



May 2021

# EMPLOYEE BENEFITS SECURITY ADMINISTRATION

## Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans



A Century of Non-Partisan Fact-Based Work

# GAO@100 Highlights

Highlights of [GAO-21-376](#), a report to congressional addressees

## Why GAO Did This Study

Millions of Americans rely on employer benefits for their health care and future financial security. Private sector retirement plans are a key source of income for many retirees and employer-sponsored group health plans cover over one-half of all Americans. Consequently, effective oversight and enforcement are critically important to ensure the integrity of the private employee benefit system, especially in light of the economic and health effects of COVID-19 on American workers and their families. EBSA is charged with protecting the rights of participants in employer-sponsored benefit plans. As of fiscal year 2020, this included about 154 million participants in 722,000 retirement plans and 2.5 million health plans with combined assets of over \$10.7 trillion.

This report examines (1) how EBSA manages its enforcement process, (2) EBSA's strategies to improve investigative processes and ensure enforcement quality, and (3) the immediate and long-term challenges of COVID-19 for EBSA and private sector retirement and health plans. GAO analyzed EBSA data and documents; and federal laws, regulations, and guidance, including the CARES Act and the Families First Coronavirus Response Act. GAO interviewed officials from EBSA's national office and three regional offices, selected for variation in investigations, and locations as well as stakeholders from nine organizations knowledgeable about benefits compliance requirements, the employer-sponsored benefit industry, and participants' benefit plan experiences.

View [GAO-21-376](#). For more information, contact Tranchau (Kris) T. Nguyen at (202) 512-7215 or [nguyentt@gao.gov](mailto:nguyentt@gao.gov).

May 2021

## EMPLOYEE BENEFITS SECURITY ADMINISTRATION

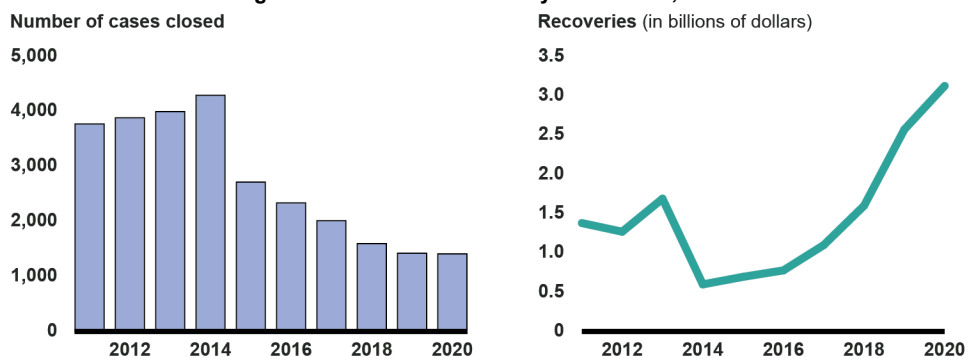
### Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans

#### What GAO Found

The Department of Labor's (DOL) Employee Benefits Security Administration's (EBSA) enforcement focuses on encouraging retirement and health plans to comply with the Employee Retirement Income Security Act of 1974, as amended, and restoring benefits that were improperly withheld from plan participants. To identify violations, EBSA investigates benefit plans and their service providers. Over two-thirds of investigation leads are identified by EBSA staff. EBSA prioritizes investigating cases that may result in large recoveries or affect many participants, such as restored retirement plan contributions or payment for incorrectly denied medical claims. When agreement cannot be reached, investigators can refer civil cases to DOL's Office of the Solicitor for civil litigation. Criminal cases are referred to Department of Justice. In fiscal year 2020, almost 84 percent of investigations were civil and more than 16 percent were criminal, resulting in over \$3 billion in payments to participants and plans.

EBSA uses a range of strategies to improve its investigative processes and seeks to ensure enforcement quality through training and oversight. For example, EBSA makes efforts to target investigations for greater impact, such as a 2013 change to prioritize cases with the potential to affect many participants and recover significant assets. As EBSA pursued more complex and technical investigations, the number of closed cases decreased, while monetary recoveries increased (see figure). To ensure investigation quality, EBSA provides training, documents procedures, and reviews open and closed cases to evaluate whether investigation procedures have been followed.

**Number of EBSA Investigations Closed and Monetary Recoveries, Fiscal Years 2011-2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data and enforcement results fact sheets. | [GAO-21-376](#)

The COVID-19 pandemic created a number of immediate and long-term challenges for EBSA and benefit plans. For example, according to stakeholders, plans were initially concerned about how to implement provisions in the Families First Coronavirus Response Act and the CARES Act, but those concerns were addressed as the agency issued FAQs and notices. Similarly, EBSA officials reported that court closures temporarily slowed criminal cases, but as virtual hearings increased, litigation resumed. Stakeholders and EBSA officials also described potential long-term challenges, including difficulties locating the many participants who may have left a job due to the pandemic and may be unaware they left behind retirement funds.

