



September 21, 2023

Via email to Donahue.Christine@dol.gov

Holly Verdeyen, Issue Group Chair
c/o Christine Donahue, Designated Federal Officer
Employee Benefits Security Administration
Advisory Council on Employee Welfare and Pension Benefit Plans
Washington, D.C. 20210

Re: Recordkeeping in the Electronic Age

Dear Ms. Verdeyen:

Thank you for the invitation to submit a written statement and provide testimony to the ERISA Advisory Council (“Council”) to assist in the Council’s examination of “the implications of employee benefit plans’ shift to electronic/digital recordkeeping for compliance with ERISA’s record retention requirements and related matters.” As a Third Party Administrator (“TPA”) to multiemployer pension and welfare benefit plans, National Employee Benefits Administrators, Inc. (“NEBA”) is a ship in the ocean as we “switch from sails to steam.”¹

The shift towards electronic benefit plan recordkeeping raises the question whether changes in how benefit plan data and information is used and maintained require changes in benefit plan recordkeeping standards to accommodate the shift. Current law and regulations describe the type of documents and records that plans must maintain² and set forth certain standards for using electronic media to satisfy welfare and pension benefit plan record retention requirements.³ Standards for use of electronic media focus on the reliability, accessibility, and integrity of electronic recordkeeping.

We understand that the Council is determining whether additional guidance would be beneficial regarding the retention, authenticity, reliability, and security of electronic records used and

¹ From the lyrics of “A Pirate Looks at Forty” by the late Jimmy Buffett.

² See ERISA §107, 29 U.S.C. §1027 (describing types of records that must be maintained relating to required reports and disclosures); ERISA §209, 29 U.S.C. §1059 (describing recordkeeping requirements relating to benefits due to employees).

³ 29 C.F.R. §107-1 (“Use of electronic media for maintenance and retention of records”).

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maintained in benefit plan administration. We hope that our insight is useful to the Council as you conduct this inquiry.

INTRODUCTION TO NEBA

NEBA is located in Pembroke Pines, FL and has been providing TPA services to multiemployer pension and welfare benefit plans across the United States since 1994. Ms. Karin Peters first joined NEBA as a college intern and rose through the company to become NEBA's co-owner, President, and CEO. Ms. Ivelisse Berio LeBeau is NEBA's General Counsel.⁴

NEBA's plan clients are exclusively collectively bargained and primarily multiemployer. NEBA provides TPA services to both welfare and pension plans; both fully insured and self-funded health plans; both defined benefit and defined contribution retirement plans. Our clients vary in size, geographic location, and industry.

This statement and our testimony are based on our personal experience providing services to multiemployer plan clients. We are focusing on the inquiry at hand—electronic recordkeeping for ERISA benefit plans—and not on related topics such as cyber security, cyber security controls, cyber threats, or SOC audits.

NEBA'S SERVICES TO MULTIEMPLOYER PLAN CLIENTS

Multiemployer plans are, by definition, collectively bargained with more than one employer obligated under the terms of a collective bargaining agreement to make contributions to provide employee benefits. Each plan has a Board of Trustees, comprised of equal numbers of union and employer representatives, which serves as the Plan Sponsor, Plan Administrator, and typically Named Fiduciary. Each plan also has a dedicated trust fund to hold employer contributions for the exclusive purpose of providing employee benefits. Each board is tasked with managing the trust fund and developing a plan of employee benefits.

NEBA is hired by a plan's Board of Trustees to provide TPA services, including services unique to multiemployer plans, such as receiving and processing reports of covered employee work hours and employer contributions. NEBA maintains administrative records relating to the services it provides and as requested by clients.

⁴ Ms. Berio LeBeau previously served as a Trial Attorney in the Office of the Solicitor for the U.S. Department of Labor where she primarily worked with EBSA, and has more than 15 years of private practice experience serving as Fund Counsel to multiemployer benefit plans and representing benefit plan fiduciaries, participants, sponsors, and service providers.

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NEBA holds a plan's records and information for the sole purpose of benefit plan administration. NEBA has no other relationship with plan participants, contributing employers, unions, or plan trustees.

