



**PENSION RIGHTS
CENTER**

National Training
Document Retention

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Example Scenarios

- Client is deferred vested participant. Plan no longer has plan document or SPD for last hour of service.
- Client is participant in multi-employer plan. Employer, now out of business, never provided service records to plan and plan claims participant is not vested.
- Plan seeks to recoup from client and has not retained original benefit calculation.
- Client's data was corrupted when records were converted to electronic format.

ERISA Requirements and Remedies

§107 (29 USC §1027)

- Documents necessary to verify mandatory disclosure info
- Anyone subject to reporting/disclosure requirements
- 6 years

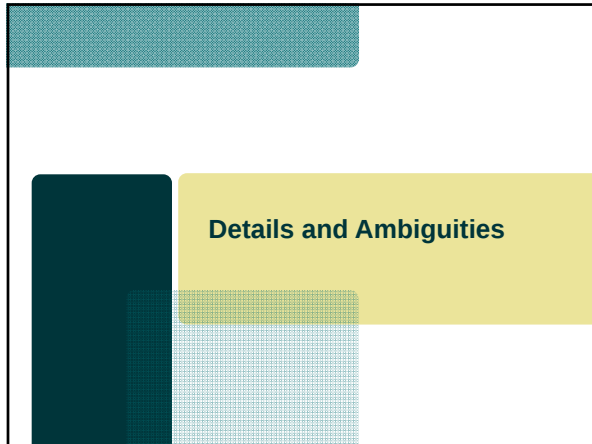
*Similar PBGC regulation requires plans undergoing termination to retain records for 6 years (29 C.F.R. §4041.5)

§209 (29 USC §1059)

- Documents necessary to determine a potential benefit
- No clear minimum amount of time
- Employers Only (Single Employer Plans)
- Multi-Employer Plans:
 - In the case of a multi-employer plan employers must furnish §209 information to the plan administrator, who is then responsible for retaining the information
 - Most CBAs grant plan right to audit employer's records; there may be a fiduciary duty argument against a plan that does not make an effort to obtain correct records from an employer

Remedies

- §107 does not specify a remedy
- §209 provides a \$10 penalty per employee for whom employer (unless a multi) did not retain records
 - Only \$10
 - Money goes to Secretary
 - What about plan itself if single employer, TPA?
- Breach of fiduciary Duty
 - *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003)
 - When plan is terminated may be only option because fiduciaries are personally liable
 - Fiduciaries have a duty to reconstruct
- **How do you calculate the benefit?**



What Documents?

1983 DOL Opinion Letter (see PC.net)

- Under §107 “or other retention requirements”
- Agreements, bank statements, checks, claim records, contractor report forms, contracts, eligibility records or reports, employee work history, employer reporting and remittance forms, individual census data, invoices, journals, ledgers, payroll information, receipts, reciprocity requests and transmittals, resolutions, vouchers and worksheets
- List is not exhaustive

But What’s Missing?

How long under §209?

- *Proposed* DOL reg 29 CFR 2530.209-(d)
 - From 1979
 - Plans should retain §209 records as long as the possibility exists that they are needed to calculate a benefit
 - Reg has never been withdrawn or finalized
 - General rule of thumb within industry
- *Dugan v. Palumbo Bros., Inc.*, 1991 WL 28206 at 4 (N.D.Ill. 1991).
 - Similar legislative history to §107 → at least 6 years

Fiduciary Duty Under §209

- 29 CFR §2509.75-8, Q&A D-4: Board members of the employer are fiduciaries if they are responsible for the functions described in ERISA §3(21)(A)
- ERISA §3(21)(A):
 - Exercises any discretionary authority or control re: plan management or any authority or control re: management or disposition of plan assets
 - Has any authority to render investment advice
 - Has any discretionary authority or responsibility for plan administration
- 29 CFR §2509.75-8, Q&A D-2: Persons who have no decision-making power but who perform administrative functions, such as *maintenance of participants' service and employment records*, are not fiduciaries

Is there a §502(a) claim?

Gordon v. Kaleida Health, 847 F.Supp.2d 479, 486 (W.D.N.Y. 2012)

- Standing in a §502(a)(3) claim for injunctive relief requires specific injury or deprivation of a right
- Claiming mere non-compliance with recordkeeping requirements is not a specific injury
- Any injury in this case would be that it deprives participant of higher benefits → monetary claim
- To have standing for a monetary claim “the asserted injury must be concrete and particularized as well as actual or imminent”
- Participants should have sued under §502(a)(1)(B) (clarify / enforce)
- §502(a)(3) claim and breach of fiduciary duty claims both dismissed

Document Mechanics

Transfers

DOL Advisory Opinion 75-58

When a party transfers records to another administrator the transferring party is no longer required to retain documents BUT it must keep a list of the records transferred.

