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Operating a benefit plan requires the careful maintenance of extensive documentation. A plan administrator seeking to design a comprehensive record retention policy must be familiar with the documents and records that a plan is required to create, and the statutory and regulatory guidance governing their retention. However, the plan administrator must also take into account the practical needs of plan administration in deciding which documents and records are essential and for how long they must be kept.

If asked to list the key ingredients to a successful employee benefits program, any benefit plan professional would include maintaining accurate records and up-to-date plan documents as high priority items. Indeed, the need to maintain important records for extended periods of time has spawned an entire industry devoted to benefit plan recordkeeping. If asked how long a benefit plan should maintain copies of these records and plan documents, the benefits professional likely would be tempted to respond, "Forever." Pressed for a more practical answer, the benefits professional encounters a general lack of clear guidance. Although federal statutes and regulations set forth specific rules for a few types of records, a great deal of material simply falls under the open-ended requirement that an

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employer maintain the records necessary to determine the benefits due under a plan.

OVERALL RECORD RETENTION STANDARDS

Although official guidance on the record retention front is limited, some statutory and regulatory provisions do exist. Benefit plan fiduciaries should be familiar with these express legal requirements, and should then take into account the various practical considerations of plan administration in order to construct a comprehensive record retention policy.

ERISA

Section 209 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), states that "every employer shall, in accordance with such regulations as the Secretary [of Labor] may prescribe, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." No time limit is provided, and proposed Department of Labor (DOL) regulations indicate that records must be kept for as long as they might possibly be relevant to a benefit determination.[1]

ERISA Section 107 imposes further recordkeeping obligations on the plan administrator and any other person required to file a report under Title I of ERISA.[2] ERISA Section 107 states that such a person "shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions." These records must be kept available for at least six years from the filing date.

Pension Benefit Guaranty Corporation (PBGC) Regulations Section 4007.10 requires that the plan administrator maintain records supporting PBGC premium payments for a period of six years after the premium due date. Under PBGC Regulations Section 4041.5, the plan sponsor and plan administrator of a single-employer plan covered by PBGC termination insurance must maintain records adequate to show that the terminating plan complied with ERISA Section 4041, which sets forth the rules governing plan termination. These records must be kept for six years from the filing of the post-distribution certification.

DOL Regulations Section 2520.107-1 permits records to be kept in electronic form in lieu of on paper, if certain conditions are met, and PBGC Regulations Section 4000.53 contains parallel rules for recordkeeping requirements imposed by the PBGC.[3] The electronic system

must have appropriate controls in place to ensure the integrity, accuracy, authenticity, and reliability of records. In addition, the system must ensure that records are kept secure and are stored in an orderly fashion.[4] Records must remain accessible.[5] The records must be legible on screen, and must be convertible into legible paper copies as needed. Naturally, there must be appropriate record management practices in place. For example, the system must provide for proper back-up copies, secure storage, and quality assurance monitoring.

Beyond these requirements, it is worth noting that ERISA plans participating in the Medicare Part D retiree drug subsidy program or the Early Retiree Reinsurance Program may be subject to special recordkeeping requirements, which are outside the scope of this article.[6] Conversely, it is worth noting that "top hat" executive plans are exempt from Parts 1 through 4 of Title I of ERISA and Title IV of ERISA, meaning that the recordkeeping obligations imposed by these sections of the statute are inapplicable. Certain other plans (such as governmental plans) are exempt from ERISA entirely.

Internal Revenue Code

In addition to ERISA's requirements, a plan administrator must consider the requirements imposed by the Internal Revenue Code of 1986, as amended (the Code). Generally, IRC Section 6001 and accompanying Treasury regulations require records of tax and information returns to be kept as long as they could be material under the Code. For the most part, this means that tax-related records (such as the plan's tax return) should be retained for at least seven years from the last tax year to which the record was relevant.[7] Of course, a plan's situation may call for a longer retention period for some or all tax-related records. For example, it is often helpful to retain Form 1099-R indefinitely as proof of distribution and tax treatment. In addition, some records must be maintained indefinitely. For example, Revenue Procedure 2011-06[8] requires that a copy of the determination letter application and supporting material be retained in order for the employer to rely on the determination letter. Like the DOL and the PBGC, the IRS generally permits maintenance of records in electronic form.[9]

Other Considerations

Finally, a plan administrator or employer establishing a record retention policy must consider the practical reasons why it creates and retains plan documentation. Obviously, any document in active use in plan administration must be retained. For this reason, the current plan document and summary plan description (SPD) should be readily accessible at all times. However, superseded documents may also be relevant. For example, many disability plans provide that

benefits will continue under the terms of the plan as in effect at the time the disability occurred, even if the plan is amended to change the rules for participants who become disabled in the future.

Beyond the needs of day-to-day administration, the plan administrator must consider the possibility of benefit disputes. For the most part, potentially relevant documents that are no longer in active use should be retained until a reasonable period of time after the expiration of the statute of limitations for the last day on which the document was in effect. The statute of limitations on claims for benefits varies depending on applicable state law and the terms of the relevant plan.[10] Importantly, the statute typically will not start to run until a potential plaintiff knows (or reasonably should have known) of the existence of a dispute, although this does not necessarily require that the claimant have filed a formal claim for benefits.[11] Naturally, a plan administrator relying on a reduced statute of limitations created by the plan document must be sure to keep the plan document and proof that the reduced statute of limitations was advertised to plan participants, in order to be able to enforce the reduced statute.[12] All in all, a plan administrator must use extreme caution in disposing of official plan documents and SPDs.

Since claims typically trigger the statute of limitations only when a participant becomes aware of a dispute, long-term retention is particularly important for retirement plans. Retirement plan participants generally cannot be required to take distribution of retirement plan benefits prior to normal retirement age.[13] As a result, these benefits may be left unclaimed for extended periods of time without either side knowing that the benefits are in fact going to prove a source of controversy. Regular communication regarding benefits (or the lack thereof) can alleviate this problem, but it is still highly advisable for a plan administrator to maintain copies of plan documents, SPDs, and basic benefit information (including records of payouts or forfeitures) for each participant indefinitely.

