



To Purge, or Not to Purge, That Is the Question

By Alison J. Cohen

Company BBC has been unfortunate enough to become the subject of an Internal Revenue Service ("IRS") examination. During the course of the exam, the IRS discovers some operational issues that cause the exam to be expanded back to 2014. Villanelle, the new Human Resources director, has been searching high and low for plan documents covering the 2014 – 2015 plan years. Unable to locate the documents, she contacts the plan's service provider/payroll company, only to learn that it purges its files after each restatement, as it is only a ministerial third-party administrator ("TPA") and leaves it up to the plan sponsor to meet any document retention obligations under the Employee Retirement Income Security Act of 1974 ("ERISA") and/or the Internal Revenue Code (the "Code"). Villanelle's predecessor, Eve, kept the office clean. A little too clean. She, too, purged records periodically, regardless of what the legal retention standards were. Villanelle could just kill Eve!!

How Do We Know What to Keep?

Record retention rules are found in both the Department of Labor ("DOL") Regulations and the Employee Retirement Income Security Act of 1974, plus there are statutes of limitation concerns in relation to plan sponsor liability for just about everything administrative in a retirement plan. While most plans have policies for loans, investments, and qualified domestic relations orders, very few plan sponsors seem to have a record retention policy to provide guidance on what to retain, what to purge, and when to do it all. Depending on the document category, there are different standards for how long documents need to be kept.

Retention Rules for Plan-Level Documentation

ERISA provides that the following documents must be retained for at least six years from the date the Form 5500 filing is due:[1]

- Form 5500 filings and all associated Schedules
- Financial reports
- Audited financial statements
- Vouchers

- Worksheets
- Receipts
- Annual Valuations – including participant balances
- Annual Trust Reports from the asset custodian
- Annual Nondiscrimination Testing (ADP/ACP, etc.)
- All participant notices (safe harbor, auto enrollment, QDIA, Summary Annual Reports, participant fee disclosure, black-out notices, etc.)

Retention Rules for Participant-Level Documentation

The following participant documents must be retained indefinitely.^[2]

- Date of hire, rehire, and termination
- Participant eligibility date
- Participant compensation
- Participant participation (deferral) election form
- Contribution election forms
- Participant's designated beneficiary form
- Records of any distribution requested and/or received by the participant
- Rollover requests
- Qualified Domestic Relations Orders
- Plan loan documentation

Furthermore, the plan sponsor must indefinitely retain records sufficient to permit benefits due or which may become due to a participant to be determined or “proved.”

Retention Rules for Plan Documents

Plan documents must be kept throughout the life of the plan,^[3] as they are needed to determine the calculation of a participant's benefit, as noted above. This means that **all** plan documents, amendments, interim amendments, restatements, loan policies, QDRO policies, etc., must be retained, starting with the inception of the plan, even after they have been superseded. This becomes particularly relevant now that we're coming up on the Tricycle Restatement. If you are a TPA or other service provider that supplies plan documents, it would be very valuable to remind your clients of the importance of retaining the prior plan document and all prior amendments.

Just having the documents is nice, but it's very important that the documents are appropriately adopted and signed. It is not uncommon for everyone involved in a plan to just file unsigned documents away without making sure that they are fully executed. While unsigned documents are helpful in proving that intended actions took place for the plan, it is still a failure as to form if they aren't signed and dated.

Additionally, the following documents should be retained in the employer's Plan Document Folder, as they will be the first items requested by the IRS for an examination or audit (and the DOL for an investigation):

- Summary Plan Description
- Modifications to the Summary Plan Description (also called a “Summary of Material Modifications”)
- Corporate Actions – minutes, agendas, handouts from meetings, etc.
- Service Agreements with service providers
- Fidelity Bonds

- Fee Disclosures required under ERISA § 408(b)(2)

However, thanks to the statute of limitations on participant lawsuits for benefits or fiduciary breaches of duty, these records may be purged seven years following the full termination and distribution of all plan assets.

And, It's Important For Other Reasons, Too

In addition to having documents available if the government agencies review the plan, the plan sponsor (and the plan's service providers) must remember that there is always a potential lawsuit in the background. If such a concern should arise, having the legal documents surrounding the plan, as well as the facts about a participant's employment, compensation, and benefits earned and paid, can make a big difference to the ability to defend the plan sponsor's position.

In the "olden" days, purging paper was critical to maintaining a neat workplace and reducing storage costs. Nowadays, the cost of keeping virtual copies in the cloud or on disk is vastly outweighed by the risk reduction that having these items provides. Scan it, store it, and forget it until it's needed.

What Are the Consequences of Missing Documents?

For our friend, Villanelle, the consequences could be dire. If she has no proof that the plan was timely adopted (or restated), and she has no proof that how the plan was administered matches the terms of the document, the IRS examination could be very unpleasant and result in substantial sanctions and IRS-dictated corrections. Eve's routine of purging the files of the plan documents and records could be the death of the company. Developing a record retention policy is a good first step and Ferenczy Benefits Law Center can help you with that.

If this bad practice is caught before the IRS steps in, missed plan documents can be corrected through the Employee Plans Correction Resolution System. More about this process in another Solution, but know that missing plan documents don't have to be fatal.

[1] ERISA § 107.

[2] ERISA § 209.

[3] ERISA § 209.



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