NEBA typically receives plan related documents and information in both paper and electronic forms and from different sources, including plan trustees, plan participants, and other plan service providers.⁵ NEBA also creates and maintains certain records in connection with providing administrative services. NEBA's services are predominately ministerial.

Multiemployer plan TPAs are not the only plan service providers that hold plan records or information. Each plan typically has different advisors, such as legal, accounting, actuarial, or consulting firms. Other plan service providers may receive, create, and/or maintain plan related information or documents that are not provided to NEBA for maintenance. Plans also receive services from financial institutions that receive, create, and/or maintain plan related documents and information. This statement and our testimony are about the types of records that NEBA maintains in connection with providing TPA services.

SHIFT TO ELECTRONIC RECORDKEEPING FOR HEALTH PLANS AND RETIREMENT INCOME PLANS

There are many distinct aspects of benefit plan administration, including, broadly speaking, plan governance, benefit claim administration, and financial recordkeeping;⁶ each aspect involves distinct functions and each utilizes different types of electronic and non-electronic records.

In particular, benefit claim administration is heavily dependent on the use of electronic records, but electronic records are created and used differently for administering health benefits and retirement benefits. Electronic and non-electronic records are also used differently in connection with plan governance functions.

Applicable law and regulations do not distinguish between recordkeeping for health and retirement plans or provide guidance on maintaining records for different plan administration functions. Accordingly, we suggest that the Council consider how any recommended guidance for electronic recordkeeping would apply to different types of benefit plans and plan administration functions,

⁵ NEBA does not typically review documents or information received from third party sources for accuracy or completeness; a TPA would not have the information or expertise needed to do so, and such a review is generally not within typical administrative services.

⁶ This statement and our testimony focus on records relating to plan governance and benefit claim administration and not financial recordkeeping or similar services. Broadly speaking, however, many of the issues discussed regarding electronic databases used in claims administration also apply to similar electronic accounting databases.

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and whether there should be different electronic recordkeeping guidance for welfare and retirement income plans.

Health Plans

Unlike retirement plans, health plans are covered by HIPAA, which sets forth requirements for privacy, security, and transmission of electronically stored protected health information. Moreover, health plan claims information is primarily maintained electronically with standardized industry practices for creation, maintenance, and transmission among health care providers, insurance companies, and claims payers such as TPAs.

Also unlike retirement plans, health plan eligibility is short term, typically measured in months, not years, and typically involving current employees. Claims activity is high volume and occurs daily; participants may have many claims in any given year or any given day or may have no claims at all. Dependents are typically eligible for similar benefits as employees or covered retirees. Eligibility information is necessarily maintained and accessed electronically to facilitate effective claims administration under applicable standards.

Health plan claims administration also requires multiple service providers providing related services, including health professionals, hospitals and similar facilities, insurance companies, pharmacy benefit managers, consultants, and administrators.⁷

NEBA maintains electronic records on health plan eligibility and benefits in an electronic database for use with benefit administration software, as discussed further below. Effective health plan administration requires frequent access and exchange of electronically stored eligibility and claims information among different types of service providers, and there are legal and industry standards in place for creating, storing, and transmitting this type of electronic information.

While health claim administration necessarily uses electronic records under established industry practice, there are other aspects of health plan administration that utilize paper and electronic records similar to paper.⁸

⁷ For example, multiemployer health plans often provide benefits in partnership with insurance companies. Health plans are typically either fully insured through health insurance policies, or self-funded, where claims are paid using trust assets. Claims under self-funded plans can be administered by insurance companies or can be administered by TPAs or fund offices. Electronic health plan claims and eligibility records are thus maintained by different providers according to the services provided, roles performed, and the nature of funding and administration arrangements.

⁸ For example, the Centers for Medicare and Medicaid Services regularly communicate with NEBA using paper mail or via fax, and responses are sent by mail to P.O. boxes.

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Retirement Income Plans

Unlike health plans, retirement plans have long term recordkeeping needs. Participants are typically not eligible for benefits until retirement age, and eligibility is typically based on work over the course of a person's career. Participants apply for benefits only at retirement; dependent benefits are secondary.

