
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Chapter 43, Participant's Rights

1. **Statutory Requirements.** Cases investigated under Program 43 are based on allegations that ERISA section 510 has been violated. Section 510 provides for civil proceedings to be brought by the Secretary of Labor, or a participant or beneficiary 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 participant or beneficiary of the plan within the meaning of section 3(7) or 3(8) or is a person who has given information, testified, or is about to give testimony relating to ERISA.

c. The complainant was discharged, fined, suspended, expelled, disciplined, or discriminated against for exercising any right to which the complainant is entitled under the provisions of an employee benefit plan, Title I of ERISA, or section 3001 of ERISA, or 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

d. The complainant was discharged, fined, expelled, or discriminated against 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.** A case may be opened upon a written or oral complaint. However, it is preferable to obtain a written statement of the allegations from the complainant prior to case opening.

The written complaint should be as complete and specific as possible, setting forth the date of the complainant's termination or other disciplinary action and identifying what the complainant believes to be the reason for the action. If there has been any correspondence between the complainant and the employer, union, plan, etc., it should be attached by the complainant to the complaint.

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

a. The complainant should be advised that his/her name might be used during the investigation. Since the complainant is usually alleging that the reason for the termination or disciplinary action was to prevent him/her from obtaining a benefit or a right to a benefit, he/she should furnish details identifying the benefit or the benefit right he/she has been

deprived of by the adverse action. The fact that the complainant is not familiar with plan provisions does not necessarily mean that he/she has no valid complaint. His/Her lack of knowledge may be due to a failure by the plan administrator to provide proper disclosure.

b. The Investigator/Auditor should be aware of the possibility that age discrimination or other equal opportunity employment case may exist; if so, the complaint should be directed to the Equal Employment Opportunity Commission. After review of the complaint, if no case is opened, this should be communicated to the complainant.

c. Because ERISA Section 413 governs limitations on actions brought under part 4 of Title I, its 3- and 6-year limitations are inapplicable to Section 510 violations. Therefore, the statute analysis should use the most analogous state law cause of action to determine the limitations period. Among the circuit courts, the analogous state laws appear to be “wrongful termination” or “retaliatory discharge.” In light of this, the investigative analysis of the state statute of limitations in ERISA Section 510 cases should be initially done in consultation with the SOL/RSOL. The statute of limitations matrix (Figure 8) should be used 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 1 for the format to use in preparing the investigative plan. Figure 2 should be used as a guide in determining the elements to cover in the investigation. The supervisor will, in accordance with EBSA policy, review the investigative plan and, after making any changes deemed necessary, will initial and date the plan. The plan will become part of the case file.

6. **Initial Contact With Plan.** Except in unusual circumstances, the investigation should begin with a letter to the plan sponsor, sent by certified mail, return receipt requested, stating that the RO/DO has received a complaint from a participant or beneficiary and requesting an explanation for the actions taken against the complainant. The provisions of section 510 should be explained and the nature of the alleged violation should be discussed. The letter should request a written reply from the addressee within 14 days of receipt of the letter. A sample letter is set forth as Figure 3. 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. ERISA gives the Secretary the authority to conduct an investigation, interview witnesses and examine records to the extent necessary to determine whether ERISA has been violated. Records reviewed should be those reasonably expected to reveal information pertaining to the subject area of inquiry or those that leads have indicated need reviewing.

8. **Development of the Case.** Some matters to consider in the development of section 510 cases are listed below:

a. Discrimination can often successfully be proven by establishing patterns of actions taken against employees in certain groups. 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. In many situations, it may be necessary for the Investigator/Auditor to prove, through personnel and other records, that there was no valid reason for the complainant's termination other than the 510 violation. Normally, an employer will deny the allegation that the employee was terminated to prevent him/her from attaining a benefit. The company should be willing and able to prove, through records and/or testimony, that the complainant's work record or actions, or some other proper reason(s), were the basis for the discharge.

c. If the stated reason for termination was that the employee's work record was poor, the Investigator/Auditor should question why the employee was retained on the job for a number of years before he/she was terminated. 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.**

a. If, during the course of the investigation, information is received or developed which indicates possible violations of ERISA which are unrelated to this case type, a separate case will be opened, as appropriate, under the applicable program number.

b. If an investigation under this program develops evidence sufficient 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 Chapter 52 of this Manual.

10. **Violations.** When the investigation does not uncover any violations the Investigator/Auditor will prepare a closed report. If the RD concurs that the case will be closed, a pattern closing letter will be sent (Figure 4). The complainant will also be advised of the final decision. The format in Figure 5 will be used in preparing closed ROIs.

11. **Compliance Achieved.**

a. When there are apparent violations the RO will, when appropriate, attempt to obtain voluntary compliance from the plan officials.

b. 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 is in compliance with ERISA. For example, the plan administrator may not grant a right, such as a vested interest, to a terminated participant unless that right has been 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 voluntarily take some steps necessary to correct a discrimination situation, but is not willing to take all the necessary steps.

c. If voluntary compliance is achieved, the Investigator/Auditor will prepare a Closed ROI including documentation of the manner in which the plan has corrected the violation.

d. Although participant's rights cases may be resolved through voluntary compliance, neither the RO nor EBSA is bound to seek voluntary compliance in all such cases.