(how long do you have to retain the list?)

Electronic Records

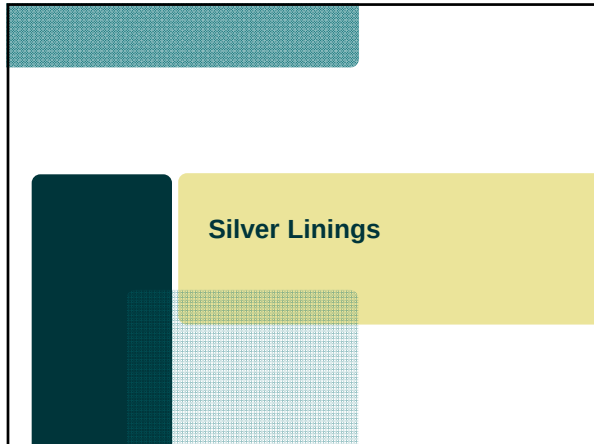
29 CFR §2520.107-1

- Where electronic copies are a duplicate, plans may use electronic copies and throw away paper originals
- Must be highly legible and must be convertible into highly legible paper documents
- System controls must ensure accuracy, integrity, authenticity and reliability
- System must index, retrieve, produce and replicate records so that they are readily available for review
- Plan must use adequate records management practices and quality assurance programs
- System specs must not hinder ERISA compliance

Duty to Reconstruct

DOL Advisory Opinion 84-19A (1984)

- TPA unintentionally destroyed records that plan was clearly required to retain under §107
- Plan fiduciaries have a **duty to reconstruct** missing documents at own expense where reasonably possible
- No duty to reconstruct where impossible or where costs are excessive or unreasonable
- Reconstruction is unnecessary where fiduciaries have access to underlying documents that can be used to reconstruct lost documents and provisions are made to maintain them



Standard of Review

Does the lack of documents give rise to a futility argument that can overcome requirement to exhaust administrative remedies?

→ *de novo* review

Medoy v. Warnaco Employees' Long Term Disability Ins. Plan, 43 F.Supp.2d 303, 309 (E.D.N.Y. 1999).

Statute of Limitations

Absence of record may make it impossible to ascertain when benefit accrued

→ Overcomes statute of limitations defense

- o *Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 594 (2nd Cir. 1993)
- o *Denton v. First Nat. Bank of Waco, Texas*, 765 F.2d 1295, 1300 (5th Cir. 1985)
- o *Fizer v. Safeway Stores*, 586 F.2d 182, 183 (10th Cir. 1978).

Reduced Ability to Defend

If the plan has not retained records it will be more difficult to defend against a claim for benefits if the participant can produce documents.

An employer that has not retained documents is more susceptible to a contributions claim from a multi-employer plan because it gives rise to doubts about whether the employer is contributing the correct amount.

Example Fact Patterns

Problem No. 1

Your client is entitled to a pension from a multi-employer plan. The plan administrator claims that your client never vested but your client knows she worked enough hours in enough years to vest. You discover that two of your client's covered employers failed to report your client's hours to the plan. One of the employers is out of business and the other employer no longer has your client's records on file.

Problem No. 1

- Is the plan liable?
 - If the plan breached fiduciary duty
- Is either employer liable?
 - Yes, both, under §209
- What remedies against the employers?
 - \$10 statutory remedy to DOL
 - Vulnerable to contributions action by plan
 - Fiduciary breach?

Problem No. 2

Your client is a deferred vested participant. Her last hour of service was many years ago. The plan has since updated its plan document and has not retained the historical plan document in place when your client left, nor does it have a corresponding SPD. Your client knows she's entitled to a benefit but has no idea how to calculate the benefit.

Problem No. 2

- Public disclosure room ???
- DOL guidance does not specifically mention plan doc/SPD
- Is the duty to reconstruct implicated?
- What if the employer is gone and you're dealing with PBGC?
- How do you calculate the benefit?

Problem No. 3

The plan has sent your retired client a recoupment notice, claiming that the plan miscalculated your client's benefit several years ago. You ask to see the original benefit calculation but the plan destroyed all its paper records when it converted to electronic file-keeping in 2000. Your client's records for some reason were never converted to electronic format and so the plan is unable to provide the original benefit calculation.

Problem No. 3

- Did the plan's electronic conversion scheme comply with the electronic retention reg?
- Was the electronic conversion delegated to non-fiduciary service provider and, if so, was selection of that provider consistent with plan's fiduciary duty?
