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Retention of Plan Records – ERISA Requirements

ERISA §107

Every person subject to a requirement to file any report . . . shall maintain a copy of such report and records on the matters of which disclosure is required . . . and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain . . .

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Retention of Plan Records – ERISA Requirements

ERISA §209

(a)(1) . . . every employer shall, in accordance with such regulations as the Secretary may prescribe, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

(b) If any person who is required, under subsection (a), to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

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Presentation Focus – Retirement Plans that are:

- Small plans, i.e., under $50 million in assets
- Individual account (defined contribution) plans
- Sponsored by companies that are closely held

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What records in an individual account plan are "sufficient to determine the benefits due or which may become due to such employees?"

- Basic personal information
  - Participant name, social security number, birth date
  - Marital status – if married, spouse name, social security number
  - Location – home address, contact information

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- Employment Information
  - Date of hire
  - Date of termination
  - Employee classification – hourly, salaried, seasonal, other
  - Employment service information
  - Compensation (consistent with plan definition)

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- Plan information
  - Plan entry date
  - Deferral election (date, amount, sources)
  - Contributions – amounts and when, nature: employer or employee (source codes)
  - Earnings
  - Distributions – when, amounts, reason: termination, hardship, loan, QDRO

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Who actually retains the information that is "sufficient to determine the benefits due"?

- Employer will have –
  - ✓ Basic personal information
  - ✓ Employment information
- Generally does not have –
  - ✓ Plan information

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Who actually retains the information that is "sufficient to determine the benefits due"?

- Plan recordkeeper will have
  - ✓ Plan information
- Record keeper often also has –
  - ✓ Basic personal information
  - ✓ Employment information

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Many small employers utilize employee leasing companies to handle their payroll and employment records.

Employee leasing companies often act as sponsors of individual account plans in which their clients are participating employers.

The existence of these multiple employer plans – sometimes referred to as MEPs or PEPs – raise separate and unique issues about their operation and the corresponding fiduciary responsibility for recordkeeping and record retention. Those issues are not covered in this presentation.

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What plan information detail is "sufficient to determine the benefits due"?

- "Detail," in addition to the information listed above, could include –
  - ✓ Every deferral election and every election change
  - ✓ Every paycheck reflecting a deferral amount
  - ✓ Every employer contribution – date and amount allocated to each account
  - ✓ Every employee investment election and change
  - ✓ Every record of investment earnings – for plans that treat every business day as a valuation date (common), this is a record of daily earnings
- Summaries of detail good enough? If so, monthly, quarterly, annually?

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When account "detail" might be needed –

- To determine the benefit payable to an alternate payee under a QDRO
- To determine which accounts may be accessed (and in what amounts) for a distribution
- To determine the exact amount of a "restorative payment"

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Transfers of Plan Records Between Recordkeepers

ERISA §208

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

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ERISA §101(i)

In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection. . . . (i)(7)(A) The term “blackout period” means, in connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days.

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- Plan mergers, spin-offs, transfers or any event which moves the investment funds in an individual account plan to new a new recordkeeper and different investment funds will require compliance with ERISA §§101(i) and 208.
- Except as may be necessary to confirm compliance by a plan administrator with both sections, neither section requires any specific form of record retention.
- The only plan and employee information required to be transferred in connection with a merger or spin-off is current account balance information.

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- Plan and employee information is not required to be transferred under ERISA in connection with a transfer of plan assets to a new trustee or recordkeeper, except to the extent it is needed to confirm compliance with blackout rules, i.e., ERISA §208 does not apply.
- Neither section requires the transfer of historical data or information about the Plan or employees who are participants therein.
- ERISA §209 does impact the information transfer between recordkeepers – the Employer must still be able to access information sufficient to determine benefits after the transfer.
- Common industry practice – once funds have been transferred and receipt confirmed, the former recordkeeper purges its system.

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Former recordkeepers may, but are not required to maintain prior records. There is no incentive to do so. They are not paid for maintenance of prior records and prior records take up space on their systems.

Prior records may show errors – which the prior recordkeeper has no interest in disclosing.

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Transfer of records between recordkeepers raises numerous issues –

- Former recordkeepers often charge additional fees to assist in the transfer of their records to a new recordkeeper.
- The former recordkeeper may have maintained data and information using “proprietary” software. There is often no contractual provision requiring conversion to a usable format.
- Even if conversion can be accomplished, there is rarely any assurance offered that the information transmitted will be accurately received.
- The new recordkeeper’s system may not be set up to accept historical data.