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## Abbreviations

COBRA	Consolidated Omnibus Budget Reconciliation Act
COVID-19	Coronavirus Disease 2019
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
ERISA	Employee Retirement Income Security Act of 1974, as amended
ESOP	employee stock ownership plan
FFCRA	Families First Coronavirus Response Act
HHS	Department of Health and Human Services
IRS	Internal Revenue Service
MEWA	multiple employer welfare arrangement
PBGC	Pension Benefit Guaranty Corporation

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May 27, 2021

Congressional Addressees

Millions of Americans rely on workplace benefits for their health care and future financial security. Private sector retirement plans are a key source of income for many retirees and employer-sponsored group health plans cover over one-half of all Americans. Consequently, effective oversight and enforcement are critically important to ensure the integrity of the private employer-sponsored benefit system, especially in light of the economic and health effects of Coronavirus Disease 2019 (COVID-19) on American workers and their families.<sup>1</sup> Employees who experience unemployment may leave behind retirement savings accounts or lose employer-sponsored health plan benefits.

The mission of the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) includes ensuring the security of the health and retirement benefits of American workers and their families. In fiscal year 2020, EBSA was responsible for protecting the rights of about 154 million workers and their dependents enrolled in employer-sponsored retirement and health plans.<sup>2</sup> DOL reported that in fiscal year 2020, EBSA's oversight authority extended to nearly 722,000 retirement plans and approximately 2.5 million health plans.<sup>3</sup> Over the past decade, these

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<sup>1</sup>We regularly issue government-wide reports on the federal response to COVID-19. For the latest report, see GAO, *COVID-19: Sustained Federal Action Is Crucial as Pandemic Enters Its Second Year*, GAO-21-387 (Washington, D.C.: Mar. 31, 2021). Our next government-wide report will be issued in July 2021 and will be available on GAO's website at <https://www.gao.gov/coronavirus>.

<sup>2</sup>The Employee Retirement Security Act of 1974, as amended, (ERISA) defines participant as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such an organization, or whose beneficiaries are eligible to receive any such benefit." See 29 U.S.C. § 1002(7). We use the term "participants" to include (1) individuals who participate in private employer-sponsored retirement plans, (2) individuals receiving pension or individual retirement payments from a private employer-sponsored plan, and (3) individuals who are enrolled in or purchase an employer-sponsored group health plan and their covered dependents.

<sup>3</sup>For the purpose of this report, we use the terms "benefit plans" or "plans" to refer collectively to private sector employer-sponsored retirement and group health plans covered under Title I of ERISA, unless the statement applies to only one type of employee benefit.

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benefit plan assets have risen from over \$5 trillion to \$10.7 trillion. EBSA describes its enforcement program efforts as targeting the most egregious and persistent violators, protecting the most vulnerable populations while ensuring broad-based compliance, and establishing processes to evaluate the success of enforcement activities.

In 2007, we reported on EBSA's enforcement program.<sup>4</sup> Since then, there have been numerous developments, including EBSA promulgating new regulations under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) (408(b)(2) Fee Disclosure Rule) and the enactment of legislation such as the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 and the Patient Protection and Affordable Care Act, which have affected the way that retirement and health plans operate.<sup>5</sup> In light of these and other developments, including the health and economic impact of COVID-19, this report examines (1) how EBSA manages its enforcement process, (2) EBSA's strategies to improve investigative processes and ensure enforcement quality, and (3) the immediate and long-term challenges of COVID-19 for EBSA and private sector retirement and health plans.

To address the first two objectives, we reviewed relevant federal laws, regulations, and public guidance regarding requirements for EBSA's oversight of retirement and health plans. We also reviewed EBSA's enforcement manual and other relevant internal guidance and documentation, including national and regional enforcement projects and annual operating plans. To describe trends from the past 10 years, we analyzed staffing data and selected variables from EBSA's enforcement

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<sup>4</sup>GAO, *Employee Benefits Security Administration: Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight*, [GAO-07-22](#) (Washington, D.C.: Jan. 18, 2007).

<sup>5</sup>The 408(b)(2) Fee Disclosure Rule requires that certain retirement plan service providers disclose information about the service providers' compensation and potential conflicts of interest. See 29 C.F.R. § 2550.408b-2(c)(1). The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 requires coverage for mental health and substance use disorder services—when those services are offered by group health plans sponsored by large employers (generally employers with more than 50 employees)—be no more restrictive than coverage for medical/surgical services. See Pub. L. No. 110-343, div. C, tit. V, sub. B, §§ 511-512, 122 Stat. 3765, 3881-3893 (2008). Among other things, the Patient Protection and Affordable Care Act of 2010 extended mental health and substance use disorder parity requirements to individual insurance plans and some small group health plans, and it created new reporting responsibilities for certain healthcare plans, and such responsibilities are overseen and enforced by EBSA. See Pub. L. No. 111-148, tit. I, sub. C, §§ 1201, 1302, and 1311(j), tit. VI, sub. G, § 6606, 124 Stat. 119, 161, 163-64, 181, and, 781 (2010).

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activities database, such as the number of investigations pursued and their outcomes. We assessed the reliability of trend data by (1) performing electronic testing of required data elements, (2) reviewing existing information about the data and the system that produced them, such as data dictionaries, (3) reviewing written responses from EBSA about the quality assurance practices used to ensure data integrity, and (4) interviewing agency official knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of our reporting objectives.

We interviewed officials from EBSA's national office and three of EBSA's 10 regional offices—Kansas City, Los Angeles, and Philadelphia—to understand EBSA compliance and enforcement activities. The interviews also addressed how the national office monitors and improves the adherence of its regional offices to the agency's enforcement policies and procedures. We selected regional offices to provide variation in caseload, number of investigators and the number of hours dedicated to investigations, regional office projects, and location. We also interviewed managers, benefits advisors, and investigators in each of the selected offices.

