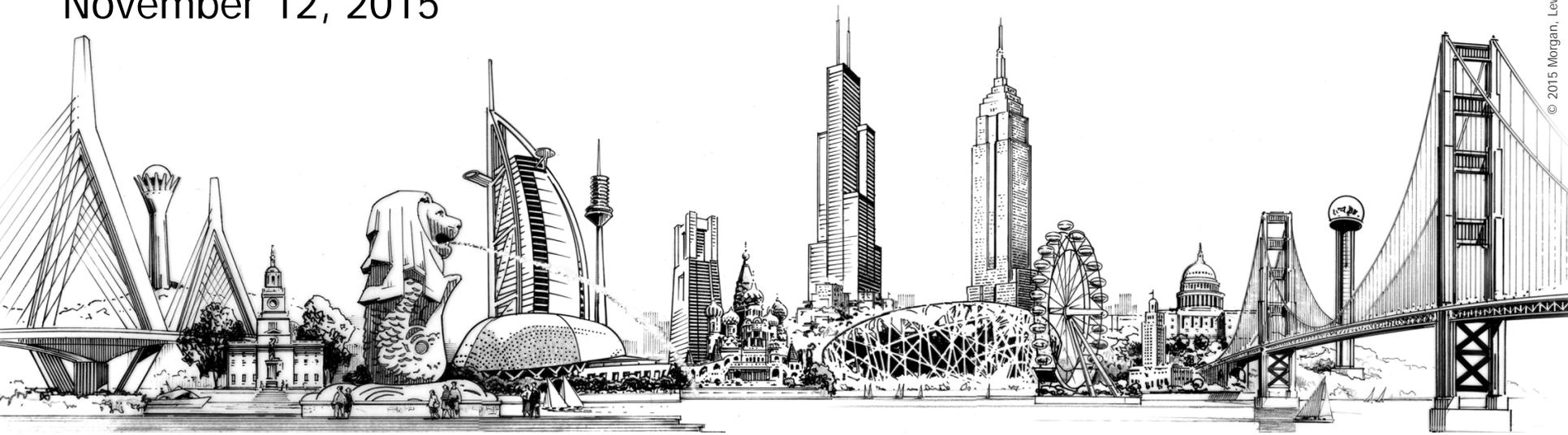


Morgan Lewis

DOL HEALTH PLAN AUDITS POST-ACA

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INTRODUCTION

What We Will Cover Today

- Enforcement Background
- Understanding the Department of Labor (DOL) Audit Letter
- Responding to a DOL Audit Letter
- Preparing for the DOL Audit Interview
- The Aftermath – Correction and Closing Letter
- How to Lessen the Pain of an Audit

Enforcement Background

- DOL audits undertaken by the Employee Benefits Security Administration (EBSA)
- Health and welfare plan audits have increased in recent years
 - Heavy activity out of the Dallas, Chicago, and Philadelphia regional offices
- EBSA Chain of Command for Audits
 - Benefits Advisor
 - Investigator
 - Associate Regional Directors and Regional Directors
 - Office of Enforcement – EBSA “HQ” in Washington, DC
 - Deputy Secretaries of Labor and Assistant Secretary of Labor
- Other related agencies:
 - Office of the Solicitor (EBSA’s legal counsel)
 - Office of the Chief Accountant (DOL’s Form 5500 office)

Enforcement Background

- Other agencies may audit too:
 - IRS, for healthcare requirements under the Internal Revenue Code
 - HHS, for HIPAA privacy, security, and breach notification issues
- Investigations are often coordinated, with one agency making other agencies aware of violations within their jurisdictions
- Most audits are health plan audits, which tend to focus on:
 - Reporting and disclosure requirements
 - COBRA notices
 - Health plan legal requirements under Part 7 of ERISA
 - Portability, special enrollment, and nondiscrimination rules
 - Newborns and Mothers Health Protection Act
 - Women's Health and Cancer Rights Act
 - Mental Health Parity Act
 - And now – the Affordable Care Act!
 - Fiduciary responsibility rule

UNDERSTANDING THE DOL AUDIT LETTER

What Triggers a DOL Audit?

- Why me?
 - Many audits triggered by participant complaints, with investigations leading to full audits
 - Participant complaints are handled by a Benefits Advisor
 - Failure to cooperate with a Benefits Advisor may lead to investigation
 - Systematic participant complaints
 - A health plan audit may be opened if there is an existing audit on the pension side
 - Other audits based on referrals from other agencies or discovered through outside means, such as newspaper articles
 - EBSA initiatives
 - Random audit

The Audit Letter

- Most audits are document driven and not transaction driven
 - Compliance driven
- “Kitchen sink” letter
- Large numbers of documents requested
 - Documents constituting the plan (including all documents incorporated by reference and, in some cases, insurance contracts and administrative agreements, etc.) and plan amendments
 - Documents evidencing adoption of the plan and amendments
 - SPDs and SMMs
 - SBCs
 - COBRA notices
 - WHCRA notices
 - Special Enrollment Rights notice
 - Evidence of distribution of notices
 - Information on wellness programs

The Audit Letter

- Evidence of compliance with ERISA nondiscrimination rules
- Evidence of compliance with Mental Health Parity rules
- Certain ACA notices regarding older dependents and lifetime limits, etc.
- Sample of actual claim denial letters (including those involving mental health/substance abuse) and a list of denial codes
- Identification of all plan fiduciaries
- Minutes of committee meetings
- Fidelity bond
- Stop-loss policy