Some welfare plans are by their nature more transitory, and associated documentation may therefore become clearly irrelevant after the passing of a certain amount of time. However, the plan administrator should review the plan document and SPD carefully to be sure that filing deadlines and statutes of limitations have been measured properly. In addition, if retiree benefits are provided under a plan, the administrator should consider retaining the documents even if the statute has lapsed.

When identifying the expiration date for a statute of limitations, a plan fiduciary should also consider ERISA Section 413, which applies to claims alleging a breach of fiduciary duty. Generally documents of potential relevance to such claims should be kept for at least six years after the last fiduciary act or omission to which they are relevant.[14]

Relevant documents are likely to include plan documents, SPDs, participant communications, claims files, and investment records.

KEY DOCUMENATION

ERISA Section 402 begins with the deceptively simple statement that "Every employee benefit plan shall be established and maintained pursuant to a written instrument." ERISA Section 209 requires an employer to maintain the information necessary to determine a person's entitlement to benefits under the plan. From this humble beginning, a plan generally proceeds to generate a mountain of paper (or the electronic equivalent thereof).

The Plan Document

The "written instrument" required under ERISA Section 402 must designate one or more named fiduciaries, provide for a funding policy,[15] describe the manner in which responsibilities will be allocated, set forth the manner in which the plan may be amended, and set forth the basis on which payments will be made to or from the plan. The plan document also may authorize one or more people to serve in more than one fiduciary capacity, authorize a fiduciary to employ advisers, and authorize a named fiduciary to appoint an investment manager. Beyond these statutory elements, plan documents typically include a host of other details important to plan administration and benefit calculation. Qualified retirement plans, in particular, must comply with detailed IRS guidelines regarding required plan provisions in order to obtain IRS approval.

RETIREMENT PLANS

For a retirement plan, identification of the official "written instrument" is usually a relatively simple matter. The "written instrument" may come as a single document or in the form of an "adoption agreement" with an accompanying "basic plan document." Whatever the form of the document, it is important that the employer take appropriate action to approve the official plan document. Usually, this requires approval by the employer's board of directors or equivalent governing body (or an individual or committee designated by the governing body), and execution of the plan document by an officer. The employer should retain the signed, dated copy of the plan document and proof of proper approval in its permanent records.

Unless a plan has a very short lifespan, it will be amended as time passes. The employer must be sure that it follows the amendment process in the plan document. In many cases, the vendor from which the employer purchases its plan document is authorized to make

certain required amendments, and will provide these pre-approved updates to the employer. In other cases, the employer will need to take independent action to approve plan amendments. In all cases, the employer should be sure to retain signed, dated copies of all amendments and any required company approval in its permanent records. Documents should *not* be discarded, even if they are superseded by later amendments.[16]

In addition to the official copies of the plan documents themselves, the plan administrator should maintain proof that the plan document met the legal qualification requirements. Accordingly, the plan administrator should obtain a copy of a pre-approved plan's IRS opinion or advisory letter, and should retain a copy of any determination letter issued to the plan (along with a copy of the determination letter application). If the plan has obtained a private letter ruling, the plan administrator should retain copies of that ruling and its supporting application as well.

A retirement plan must hold its funds in trust or in the custody of a licensed insurer.[17] An employer should consider the trust agreement or insurance contract a part of its official plan documentation, and maintain the official, executed copies of these documents accordingly.

Finally, plan documents may also incorporate or rely upon collective bargaining agreements. In addition to retention obligations under labor laws, employers and plan administrators should be aware of a collective bargaining agreement's impact on plan administration and determine whether the agreement needs to be treated as part of the plan document or otherwise retained in the plan's files.

Welfare Plans

As a general matter, welfare plans are less likely to utilize clearly identifiable official "written instruments." Many employers with insured welfare plans simply rely on the insurance documents, and employers with self-insured plans often rely on the documentation prepared by the claims administrator to describe plan benefits. It is generally advantageous to the employer to utilize these third-party documents in this fashion, since doing so is a cost-effective way to ensure that the plan describes the benefits that actually will be provided. However, these documents may not contain all the provisions advisable for proper plan administration under ERISA. In addition, the employer may want to consolidate its welfare benefit programs into a single plan to simplify the filing of Form 5500. For this reason, an employer may want to consider having a "wraparound" document prepared, and treat the insurance and claims administration documents as appendices to that wraparound document. If a collective bargaining agreement affects plan benefits, the plan administrator

needs to know whether that agreement has been incorporated into the plan as well. Even if it has not, the plan administrator generally will want to retain the agreement with the plan's files.

Whichever approach the employer takes, the employer should be sure that it identifies the document or documents that serve as the official plan document. This can be important in the event of a benefit dispute, or if the employer needs to produce a plan document in response to a request from a participant or government auditor. The employer should take appropriate action to approve the terms of the official plan document and keep a record of having done so. As changes are made to the plan document, the employer should keep records showing that the changes were duly approved. If the plan document also serves as the SPD, the employer should be sure that this dual function is clear.[18]

The retention requirement for welfare plan documents depends on the benefits offered by the plan. For example, a group health plan may be updated frequently, and old documents may become irrelevant once the statute of limitations has expired. In contrast, a disability plan may remain relevant to disabled participants even after it has been superseded for active employees. Ultimately, an employer should always be cautious when disposing of plan documents, and should confirm that the document no longer governs any potential claims. It is also worth noting that a group health or group life insurance plan document that sets forth the eligibility rules for retiree medical or life insurance generally should not be discarded, even if it is later superseded. Such a plan's provisions regarding the employer's right to make the superseding changes could become relevant years after the fact.[19]

The Summary Plan Description

ERISA Section 104 requires that each participant be furnished with an SPD within 90 days of becoming a participant.[20] An updated SPD must be furnished every five years, or every ten years if no amendments are made to the plan. In between updated SPDs, amendments to the plan must be reflected via a "summary of material modifications," due within 210 days of the end of the plan year in which the amendment was adopted (or not later than 60 days after the date of adoption of a change that is a "material reduction" in covered services or benefits under a group health plan).