12. **Noncompliance - Legal Action Not Warranted.** In those cases where a settlement offer is made which is either not acceptable to the complainant(s) or would not result in full compliance with ERISA, advice will be sought from OE/DFO. If legal action does not appear warranted, the Investigator/Auditor will prepare a Closed ROI 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 those cases where a settlement offer is made which 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 ROI. The format in Figure 6 will be used in preparing Action ROIs. The Action ROI together with a cover memorandum from the RD (Figure 7) will be sent to the RSOL. A copy of the cover memorandum and narrative portion of the ROI sent directly to the RSOL shall be sent simultaneously to OE/DFO.

14. **SBREFA Notice.** In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Small Business Regulatory Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small businesses. If a small business wishes to comment on the enforcement actions of EBSA, it may call 1-888-REG-FAIR (1-888-734-3247) or write to the Ombudsman at 409 3rd Street SW, MC 2120, Washington, DC 20416.

Notice of the right to comment to the SBREFA Ombudsman will be provided by copy of the EBSA Customer Service Standards pamphlet to all plan sponsors, plans, or plan service providers with less than 100 participants or employees during the course of ERISA Title I civil investigations. Discretion is granted to EBSA Regional Directors regarding the timing of the delivery of the pamphlet/notice on a case-by-case basis. The case file must reflect appropriate documentation of the SBREFA notice.

The right to file a comment with the Ombudsman does not affect EBSA's authority to enforce or otherwise seek compliance with ERISA. The filing of a comment by a small business with the

Ombudsman is not a substitute for complying with an EBSA subpoena or addressing EBSA's proposed corrective action in a timely manner to protect the business' interests.

MEMORANDUM FORMAT FOR PARTICIPANT'S RIGHTS CASE
INVESTIGATIVE PLAN

SUBJECT: (Same subject as on case opening form)

TO: (Supervisor)

Investigative Plan for Subject Case

- I. **Allegation** - set forth the alleged violation.
- II. **Planned Investigation** - (Using Figure 2 as a guide, list the areas to be investigated.)
- III. **Time** - Estimate the number of workdays necessary to complete the investigation.

Approved: _____
Supervisor

Date

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 2)

FORMAT FOR INITIAL LETTER PROGRAM 43 - 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, has 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 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

Investigator/Auditor: Richard Stevens
Telephone Number: (100) 212-4141

March 2007

SAMPLE PATTEN CLOSING LETTER

No ERISA Violations Detected

Dear (Plan Administrator/Fiduciary):

The Department of Labor has recently conducted 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).

This is to advise you that our inquiry is now concluded 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 Notice¹

cc: OE
File

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.

(Figure 4)

Report of Investigation
SAMPLE FORMAT

U.S. Department of Labor
Employee Benefits Security Administration



This document is the property of the Employee Benefits Security Administration.
Its contents are not to be disclosed to unauthorized persons.

Subject:
(Last Name of Complainant) v. Employer

File No.

Date

By Investigator/Auditor

Approved by

Status: Closed

Address of Employer

EIN/PN

I. Predication

State reason for case opening.

II. Issues and Findings

A. Set forth the allegation/issue.

(Cite the facts that show that the allegation/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. (Repeat as above for each allegation/issue.)

III. Other Findings

(This heading can be used to present facts or any other investigative activity not previously mentioned.)

(Figure 5)

Report of Investigation
SAMPLE FORMAT

U.S. Department of Labor
Employee Benefits Security Administration



This document is the property of the Employee Benefits Security Administration.
Its contents are not to be disclosed to unauthorized persons.

Subject:

(Last Name of Complainant) v. Employer

File No.

Date

Address of Employer

By Investigator/Auditor

EIN/PN

Approved by

Status: Action

I. Predication

State 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

If appropriate.

IV. Issues and Findings

A. Set forth the allegation/issue.

(Cite the facts that show that the allegation/issue is a violation.) In the last paragraph present the position taken by the plan administrator or other fiduciary(ies) concerning the issue and indicate efforts made to obtain voluntary compliance. Include copies of any correspondence or RIs of conferences with the plan officials as exhibits.

B. If there are multiple or diverse issues involved, repeat the format set forth above.

V. Other Findings

This heading can be used to present facts or any other investigative activities not previously mentioned.

(Figure 6)

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 RO but Not Used as Exhibits

List documents, schedules, RIs, and other materials in the RO file that were not included as exhibits. Identify the date of each document.

FORMAT FOR THE RD's COVER MEMO TO AN ACTION REPORT

TO: Regional Solicitor
FROM: RD
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 RO'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 RD's recommendations for the final disposition of the case. If a partial settlement offer has been made the RD should comment on its acceptability.

cc: File

STATUTE OF LIMITATIONS MATRIX – PROGRAM 43 CASES

ISSUE(S):	Date of unlawful practice	Analogous state statute	Applicable statute of limitations date
1.			
2.			
3.			
4.			

(Figure 8)