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ADDENDA

The material that follows is provided as a supplement to the preceding discussion. It begins with a brief explanation of the market conditions which smaller employers face when hiring recordkeepers for their plans. After that is a listing of contract provisions that deal with records retention, plan transfers, fiduciary status (or lack thereof) applicable to recordkeepers and finally, remedy remedies.

As noted, this information generally applies to plans with assets under $50 million. While the number of participants in some such plans may exceed 100, thus requiring an auditor's report with the annual (Form 5500) filing, many small plans on the lower end of the asset spectrum (a few thousand dollars up to $10 million) will rarely have that number of participants.

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Small plan sponsors who establish a retirement plan for their employees[1] often have little or no experience – and no knowledge – of how retirement plans work or operate. The focus of these business owners is foremost to cover their business expenses and, hopefully, make a profit. Company-sponsored benefit programs for these employers (typically limited to some form of health insurance contract and a cookie-cutter style 401(k) plan) are often viewed, and treated, as a necessary cost of running the business and attracting and keeping competent employees.

[1] I exclude here plans that operate as IRA custodial arrangements under Internal Revenue Code Section 408 – SEPs, Simples and the like.

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Most such companies will often have no formal human resources department or representative. It is the owner, business manager or person in care of company finances who is tasked with establishing the retirement plan and obtaining outside assistance in its operation. These companies have little or no bargaining power when contracting with retirement plan recordkeepers.

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Small plan recordkeepers often provide a “complete” package of retirement services – plan documentation, recordkeeping, employee enrollment and education, as well as trustee or custodial and investment advisor services. The documentation presented to the company in these circumstances is pre-formatted. Plan and trust agreements are pre-printed form documents that have received advance approval through the IRS’s pre-approved plan documents program. They consist of a “check the box” Adoption Agreement that can be anywhere from a half-dozen to 50 or more pages and a Basic Plan document that includes unchangeable plan terms. Basic Plan documents can be 100 pages or more of small print. They are very rarely reviewed or read and often not even provided unless specially requested (usually only when a problem has arisen).

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An administrative services agreement, along with related documents, such as a trust or custodial agreement and an investment advisor contract (also pre-printed forms) defines the relationship between the company as plan sponsor and the service provider who will handle all aspects of the plan operations. When larger recordkeepers are involved the company's contact may be limited to an account representative or someone with only minimal ERISA experience who works from a pre-determined script. This is especially so when plan asset size is smaller. My experience indicates that these contracts are signed without question or comment. Input on behalf of the company from qualified legal counsel is non-existent.

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The following excerpted contract terms (all de-identified) are taken directly from service provider contracts furnished by companies engaging in employee benefit plan record keeping. These are contracts used primarily for small plans – as noted, plans that generally hold less than $50 million in assets. Some may have more than 100 participants.

The contract provisions (Contracts A through I) are grouped into four subject categories – (i) records retention, (ii) record keeper transition, (iii) fiduciary status of the record keeper and (iv) remedies against the recordkeeper for service failures. Not every contract includes provisions addressing each of these issues.

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Provisions addressing Retention of Plan Records

CONTRACT A

Recordkeeper [RK] “agrees to retain all Plan and Participant account records that reside on [RK’s system] and are necessary to determine benefits under the Plan until the earlier of the termination of (i) this Agreement, or (ii) the Plan.”

[RK] “shall retain records of the Services in accordance with [RK’s] record retention policy or such longer period as may be required of [RK] under applicable law or industry or government regulations. Notwithstanding the foregoing, upon expiration or termination of the Agreement, [RK] may retain a copy of all Plan records residing on its backup and recordkeeping systems necessary for it to fulfill its legal or regulatory obligations.”

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CONTRACT B

"[RK] shall have the right, but not the obligation, to retain copies of all or part of such (Plan) records."

CONTRACT C

No provisions addressing records retention, either during the engagement or after.

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CONTRACT D

Note – DB plan; contract includes actuarial services. "[RK] will retain our records and data for no more than 6 years following the year of the final distribution for a terminated plan, and no more than 3 years following the year in which our services are terminated for any reason other than plan termination. . . The cost for retrieving, copying and transmitting such records will be billed at our usual and customary rates at that time."