The SPD is intended to be the participant's primary source of information about the plan.[21] Accordingly, the contents of the SPD are of great importance. The plan administrator should keep a copy of the SPD, and maintain records demonstrating that it provided SPDs on a timely basis. Although there is no formal recordkeeping requirement that explicitly addresses the retention period for SPDs (and associated summaries of material modifications), a plan administrator definitely

will want to keep these documents on hand for the six-year period applicable under ERISA Section 107. If the IRS or DOL audits the plan's Form 5500, the auditor typically will request the SPD. Beyond that, the plan administrator would be well-advised to retain the documents at least until the expiration of the statute of limitations for any potential claims.

Therefore, a retirement plan administrator generally will want to keep SPDs indefinitely. The contents of the SPD may be decisive if a former employee makes a disputed claim. For example, a former employee may believe that he or she is entitled to benefits in a certain amount based on past service, while the employer believes that the employee forfeited that service under the plan's break-in-service rules. In this situation, the employer will want to be able to point to an SPD from the pertinent time period disclosing the break-in-service rules. Likewise, enforcement of a plan's procedural rules may require the plan administrator to prove that those rules were duly communicated to participants in an SPD.[22]

Since welfare plans offering health or life insurance or severance benefits generally give rise to defined claim events, and may also impose specific claims deadlines, it is easier to identify a specified point of time as of which no one is expected to be able to make a claim under a particular document. However, as with welfare plan documents, SPDs that may impact claims of eligibility for ongoing coverage should be retained. For example, SPDs addressing retiree benefit programs generally should be kept indefinitely. For plans offering disability benefits, the SPD should be retained as long as anyone is receiving benefits under that version of the SPD, and until the statute of limitations has expired on any cancellation or denial of benefits.

Administrative Records

In addition to documents setting forth the terms of the plan, a plan administrator must maintain records relating to plan operations.

Benefit Computation Records

A plan administrator must be able to determine which individuals are eligible to participate in a plan at which points in time, and to calculate the amount of benefits to which any given individual is entitled. Relevant information is likely to include:

- Employee and beneficiary names, addresses, and dates of birth, as well as Social Security numbers when needed for tax reporting;
- Employment dates, employment classification, and hours of service credited;

- Dependent status;
- Beneficiary designations, including spousal consent;
- Compensation information;
- Classification as "highly compensated" for non-discrimination testing purposes;
- Employer and employee contributions;
- Investment selection and performance records for defined contribution retirement plans;
- Records of benefit claims paid or denied, including copies of participant and spousal consent to payment;
- Records of benefits forfeited;
- Records regarding plan loans (dates and amounts for loans taken, repaid, deemed distributed, and offset); and
- Collective bargaining agreements relevant to plan benefits.

It is worth noting that a retirement plan administrator should keep some records regarding a participant even if the participant has been paid out, or terminated without a vested benefit. A participant may remember a former employer years after the fact, and inquire with respect to available benefits. For example, a vested participant reported as such to the Social Security Administration may forget that he or she subsequently requested a payout of his or her benefit, and contact the plan upon receiving the Social Security Administration's notice that benefits may be available. At that point, a plan administrator will find it helpful to be able to produce proof of payment. A plan administrator should pay particular attention to the transference of these records when changing plan recordkeepers or insurers, since these vendors may transfer only current benefit information unless special arrangements are made.

Likewise, it is important for an employer to bear in mind that records must be kept even on workers who are not eligible, in order to demonstrate that exclusion of these employees was proper. This may include documentation that an individual was an independent contractor rather than an employee, was employed in an ineligible class (*e.g.,* was a union employee and hence ineligible for the non-union plan, or vice versa), failed to work the requisite number of hours in any year of employment, or was not old enough to participate.

Finally, it is important to note that an individual who previously was ineligible may become eligible, and an individual who

previously terminated employment without a vested right to benefits may be re-employed. The plan administrator needs to be familiar with the plan's service crediting and eligibility rules, and maintain the necessary records to ensure that service is credited properly.

Nondiscrimination Testing

Retirement plans, "cafeteria" plans offered under IRC Section 125, flexible spending accounts, and self-insured health plans, must satisfy certain tests to ensure that their benefits are not offered disproportionately to "highly compensated" or "key" employees.[23] Insured health plans will become subject to non-discrimination requirements when guidance is issued on the non-discrimination rules established by the Patient Protection and Affordable Care Act (PPACA).

The plan administrator should be sure that required tests are conducted on a timely basis, and that records of test results and underlying data are retained for at least six years after the filing of the plan's Form 5500 (or the date Form 5500 would have been filed if required, in the case of a plan that is exempt from filing). Some tests, such as ADP and ACP testing[24] for 401(k) plans and retirement plan Section 415 testing, must be run annually. A plan can rely on the results of certain other tests, such as the Section 410(b) coverage test for retirement plans, for up to three years in the absence of changes in the plan or the employer's demographics. The plan administrator should discuss the plan's testing needs with the plan's counsel or consultant, and should document any decision to forego testing for a year in reliance on a prior year's result. If a test is relied on for more than one year, the plan administrator must bear in mind that the testing data will remain relevant in the event of an audit of the subsequent year's Form 5500. As a result, the destruction date for the record of that test may need to be delayed.

It is also worth noting that retirement plan non-discrimination testing results may in some cases remain relevant even after the six-year audit window has lapsed. For example, if a problem with past contributions or testing methodology is discovered, the employer may need to arrange for correction even for years outside that six-year window, and may need the testing data to do so. Accordingly, if storage is not an issue, retaining these records may be advantageous.

Contribution and Funding Records

Records of plan contributions (including welfare plan premium payments) should be retained for at least six years from the Form 5500 filing date (or the date Form 5500 would have been filed if required, in the case of a plan that is exempt from filing). However,

it is generally advisable to keep contribution records for defined contribution retirement plans indefinitely.

Retention of a pension plan's actuarial records should be discussed with the plan's actuary. At the least, however, evidence of proper valuation and funding certifications should be kept for six years from the Form 5500 and PBGC premium filing dates.

Administrative Procedures

While the plan document is the principal governing document for plan administration, it is common for plan fiduciaries to maintain ancillary administrative procedures. For example, a plan is required under ERISA Section 503 to maintain a claims procedure. A retirement plan that offers loans must maintain a loan procedure, which may be included in the main plan document or may be set forth in a separate document incorporated into the plan by reference.[25] A retirement plan must maintain a procedure for processing qualified domestic relations orders (QDROs),[26] and a group health plan must maintain a procedure for processing qualified medical child support orders (QMCSOs).[27]

In addition to these required procedures, plans often maintain administrative manuals for use by the plan's administrative staff, detailing the proper manner for performing certain plan functions. Large plans, in particular, may maintain procedures for dealing with certain common problems, such as contribution or distribution errors.