There are no federal standards or established industry practices for creating, maintaining, or transmitting data or information for retirement income plans. Retirement plan administration, however, does not typically require frequent transmission between providers like health plan administration does.

Defined Benefit Plans

Most of NEBA's retirement plan clients are collectively bargained defined benefit plans, where eligibility is based on work performed over the course of a career and benefits are paid out of trust fund assets. NEBA receives and maintains information necessary for determining eligibility for retirement benefits and making benefit payments from two key sources: 1) employer contribution and work reports and 2) participant personal information.

Defined benefit plan records have historically been maintained in hard copy. Employers would send contribution checks and work reports by mail, creating paper records. While many paper records still exist, payments are now often made by electronic fund transfers and work reports are often submitted on electronically created documents, such as Excel sheets, or through online portals.⁹ Collective bargaining agreements may allow or require electronic submission of contributions or work reports.

Participants have also historically submitted personal information on paper, such as in benefit applications, and plans have historical records in hard copy. There is also a trend towards allowing participants to submit information and upload documents electronically using email or online portals.¹⁰

On a practical level, however, the means used to provide information, whether paper or electronic, is less important than the information itself. Regardless of source media, participant personal information, work history, and contributions details are all loaded into electronic databases and the

⁹ Not all employers, however, have the experience and knowledge necessary to use these types of electronic tools, and some employers continue to submit some materials on paper.

¹⁰ Not all participants, however, have the experience and knowledge necessary to use these types of electronic tools, and many continue to prefer using paper documents.

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electronic records are used in benefit administration software to administer and pay pension benefits, as discussed further below.

Defined Contribution Plans

NEBA also administers multiemployer defined contribution plans. NEBA can independently administer defined contribution plans with pooled investments.¹¹ We receive similar electronic and non-electronic documents and information from employers and participants.

NEBA does not provide certain services for defined contribution plans that allow for participant directed investments. A plan's board of trustees will engage an independent financial institution to provide investment platform and related services and act as the recordkeeper for participant accounts and benefits.¹²

Common Plan Governance and Other Documents

NEBA maintains both electronic and non-electronic records for essentially all of its benefit plan clients. Some types of documents are maintained in both electronic and non-electronic form, while others may be kept only in the form in which they were provided.

Governing documents for all types of plans—such as plan documents, plan amendments, SPDs, SMMs, trust documents, trust amendments, and governance policies—are sometimes maintained as paper documents in paper files, often with original signatures. These types of paper documents are often scanned to create electronic PDF versions for ease of access and transmission.

Information contained in plan governing documents is also loaded into plan administration software to create electronic plan rules used in benefit administration.

Other types of documents, such as collective bargaining agreements, QDROS, benefit applications, service provider reports, or correspondence, are typically received by email and retained in electronic form, such as scanned PDF documents, or sometimes received and retained in hard copy.

TYPES OF MEDIA USED IN BENEFIT PLAN ADMINISTRATION

There are different types of “electronic records” created, used, maintained, and stored in benefit plan administration.

¹¹ Benefits in a defined contribution plan will of course be determined by individual account values. NEBA provides services such as collecting and maintaining participant personal information, work history, and contribution reports, and administering benefit payments.

¹² NEBA typically collects and maintains electronic records on participant personal information, work history, and employer contribution data. NEBA then transmits necessary information and assets to a plan's investment platform provider in a form and manner determined by the parties.

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Documents created, shared, or maintained using computer systems are “electronic” records, however they share many characteristics with paper documents and are often used similarly to paper documents. Electronic recordkeeping systems, on the other hand, use a database to electronically store and maintain information obtained from third party sources to be used in plan administration.

The Council should consider the nature and uses of different types of electronic records and how source information is stored on different types of media when determining whether additional guidance would be helpful relating to maintenance and use of electronic records for benefit plan administration.