To address the third objective, we reviewed relevant provisions in the Families First Coronavirus Response Act (FFCRA) and the CARES Act, and relevant DOL guidance. To identify concerns and perspectives on retirement and health plans and efforts to meet the needs of plan participants during the COVID-19 pandemic, we interviewed officials from EBSA's national office and selected regional offices, as well as stakeholders from nine organizations knowledgeable about benefits compliance, the employer-sponsored benefit industry, and participant experiences.

We conducted this performance audit from February 2020 to May 2021 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



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## Background

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### Employee Retirement Income Security Act of 1974 (ERISA), as Amended, Provisions

In 1974, ERISA, the federal law that establishes minimum standards and requirements governing most private sector employer-sponsored retirement and group health plans in the United States, was enacted.<sup>6</sup> ERISA has been amended to reflect changes in employee benefits, such as the increased use of defined contribution plans (in which plan participants are generally responsible for making their own investment decisions and ensuring they have sufficiently saved for retirement). For example, the Pension Protection Act of 2006 amended ERISA by expanding the availability of fiduciary investment advice to participants in defined contribution plans.<sup>7</sup>

Amendments to ERISA also expanded benefit protections for employer-sponsored health plan participants.<sup>8</sup> For example, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides for the continuation of group health coverage for covered employees and their families for a limited time under certain circumstances, such as voluntary or involuntary job loss or other life events. Also, the Patient Protection and Affordable Care Act extends the age for dependent coverage,

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<sup>6</sup>See Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.). Unless otherwise clear from context, when we refer to ERISA, it includes all amendments by subsequent legislation. For discussion of selected federal legislation and other milestones shaping retirement in the United States see GAO, *The Nation's Retirement System: A Comprehensive Re-evaluation is Needed to Better Promote Future Retirement Security*, [GAO-18-118SP](#) (Washington, D.C.: October 2017). For additional information on private health insurance markets and coverage see *Private Health Insurance: Markets Remained Concentrated through 2018, with Increases in the Individual and Small Group Markets*, [GAO-21-34](#) (Washington, D.C.: Nov. 13, 2020) and *Mental Health and Substance Use: State and Federal Oversight of Compliance with Parity Requirements Varies*, [GAO-20-150](#), (Washington, D.C., December 2019).

<sup>7</sup>Under ERISA, a fiduciary is anyone, such as a sponsor, trustee, investment adviser, or other service provider, to the extent they exercise any discretionary authority or control over plan management or any authority or control over the management or disposition of plan assets; render investment advice respecting plan money or property for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so; or have discretionary authority or responsibility for plan administration. See 29 U.S.C. § 1002(21)(a).

<sup>8</sup>The majority of privately insured individuals are covered through group health plans provided by an employer, an employee organization (such as a union), or multiple employers through a multiple employer welfare arrangement (MEWA). ERISA does not cover certain plans, such as those established or maintained by governmental entities or churches for their employees.

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supports mental health parity, and requires coverage of emergency services, among other things.

Employer-sponsored retirement and health plans subject to ERISA generally must comply with requirements intended to protect the interests of plan participants. Specifically, among other things:

- plan administrators<sup>9</sup> are required to provide participants with a summary plan description outlining their benefits, rights, and responsibilities under the plan, and notify participants of any material changes;
- plan administrators are generally required to file annual reports, the Form 5500 Annual Return/Report of Employee Benefit Plan (Form 5500) and applicable nine schedules and attachments that collect information on particular plan aspects and fulfill specific filing requirements, including information on plan investment and service provider fee information, financial condition, annual participant contributions, and number of participants;<sup>10</sup>
- plan fiduciaries are required to discharge their duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration and with the care, skill, prudence, and diligence under the circumstances then prevailing of a prudent man acting in a like capacity and familiar with such matters;
- plan fiduciaries are generally prohibited from entering into certain transactions with the plan, such as by dealing with plan assets in the fiduciary's own interest; and
- plan fiduciaries are required to maintain reasonable procedures for filing benefit claims, providing notice of benefit determinations, and appealing adverse benefit determinations.