To the extent these procedures affect benefits due, they may be subject to ERISA Section 209's indefinite retention period. Such procedures are also commonly requested by government auditors, making the Section 107 retention period potentially applicable. At the least, however, such materials should be treated as relevant to fiduciary conduct governed by the Section 413 statute of limitations, and be retained accordingly.

Claims Files

Claims files deserve special consideration, since by their nature they raise the specter of possible litigation. If a claim is fully resolved in favor of the claimant, the claim file itself may be able to be discarded six years after filing Form 5500 for the relevant year. However, evidence of benefit calculations, payments, and so forth should be retained under the same rules applicable to records of benefits paid in the ordinary course. If a claim is denied, the claim file should at the least be retained until expiration of the Section 107 six-year period, or until expiration of the applicable statute of limitations, if longer. In all cases involving claims that could generate litigation, counsel should be consulted before the file is destroyed.

QDROs and QMCSOs

As noted above, every retirement plan must maintain a procedure for handling qualified domestic relations orders, and group health plans must maintain procedures for handling qualified medical child support orders. The plans also must maintain the records necessary to administer these orders, and maintain copies of the orders themselves as long as they are administratively relevant.

A QMCSO should be kept while it is in effect and thereafter until the statute of limitations has expired on any claim that may have arisen while it was in effect. If the Section 107 retention period for the last year in which the QMCSO-affected plan benefit payments has not yet expired by that point, the QMCSO should be retained until that period also has lapsed. Like participant records, a QDRO should be maintained indefinitely, even after payment has been made to both the participant and the alternate payee, along with record of the payments.

If approval of a purported QMCSO or QDRO is denied, a copy of the order and the denial should be retained. The records should be handled in the same fashion as a record of a claim for denial of benefits. In most cases, the matter subsequently will be resolved by submission of an amended order that can be approved, but counsel should be consulted regarding post-approval record retention if the delay in approval had any potential for economic impact.

Service Contracts

A plan should keep a copy of all contracts for administrative services until at least six years after Form 5500 is filed for the final plan year during which the contract was in effect. If the plan considers it possible that it might need to seek recourse against the vendor for errors or problems that arose under the contract, or might need transitional assistance covered by the contract, it should keep the contract for any additional time necessary.

In this regard, it is important to note that many plan service arrangements soon will be covered by new DOL regulations.[28] In order for a covered service arrangement to avoid classification as a prohibited transaction, plan vendors will need to provide specified information to plan fiduciaries. Since involvement in a prohibited transaction is a breach of fiduciary duty, plan fiduciaries will need to retain the evidence that all the disclosures required by those regulations were timely made for at least the Section 413 statute of limitations period, measured from the last day the service arrangement covered by the disclosure was in effect.

Investment and Financial Records

Retirement plans and funded welfare plans invest their assets in a wide variety of vehicles. For a typical participant-directed defined contribution plan, investment-related records are likely to consist of brokerage and recordkeeping contracts, investment disclosure materials, and the plan's account statements, along with the service agreements for investment advisers retained by the plan fiduciary for assistance in developing the plan's investment array or to provide advice to plan participants. Professionally managed plans generally will have similar documentation, and also typically retain one or more investment managers with discretionary authority over plan investments pursuant to a written agreement. Plans that invest in a wider variety of investments, such as private equity, venture capital, real estate, and hedge funds, are likely to have a wider variety of investment-related documents. For example, such plans will want to retain copies of an investment vehicle's organizational documents, subscription materials, side letter agreements, and offering memorandum.

Account statements generally should be kept indefinitely if they are relevant to the computation of a participant's benefits at any given point in time, as is the case for a defined contribution plan.[29] For example, account statements might be needed to resolve a dispute over contribution amounts or allocation of earnings, to divide money received under an investment-related class action settlement or award, or to calculate a benefit division under a QDRO. If a plan's finances do not impact benefit entitlement, as in the case of a defined benefit plan, it may be possible to discard old financial records at some point. However, any such decision should be made with caution. Records certainly should be kept for the six-year period after the filing of Form 5500 for the relevant year, and until the expiration of the Section 413 statute of limitations on any fiduciary decisions associated with the reported investments. Since many investments are held for years on end, it is often easier simply to keep financial reports.

Ownership documentation for investments generally will be held by the plan's trustee or custodian, and may consist of official instruments, such as share certificates or executed subscription agreements, or of book entries. ERISA requires that the "indicia of ownership" of all investments be maintained within the jurisdiction of the US district courts.[30] Furthermore, the plan needs to be sure that it has the documentation necessary to ascertain and enforce its rights. This determination will need to be made based on the terms of the particular investment. Documentation must be maintained for as long as the plan holds the investment or might wish to assert claims related to the investment, or until the expiration of the Section 413 statute of limitations, if later, with respect to the decision to invest in or divest

from the investment.[31] Since investment information is reported on Form 5500, the Section 107 retention requirement must be satisfied as well.

In addition to materials reflecting the plan's actual financial situation and investment holdings at any given point in time, a funded plan is required to have an overarching funding policy. For defined contribution retirement plans, the funding policy generally consists of the contribution provisions stated in the plan document and the plan's investment policy. Defined benefit plan sponsors and fiduciaries should design the plan's funding policy after consultation with the plan's actuary. For a funded welfare plan, the funding policy will depend on the purpose of the trust fund. Some trusts simply provide a vehicle for payment of current welfare benefits, while others are intended to fund future benefit needs over an extended period of time. The funding policy should be retained for at least the Section 107, Section 4007.10, or Section 413 period, whichever is longest.

DOL Regulations Section 2509.08-2 also requires a plan to have an investment policy. An investment policy is "a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time or as to voting specific plan proxies." The plan investment fiduciaries should be sure that plan investments are kept in compliance with the investment policy, and that the investment policy is updated as appropriate. An investment policy may be relevant to claims asserting a breach of fiduciary duty, and typically is requested in the course of a DOL Form 5500 audit. Therefore, an investment policy should be kept until at least six years after the filing of Form 5500 for the year in which it is superseded by an updated policy.

