

Client Alert

Employee Benefits Department

April 26, 2011

Importance of Maintaining an ERISA-Compliant Document Retention Policy

Occasionally we receive a call from a client asking about the period of time for which an ERISA plan administrator is required to maintain records. Even for clients who maintain an overall document retention policy, we recommend that the applicable ERISA requirements be taken into account and incorporated into such policy.

The answer to the document retention question under ERISA is not clear. ERISA Section 209(a) requires an employer to maintain records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees. Proposed 1980 regulations implementing ERISA Section 209(a) required records to be retained “so long as any possibility exists that they might be relevant to a determination of benefit entitlement.” So, in the simple case, if a client maintains a tax qualified defined benefit plan with a normal retirement age of 65 and an employee terminates employment at age 35 with a fully vested benefit, the plan sponsor may need to retain records for a period of 30 years. However, if a plan has terminated and the plan sponsor believes that all required distributions have been made, a plan sponsor generally would not need to maintain records longer than the period in which an employee could file a claim (generally six years). The difficult case would arise if a plan participant were to claim not to have received a distribution from the terminated plan. At that point, the employer would have to establish either that the former employee was paid or was not entitled to payment, rather than the employee. From an ERISA perspective, an employer cannot avoid its obligation to make payments under ERISA by avoiding its obligation to maintain records.

Generally, from an ERISA fiduciary perspective, it is important to have an ERISA-compliant document retention policy. If a defined benefit plan is sponsored, it is important to maintain, for example, the employee’s compensation and service history. In addition, all plan documents and plan amendments should be retained. Many plans provide that if a plan participant terminates employment, his rights are determined under the plan (except to the extent that the law requires to the contrary). Since plan participants are allowed to rely upon summary plan descriptions (“SPDs”), it is also important to have available all prior copies of SPDs. The fact that an issue has been addressed in a current SPD does not necessarily provide relief with respect to former plan participants who terminated employment when an earlier version of the SPD was in effect. Other documents, such as any information pertaining to a Form 5500, the annual information return for a tax-qualified plan or certain welfare plans, should be retained for a period of six years. For possible protection in an ERISA litigation context, we also recommend retaining committee minutes for an indefinite

period of time. When ERISA was first enacted storage needed to be physical. However, under the 1980 proposed regulations, original records could be destroyed if microfilm, microfiche, or similar reproduced records were retained.

If you have any questions regarding ERISA document retention obligations or recommendations, please contact us.

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