

Issue Brief

Record Retention for Health and Welfare Benefit Plans

Issue Date: 4/17/2012

Like the proverbial ~~pitch~~ hitch in time, the efficient filing of benefit plan records inevitably saves time, resources, and anguish otherwise spent searching for documents needed at a later date. Moreover, the law penalizes the failure to maintain certain records. This Issue Brief outlines key recordkeeping requirements for health and welfare plans under federal law, with a focus on plans subject to the Employee Retirement Income Security Act (ERISA). A recommended retention list is provided at the end. Retirement plan records are not addressed, and state laws may impose additional requirements.

Plan Administrator to Maintain Records Underlying Form 5500.

First and foremost, ERISA Section 107 imposes a significant recordkeeping obligation on the plan administrator (generally the employer sponsoring the plan). The plan administrator must maintain sufficiently detailed records so that all information required to be reported (or that would have been required but for a reporting exemption) or certified on the IRS Form 5500 Annual Report can be ~~verified~~, explained, or clarified, and checked for accuracy and completeness. This obligation applies even when a Form 5500 is not required because of an exemption such as for certain small plans with under 100 participants (no Form 5500 may be required), or when an abbreviated Form 5500 is allowed such as for large unfunded plans (for which Schedule H financial data may not be required). The administrator of a multiple employer welfare arrangement (MEWA) must also maintain similar records required for verifying the Department of Labor Form M-1 Report for MEWAs.

Types of Records. Although the Department of Labor has not issued detailed guidance on the records that must be maintained, its general guidance refers to journals, ledgers, checks, invoices, bank statements, contracts, agreements, vouchers, worksheets, receipts, claim records, payrolls and applicable resolutions. Actual records, not summaries, are required, although electronic versions are acceptable if certain standards for electronic retention are met.

Retention Period. Records subject to ERISA Section 107 must be maintained for at least six years from the date the associated Form 5500 is filed (or would have been filed but for an exemption). For a small plan exempt from Form 5500 filing with the calendar year as the plan year, this would be six years from the July 31st following the end of the respective plan year. Many practitioners recommend retaining records under ERISA Section 107 for seven or eight years after the end of the applicable plan year rather than the minimum period in Section 107. This is particularly appropriate since filing extensions often result in Form 5500 being filed many months after the end of the applicable plan year being reported. To the extent any benefits under a plan may be the subject of claims litigation, legal counsel should be consulted on additional retention periods for specific records since the statute of limitations (which can bar lawsuits for benefits after the limitation period expires) may be longer than eight years and varies among the states.

Penalties. Although ERISA imposes no specific penalty for a failure to maintain records under Section 107, any person who knowingly violates those requirements, as with other ERISA violations, can be liable for up to \$100,000 in fines (\$500,000 for a corporation) and ten years in prison, among other criminal penalties. Moreover, any plan participant, beneficiary or fiduciary can sue for enforcement of the recordkeeping requirements, and individuals responsible for any failure can be required to cover associated plan costs (e.g., re-establishment of records) and can be removed as fiduciaries. If certain documents are not furnished within 30 days of a written request by participants, the plan administrator can be liable for up to \$110 per day from the date of the failure.

Recommendations. The following is a recommended starting point for establishing a list of records to be maintained for health and welfare benefit plans. Except as specifically noted, the items are listed

primarily for purposes of complying with ERISA Section 107 with a recommended minimum retention of eight years following the end of the plan year in which the information or data was last needed in plan operations. Although longer retention periods may be appropriate for defending lawsuits and other purposes, some argue for minimum periods in order to avoid fishing expeditions by plaintiffs' attorneys and simply due to the practicalities of storage.

Service providers and carriers may assume certain recordkeeping obligations (especially some of the more burdensome such as for health benefit claim forms, claim and appeal records, and documents to substantiate Form 5500 Schedule A entries), but contractual provisions requiring retention are advisable to ensure the plan administrator (having ultimate responsibility) is meeting retention requirements.

DESCRIPTION OF DOCUMENTATION	RETENTION NOTES*
Governance & Descriptive Documentation	
Plan documents, including any wrap-around document, plan amendments, and adopting resolutions as well as documents incorporated by reference	
Company resolutions authorizing establishment of the plan or delegating responsibilities for plan adoption, amendment, or administration	
Insurance policies, carrier and third party service provider contracts, carrier and provider correspondence, and broker agreements	
Summary Plan Descriptions, Summaries of Material Modifications, evidence or certificates of coverage, Summaries of Benefits and Coverage, and other booklets or enrollment materials used to communicate the benefits	
Documents establishing any trust used for funding, including trust agreements, authorizing resolutions, etc.	
Collective bargaining agreements, if any	
For medical plans claiming grandfathered status under health reform, documents establishing plan design and contribution schedules as of March 23, 2010	Suggested retention of at least 6 years from end of last year of grandfathered status
Administrative/Operational Records	
COBRA notifications, forms and records of premium calculations	
Claim forms, HIPAA creditable coverage certifications, beneficiary designation forms, dependent affidavits, status change requests, special enrollment notices and requests, advance notice of coverage rescission, and any other administrative forms	
Administrative policies or other records substantiating process used for distribution of SPDs and other required notices	
Evidence (worksheets, reports, etc.) of monitoring and complying with nondiscrimination requirements (Code Sections 79, 105(h), 125, 129, etc.)	Not ERISA Section 107 item. Retain records at least 6 years from filing of employer income tax return for associated year.
Claims payments; Plan Administrator (or delegate) interpretations and decisions on any claims or appeals, along with records of denial letters, review process, and opinions from advisors in connection with such activities	For Medicare-covered individuals, medical plan records may need to be retained indefinitely if plan does not specify period for timely filing.
Medicare Part D prescription drug creditable coverage assessments and notifications	
Requests for plan information and for documents and instruments under which plan is operated and responses to such requests	
Qualified Medical Child Support Order determinations and supporting documents and procedures	
One-time health reform notifications for health plans in existence prior to 9/23/2010: <ul style="list-style-type: none"> • Extension of dependent coverage to age 26 • Elimination of lifetime limits 	

Summary Annual Reports	
ERISA bond	
HIPAA Privacy and Security written policies and procedures, privacy notifications, business associate agreements, risk assessments, disclosure authorizations, individual rights correspondence and related compliance documentation	Not ERISA Section 107 item. HIPAA required retention: 6 years from later of document creation or last date in effect.
Government Filings	
Form 5500s and related correspondence with IRS or DOL (e.g., filing extensions), including all attached schedules, audited financial statements and accountant opinions, as applicable, and underlying records (if not otherwise listed in this table) such as documentation on Schedule C compensation (including certain indirect compensation)	
If trust funding is used, any IRS exemption application and response, and Form 990 or other IRS filings	Not ERISA Section 107 item. Retain records at least 6 years from filing date.
Form 8928 and any other excise tax filings, work papers, and underlying transaction records (relates to various violations under COBRA, HIPAA portability, certain HSA noncompliance, and potentially certain health reform violations)	Not ERISA Section 107 item. Generally employer duty. Retain records at least 6 years from filing date.
Additional Financial & Related Data	
Plan year end and plan year beginning financial and enrollment data with supporting payroll, retiree and enrollment (including COBRA election) records	
Records of payments and reimbursements to carriers and other vendors of plan services, including source of payment (i.e., whether from employee contributions or other plan assets, or from employer general assets)	
If trust funding is used, investment records, and trustee records	

*Except as otherwise noted, the recommendation is that all listed records should be retained for eight years from the end of the plan year in which the information or data was last needed in plan operations. It is generally advisable to maintain records on an annual plan year basis.

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