Finally, plan vendors or counterparties may be relying on one or more class or individual exemptions from ERISA's prohibited transaction rules. Those exemptions often require that certain disclosures be made to the plan, and that the vendor or counterparty retain certain records.[32] In case of a breach of fiduciary duty claim or government audit, the plan fiduciaries should retain copies of the required disclosures until at least six years after the end of the last year in which the exempted service arrangement or investment is in effect. Although the vendor or counterparty typically is responsible for special recordkeeping requirements imposed by the terms of an exemption, the plan administrator should be familiar with any recordkeeping obligations applicable to the plan or employer.

Participant Communications

As noted above, SPDs generally should be kept indefinitely for retirement plans, with a greater degree of flexibility available for welfare plans in some cases. However, plans also utilize a wide variety of less formal communications, ranging from informal "highlights" brochures, informational Web sites or slideshows to official notices such as 401(k) safe harbor or auto-enrollment notices and investment-related notices. Copies of participant communications should be kept at least until the expiration of both the Section 413 period relating to the information in the communications and the Section 107 retention period for the latest year for which the communication is relevant.

Typically, plan communications will include documents such as:

- Retirement Plans
  - — Brochures;
  - — Participant Web sites;
  - — Participant presentations;
  - — Notices, such as:
    - *For defined contribution plans:* annual safe harbor, automatic enrollment and/or qualified default investment alternative notices, as well as as-needed communications such as blackout notices and the IRS determination letter application notice to interested parties;
    - *For defined benefit plans:* notices relating to suspension of benefits, the IRS determination letter notice to interested parties, and/or certain notices associated with funding difficulties; and
    - Section 204(h) notices relating to reduction or elimination of benefit accruals under defined benefit plans and certain defined contribution plans.[33]
  - — Distribution documentation, including the special tax notice, qualified joint and survivor annuity explanation, notice of right to defer distributions, and participant and spousal consent;
  - — Loan documentation;
  - — Investment option disclosures;

  - — Benefit statements;
  - — Summary annual reports (defined contribution plans); and
  - — Annual funding notices (defined benefit plans)
- Welfare Plans
  - — Brochures;
  - — Initial and annual enrollment materials;
  - — Benefit summaries;[34]
  - — Provider network information;
  - — Notices (*e.g.*, COBRA, HIPAA privacy, HIPAA enrollment rights, HIPAA preexisting condition notice, HIPAA creditable coverage, Medicare Part D creditable coverage, CHIP, WHCRA, PPACA patient protection notice (non-grandfathered plans) or notice of grandfathered plan status); and
  - — Summary annual reports.

Government Reports

ERISA Section 107 provides a simple answer to the question of how long a plan should retain Form 5500. The plan's annual report should be kept until six years after the filing date. However, ERISA Section 107 also requires retention of the supporting material underlying the information provided on Form 5500 itself. Although the DOL has not issued regulatory guidance under ERISA Section 107, it has indicated informally that Section 107 records

> include (but are not limited to) resolutions and matters relating to the plan for which a description or annual report is or may be required to be filed, journals, ledgers, checks, invoices, bank statements, contracts, agreements, vouchers, worksheets, receipts, claim records and payrolls of any party. ... Records maintained shall also include, where appropriate, information certified to the Administrator by an insurance carrier or service or other organization.[35]

The DOL also mentioned the need to retain a copy of Form 5500 with its attachments, claim files, pension and medical claim checks, contractor report forms, employer reporting and remittance forms, reciprocity transfer requests and transmittals, and eligibility reports.[36] Other relevant materials may include evidence of fidelity

bond coverage, nondiscrimination testing reports, employee compensation and service records, and the plan document itself.[37]

PBGC Regulations Section 4007.10(a)(4) provides a similarly inclusive list of materials that must be maintained in support of a defined benefit plan's PBGC premium filing for the PBGC Regulations Section 4007.10 retention period. The list of potentially affected records includes

> plan documents; participant data records; personnel and payroll records; actuarial tables, worksheets, and reports; records of computations, projections, and estimates; benefit statements, disclosures, and applications; financial and tax records; insurance contracts; records of plan procedures and practices; and any other records, whether in written, electronic, or other format, that are relevant to the determination of the amount of any premium required to be paid or any premium-related information required to be reported.

Plan Governance

Although a plan qualifies as a distinct legal entity for purposes of ERISA,[38] it naturally cannot operate itself. A plan needs an official named fiduciary and plan administrator,[39] who generally then delegate authority and responsibility to employees of the plan sponsor and to outside vendors. The plan document identifies the named fiduciary and plan administrator, or describes the manner in which they are designated. A plan should keep a record of the entities serving in these positions for at least six years from the filing of Form 5500 for the last year to which the record pertains, and may find it helpful to keep these records indefinitely.

Likewise, the plan needs to keep records of the identities and responsibilities of any individuals holding delegated fiduciary power or administrative responsibilities, and a record of the instrument of delegation, along with records demonstrating that the appointing fiduciary met its obligation to oversee the activities of its designees. For example, if an employer's governing body has the authority to appoint a fiduciary committee to discharge some or all fiduciary functions, the plan will need a written record of the appointment and removal of committee members and evidence that the employer's governing body exercised appropriate oversight over the appointees.

Furthermore, for their own protection, plan fiduciaries themselves must keep records sufficient to demonstrate that their duties have been performed in accordance with ERISA. These records should be kept for at least the Section 413 and Section 107 retention periods. Since fiduciaries may find it helpful to be able to show a long history of proper plan governance if an issue arises and may find that

old documentation covers items of continued relevance, fiduciaries should consider keeping at least the most significant records, such as meeting minutes and performance appraisals for major vendors, indefinitely. For example, if a plan investment is challenged, the fiduciaries will want to produce the meeting minutes showing a prudent decision to invest initially and prudent monitoring, which may cover multiple years. This type of need makes it difficult to identify records that can be destroyed safely.