RESPONDING TO A DOL AUDIT LETTER

Responding to DOL Audit Letter

- Secure legal counsel for assistance
- Be responsive
- Negotiate or clarify the scope of the document request (often a wrap plan will be named, but only the medical component is at issue) and the year or years under audit
- Time lines are usually flexible – ask for an extension to the response deadline and meet the deadline!
- Identify early any holes that need to be filled by requesting assistance from carriers and other vendors

Responding to a DOL Audit Letter

- Gather and organize documents responsive to the request
 - TPAs, legal counsel, consultants, actuaries
 - Organize in the same format as the letter
- Electronic, web-based organization services extremely helpful when coordinating with outside counsel
 - Explain the absence of any documents requested
- Expect supplemental requests
- Keep copies of your response
 - Keep records of any interaction with the DOL

PREPARING FOR THE DOL AUDIT INTERVIEW

The Interview Process

- If issues not resolved as part of document reduction
- Review any compliance issues with ERISA counsel in advance
- Determine who will be interviewed (person most knowledgeable)
 - DOL Investigator will generally limit interview to one person
 - Legal counsel can be present but cannot respond directly to questions
 - Be familiar with the plan documents, plan operations, and vendor relationships
 - Be prepared to address compliance issues and propose or describe corrective measures
- Expect the interview to last several hours
 - From several hours to an entire day or longer if significant issues arise
- Designate an appropriate location for the interview/review
 - Private, comfortable

The Interview Process

- Interview is not recorded
- The Interview
 - DOL Investigator operates from a script
 - Expect detailed questions about plan operations and compliance requirements
 - Respond truthfully
 - Don't base a response on assumptions
 - Let DOL Investigator know you that need to confirm or validate a point
 - Respond only to questions asked
 - Ask for clarification on any point that is unclear
 - DOL Investigator will take notes
 - Supplement any documents you were not able to produce originally
 - Expect follow-up

THE AFTERMATH – CORRECTION AND CLOSING LETTER

After the Interview

- The DOL Investigator must report his/her findings based upon the document production and interview along with any recommendations to his/her supervisor
 - Additional follow-ups possible
- Case cannot close until the reason for the audit is resolved or explained
- Potential Outcomes
 - Typically, the DOL will require correction of defects to the extent possible
 - This may mean paying benefits to those who were improperly denied
 - Since the period in question may be years in the past, this can be problematic and impractical

After the Interview

- The Closing Letter
 - No violation letter
 - No action letter
 - Voluntary compliance letter
 - Corrective measures required – requires proof
 - 10 days to respond
 - Corrective action letter
 - Civil Penalty letter
 - Litigation – Office of the Solicitor
 - Egregious violations
- DOL may refer violations to other enforcement agencies
- Sample letters: <http://www.dol.gov/ebsa/oemmanual/cha34.html>

Potential Penalties

- Penalties may be assessed
 - A willful violation of any reporting, disclosure or notice requirement of Part I of ERISA is punishable by imposition of a criminal fine of not more than \$100,000, imprisonment for not more than 10 years, or both; except that a corporation or any other person who is not an individual may be fined up to \$500,000
 - Civil penalty under ERISA for late or incomplete filing of Form 5500
 - \$1,100/day late; may be waived for reasonable cause
 - Delinquent Filer Voluntary Compliance Program offers greatly reduced penalties
 - Small plans – \$10/day late, not to exceed \$750; where there are multiple years for the same plan, the maximum penalty amount is \$750 for each annual report, not to exceed \$1,500 per plan
 - Large plans – \$10/day late, not to exceed \$2,000; where there are multiple years for the same plan, the maximum penalty amount is \$2,000 for each annual report, not to exceed \$4,000 per plan
 - Link to DFVC FAQs: http://www.dol.gov/ebsa/faqs/faq_DFVC.html

Potential Penalties

- \$110/day for failing to provide certain documents upon request (including request by the DOL); may be waived if due to matters reasonably beyond the control of the plan administrator
- \$110/day for failure to provide the general (initial) COBRA notice or the COBRA election notice; may be waived if the failure is due to matters reasonably beyond the control of the plan administrator
- IRS penalties may apply too

HOW TO LESSEN THE PAIN OF AN AUDIT

Minimize Exposure

- Employers may be in a better position to minimize exposure on audit by taking the following actions:
 - Conduct a self-audit to identify compliance holes
 - Make sure all plans have been identified – don't forget EAPs, on-site clinics, special executive and retiree arrangements, etc.
 - File all required government forms (e.g., Form 5500) accurately and on time
 - Provide notices and other disclosures in a timely manner and keep logs and other records demonstrating this
 - Address all benefit questions and requests for information in promptly and on a consistent basis

Minimize Exposure

- Centralize compliance and participant interface functions to increase consistency; address violations or other issues/disputes immediately
- Train staff on compliance requirements and implement internal procedures to address violations promptly
- Calendar compliance events for automatic reminders
- Retain documentation and procedures that demonstrate compliance; organize files; consider electronic storage
- Make sure vendors have been delegated claim administration authority and monitor their performance to ensure that denials and other notices are compliant

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QUESTIONS?

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