Paper Documents

The original medium, of course, is paper. Most multiemployer plans have significant amounts of historical paper records.¹³ Paper records are kept onsite and offsite by storage companies such as Iron Mountain.¹⁴

Mass digitizing of paper records would be time consuming, likely cost prohibitive, and, importantly, not necessary for effective plan administration. In NEBA’s experience multiemployer plans have not digitized historical paper records.

Finding information in paper records is largely dependent on how well files are organized and indexed. This can be challenging when paper files are received from a predecessor TPA if it is not clear how documents were maintained and organized or if there are no indexes or inventory lists. By their nature paper records have certain limitations.¹⁵

Paper records are often source documents for information maintained in electronic databases for use in benefit administration. In that capacity they are not used in daily administration but may be necessary to validate or supplement information maintained in electronic recordkeeping systems.

¹³ Paper records for multiemployer plans include documents with original signatures, such as plan or trust documents and enrollment applications; copies of original documents, such as birth and marriage certificates, or court orders; and historical work and contribution reports. Paper records may also include correspondence, financial statements, trustee meeting materials, and service provider reports.

¹⁴ Offsite paper records are typically readily available when needed; NEBA typically pulls records from storage on a weekly or more frequent basis.

¹⁵ Paper records are subject to the risk of physical loss or damage. Paper can deteriorate over time, such as old fax paper or receipts where the ink disappears. Paper records cannot be searched, other than as described in indexes. It is difficult to find misfiled paper records. Paper records cannot be easily backed up. On the other hand, wet signatures can be readily observed on paper records, and accessing paper records is not dependent on electricity. Paper records are not vulnerable to loss or unauthorized access by cyber threats.

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Electronically Scanned Paper Documents

Paper documents can be converted to electronic documents by scanning and saving them in electronic files. It is important to recognize, however, that while scanned documents are “electronic records” their usefulness as “electronic records” depends on how they are created.

If paper documents are scanned without OCR technology and without indexing or substantive metadata, then electronic versions of paper documents are in many ways similar to paper documents. While they can be stored and accessed electronically, they cannot be word searched and information contained in them cannot be electronically retrieved. They are saved in files or folders in computer systems, and finding them depends on how they are named, organized, and stored, just like paper documents in filing cabinets.¹⁶

Paper documents can also be scanned with OCR technology and with usable metadata or indexing that allows for electronic searching and retrieval. These types of scanned electronic records also share some characteristics of paper records but with electronic capabilities that may allow for electronic retrieval of information.

Paper documents are sometimes scanned to create duplicate electronic versions that can be accessed and shared, such as plan and trust documents. These can serve as backups to stored paper records and preserve paper records as of the date scanned.

Electronically Created Documents

Electronic documents can also be created using computer software, such as Microsoft Word or Excel, or reports created using different types of software. These types of documents may or may not have duplicate paper versions; they are created, saved, used, and stored in computer systems and can be electronically searched and retrieved.

NEBA creates and uses electronic documents to accomplish certain administrative tasks, such as preparing and sharing meeting materials, analyzing data using spreadsheets, and creating notices and correspondence. NEBA also receives electronically created documents from third party sources such as other plan service providers, participants, employers, and trustees.

¹⁶ It is possible or likely, however, that Artificial Intelligence and emerging technologies could change the accessibility of information in scanned documents in the coming future.

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Electronic Database Records

TPAs like NEBA typically hold plan related data in a database using benefit plan administration software. The database is the primary source of electronic records maintained and used for benefit administration.

Electronic databases hold information needed to determine eligibility and administer and pay benefits under plan terms. Electronic records maintained in databases are not similar to paper or scanned PDF or electronically created documents using programs like Word or Excel. Rather, the database holds information entered using fields and codes, to be retrieved and used as needed for claim administration.¹⁷

Information is entered into a database using fields and codes in benefit administration software. There is no industry standard on how database information is maintained and used. Each software program has unique characteristics, and TPAs will customize fields and codes as needed in plan administration.

Information is entered into a database from third party sources. Information can be manually keyed in by employees from source paper or scanned PDF documents, like enrollment applications or employee census lists. Information may be obtained from electronically created documents, such as Excel spreadsheets. Information can also be entered electronically by participants or employers directly through an online portal. Electronic data transfer procedures can also be used to load information into a database.