Typically, documents relevant to fiduciary governance will include items such as:

- Board or officer resolutions appointing fiduciary committee members, and/or copies of plan document provisions designating the individuals or entities serving as fiduciaries;
- Fiduciary committee charters/bylaws;
- Fiduciary committee minutes;
- Vendor service contracts and requests for proposal materials used to select vendors;
- Vendor performance reports; and
- Reports of subordinate fiduciaries and administrative staff to appointing fiduciaries.

Fiduciary records also should include copies of fiduciary liability insurance coverage, including any employer bylaws relevant to indemnity protection for prior years. If the plan is required to maintain a fidelity bond under ERISA Section 412, proof that the required coverage was in place is subject to the Section 107 retention requirement, since bonding information is reported on Form 5500. At the least, insurance and bonding documents should be retained for as long as a claim potentially could be made under those documents, or until the expiration of the Section 107 and Section 413 periods, if later.

Tax Returns

As noted above, tax returns generally must be retained as long as they are of potential material relevance, which normally translates to a retention period of at least seven years. However, it generally is advisable to maintain records of retirement plan payouts indefinitely, and retaining Form 1099-R may be a convenient way to do so. In addition, it is important to note that records of deemed distributions of retirement plan loans and records relating to allocation of tax basis for after-tax and Roth contributions will be relevant until at least seven years after the final distribution of the participant's entire benefit is

made, since the tax treatment of the previous deemed and actual distributions will affect the tax treatment of subsequent distributions.

RESPONSIBILITY FOR MAINTENANCE OF RECORDS

ERISA Section 107 imposes a record retention responsibility on the plan administrator, the person responsible for filing Form 5500. ERISA Section 209 imposes a record retention responsibility on the employer, and imposes a penalty of $11 per affected employee on an employer that fails to meet that responsibility. ERISA Section 502(c)(1) permits a court, in its discretion, to impose a $110 per day penalty on a plan administrator who fails to disclose documents requested by a plan participant under ERISA Section 104(b)(4),[40] unless the failure occurred for reasons beyond the control of the plan administrator, and imposes a variety of penalties on administrators (or employers, as applicable) who fail to provide various required benefit statements or notices, or who do not produce various required documents upon receipt of a request from a person authorized by statute to access the document. Accordingly, the plan must retain proof of compliance with all disclosure deadlines (including proof of timely response to disclosure requests) and copies of any documents which the government, a participant, or any other person is empowered to request.

It is common practice for plans to contract with third-party vendors to retain benefit plan records. However, it is essential for plan fiduciaries and employers to understand that doing so does not relieve them of their legal obligations under ERISA. If a plan cannot produce a document that it was required to maintain, the person required to maintain it can be held liable for the failure.[41]

For this reason, plan fiduciaries and employers should review their record retention service contracts carefully. In the first place, fiduciaries and employers need to know what the vendor has—and has not—agreed to do. The retention agreement may specify that records will be destroyed after a specified period of time, or may otherwise limit the recordkeeper's responsibility. If record retention is simply an aspect of a vendor's service package rather than the primary service being purchased, the contracting plan needs to be sure that it is addressed with adequate specificity. For example, the mere fact that a medical plan's claims are processed by an insurer or third-party claims administrator does not exempt the plan administrator from the retention and disclosure requirements imposed by ERISA.[42] Likewise, the mere fact that benefit calculations are performed by a third-party vendor rather than by the plan sponsor's own personnel does not alter the employer's obligation to ensure availability of the underlying data.[43]

Accordingly, plan fiduciaries and employers should be sure that their service contracts allow access to any information covered by ERISA Sections 107 or 209, PBGC Regulations Sections 4007.10 and

4041.5, or IRC Section 6001, along with any additional records needed for plan administration. The service agreement also should require retention of covered documents for the statutory period, require the vendor to notify the plan before destroying records, and allow the plan to take custody of any records the vendor is no longer willing to maintain. The administrator and employer also need to know whether the recordkeeper will indemnify them in the event of the premature loss or destruction of the records and, if so, under what circumstances.

When making final decisions regarding record retention and destruction, employers and fiduciaries should also be mindful of other relevant laws. For example, employers have legal obligations to safeguard various types of employee data, such as Social Security numbers. A plan may also have contractual obligations to keep information confidential, under the terms of a vendor agreement or an investment vehicle's governing documents. In some cases, plan sponsors and fiduciaries may also be concerned to preserve attorney-client privilege, work product privilege, or similar protections.[44] Records should be stored in a secure fashion consistent with industry best practices regarding record retention. Destruction should be authorized only when legally permissible and carried out in a manner that complies with confidentiality obligations.

CONCLUSION

Clearly, there are reasons why "just keep everything forever" is often the path of least resistance in the paper-intensive world of employee benefit plans. A number of items do need to be kept indefinitely. Nonetheless, it is possible to construct a record retention protocol that allows the periodic disposal of outdated materials while ensuring the safe, cost-efficient storage of items that the plan still needs.

NOTES

1. DOL Prop. Reg. § 2530.209-2(d).

2. The record retention obligation extends to individuals who normally would be required to file a report, but who qualify for an exemption from filing because the plan has fewer than 100 participants, or because the plan is a welfare plan.

3. Paper copies must be kept if the electronic copy cannot be treated as a duplicate or substitute record. In recent years, this has become less of a concern, since the federal E-SIGN Act and similar state laws are expanding the ability to use electronic rather than paper documents. However, in some cases, original documents remain essential. For example, if a plan has share certificates reflecting its investment in a company, those original share certificates must be retained.

4. The DOL and PBGC regulations require that the electronic recordkeeping system be capable of indexing, retaining, preserving, retrieving, and reproducing the records.

5. Any agreement governing access to the electronic system must be designed to ensure the degree of access necessary to allow compliance with ERISA. The DOL and PBGC regulations expressly prohibit an agreement from imposing restrictions that would violate this standard.

6. *See* 42 C.F.R. § 423.888(d) for regulations regarding the Medicare Part D retiree drug subsidy, and 45 C.F.R. § 149.350 for the Early Retiree Reinsurance Program.

7. A seven-year time period allows ample time for six years to lapse from the likely return filing date. Under IRC § 6501, three years is the usual statute of limitations, with a six-year statute of limitations in the event of a substantial understatement. Accordingly, barring extension of the statute due to fraud or other unusual circumstances, a seven-year retention window from the last tax year to which an item was relevant should be sufficient. However, the specific circumstances associated with any given record must be taken into account before a record is approved for destruction.

