

Participants' Rights

1. **Statutory Requirements.** Section 510¹ provides for the Secretary, or a participant or beneficiary to bring civil proceedings under the provisions of Section 502 of ERISA.

2. **Elements.** The following are basic elements necessary to establish that a violation has occurred:

a. The plan is an employee benefit plan within the meaning of either Section 3(1) or 3(2) of ERISA and meets the coverage requirements of Section 4 of ERISA;

b. The complainant is a plan participant or beneficiary within the meaning of Section 3(7) or 3(8) or has given information, has testified, or is about to give testimony relating to ERISA;

The complainant was discharged, fined, suspended, expelled, disciplined, or discriminated against:

i. For exercising any right to which s/he is entitled under the provisions of an employee benefit plan, Title I of ERISA, or Section 3001 of ERISA; or

ii. For the purpose of interfering with the attainment of any right to which the complainant may become entitled under the plan, or Title I of ERISA; or

iii. Because the complainant has given information or has testified or is about to testify in any inquiry or proceeding relating to ERISA.

3. **Source of Case Opening Data.** An investigator may open a case after receiving a written or oral complaint. It is best to obtain a written statement of the allegations from the complainant before opening a case. The written complaint should be as complete and specific as possible:

a. Setting forth the date of the complainant's termination or other disciplinary action;

b. Identifying what the complainant believes to be the reason for the action; and

c. Including any correspondence between the complainant and the employer, union, plan, etc.

4. **Preliminary Steps Prior to Opening a Case.**

a. Complainant should identify the benefit or the benefit right he/she was deprived of by the adverse action.²

b. Advise complainant his/her name might be used during the investigation.

- c. Consider the possibility of age discrimination or other equal opportunity employment case. Refer complainant to the Equal Employment Opportunity Commission, as appropriate. Tell complainant if you do not open a case.

Statute of limitations analysis should use the most analogous state law cause of action to determine the limitations period and be done in consultation with the SOL.³ Use the statute of limitations matrix (Figure 1) as a guide.

5. **Written Plan.** At the discretion of the RD, a written investigative plan, in the form of a memorandum to the supervisor, may be prepared. See Figure 2 for the format to use in preparing the investigative plan. Use Figure 3 as a guide in determining the elements to cover in the investigation.
6. **Initial Contact With Plan.** ROs should exercise discretion in deciding to begin the investigation with a letter to the plan sponsor, sent by certified mail, return receipt requested, stating that the RO received a complaint from a participant or beneficiary and requesting an explanation for the actions taken against the complainant.⁴

The letter should:

- a. Explain the provisions of Section 510;
- b. Discuss the nature of the alleged violation; and
- c. Request a written reply from the addressee within 14 days of receipt of the letter. A sample letter is set forth as Figure 4.

In all contacts with the parties, the Investigator/Auditor should convey the Department's intention to resolve the matter fairly and in accordance with the provisions of ERISA.

7. **Scope of Investigation.** The extent of the investigation depends upon the answer received from the plan administrator after the initial contact.
8. **Development of the Case.** Some matters to consider in the development of Section 510 cases include:
 - a. Establishing patterns of actions taken against employees in certain groups can often successfully prove discrimination.

If several plan participants are terminated, all of whom are at an age nearing full vesting, while younger persons, less experienced and less productive, are kept on the payroll, discrimination to prevent attainment of a benefit right may be indicated. If the persons terminated include both those nearing a fully vested age and younger employees who have many years to go until full-vesting, discrimination may not be so apparent. However, establishing such a pattern may not be necessary in order to show a violation of Section 510, if other evidence is available.

b. The Investigator/Auditor may need to prove there was no valid reason for the complainant's termination other than the Section 510 violation. This can be done through personnel and other records. Normally, an employer will deny the allegation that the employee's termination was to prevent him/her from attaining a benefit. The company should be willing and able to prove that the complainant's work record or actions, or some other proper reason(s), were the basis for the discharge.

If the stated reason for termination was that the employee's work record was poor, the Investigator/Auditor should question the reason for the employee's retention for a number of years before termination. If he/she was sufficiently capable to be retained on the job until he/she was nearly vested, determine why his/her work suddenly deteriorated if, in fact, it did.

9. **Allegations Involving Other Case Types.** If information received or developed indicates possible ERISA violations unrelated to the current issue, open a separate case, as appropriate.

If the investigation develops sufficient evidence to make a preliminary determination that matters being investigated may also constitute violations of Title 18 or ERISA Section 511, the investigation of the criminal aspects will be discontinued and a referral will be made pursuant to the **Criminal Investigations** section of this Manual.

10. **Violations.** When the investigation does not uncover any violations, prepare a closing ROI (**Figure 5**). If the RD concurs, send a pattern closing letter (**Figure 6**) and advise the complainant of the final decision.