Source documents vary based on how information was originally recorded and how information was entered. For example, employers electronically submitting work reports using an online portal will have their own payroll and other records to support the information provided and can obtain a report detailing information that they entered. Participants can provide their personal information by entering it themselves using an online portal or by submitting it on a paper form. Either way, participants would have any personal source documents at home, and a paper submission would create an additional hard copy source document. Participants also submit copies of certain source documents, such as birth certificates. Mailed photocopies will create paper source documents and scanned PDF documents will create electronic source documents. Electronically transmitted information will generally have metadata with source data created at the time of submission.

¹⁷ The database holds personal information on plan participants, dependents, and beneficiaries; benefit plan eligibility data; employer contribution data; work history data. Depending on the type of plan the database may hold claims adjudication and benefit payment data. The database holds plan rules as set forth in governing documents.

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Each benefit administration software program has unique features and capabilities, and each TPA using the software has customized and implemented the software to meet its plan administration methods and needs. Customization is necessary to implement each benefit plan's unique rules. Each database is necessarily defined by the fields and codes used to enter and tag information, and the ways those fields and codes are used to accomplish necessary administration tasks.

There are no recognized industry or legal standards for fields, codes, or how database information is maintained, so each TPA determines how to describe, catalog, and use information in its database for benefit administration. This flexibility allows TPAs to customize and innovate in servicing their clients. The lack of common standards, however, can affect how information is shared with other service providers, such as when transitioning between TPA providers.

TRANSITION BETWEEN THIRD PARTY ADMINISTRATORS

Onboarding a new client requires detailed work focused on identifying and converting data and information from a prior TPA's systems to NEBA's systems.

NEBA starts by asking for all plan documents and information in all forms. NEBA will receive documents and information in a combination of paper documents, electronic documents, and electronically stored data. NEBA typically receives significant numbers of boxes of paper documents along with information on how paper files were organized and stored. NEBA will also receive electronic files of scanned PDF and other electronically created or maintained documents, along with information on how files were named and stored. These types of records are often historical.

NEBA typically cannot confirm whether NEBA has received all documents and information and may not be able to identify any potential gaps at the time of transition. NEBA receives documents and information as they were maintained by a prior TPA and will typically maintain the records in the same form. NEBA will not know if there are any mistakes in the materials received, whether in how documents were organized or their substantive content.

NEBA obtains and uses a plan's governing documents, including original signed plan and trust documents with all amendments, SPDs, and governing policies, to program plan rules and build the plan in NEBA's electronic database. These types of records are often received in hard copy and as scanned PDF electronic documents.

NEBA also obtains information about the transferring TPA's electronic database and asks for data dictionaries, with information about the meanings and purposes of fields and codes. NEBA analyzes how a predecessor TPA electronically stored information about plan participants,

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eligibility, and benefits and develops a process for converting the data. The task is detailed and technical, using information on fields, codes, and data points to understand how data was stored.

Benefit plan administration uses the same types of data and information across all types of benefit administration software, so certain information is typically easy to understand and convert, even if there are different fields, codes, or descriptions. Participant personal information, for example, is often stored using similar fields and codes.

Each TPA has developed its own fields and codes that it uses in benefit administration, however, and sometimes these fields and codes are not self-evident. Different benefit administration software may have different features and capabilities. NEBA will work with a prior TPA to ensure understanding of fields and codes used to store electronic records as part of the conversion process.

Information maintained in an electronic database was obtained from third party sources, and source documents and data are also transferred to NEBA. As part of the conversion process NEBA will independently validate data using source documents, such as employer reports, audited financial statements, actuarial data files, and pension statements.¹⁸

ADMINISTRATIVE SERVICES AGREEMENTS

Administrative service agreements (“ASAs”) typically include termination provisions that require TPAs to work cooperatively to transfer plan records and information to a successor TPA. The language in such provisions is typically, and necessarily, general. Parties would have no way of anticipating what type of technology, data, and information might be used at some unknown point in the future.