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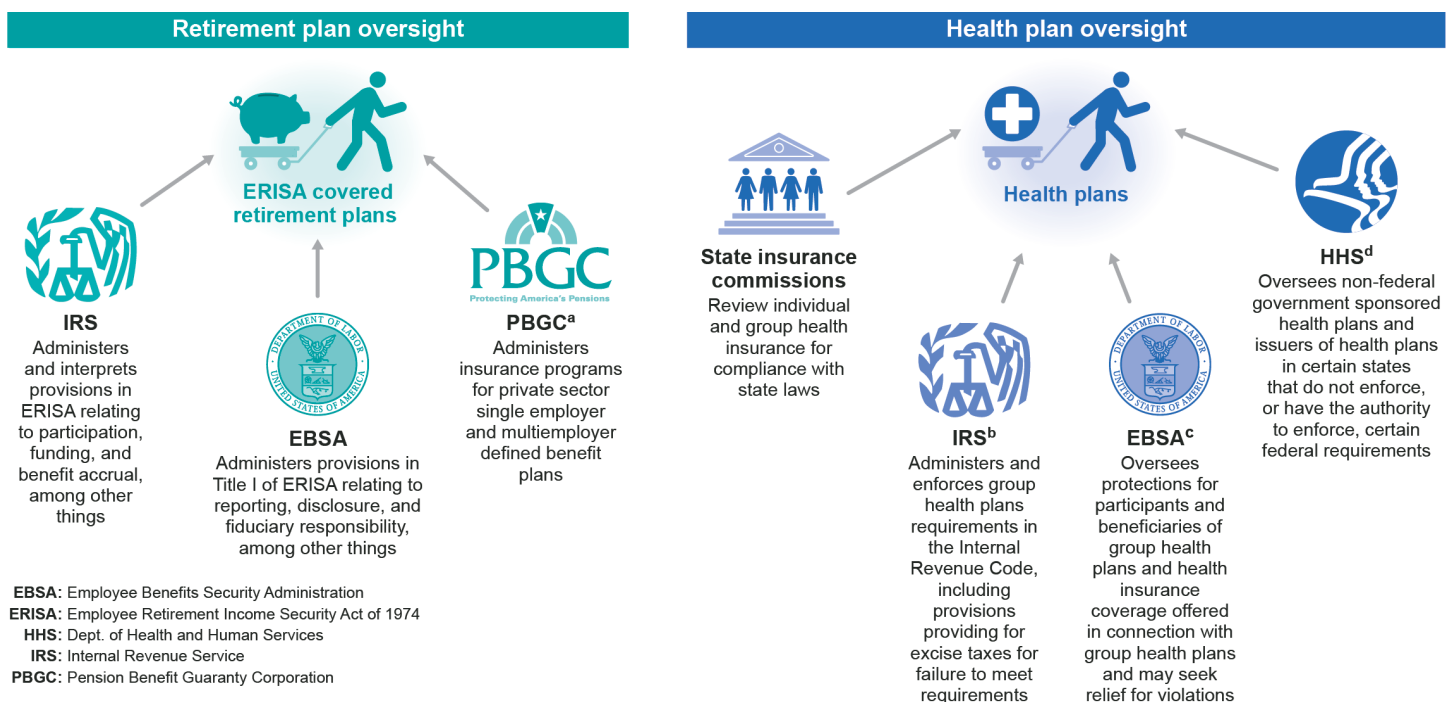
<sup>9</sup>Plan administrators are responsible for administering the day-to-day operations of the plan. Plan administration may be provided by the plan sponsor or by a third-party.

<sup>10</sup>The Form 5500 is an important compliance, research, and disclosure tool for the Department of Labor and a source of information and data for use by Congress and other federal agencies, in assessing employee benefit, tax, and economic trends and policies.

# The Role of Employee Benefits Security Administration (EBSA) and Other Enforcement Agencies

EBSA is the agency within DOL primarily responsible for ensuring that employer-sponsored retirement and group health plans comply with requirements in Title I of ERISA; however, certain compliance issues are the responsibility of other state and federal entities (see fig. 1).<sup>11</sup> EBSA shares responsibility for administering provisions within ERISA with the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC). For example, the agencies jointly developed and maintain the Form 5500. Similarly, EBSA shares responsibility for the regulation and oversight of group health plans with the Department of Health and Human Services and IRS.

**Figure 1: Federal and State Oversight of Retirement and Health Plans**



Source: GAO analysis of EBSA, HHS, IRS, and PBGC documents and GAO-20-150. | GAO-21-376

<sup>a</sup>PBGC insures the pension benefits of American workers and retirees who participate in private sector defined benefit pension plans and guarantees benefits up to statutory limits.

<sup>b</sup>The Employee Plans Office of the IRS was created in 1974, following enactment of ERISA, to help protect the retirement benefits of employees.

<sup>c</sup>ERISA has been amended by a number of laws that established additional health plan requirements: the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Paul Wellstone and Pete Domenici Mental Health

<sup>11</sup>EBSA also oversees welfare benefit plans other than group health plans, such as life insurance and disability insurance plans. See 29 U.S.C. § 1002(1). Oversight of these other welfare benefits is outside the scope of this report.

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Parity and Addiction Equity Act of 2008, which generally requires that coverage for mental health and substance use disorder be no more restrictive than coverage for medical/surgical services; and the Patient Protection and Affordable Care Act.

