

March 25, 2013

Susan Rees
Chief, Division of Coverage, Reporting and Disclosure
US Department of Labor, Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Ave. NW, Rm. N-5669
Washington, DC 20210

Re: Retention of historical summary plan descriptions

Dear Ms. Rees,

We are following up on a letter that we sent to the Employee Benefit Security Administration (EBSA) on February 8, 2013, in which we requested that EBSA retain its extensive archive of summary plan descriptions (SPDs) collected between 1976 and 1997. The Pension Rights Center is a consumer organization dedicated to protecting and promoting the retirement security of American workers and their families. The Center believes that the SPD collection is still of great value for pension plan participants and beneficiaries, and, for that reason, EBSA should continue to maintain as much of the collection as possible. However, because it appears EBSA is proceeding with its plan to dispose of the documents, we also ask that EBSA act to minimize the potential harm to plan participants and beneficiaries by issuing guidance clarifying the remedies available when plans fail to retain plan documents as required under §209 of the Employee Retirement Income Security Act (ERISA).

EBSA could retain part of the collection

The existing SPD collection covers plan years from 1975 through 1997. From 1975 until 1991, the documents were collected and stored in microfiche. The microfiche portion of the collection is currently housed in 23 filing cabinets at the EBSA public disclosure room at the U.S. Department of Labor Frances Perkins building in Washington, D.C. Documents collected from 1991 through 1997 were collected in paper form, filling 7,000 boxes housed in an off-site warehouse in Virginia. It is our understanding that EBSA has obtained a legal opinion granting it permission to dispose of the entire collection and that, under the opinion, EBSA may not “bifurcate the collection based on medium” and thereby keep only a part of the collection. Essentially all must be disposed of or all must be retained. We recognize that the financial burden of holding the paper documents in the off-site location is far greater than the burden of holding the microfiche portion of the collection, and we request that EBSA seek clarification of the original legal opinion with respect to keeping only the microfiche portion of the collection. The microfiche covers 16 years as opposed to the paper documents, which cover only five years. Furthermore the microfiche represents the oldest part of the collection, which contains the documents that are more likely to be missing from a plan sponsor’s records.

Regulatory guidance is necessary to clarify remedies under ERISA §209

In order to correctly calculate a benefit, plans must use the plan rules that were in effect during a participant’s last hour of credited service. ERISA §209 requires employers to retain indefinitely records sufficient to determine the benefits to which employees are or may become entitled. It imposes a \$10 per employee penalty on employers that fail to properly retain records but does not provide a sufficient remedy for participants who experience problems calculating and verifying

benefit amounts or eligibility as a result of missing documents. The Center and the U.S. Administration on Aging's Pension Counseling and Information Projects have represented numerous individuals who were harmed after a plan's failure to produce the correct documents led to difficulties in verifying entitlement to benefits and correct benefit calculations. When plans fail to archive plan rules that were in effect at the time of a participant's last hour of service they effectively shift the burden of proof to the participants to establish an entitlement to a benefit. The problem is most prevalent for deferred vested participants who apply for benefits several years after their last hour of service.

In our letter dated February 8, 2013, we gave an example of a client assisted by the New England Pension Assistance Project, whose employer terminated its plan and purchased annuities for its participants from a third party. Despite being fully vested, this participant had never received an annuity, and so the participant filed a claim with the Pension Benefit Guaranty Corporation (PBGC). The PBGC could not calculate and pay the benefit, however, without access to documentation of the plan rules in place when the participant left employment. The participant was able to use a 1981 SPD that had been filed in EBSA's archive. Without the historical SPD the participant may never have been able to obtain the benefit to which she was entitled.

Finally, much of the SPD collection's value stems from the fact that it may be the only source of information about the plan rules in place when a deferred vested participant left employment. Its loss will be less harmful to participants if EBSA provides administrative guidance clarifying the remedies available under §209 if a plan is unable to produce the documents necessary to calculate a benefit, and/or how a deferred vested participant's benefits must be calculated if the relevant historical plan rules can't be determined. Without new administrative guidance, a participant's only option will be to bring a lawsuit against the plan alleging a breach of fiduciary duty. Such a lawsuit would be a difficult avenue for individuals to pursue and impossible in the case of terminated plans.

Conclusion

We therefore request that EBSA retain its SPD collection, or at least the portion of the collection stored in microfiche until it issues further guidance under ERISA § 209. In addition we will make a request of the PBGC that, in the future, it require all standard terminations of pension plans to provide the PBGC with all current and past plan documents so that the agency may properly insure the benefits for deferred vested and forgotten participants.

Thank you very much for your time and for your continued consideration of this matter. Please let us know if we can provide any assistance or further information. We would welcome the opportunity to work with EBSA to brainstorm solutions that guarantee participants the continued ability to calculate their benefits based on historical plan rules.

Sincerely,



Rebecca Davis
Legal Director



Emily Spreiser
Staff Attorney