

framework of policies, interpretations, rules, practices, and procedures made by other persons."[13]

Whether or not a third-party service provider is a fiduciary has serious consequence for a plan's named fiduciary. The Department of Labor, in the amicus brief just referenced, expressed its view that unreduced fiduciary responsibility for a third party's ministerial activities remains with the plan's named fiduciary: The ministerial service category for a service provider "does not accord derivative immunity to the powerful named fiduciaries who hire those third parties and make the rules under which they operate. In holding otherwise, the panel's decision threatens to shield ERISA plan administrators and other named fiduciaries from accountability for performing some of the most central tasks of plan management and administration whenever they enlist ministerial agents to assist them.[14]

III. Electronic v. Paper Disclosure.

A plan participant independently retaining documents is a powerful check against recordkeeping error. In the pre-electronic era, plan participants often maintained the proverbial shoebox of documents sent to them. But under the Department of Labor's notice-and-access rule, participants will automatically receive electronic disclosure unless they affirmatively elect paper disclosure. Conscientious, computer-sophisticated participants may be able to retain important documents even though presented to them in digital format by downloading documents to a computer hard-drive or by printing them out and retaining them in paper form. But from the work of behavioral economists, we know that some people who are unwilling or unable to find electronic records on a website and then download or print them out will

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[13] These issues are considered in Norman P. Stein, I, Fiduciary: *Some Reflections on the Derffinition of Fiduciary in ERISA, 6* Drexel L. Rev. 555, 560-562 (2013).

[14] See note 12, supra, at page 3.

nevertheless default into the electronic regime. The Department of Labor's "notice-and-access" disclosure regulations thus misset the default and will reduce the number of people who retain critical documents in a personal archive, which deprives the system of an important even if informal backup in case of recordkeeping failures. This is reason for the Department of Labor to rethink the default rules under its electronic notice-and-access regime.