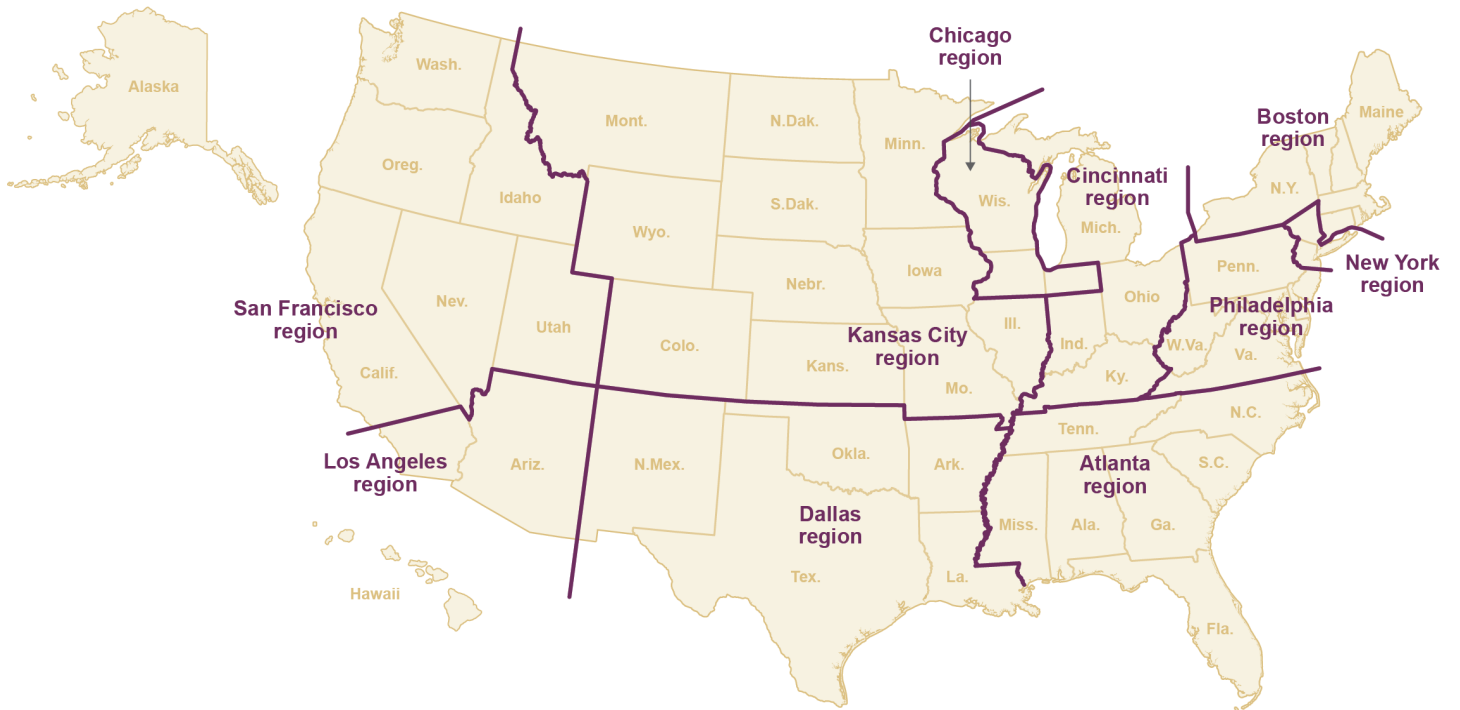
<sup>d</sup>HHS may investigate and implement corrective action or impose civil monetary penalties for any non-Federal governmental plan that fails to comply with applicable Public Health Service Act requirements.

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## EBSA Organizational Structure

EBSA's national and regional staff work together to ensure plan participants receive the benefits to which they are entitled. The national office functions include interpreting ERISA and developing relevant regulations, as well as developing the enforcement guidance regional office staff use to address inquiries and conduct investigations. In particular, the agency's Office of Enforcement, Deputy Assistant Secretary for National Operations, and the Deputy Assistant Secretary for Regional Office Operations focus on ERISA compliance by establishing investigation processes and providing policy direction, technical investigative assistance, and oversight to enforcement personnel. The national office also identifies national priorities and approves regional office proposals for issues meriting further regional investigation. (See app. I for national enforcement projects in fiscal years 2011 through 2021). Regional offices may develop their own regional projects and areas of expertise based, in part, on local issues and the results of previous investigations. (See app. II for a list of fiscal year 2021 regional projects). In addition, EBSA's national office staff also provided training to EBSA staff on the compliance requirements in new legislation (see fig. 2).

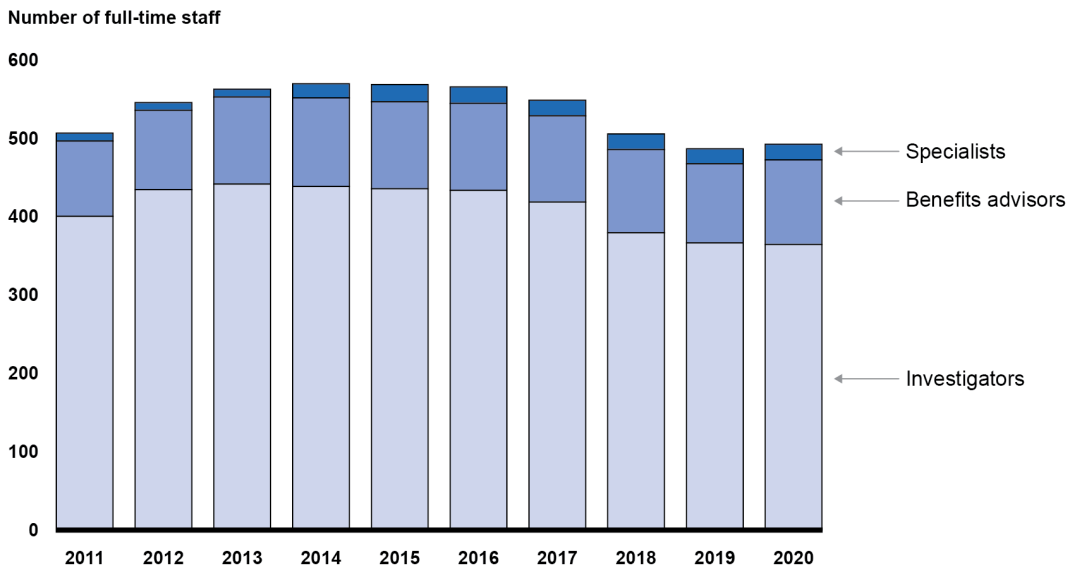
**Figure 2: EBSA Regions and Regional Office Locations**



Source: Employee Benefits Security Administration (EBSA) fiscal year 2020 operating plan; National Atlas (base map). | GAO-21-376

In fiscal year 2020, EBSA’s regional office staff included 364 investigators, 108 benefits advisors, and 20 specialists, compared to 10-year highs of 441 investigators in fiscal year 2013, 113 benefits advisors in fiscal year 2014, and 22 specialists in fiscal year 2015 (see fig. 3).

