



Department of Labor Investigations

Jim Cole
Groom Law Group, Chartered
(202) 861-0175
jcole@groom.com
September 26, 2017

1

GROOM LAW GROUP

Overview



- Short Overview of the Law
- Anatomy of a DOL EBSA Audit
- What Do I Do When I Get a DOL Document Request?
- Some Issues That Have Come up on Audit
- How Can a Fiduciary Protect Himself?

2

GROOM LAW GROUP

Overview

Why DOL Investigates

- Participant Complaints/Inquiries
- Referrals from Other Regulators (e.g., OLMS, IRS, SEC, or DOJ)
- Other Information (e.g., News Reports)
- National and Field Office Projects
- Form 5500 / Form 990 Desk and Edit Checks

3

GROOM LAW GROUP

Overview

ERISA - Breaches of Fiduciary Duty

- | | |
|---|---|
| <ul style="list-style-type: none"> ▪ Prudence – reasonable expert (know what you don't know) ▪ Sole & Exclusive Benefit Rule ▪ Administration expenses reasonable & necessary ▪ Diversification | <ul style="list-style-type: none"> ▪ Prohibited Transactions <ul style="list-style-type: none"> ▪ 406(a) – Almost everything is “prohibited” ▪ Many exceptions ▪ Service provider & fiduciary compensation ▪ Related party transactions ▪ Self-dealing ▪ Acting as Adverse Party ▪ Anti-kick back rule |
|---|---|

4

GROOM LAW GROUP

Overview

ERISA – Violations

For What?

- Breach of Fiduciary Duty
- Co-Fiduciary Liability
- Knowing Participation in a Breach

So What?

- **Potential Personal Liability**
- Excise Taxes & Penalties
- Equitable Remedies

5

GROOM LAW GROUP

Overview

Criminal Authority, ERISA § 506(b)

- ERISA § 506(b) - Authorizes Secretary of Labor to investigate and refer criminal violations involving employee benefit plans.
 - 18 U.S.C § 1001 material false statements to executive agency
 - 18 U.S.C. § 1027 - false statements in documents required by ERISA, such as Form 5500 filing
 - 18 U.S.C. § 1954 -solicitation to influence operations of a plan
 - ERISA § 411 - prohibits certain persons from holding plan positions
 - ERISA § 501 - willful violation of Title I
 - ERISA § 511 - coercive interference with participants' rights
 - Taft-Hartley § 302 – strict payment prohibition & anti-bribery
- Often prosecuted by DOL Inspector General/U.S. Attorney's office.

7

GROOM LAW GROUP

Anatomy of a DOL Audit

- Initial document request or subpoena
- On-site review vs. production by counsel
- Key person interviews
- 10 Day Letter – Voluntary Compliance “VC” Letter
- Reply from Board of Trustees
- Meeting with Investigator/Supervisor/Assistant Regional Director/Regional Director

9

GROOM LAW GROUP

Anatomy of a DOL Audit

- Agree to remedies
- Provide additional information
- Agree to disagree
- Review up line at Regional Office
- Review by Regional Solicitor’s Office
- Possible review by National Enforcement Office and National Solicitor’s Office for national or difficult issues (especially with a national enforcement program)

10

GROOM LAW GROUP

Anatomy of a DOL Audit

- Attorney informal meetings or consultations with Regional Solicitor, National Enforcement, National Solicitor Offices
- Provide additional legal and factual analysis
- Consider request for interpretive advice (especially for widespread issues)
- Enforcement Manual, Advisory Opinions & Information Letters
- Negotiated settlement before DOL suit
- Closing Letters
- DOL files lawsuit – discovery, possible settlement, news release
- Referral to other agency

11

GROOM LAW GROUP

What Do I Do When I Get the Document Request from DOL?