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CONTRACT E

Note – DB plan; contract includes actuarial services. "The [RK] acknowledges that it is responsible for the safety and confidentiality of any and all information and data about the Company, the Participants and their beneficiaries, and/or the Plan(s) which may come into the [RK's] possession . . ." No other provisions addressing records retention, either during the engagement or after.

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CONTRACT F

No provisions addressing records retention, either during the engagement or after.

CONTRACT G

No provisions addressing records retention, either during the engagement or after.

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CONTRACT H

"[RK] maintains Plan contribution, investment, location, and Participant information. Where applicable, [RK] maintains historical Participant information including compensation and service history."

CONTRACT I

No provisions addressing records retention, either during the engagement or after.

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Provisions Addressing the Transfer of Records to a Different Recordkeeper

CONTRACT A

"Upon expiration or termination of this Agreement [RK] will transfer in a reasonable time frame all records necessary to install the Plan's records with a successor recordkeeper in accordance with the Plan Administrator's reasonable directions. [RK] will be responsible for ensuring that all such transferred records may be retrieved and used by the Plan Administrator, or its representative, in a format reasonably available to the Plan Administrator under available technology in the industry at the time of transfer."

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CONTRACT B

"Upon termination of the Agreement, [RK] shall deliver all records on the Plan to Plan Administrator or to successor service providers upon instruction by notice from Plan Administrator, except as follows. [RK] shall have the right, but not the obligation, to retain copies of all or part of such records. [RK's] services performed in connection with the transfer of records upon termination of either this Agreement or [RK's] services shall be an additional consulting service for which it may charge fees . . ."

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CONTRACT C

No provision addressing transfer of records.

CONTRACT D

Note – DB plan; contract includes actuarial services. No provision addressing transfer of records.

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Recordkeeping in the Electronic Age

CONTRACT E

Note – DB plan; contract includes actuarial services. "Upon termination of this Agreement and request by the Company, [RK] shall return to the Company, within 60 days, all such data files and records in an orderly fashion, assuming all fees and costs due [RK] have been paid. For records that are maintained in electronic form, the [RK] will make available to the Company all underlying data files and records in a reasonably convertible electronic format promptly following any termination of this Agreement."

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CONTRACT F

No provision addressing transfer of records.

CONTRACT G

“Upon receipt of notice that the Employer desires to terminate this Agreement, [RK] will cooperate with the Employer and Plan Administrator to accomplish the termination of this Agreement and the transfer of account records by the termination date designated by the Employer. [RK] will transfer the account records as directed in writing by the Employer once the Employer provides the documents reasonably requested by [RK] in connection with the termination of this Agreement . . .”

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CONTRACT H

"[RK] will provide a final accounting with regard to Transfers. This will show the Transfer and the effect of the Transfer. [RK] will not be responsible for providing any Services with regard to amounts Transferred to a Successor. The final accounting will be provided in a reasonable time period after the Transfer occurs."

CONTRACT I

No provision addressing transfer of records.

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Provisions Addressing Recordkeeper Fiduciary Status

CONTRACT A

"[RK] by performing its duties under this Agreement shall not be a fiduciary within the meaning of ERISA . . . [RK] shall not have or exercise any discretion with respect to the management and administration of the Plan . . ."

CONTRACT B

"The services performed under this Agreement shall not make [RK] or any . . . officers, employees, affiliates and agents the 'administrator,' the 'plan sponsor' or a 'fiduciary' of the Plan . . ."

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Recordkeeping in the Electronic Age

CONTRACT C

"[RK] is not acting as a fiduciary of the Plan as defined in ERISA §(3)(16)(A)." "[RK] has no discretion or responsibility to any participant under the Plan, or to take any other action with respect to the management or administration of the Plan."

CONTRACT D

"This Agreement is not intended to benefit or to create a contractual obligation or fiduciary relationship between [RK] and any retirement plan of the Plan sponsor or any participant or beneficiary of such plan."

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Recordkeeping in the Electronic Age

CONTRACT E

"[RK] is not a fiduciary with respect to this engagement and shall not exercise any discretionary authority or control over the Plan's assets, or with respect to the Plan's terms."

CONTRACT F

"Sponsor hereby authorizes and appoints [RK] as the sole and end exclusive Plan administrator with the meaning of section 3(16) of ERISA and [RK] accepts such appointment . . . [RK] shall have the power and authority to determine services it will not render to the Plan."