11. **Compliance Achieved.** When there are apparent violations, the RO if appropriate, will attempt to obtain voluntary compliance from the plan officials. See the Voluntary Compliance section for further details.

In cases where discrimination is apparent and the plan sponsor acknowledges that it may have acted improperly and is willing to correct the situation, the Investigator/Auditor must carefully consider whether the proposed correction complies with ERISA.

For example, the plan administrator may not grant a right, such as a vested interest, to a terminated participant unless that right was earned. If the plan administrator were to do that, that action would violate the fiduciary requirement that a plan administrator must operate the plan strictly in accordance with the plan provisions.

The corrective action in this type of case can become extremely complex, especially when a plan sponsor is willing to take some steps necessary voluntarily to correct a discrimination situation, but is not willing to take all the necessary steps.

If there is voluntary compliance, the Investigator/Auditor will prepare a Closing Report of Investigation including documentation of the manner in which the plan corrected the violation.

Although participant's rights cases may be resolved through voluntary compliance, EBSA is not required to seek voluntary compliance in all cases.

12. **Noncompliance - Legal Action Not Warranted.** In cases where a settlement offer is made that is either not acceptable to the complainant(s) or would not result in full compliance with ERISA, seek advice from OE. If legal action does not appear warranted, the Investigator/Auditor will prepare a Closing Report of Investigation and, after approval by the RD, the RO will advise the complainant of the final decision in the matter.

13. **Noncompliance - Legal Action Warranted.** In cases where a settlement offer is made that is either not acceptable to the complainant(s) or would not result in full compliance with ERISA, and legal action is believed to be warranted, the Investigator/Auditor will prepare an Action Report of Investigation (See [Figure 7](#)). The RO sends the Action Report of Investigation with a cover memorandum from the RD ([Figure 8](#)) to the RSOL. The RO also sends a copy of the cover memorandum and narrative portion of the Report of Investigation to OE.

(Figure 1)
Statute of Limitations Matrix

Participant Rights Cases

Issue(s)	Date of Unlawful Practice	Analogous State Statute	Applicable Statute of Limitations Date
1.			
2.			
3.			
4.			

(Figure 3)
Investigative Guide
ERISA Section 510

1. Name of employee
2. Address
3. Phone Number

Employment History

1. Period of service for the company. (If possible give data under next heading for each job.)
2. Job at the time of alleged discrimination.
 - a. Duties
 - b. Department
 - c. Immediate Supervisor
 - d. Length of service
 - e. Wage rate
3. Efficiency
 - a. Expressions from company
 - b. Statements
 - c. Wage increases
 - d. Other evidence
4. Seniority as compared to other employees in same category

Circumstances of Discharge or Other Adverse Action

1. Timing
2. Circumstances leading up to the discharge
3. Complaints or warnings before discharge
4. Circumstances surrounding discharge
 - a. Complete story
 - b. Whether manner of discharge was in line with customary practice
5. Reason given by company at time of discharge--state who gave reason and when.

Lack of work

1. Whether force was being reduced.
2. Number of other employees who were similarly discharged.
3. Name, dates, and reasons given for discharge.
4. Proportion of union and non-union employees discharged.
5. Method used to determine who was discharged.
6. Whether method was in line with usual practice.
7. Whether others were uniformly affected for similar cause.
 - a. Names, positions and dates
 - b. Whether the practice was the same prior to the time of alleged discrimination
8. Whether company plans to recall these employees.

Status of Replacement

1. Identity
 - a. Name
 - b. Address

- c. Phone Number
- 2. Other status
 - a. Experience
 - b. Length of service
 - c. Rating with company

Evidence to Show Motive of Company

- 1. Threats before discrimination
- 2. Explanations after

Steps Taken After Discrimination

- 1. Application to have company reconsider
- 2. Grievance machinery
- 3. Agreement to arbitrate
- 4. Satisfaction or waiver

Inefficiency

Insubordination

Violation of Rules

(Figure 4)
Format for Initial Letter – Participant’s Rights

Certified Mail - Return Receipt Requested

October 14, 2005

Mr. John H. Lewis

Director, Benefit Plans and Personnel Policies

ABC Company

123 Main Street

Kansas City, Missouri 64106

Dear Mr. Lewis:

Mr. Elmo Jones, a former employee of your company, lodged a complaint with this office alleging that recent action was taken with respect to his employment for the purpose of interfering with a right to which he may become entitled under the provisions of the ABC Company Retirement Plan. If true, such action would constitute a violation of section 510 of the Employee Retirement Income Security Act of 1974 (ERISA).

Briefly, section 510 of ERISA provides that it shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary of an employee benefit plan for the purpose of interfering with the attainment of any right to which such participant may become entitled under an employee benefit plan, Title I of ERISA, or the Welfare and Pension Plans Disclosure Act.