8. The IRS re-issues this revenue procedure in substantially similar form every year. So, for example, in 2012, the rule stated can be expected to be found in Rev. Proc. 2012-06.

9. *See* Rev. Proc. 98-25, 1998-1 C.B. 689.

10. *See, e.g.*, Wise v. Verizon Communs. Inc., 600 F.3d 1180, 1184 (9th Cir. 2010) (state law determines statute of limitations for benefit claims in absence of ERISA provision on point); Miles v. N.Y. State Teamsters Conf. Pension & Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 598 (2d Cir. 1983) (state law determines statute of limitations for benefit claims in absence of ERISA provision on point); Santino v. Provident Life & Accident Ins. Co., 276 F.3d 772 (6th Cir. 2001) (upholding contractual statute of limitations under plan document); Dioguardi v. Rochester Laborers Pension Fund, 317 F. Supp. 2d 216 (W.D.N.Y. 2004) (upholding contractual statute of limitations under plan document).

11. *See* Carey v. IBEW Local 363 Pension Plan, 201 F.3d 44 (2d Cir. 1999); *but see* Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc., 637 F.2d 357 (5th Cir. 1981) (rejecting "discovery" rule in favor of requirement of application denial).

12. *See* Dioguardi v. Rochester Laborers Pension Fund, *supra*, n.10.

13. *See* IRC § 411(a)(11).

14. Under ERISA § 413, such a claim generally cannot be brought after the earlier of (i) six years after the date of the last action which constituted a part of the fiduciary breach (the latest date on which the fiduciary could have cured the breach or violation, if the claim alleges a breach of fiduciary duty in the form of omission rather than an action) or (ii) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. In the case of fraud or concealment, the deadline is extended to allow an action to be brought not later than six years after the date of discovery of the breach.

15. Unfunded plans are exempt from this requirement. *See* Interpretive Bulletin 75-5, FR-5.

16. In Roarty v. AFA Protective Systems Inc., 45 Employee Benefits Cas. (BNA) 2546 (E.D. N.Y. 2008), the court held that an employer was not obligated to retain a plan document beyond the six-year period mandated by ERISA § 107. However, the plan document could be considered a record that is necessary to determine benefits due under ERISA § 209, which would impose a potentially indefinite retention obligation. In any event, an employer generally is better off when it can produce a plan document and resolve a dispute, rather than having to take the matter to court.

17. ERISA § 403. This rule does not apply to plans consisting of individual retirement accounts or certain other custodial accounts.

18. For example, the employer should avoid the common error of having a dual-function plan document/SPD refer to a non-existent separate plan document.

19. *See, e.g.*, Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76 (2d Cir. 2001 (contents of documents from 1980s and 1990s relevant to benefit changes announced in 1998).

20. The beneficiary of a deceased participant must be furnished with an SPD within 90 days of first receiving benefits.

21. *See, e.g.*, Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 110 (2d Cir. 2003).

22. Wilkins v. Mason Tenders District Council Pension Fund, 445 F.3d 572 (2d Cir. 2006) (rule requiring participant to prove assertions not reflected in plan's records required to have been disclosed in SPD).

23. For retirement plan purposes, "highly compensated employees" are defined by IRC § 414(q), and "key employees" are defined by IRC § 416. The rules governing cafeteria plans, health plans, and flexible spending accounts use different tests and different terminology. The discussion in this section of the article is intended to refer broadly to all tests addressing disparity in benefits for employees based on compensation and/or status as an officer or owner.

24. Actual deferral percentage and actual contribution percentage testing, relating to elective deferrals and matching contributions.

25. *See* 29 C.F.R. § 2550.408b-1 (loans must be made in accordance with specific provisions set forth in the plan).

26. *See* ERISA § 206(d)(3) and IRC § 414(p).

27. *See* ERISA § 609(a)(5)(B).

28. 29 C.F.R. § 2550.408b-2. The DOL has indicated that these rules, originally scheduled to take effect as of July 16, 2011, will be delayed until Jan. 1, 2012 (*http://www.dol.gov/ebsa/newsroom/2011/ebsa021111.html*) (last visited Mar. 11, 2011).

29. It is common to limit recordkeeping to some reasonable interval of time. For example, a daily valued plan might retain account statements only for quarterly or annual valuation dates after a certain period of time has elapsed, particularly if there has been a change in recordkeepers.

30. ERISA § 404(b). Accompanying regulations describe permissible methods for holding certain foreign investments without violating this rule.

31. Naturally, documentation that must be surrendered at time of sale (such as stock certificates) will not be retained after the sale occurs.

32. Class exemptions with recordkeeping requirements typically call for a six-year record retention period. *See, e.g.*, Prohibited Transaction Class Exemption 2004-07; Prohibited Transaction Class Exemption 84-24.

33. Section 204(h) notices generally should be kept indefinitely.

34. Benefit summaries or other documents which address retiree benefit coverage generally should be retained indefinitely.

35. 1983 ERISA LEXIS 59 (DOL letter dated Aug. 23, 1983).

36. *Id.*

37. Naturally, not all types of records will exist for all plans. For example, reciprocity materials typically will apply only to multiemployer plans.

38. ERISA § 502(d)(1).

39. *See* ERISA §§ 402 and 3(16), respectively.

40. ERISA § 104(b)(4) permits a participant to request a copy of the latest SPD, the latest Form 5500 filing, any collective bargaining agreement that covers the plan, the trust agreement, a contract, and "other instruments under which the plan is established or operated." The last term assuredly covers the plan document, and courts have at times taken a broad interpretation of this clause.

41. *See, e.g.*, 1984 ERISA LEXIS 28 (DOL letter dated Apr. 26, 1984) (duty to maintain records cannot be avoided by delegation, although liability to reconstruct records inadvertently destroyed by vendor dependent on facts and circumstances); Tomlinson v. El Paso Corp., 245 F.R.D. 474 (D. Colo. 2007).

42. *See* 1984 ERISA LEXIS 28 (*supra*, n.41).

43. *See Tomlinson*, *supra*, n.41.

