

Retention of Plan Documents: A Primer

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As a plan sponsor, you have a duty to maintain sufficient records for a period of time. But what does this statement really mean? How long is this "period of time"? What are "sufficient records"? What are the consequences of not retaining such records or of losing them? Rest assured, these questions (and more!) will be answered for you in this post.



For how long must an employer maintain sufficient records?

ERISA has two retention provisions pertaining to what documents to keep and for how long; both ERISA § 107 and ERISA § 209 apply to all ERISA plans. According to ERISA § 107, anyone who files or certifies certain information (e.g., Form 5500s) must keep the records for six years after the filing date or from the date of any extended date for filing.

ERISA § 209 gives more guidance on keeping certain records. With this provision, the time frame with which a plan administrator must comply is extended significantly. This is clear within the language of the statute, which provides that the length of time for retention is "as long as [the documents or records] might be relevant to a determination of the benefit entitlements of a participant or beneficiary." So, even though one ERISA provision only requires plan sponsors to retain certain documents for six years while another requires plan sponsors to keep certain documents for an indefinite amount of time, best practices encourage plan sponsors to hold such documents forever.

What are sufficient records?

A sufficient document or record could mean any kind of record, from plan documents to amendments to email correspondences to work records like spreadsheets. So, it's clear that for ERISA § 107, all plan documents and anything that may be useful in filing a 5500 have a retention period of at least six years. As for ERISA § 209, all plan documents and anything that might be relevant in determining the benefits of a participant or beneficiary must be kept indefinitely.

Who is responsible for keeping these records?

Some employers may think, "I don't have them on hand, but my third-party administrator does, so we're meeting the ERISA requirements." This is not entirely correct. It is the duty of the plan sponsor to maintain these documents. It may be the case that a plan sponsor has complied with ERISA because the contracted TPA does, in fact, have every plan document from the inception of the plan until now, but what if there are missing documents? Who is liable if the TPA does not have a document? The liable party is most likely the plan sponsor. As such, best practices encourage that the employer should have access to all relevant documents.

What are the consequences of not having the documents?

ERISA § 107 imposes no penalty, and ERISA § 209 only imposes a minimal penalty for \$10 per employee affected in the event a failure to maintain records pursuant to the law.

But this failure to maintain records is much more far-reaching than made clear from the statutory provisions. Litigation could result from such a failure; in such an instance, an employer could find itself expending both man hours and litigation fees in defense of a lawsuit. There could be a suit based on a claim for benefits where the employer might have to prove the accuracy of how benefits amounts were calculated. Without sufficiently retained documentation, such a case could be a total nightmare for an employer.

Alternatively, failing to preserve records may subject a plan sponsor to an ERISA violation for failing to provide document disclosure upon request by a participant; this failure can lead to a statutory penalty of \$110 per day for each document not disclosed upon request. Furthermore, a failure to retain documents may subject a plan sponsor to fiduciary breach. An employer could find itself defending claims not simply for failing to keep documents, but also for the resulting breach. In that event, the fiduciary could find himself or herself personally liable for surmounting statutory fines.

How should you avoid the pitfalls associated with inadequate document retention?

One of the best ways to avoid the common pitfalls associated with lackluster document retention is to make sure that you have a clean, well-organized storage place to maintain all your documents from the inception of your plan. Another way is by making sure you understand what documents need to be retained. Here is a list of some of the documents you should make sure you keep:

- the first legislatively-required amendment for the plan;
- the last in-house decided optional plan amendment, and every amendment in between;
- every summary plan description or summary of material modification from the inception of the plan as well as every basic plan or trust document;
- the first and each subsequent adoption agreement, all ancillary documents like QDROs or loan procedures; and
- everything else that relates to the operation or establishment of the plan.