**Figure 3: EBSA Full-Time Regional Investigative Staff, Fiscal Years 2011-2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) summary staffing reports. | GAO-21-376

In addition, other offices within EBSA and other divisions of DOL support EBSA work. The agency's Office of the Chief Accountant focuses on annual reporting and audit requirements by employee benefit plans and enforces those requirements through the imposition of civil penalties against plan administrators whose Form 5500 is rejected for being incomplete or inaccurate.<sup>12</sup> The office also operates under broad authority to conduct investigations of benefit plans and to inspect benefit plan records. The Office of the Solicitor provides legal services to EBSA in all litigation, including enforcement actions. The Office of Inspector General conducts audits to review the effectiveness, efficiency, economy, and integrity of all DOL programs and operations, including within EBSA. Specifically, the Office of Inspector General and EBSA have agreed to exchange information in investigations involving matters of interest to

<sup>12</sup>ERISA provides for the assessment of civil monetary penalties on a per day basis for a plan administrator's failure to provide required reports to DOL and required disclosures to participants, among other things. See 29 U.S.C. § 1132(c). See *Private Pensions: Clarity of Required Reports and Disclosures Could be Improved*, GAO-14-92 (Washington, D.C.: Nov. 21, 2013) for more information about those requirements. In addition, ERISA provides for the assessment of civil monetary penalties against a party in interest who engages in a prohibited transaction and a fiduciary who breaches their fiduciary responsibility; the amount of the penalty is a percentage of the amount involved in the prohibited transaction or a percentage of the applicable recovery amount for breaches of fiduciary responsibility. See 29 U.S.C. § 1132(i) & (l).

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both agencies in order to strengthen the protection afforded to plan participants and their beneficiaries. EBSA and the Office of Inspector General may also conduct joint criminal investigations.

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## EBSA Enforcement Primarily Focused on Encouraging Plans to Voluntarily Meet

### General Description Selected Requirements of the Employee Retirement Income Security Act of 1974 (ERISA) for Retirement and Health Plans Enforced by EBSA

**Disclosure:** Disclosing plan information to participants: such as a description of the plan and benefits and timely notice of changes to the plan

**Reporting:** Reporting to EBSA and other agencies: such as Form 5500 and reports triggered by certain plan decisions or conditions

**Fiduciary Responsibilities:** Plan fiduciaries are required to discharge their duties solely in the interest of participants and beneficiaries:

- (1) for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration,
  - (2) with the care, skill, prudence, and diligence under the circumstances then prevailing of a prudent person acting in a like capacity and familiar with such matters would act,
  - (3) by diversifying investments to minimize the risk of large losses, and
  - (4) in accordance with plan documents.
- Additionally, among other requirements, plan fiduciaries are generally prohibited from engaging in certain transactions with the plan or with a person related to plan management.

Source: Employee Benefits Security Administration (EBSA) compliance information for retirement and health plans | GAO-21-376

EBSA generally focuses its enforcement efforts under ERISA in three broad categories of requirements that apply to both retirement and health plans and their service providers: those related to disclosure of plan information to participants, reporting to relevant agencies, and fiduciary responsibilities. (see sidebar).

EBSA primarily enforces ERISA through civil investigations of retirement and health plans and by encouraging plans to voluntarily remedy any violations identified by EBSA's regional office investigative staff, such as by restoring plan or participant assets, paying for erroneously denied services, and making needed administrative changes. See appendix III for the ten most frequently identified types of violations in EBSA investigations closed in fiscal year 2020. The majority of EBSA investigations are civil and only a small portion involve criminal acts. In fiscal year 2020, 83 percent of investigations closed were civil cases.

EBSA's enforcement framework is outlined in manuals, operating plans, and guidance materials that inform the civil investigation process. EBSA's publically available enforcement manual provides frameworks and tools for investigation procedures. EBSA's annual operating plan and related guidance outline enforcement priorities for investigators and regional office management. For example, EBSA's operating plan and guidance recommend that regional offices focus on identifying whether plans keep track of missing vested retirement plan participants, to facilitate appropriate distribution of participants' account balances.<sup>13</sup> For health

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<sup>13</sup>Plans are expected to maintain adequate records and procedures for contacting terminated participants with vested accrued retirement account benefits to ensure that the participants who have reached normal retirement age receive the benefits to which they are entitled.

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plans it instructs regional offices to focus on identifying inappropriate medical treatment limitations and wrongful denial of services notices.<sup>14</sup>

#### **EBSA Voluntary Correction Programs**

EBSA has two voluntary correction programs that encourage fiduciaries and others to self-correct Employee Retirement Income Security Act of 1974 (ERISA) violations by providing incentives, such as relief from enforcement actions and certain penalties. Plans self-report or EBSA may identify plans through reviews of information about plan operations, funding, and investments that employer-sponsored retirement and health plans submit annually on their Form 5500 or Form 5500 SF.

The Voluntary Fiduciary Correction Program allows fiduciaries to self-correct certain fiduciary violations under ERISA, including delinquent participant contributions and certain transactions that pose a conflict of interest. Applicants must correct the violation and restore the plan to the condition it would have been had the breach not occurred. EBSA received over 1,300 filings in 2020 resulting in \$12 million in recoveries.