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CONTRACT G

"[RK] shall perform the Services consistent with the terms of the applicable Plan and Trust and in accordance with the provisions of the Internal Revenue Code of 1986, as amended, (the "Code") and the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") but will not be considered the Plan Administrator or Employer under the Plan or within the meaning of ERISA Section 3(16), will have no discretionary authority over the Plan and no discretionary authority over the administration of Plan assets and will not act as a Plan fiduciary."

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Recordkeeping in the Electronic Age

CONTRACT H

"Nothing in this Agreement, nor in the provision of Services, makes [RK] a party to, or a fiduciary or administrator regarding, the Plan or any Plan Entity."

CONTRACT I

"[RK] shall have no discretion or authority with respect to the investment of the Plan assets but shall act solely as a directed Trustee of the contributed funds." (No separate reference to status for recordkeeping services).

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Provisions Addressing Remedies Against the Recordkeeper for Service Failures

CONTRACT A

"No party to this Agreement shall be liable to any other party (or to any person claiming rights derived from the rights of another party) in contract, tort (including negligence) or otherwise, for incidental, consequential, special, punitive or exemplary damages of any kind, including lost profits, loss of business, or other economic damage . . . as a result of a breach of any warranty or other term of this Agreement, including any failure of performance . . ."

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Recordkeeping in the Electronic Age

CONTRACT B

“Sponsor shall indemnify and hold harmless [RK] and . . . [its] officers, employees, affiliates, and agents, from and against any claim, loss, liability or expense incurred in connection with performance of services under this Agreement if the party being indemnified and held harmless has satisfied the standard of care [reasonable recordkeeper/third party administrator]. . . . Sponsor’s obligation shall survive termination of this Agreement.”

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Recordkeeping in the Electronic Age

CONTRACT C

“. . . except as otherwise required by ERISA, in no event shall [RK] be liable for any indirect, special, consequential or exemplary damage with respect to its Services.”

CONTRACT D

“[RK] will not audit nor be responsible for the completeness or accuracy of any work relating to plan years prior to which this Agreement applies. . . . [RK] will not be responsible for any errors stemming from reliance upon [prior work] . . .”

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CONTRACT E

"In the event [RK] or its agent or employee makes a mistake or error, [RK] shall be fully liable for all monetary damages attributable to its mistakes or errors and those of its agents or employees. . . . Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be resolved by arbitration. . . . no controversy or claim shall be submitted for arbitration without first being submitted to mediation . . . ."

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CONTRACT F

"To the extent permitted by applicable law, Sponsor's exclusive remedy for [RK's] failure to adequately perform any of the services, functions, or obligations set forth herein will be to have [RK] make a second attempt to perform or perfect the services. If [RK] fails . . . Sponsor will be entitled to recover the fees paid to [RK] for deficient services. . . .The foregoing states [RK's] entire liability for breach of this Agreement except where otherwise provided by law."

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CONTRACT G

"[RK] agrees to indemnify, hold harmless and defend the Employer and Plan Administrator and their officers, directors, employees, agents, representatives and affiliates, and their respective successors and assigns, from and against any and all Loss arising out of or relating to any breach of [RK's] responsibilities under this Agreement that are found to constitute negligence or willful misconduct and such breach is not caused by or related to the action or failure to act of any other party."

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CONTRACT H

"[RK] will not be liable with regard to any performance, failure to perform, or partial performance of, a Service when [RK] is acting based on incomplete, or inaccurate information. . . . [RK] is only obligated to provide Services and nothing more."

"If the parties cannot resolve a dispute in the ordinary course of business . . . the parties will . . . initiate the mediation process . . . if the dispute remains unresolved for any reason after the completion of the mediation process, the parties will proceed to arbitration."

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CONTRACT I

“The Employer shall indemnify [RK] against, and hold [RK] harmless from, any and all liabilities, losses, costs or expenses (including reasonable legal fees and expenses) of whatsoever kind and nature (‘Losses’) that may be incurred by, imposed upon, or asserted against [RK] at any time related to any act done or omitted to be done by any individual or person with respect to [RK’s] carrying out its responsibilities under this Agreement, except to the extent that such Losses are attributed to the negligence, willful misconduct or breach of the terms of this Agreement by [RK] or any of its subsidiaries or affiliates. . .”

“[RK] shall indemnify he Employer against, and hold the Employer harmless from, any and all Losses that may be incurred by, imposed upon, or asserted against the Employer to the extent that such Losses result from the negligence, willful misconduct or breach of the terms of this Agreement by [RK] or any of its subsidiaries or affiliates.”