44. Although many of the documents discussed in this article are related to plan administration and hence either not privileged or subject to the fiduciary exception to attorney-client privilege, some materials may be relevant instead to potential litigation or fiduciary liability and thus potentially privileged. *See generally* Leslie E. DesMarteau, "Employee Benefits Exceptions to the Attorney-Client Confidentiality (and the Exceptions to the Exceptions)," *Benefits Law Journal*, Autumn 2010, at 6.

APPENDIX

General Record Retention Guidelines

Record	Suggested Minimum Retention Period
Plan document (including amendments, trust agreement, and insurance documents forming part of the governing documents, and including proof of company approval; collective bargaining agreements may also constitute part of plan documentation or otherwise be important to retain)	Retirement plans: indefinitely. Welfare plans: while applicable to current benefit entitlements (including claims for covered goods or services purchased previously, or other benefits subject to a colorable claim and not yet paid, and still within contractual or state law statute of limitations, whichever is longer) plus six years from Form 5500 filing for last plan year of potential applicability.
Retirement plan IRS opinion and advisory letters	Indefinitely.
Retirement plan IRS determination letters or private letter rulings, application and supporting materials	Indefinitely.
SPDs (including summaries of material modifications) with proof of proper distribution to plan participants and beneficiaries	Retirement plans: indefinitely. Welfare plans: while applicable to current benefit entitlements (including claims for covered goods or services purchased previously, or other benefits subject to a colorable claim and not yet paid, and still within contractual or state law statute of limitations, whichever is longer) plus six years from Form 5500 for last plan year of potential applicability. Retiree welfare benefits: indefinitely.
Informal plan communications	Six years from Form 5500 filing for last year in which communication was used or, if later, six years from last date on which any breach of fiduciary duty claim to which the communication could be relevant may have arisen. Communications relevant to retiree benefits and Section 204(h) notices generally should be retained indefinitely.
Administrative procedures	Until six years from Form 5500 filing for last year procedure was in use. For any procedure which could affect benefit amounts, in accordance with protocol for benefit calculation records, and certainly until expiration of statute of limitations for associated claims, if longer than Form 5500 retention period.
Form 5500 with attachments and audit reports	Six years from filing date.
PBGC premium filings and supporting data	Six years from filing date.
PBGC plan termination records	Six years from filing of post-distribution certification.
Claims files (denied claims)	Six years from date of Form 5500 filing for year of denial of claim or statute of limitations triggered by denial of claim (whichever is longer); consult counsel before destroying.

Appendix Continued ...

Record	Suggested Minimum Retention Period
Claims files (granted claims)	Period dictated for denied claims or for benefit records generally, whichever is longer.
Records necessary to compute retirement plan benefits (*e.g.*, contribution records, employment classification, eligibility records, service records, compensation records, birth dates, records of payouts or forfeitures, records of plan loans, account earnings records for defined contribution plans, collective bargaining agreements relevant to plan benefits)	As long as necessary to determine benefits or demonstrate lack of entitlement to benefits (generally indefinitely). Records underlying information on Form 5500 (*e.g.*, contribution records) and/or PBGC premium filings must be retained for at least six years from the date of filing for Form 5500 or the PBGC premium filing, even if no longer necessary to compute benefits.
Records necessary to demonstrate eligibility for welfare benefits (*e.g.*, employment classification, dependent eligibility, service records, premium payments)	While applicable to current benefit entitlements (including claims for covered goods or services purchased previously, or other benefits subject to a colorable claim and not yet paid, and still within contractual or state law statute of limitations, whichever is longer) plus six years from Form 5500 filing for last plan year of potential applicability. For retiree benefits, generally indefinitely.
Nondiscrimination test reports and underlying data	Six years from date of Form 5500 filing for testing year (or any subsequent year relying on that test result); may be helpful to retain at least final reports indefinitely.
Actuarial records	Six years from Form 5500 filing or PBGC premium filing, whichever is later. Discuss with actuary before discarding.
Qualified domestic relations orders	In keeping with protocol for retirement plan benefit computation records.
Qualified medical child support orders	While in effect, and until expiration of the statute of limitations on any claim arising while in effect (or until six years after Form 5500 filing for last year of applicability, if later).
Service agreements	Six years after Form 5500 filing for the final plan year during which the contract was in effect (or as long as the plan believes it might need to assert claims against the vendor, if longer).
Investment disclosure materials	Six years after last date relevant.
Investment vehicle documentation	Six years after Form 5500 filing (and PBGC premium filing, if applicable) for last year plan holds investment; longer if necessary for the plan to assert any rights or remedies, or meet obligations, still relevant after divestiture.
Investment vehicle indicia of ownership	As long as investment is held by the plan.
Vendor disclosures	Six years after Form 5500 filing for last year for which disclosure was relevant; for ongoing relationships, retention of disclosures until six years after Form 5500 filing for last year of service arrangement is often appropriate.

Appendix Continued ...

Record	Suggested Minimum Retention Period
Financial records	As long as necessary to resolve benefit entitlements and/or relevant to current investment holdings, plus six years from Form 5500 filing (and PBGC premium filing, if applicable) for last year relevant.
Funding policy	Six years after Form 5500 filing (and PBGC premium filing, in the case of defined benefit plans) for the last year the funding policy was in effect.
Investment policy	Six years after Form 5500 filing for the last year the investment policy was in effect.
Fidelity bond	Six years after Form 5500 filing for the last covered plan year, or if longer, while claims against the bond can still be made.
Fiduciary insurance	Six years after Form 5500 filing for the last covered plan year; or if longer, while claims against the policy can still be made.
Records of fiduciary appointments and resignations	Six years after Form 5500 filing for last year during which individual or entity served as fiduciary; potentially indefinitely.
Records of fiduciary delegation and oversight	Six years after Form 5500 filing for relevant year; potentially indefinitely.
Tax returns and related documentation	Seven years (Form 1009-Rs for retirement plans often should be kept indefinitely; Form 1099-Rs reflecting tax basis in retirement benefits not yet completely distributed should at least be kept until seven years after complete distribution).
Proof of timely response to disclosure request	At least six years after date of request; in any event, should be kept while any issue or claim associated with the request is potentially outstanding and for at least six years thereafter.

The guidelines in this chart are only suggestions, and may not address all records generated in connection with a plan. Each plan must determine the appropriate retention period for its records based on its particular circumstances.