

Journal of Pension Benefits - Ferenczy and Pozek, The Unbounded Days of Retaining Plan Records, (Oct. 1, 2013)

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Plan administrators are charged with the responsibility of maintaining proper plan records for purposes of meeting DOL requirements under [ERISA Sections 107](#) and [209](#), as well as for self-preservation in audit and litigious situations. It is imperative for plan administrators to understand their responsibility in maintaining plan records.

The maintenance of proper records for a qualified retirement plan, while old news under Department of Labor (DOL) regulations, is an important function of which plan administrators should be continuously aware. Plan administrators often hire service providers to prepare certain plan records and reports; however, administrators must remember that the DOL considers the plan administrator, not the service provider(s) it may hire, responsible for maintaining required plan records. Contracts between plan administrators and service providers may outline agreed-upon document-retention services, and the failure of a service provider to follow through may warrant legal action by the plan administrator. But again, the plan administrator is solely on the line for any deficiencies.

Some of the records the DOL may commonly request include specific plan information (such as plan documents, operational compliance logs, communications to employees, and payroll records used to calculate contributions) as well as specific employee information (such as personal information, employment history, deferral elections, investment selections, and beneficiary designations). The purpose of this article is to review the requirements specified by the DOL to keep plan administrators informed of their responsibilities and the extent to which they need to maintain plan-related records. Plan administrators must also keep in mind their specific state's record-retention requirements and consider proper disposal procedures for private company or employee data.

ERISA Requirements

[Section 107](#) of ERISA requires any persons who have to file any report or to certify any information required under ERISA to maintain the records that were utilized to prepare such reports for a minimum of six years after the filing date of the report. For example, anyone required to file the [Form 5500](#) and related schedules must maintain a copy of the filing for at least six years along with all records used to substantiate the information reported on the forms. This doesn't mean just the simplified figures that end up on the filings; rather, it refers to all the information used to arrive at these figures, such as:

- Financial reports, including:
 - Statements from the trust, custodian, brokerage accounts, and/or bank accounts that reflect deposits, withdrawals, income, fees, and other transactional activity;
 - Documentation that such accounts are properly maintained as plan (not company or personal) accounts;
 - Certified audits and/or appraisals depending on plan size and type of assets held;
 - Distribution records including withholding and [Forms 1099-R](#) ; and
 - Reconciliation of deposits to deductions taken on corporate income tax returns;
- Proof of the fidelity bond covering the plan;
- Data supporting all required nondiscrimination testing, including:

- Highly compensated employee and key employee determinations based on:
 - Ownership and officer status;
 - Compensation; and
 - Familial relations
- Controlled group and affiliated service group determinations; and
- Payroll and hours information for *all* employees used to determine eligibility, exclusions, and allocations (also applicable to [Section 209](#) requirements, as described below).

[Section 209](#) of ERISA additionally requires plan administrators to retain records related to the determination of each employee's benefit for what, in some cases, could turn out to be decades. While this sounds very individualized and more than a little bit daunting, these records actually tie to the ongoing operational maintenance of the plan as well as company payroll information the company likely already maintains. However, it is imperative to back up records (*e.g.*, payroll details including time reports) that may otherwise have lesser retention requirements under other human resource guidelines.

Although the "indefinite" requirement may seem unwieldy, the very nature of the retirement plan industry propagates long-term connections with all parties involved, from the plan sponsor and/or administrator, trustees, and service providers to the participants, beneficiaries, and other parties in interest. So even without regard to the ERISA requirements, plan administrators should keep a self-preservation mindset with an organized long-term records-retention program.

Some of the records needed to substantiate the benefits due and/or paid to employees may include the following:

- Basic plan information
 - Properly executed plan documents, amendments, and/or restatements, including company resolutions adopting each. Any draft copies maintained on file should be clearly labeled as such, and pertinent notes regarding decisions to implement or change plan provisions can be helpful if changes are later questioned.
 - Timing and details of statutory/regulatory changes operationally implemented prior to being memorialized via an amendment or restatement of the plan document;
 - Participant communications, including summary plan descriptions, summaries of material modifications, educational materials, required notices, etc.; and
 - Determination, advisory, or opinion letter(s) for all plan document(s).
- Employee/participant information
 - Personal details, including name, Social Security number, date of birth, and marital/family status;
 - Employment history, including hire, termination, and rehire dates (as applicable), and termination details (*e.g.*, voluntary or involuntary discharge, death, or disability);
 - Compensation and hours history used to determine eligibility and calculate contributions;
 - Officer and ownership history and familial relations;
 - Details of employee exclusion by plan terms or employee opt-out elections;
 - Election forms for choices such as deferral amount, investment direction, benefit designation, and distribution request; and
 - Transactional history of contributions and distributions.

Plan audits and/or employee lawsuits may include a review of whether an employee was properly included or excluded. Thus, plan administrators should ensure that plan records include details for all company employees, not just those determined to be eligible to participate in the plan.

Electronic Maintenance of Records

Electronic records may back up and replace paper records if specific requirements are met. [[29 C.F.R. §2520.107-1](#)] The physical copies of records can be transferred to electronic versions if the transfer results in legible, accurate copies that are reproducible. The electronic recordkeeping system must:

- Be maintained with controls in place to ensure accuracy and authenticity of the records;
- Be able to index, retain, preserve, retrieve, and reproduce the records in a safe and accessible place;
- Be able to convert the records to legible paper form;
- Not impose access restrictions (e.g., time or location) that would impair an individual's ability to comply with reporting and disclosure requirements of ERISA; and
- Be adequately secured, organized, backed-up, and maintained by established procedures.

Not all records may be electronically stored. While electronic copies may serve as backup records, originals must be maintained if they cannot be converted to legible and accurate electronic form, or if the physical copy has significant value (e.g., legal documents with seals or notary stamps). However, those that are accurately converted to electronic records may be properly disposed of. With the continuous evolution of technology, it is also extremely important to implement internal controls that assure electronic records are regularly migrated to current storage media.

Conclusion

Service providers may offer assistance in maintaining and/or preparing records pertinent to annual disclosures, reporting, and compliance testing. However, it is the responsibility of the plan administrator to ensure that full and complete records are maintained for the plan. It is in their best interest to develop and review diligent record-retention practices and to perform self-audits to confirm they are adequately prepared to provide such records to government agencies on audit or support past determinations if questioned in court.

Records of annual administration are required to be maintained for at least six years, and records used to determine individual benefits under the plan are to be maintained indefinitely. Consider, though, that since most records are now prepared or are easily converted to and stored in electronic format, a plan administrator may find it beneficial to maintain plan records for the life of not just the plan but of the entity, if not beyond. The cost of large amounts of storage and regular, secure backup of information has only gotten cheaper over the years, and the cost of electronic storage is minimal compared to the potential cost and headache of reproducing records at the request of a government agency or a plaintiff's attorney. So while some records are required to be maintained for a minimum of just six years, in the words of Stan from *Office Space*, "if you feel that the bare minimum is enough, then, okay. But some people choose to [maintain plan records for] more, and we encourage that. You do want to [protect] yourself, don't you?"