In his complaint, Mr. Jones alleges that when he was terminated he was within five months of completion of sufficient years of participation under his retirement plan to reach retirement status. Mr. Jones furnished to us a copy of a letter to you, dated October 4, 2004, wherein he requested that he be considered for The Investigator/Auditor named below has been assigned to represent this office in this matter. You may contact him/her for additional information or assistance.

In his complaint, Mr. Jones alleges that when he was terminated he was within five months of completion of sufficient years of participation under his retirement plan to reach retirement status. Mr. Jones furnished to us a copy of a letter to you, dated October 4, 2004, wherein he requested that he be considered for other positions with the company so he would be able to complete the necessary years of participation. He also included a copy of a letter from you, dated October 29, 2004, denying his request. Mr. Jones contends that other employees with fewer years of service than he were given other positions within the company.

You are requested to furnish this office, within 14 days from your receipt of this letter, a written statement of your company's position with respect to Mr. Jones' complaint. You are free to include all pertinent facts relating to this matter.

The Investigator/Auditor named below has been assigned to represent this office in this matter. You may contact him/her for additional information or assistance.

Your cooperation in this matter will be appreciated.

Sincerely,

Joe Johnson

Regional Director

This document is the property of the Employee Benefits Security Administration. It is not to be disclosed to unauthorized persons.	File No. (43)
Subject: [Complainant Last Name] v. Employer Name Address City, State Zip	Date:
	By: Name Investigator/Auditor
	Approved by:
EIN/PN:	Status: Closed

I. Predication

State the reason for case opening.

II. Issues and Findings

a. Allegation/Issue

Cite the facts that show the allegations/issue was not a violation; or in cases where violations were substantiated, cite the facts to show voluntary compliance was achieved or that other dispositive action was taken.

b. Allegation/Issue (Repeat as above for each allegation/issue).

III. Other Findings

Use this section to present facts or any other investigative activity not previously mentioned.

(Figure 6)
Sample Pattern Closing Letter
No ERISA Violations Detected

Dear (Plan Administrator/Fiduciary):

We have completed an inquiry involving entitlement of (name of complainant) to a benefit from (name of plan) pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).

We have concluded our inquiry and no further action on this matter is contemplated at this time.

(We appreciate the cooperation you and members of your staff extended to us.)

Sincerely,

Regional Director

Enclosure: SBREFA Notice⁽¹⁾

This document is the property of the Employee Benefits Security Administration. It is not to be disclosed to unauthorized persons.	File No. (43)
Subject: [Complainant Last Name] v. Employer Name Address City, State Zip	Date:
	By: Name Investigator/Auditor
	Approved by:
EIN/PN:	Status: Closed

(Figure 7)

Participant Rights Case



Report of Investigation U.S. Department of Labor
Employee Benefits Security Administration

I. Predication

State the reason for case opening.

II. Potential Jurisdictional Problems

If no jurisdictional problems are anticipated, enter "None." If any are known, set forth the facts to identify them and document jurisdiction under Section _____.
Any issue or potential defense relating to whether the plan is covered under ERISA should be set forth in this section.

III. Background

Include information, as appropriate.

IV. Issues and Findings

a. Allegation/Issue

Cite the facts that show the allegations/issue was a violation.

b. Allegation/Issue (Repeat as above for each allegation/issue).

V. Other Findings

Use this section to present facts or any other investigative activity not previously mentioned.

Page Break

Exhibits

All significant facts presented in the report should be supported with exhibit citations. The following procedure should be used in submitting exhibits:

1. State the name of the individual who is the subject of an RI or signed statement and the date of the interview.
2. Documents, schedules, etc., should be precisely identified.
3. Each supporting document should be a separate exhibit.
4. Multiple page exhibits should be numbered.
5. Exhibits should be identified by number.
6. All copies must be legible.
7. All plan documents (trust agreements, etc.) must be included as exhibits.

List of Documents and Workpapers Available in Regional Office but Not Used as Exhibits

List documents, schedules, Report of Interviews, and other materials in the Regional Office file that were not included as exhibits. Identify the date of each document.

(Figure 8)
Format for the Regional Director's Cover Memo to an Action
Report

To: Regional Solicitor
From: Regional Director
Subject:
Name of Plan
EIN
Case File No.

The following must be included in the body of the memo:

1. Give a brief synopsis of the violations.
2. Each violation must be supported by appropriate references to the regulations, interpretive bulletins, exemptions, variances, policy statements, previous no decisions involving similar cases, and any other authoritative references which would tend to establish the existence of the violation.
3. When appropriate, outline the Regional Office's efforts to obtain voluntary compliance.
4. State the position of the violator(s) and other responsible plan officials with respect to each violation.
5. Discuss the Regional Director's recommendations for the final disposition of the case. If a partial settlement offer has been made the Regional Director should comment on its acceptability.

cc: File

Footnotes

1. Include when subject of investigation is a plan, or other business entity, with fewer than 100 participants or employees and when the notice has not been provided previously.