Similarly, ASAs generally do not have technical or detailed standards on how electronic records are created, used, or stored. ASAs describe the services to be provided, not the methods used to provide services. Moreover, technology is rapidly changing, and any contractual standards could quickly become outdated.

ASAs typically require that documents and information be retained according to document retention policies and may allow TPAs to retain documents and information as needed to preserve work product and demonstrate services performed.

¹⁸ For example, NEBA will use reports from the predecessor TPA and compare them with reports run on NEBA’s system after data conversion as means to validate how information was loaded in the system.

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DOCUMENT RETENTION AND DESTRUCTION POLICIES

Most of NEBA's multiemployer plan clients have document retention and destruction policies that have been created by plan counsel. These policies tend to track applicable regulations and list the types of documents that are to be retained indefinitely and the types of documents that can be destroyed after defined periods of time or satisfaction of defined conditions.

Retention and destruction policies typically do not distinguish between electronic and non-electronic records, other than tracking the regulation that allows for destruction of certain paper records after digital conversion.

NEBA's service agreements with its plan clients typically state that client records belong to the client. NEBA thus implements plan document retention and destruction policies as directed by plan trustees.

CLOSING THOUGHTS

We hope that this statement and our testimony is helpful to the Council in understanding how TPAs like NEBA receive, create, use, and store electronic records in connection with benefit plan administration. We urge the Council to recognize and consider several practical issues as it determines whether changes to existing guidance would be beneficial.

The Council should consider how any recommended new guidance would apply to both single employer and multiemployer plan administration. Many of the issues we've discussed also apply to single employer plan administration, however some do not. Differences between single and multiemployer administration can be subtle, such as recognizing that multiemployer plan boards of trustees are plan sponsors, and plan participants are employees of contributing employers, not plan sponsors.

The Council should consider differences in existing federal and industry standards that apply to administration of health plan benefits versus retirement plan benefits as it contemplates whether new guidance would be useful. As discussed above, day to day administration and recordkeeping needs are different for health plans and retirement plans, and health plan claims administration is already regulated by HIPAA standards for storing and transmitting electronic protected health information as well as established industry standards.

The Council should also consider differences in types and uses of electronic records in deciding whether to recommend changes that could affect how electronic records are created, used, stored, or maintained. As illustrated above, the terms "electronic records" and "electronic recordkeeping" include both electronically stored documents that are similar to paper documents and electronically

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stored data held in electronic databases and used to administer benefit plans. Electronic databases hold information obtained from third party sources; electronically stored records could be the source documents for information in a database. The Council should consider how any recommended new guidance would apply to different types of electronic records, and whether any recommended new guidance should be tailored to specific types and uses of electronic records.

As explained above, there are no legal or industry standards for how electronic retirement plan data is created, used, maintained, or transmitted. The Council should not recommend, however, that the DOL issue guidance in this area without first engaging a team of industry experts to study existing systems and determine whether it would be possible to develop useful and cost effective industry standards for electronic retirement plan recordkeeping.¹⁹ There are many details and nuances in benefit administration software, benefit plan rules, and implemented electronic recordkeeping systems and it is difficult to imagine how universal cost effective standards could be developed even among industry experts. While objective standards could assist in ensuring the authenticity, accuracy, and completeness of plan records, implementing new standards could be cost prohibitive for many providers and sponsors, and could result in unintended effects on the benefit administration industry.

Thank you again for the opportunity to participate in the Council's inquiry on electronic benefit plan recordkeeping. Please let us know if there are any questions or if you would like additional information.

Sincerely,

Karin A. Peters

Karin A. Peters
President and CEO, NEBA

Ivelisse Berio LeBeau

Ivelisse Berio LeBeau, Esq.
General Counsel, NEBA

¹⁹ This statement and our experience lies with multiemployer plan administration, and primarily with defined benefit plan administration. NEBA does not provide recordkeeping services for self-directed defined contribution plan accounts but we assume that service providers that do provide those services use electronic databases with benefit administration software, and also customize how they store electronic information for their client plans.

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