The Delinquent Filer Voluntary Compliance Program allows plans that have failed to meet ERISA reporting requirements to file reports to the agency, and pay reduced penalties. EBSA received over 19,600 filings requesting assistance through this program in 2020.

Source: Department of Labor, Employee Benefits Security Administration (EBSA) fiscal year 2021 operating plan and agency fact sheets | GAO-21-376

EBSA's investigations of retirement plans examine a wide range of financial transactions to determine whether the transactions violate the fiduciary responsibility requirements of ERISA; that is, a fiduciary must manage the plan's assets prudently and in a participant's best interest. For example, investigators may examine due diligence used by the plan in the management of investments, or potential self-dealing (such as using plan assets for their personal benefit). Investigations may also examine abandoned plans, which may have funds in trust but no active fiduciary, and a variety of issues concerning employee stock ownership plans (ESOP),<sup>15</sup> among other compliance issues.

EBSA's health plan investigations focus on enforcing federal health plan coverage and availability requirements and returning money to plans and participants affected by improper administrative practices or mishandling of plan funds. According to EBSA guidance, investigations frequently target financial solvency and fraud in multiple employer welfare arrangements (MEWA), which allow employers to pool their resources to fund their employees' health benefits or to purchase group insurance.<sup>16</sup> Arrangements that are insolvent, fraudulent, or poorly managed can leave plan participants and beneficiaries untreated, uninsured, and with unpaid medical bills. In fiscal year 2021, EBSA's operating plan stated that the agency planned to focus on health plans' compliance with requirements for reimbursement rates for the treatment of mental health conditions or substance abuse disorders (mental health parity), autism treatment limitations, denials of claims for emergency services, and fees paid to insurance companies and other service providers, among other things. EBSA has authority under the Patient Protection and Affordable Care Act to issue cease and desist orders to multiple employer welfare

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<sup>14</sup>Unless otherwise indicated, references to the operating plan and operating plan guidance describe information from the fiscal year 2021 operating plan and related guidance.

<sup>15</sup>Employee stock ownership plans are defined contribution plans designed to invest primarily in the stock of the sponsoring employer to provide retirement income to employees. When an ESOP plan representative buys or sells plan stock the plan may not pay more than, or sell for less than, the fair market value.

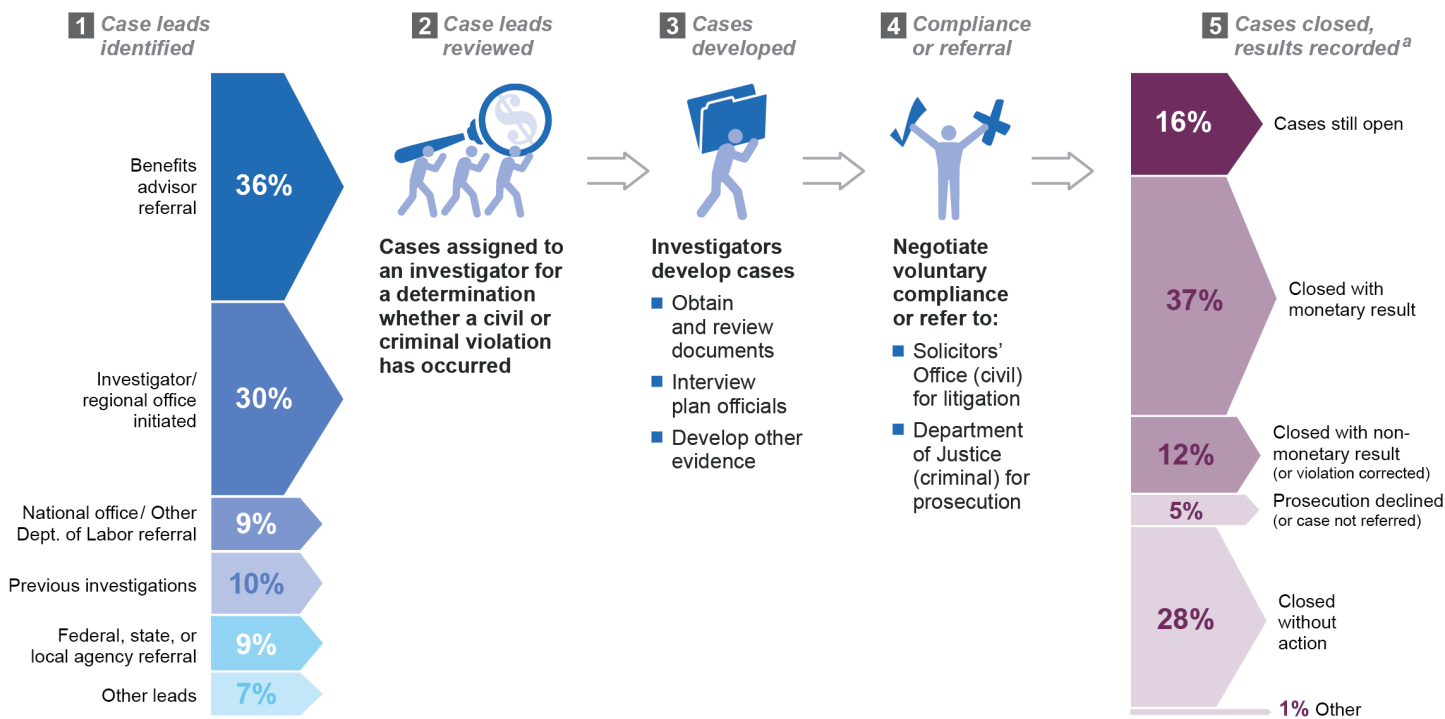
<sup>16</sup>Only multiple employer welfare agreements that constitute ERISA-covered welfare benefit plans are subject to ERISA's requirements governing benefit plans. However, those operating or managing the arrangement may be subject to fiduciary responsibility provisions if acting in that capacity.



arrangements under certain circumstances. In addition, EBSA’s benefits advisors and investigators can attempt to negotiate restoration of denied healthcare benefits. However, according to agency officials, typically, only participants are able to sue plans for the restoration of individual benefits.

