

# Highlights of Record Retention Requirements Applicable to Employee Benefit Plans

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# Example

- ABC Company decided to terminate the retiree medical plan for its retired employees, all of whom were union employees.
- ABC Company has three union groups covered under the plan.
- Current SPDs and plan documents state that ABC Company may amend or terminate the plan at any time and for any reason.
- ABC moved forward with terminating the plan.
- Shortly thereafter, one union member filed a claim, and eventually a class action lawsuit, arguing that ABC Company promised such plan would be provided for life.
- The retiree provided copies of collective bargaining agreements and participant communications from over 10 years prior containing language stating that retiree medical and life benefits offered to that one union group must be continued for life.
- The ensuing litigation was costly for ABC Company and resulted in a significant settlement.

HOW COULD THIS HAVE BEEN PREVENTED?

- The Employee Retirement Income Security Act of 1974 (“ERISA”) includes several specific recordkeeping requirements for employee benefit plans and a number of general requirements that imply a duty to retain records (e.g., general fiduciary duties, plan distribution requirements, COBRA requirements, and qualified medical child support requirements).
- Additionally, the Internal Revenue Code and HIPAA impose record retention requirements on benefit plans.
- ERISA Requirements
  - ERISA Section 107 contains an explicit 6-year record retention requirement concerning records relating to certain reports.
  - ERISA Section 209 requires maintenance of records sufficient to determine the benefits due to employees.
  - ERISA Section 701, as enacted under HIPAA, establishes records retention requirement for ERISA welfare benefit plans.
- Some Examples:
  - Plan and employer related documents and many government filings should generally be retained permanently
  - Many participant-related documents should be retained for at least 6 years
- Retention periods for other documents vary greatly and special rules may apply – always a good idea to check and establish a record retention policy

- *Estate of Barton* (2016)
  - Suggests that when an employee proves a prima facie case of entitlement to a benefit, the burden then falls on the employer to prove otherwise.
- *Brick Masons Pension Trust* (citing *Combs*) (1987)
  - ERISA imposes a duty upon employers to maintain records of the number of hours worked by employees adequate to permit trustees to determine the accuracy of the employer's contributions; and second, that once the trustees produce evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed.
- DOL Opinion Letter 79-71A
  - A plan administrator may transfer retained records to a successor if the successor agrees to maintain records in a manner that would have been required by the predecessor.
- DOL Opinion Letter 82-40A
  - A plan administrator's retention of an auditor's recapitulations that were used in preparing a plan's annual reports does not satisfy ERISA § 107.

- At a minimum, a record retention policy should:
  - Apply industry best practices rather than just legal minimums
  - Require that employees suspend all disposal procedures during a litigation hold.
  - Identify who employees should contact if they are unsure whether to dispose of a certain record.
  - Include a records retention schedule.
  - State that the employer may at any time audit employee files and e-mail inboxes to ensure that employees are retaining and discarding records consistently with the company's policy.

- Establish and follow a record retention policy
- Many benefit records should be maintained indefinitely
- Special considerations may apply in a plan freeze, corporate acquisition, and record keeper transition
- Despite periods set forth in applicable law, it may be desirable to save records for prior periods to defend against plan benefit and fiduciary claims
- Applicable penalties vary based on the type of information at issue and the law governing that information

Questions?

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**Any Questions?**

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