- Call your lawyer (I don't care if its expensive, call her anyway)
- Identify your insurance policies that may provide coverage
- Draft a claim letter to your insurers
- Establish a claim date as soon as possible and invoke the insurer's obligation to pay for defense costs
- Check for "Gap Coverage" – Pre-Claims Investigations

20

GROOM LAW GROUP

What Do I Do When I Get the Document Request from DOL?

- Establish a single point of contact with DOL (preferably counsel)
- Keep a separate copy of all the documents DOL reviews
- Keep a separate copy of all the documents DOL copies
- Designate a place for the investigator to work if on premises
- Counsel should be present during Investigator formal and informal interviews
- Consider whether to request subpoenas
- The investigator will be friendly but is there to do a job
- Speak only when spoken to and only answer the question asked

21

GROOM LAW GROUP

Issues that Have Come Up on Audit

- Plan expenses, plan expenses, and more plan expenses!
- Travel expenses for trustees and employees
- Alcohol expenses
- Food –
 - Assets used to purchase food for participants or staff on site?
 - What is the reason for doing this
- Graduation / Event / Office expenses:
 - Who is attending? Family members? Union Officers? Dignitaries?

22

GROOM LAW GROUP

Issues that Have Come Up on Audit

- Personal vehicle use
- Trustee and staff entertainment (e.g., golf, duck tours & in-town meals)
- Advertisements (e.g., clothing and events)
- Gifts to charities, trustees, employees, participants or family (e.g., funeral flowers, attendance at events, or charitable events)
- Late Fees and interest on receivables

23

GROOM LAW GROUP

Issues that Have Come Up on Audit

- Bonuses – post retirement & current employees
- Failures to recuse on expenses and compensation
- Fidelity bonding
- Building purchase and/or leasehold improvements.
 - Market value?
 - Updated lease arrangements
- Investment losses & ETIs/ESGs

25

GROOM LAW GROUP

Issues that Have Come Up on Audit

- Fiduciary status of plan employees, co-fiduciary duty
- Missing Participants
- Meals, gifts, and entertainment from service providers
- Transactions between plan, employers, or union
- Allocation of plan expenses between plans

24

GROOM LAW GROUP

Investigation Process *Privilege Considerations*

- Fiduciary exception to attorney-client privilege.
 - Generally, fiduciaries may not assert attorney-client privilege to withhold information about their fiduciary activities from plan participants or DOL.
- Exception does not apply to advice received when engaged in “settlor” functions or other activities not in scope of fiduciary duty.
- Fiduciary exception for work product doctrine?
 - Work product doctrine covers material prepared in anticipation of litigation, including analyses commissioned by corporation (e.g., memo on prospect of IRS litigation).
- Privilege for self-critical evaluations (e.g., internal audit) generally not recognized by federal courts. See generally Dept. of Education v. NCAA, (7th Cir. March 21, 2007).

16

How Can I Protect Myself from All This Potential Liability?

- “Avoid the Near Occasion of Sin”
- Procedures & Documentation
- Fiduciary Insurance – Waiver of Recourse & Pre-Claim Investigations “Gap” Endorsement
- Indemnification by Appointing Parties
- Indemnification by Plan

How Can I Protect Myself from All This Potential Liability?

IDEA: Indemnification - Using the Plan's Assets to Support and Protect the Trustee

- ★ The Gap Problem & Advancement of Fees
- ★ Maximum Extent Permitted By Law
- ★ Disfavored by DOL – Void as Against Public Policy
- ★ Conflict of Interest?
- ★ Trust Provision – Ahead of Time by Plan Sponsor Action (Trust Does Not Pay for Amendment)

How Can I Protect Myself from All This Potential Liability?

*Crystal Ball vs. Final Adjudication
Attracting & Retaining Qualified Trustees
Absolute vs. Realist to Balance Factors?*

**1. Likelihood
of Successful
Defense of
Case?**



**2. Trustee's
Promise &
Ability to
Repay?**

Department of Labor Investigations

Jim Cole
Groom Law Group, Chartered
(202) 861-0175
jcole@groom.com
September 26, 2017