In general, EBSA investigations follow five steps (see fig. 4).

**Figure 4: Flowchart of the typical Five-Step EBSA Investigative Process, Data from Cases Opened in Fiscal Year 2017**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data and enforcement manual. | GAO-21-376

Notes: Percentages do not add to 100 due to rounding.

EBSA investigations may take more than 1 year to complete. To ensure that the majority of investigations had been closed, we chose to include data from fiscal year 2017.

<sup>a</sup>Closed with monetary result, closed with non-monetary result, and closed without action categories include investigations referred to the Department of Justice.

**Step One: Case leads are identified**

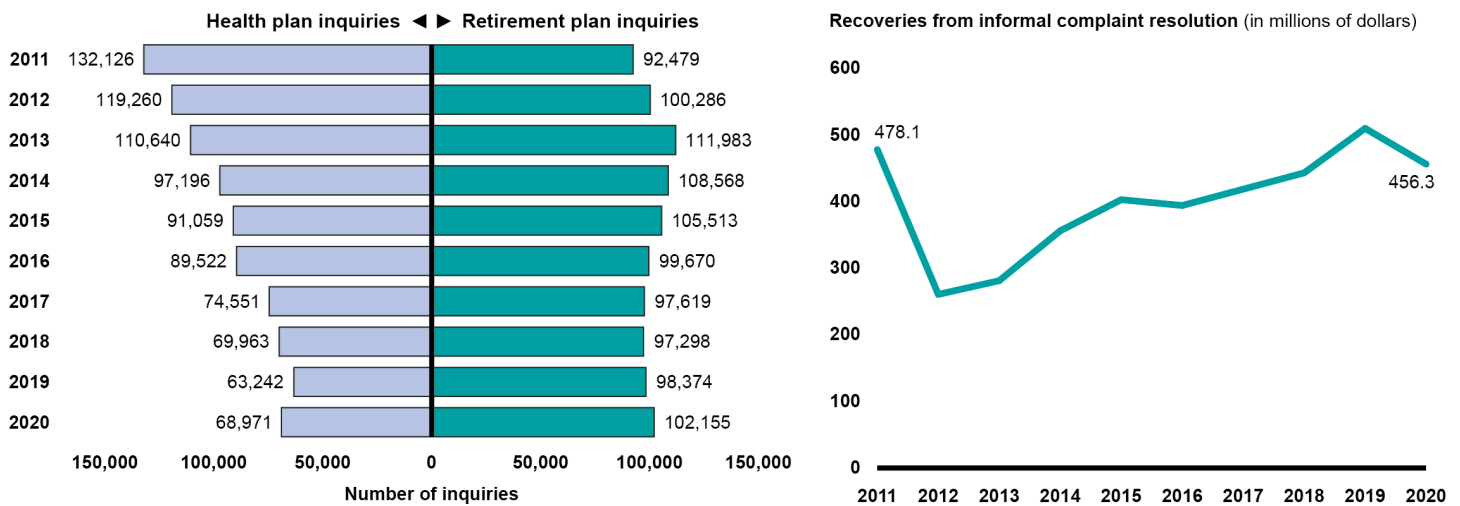
Potential cases for formal compliance investigations are identified through various sources.

- **Benefits advisors.** EBSA relies on its benefits advisors, who respond to participant inquiries, to help restore benefits to participants (monetary or non-monetary), without the need for formal investigation.

Benefits advisors provide assistance to participants who inquire about retirement benefits, such as delayed employer contributions, difficulty locating previous employers to claim accrued benefits, or plan eligibility. Participants may also inquire about health care benefits, such as eligibility for health insurance after job loss, coverage of preexisting conditions and denied health care claims.

In fiscal year 2020, benefits advisors responded to nearly 173,000 requests for assistance, 77 percent of which were from participants. Agency officials told us the number of inquiries can fluctuate due to economic conditions. For example, economic downturns can lead to increases in questions related to benefits for separated employees, such as in 2011, which includes the period following the Great Recession. In fiscal year 2020, benefits advisors recovered nearly \$457 million for plan participants, which reflects “lost” retirement benefits that benefits advisors located, as well as retirement and health benefits that had been improperly denied (see fig. 5).

**Figure 5: EBSA Benefits Advisor Inquiries and Recoveries, Fiscal Years 2011-2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) inquiry data and enforcement results fact sheets. | GAO-21-376

Similarly, benefits advisors provide technical assistance to plan representatives seeking compliance guidance, such as interpreting regulations. For example, when the Patient Protection and Affordable Care Act was implemented, EBSA emphasized assisting, rather than imposing penalties on, health plans they determined were working diligently and in good faith to understand and comply with the new

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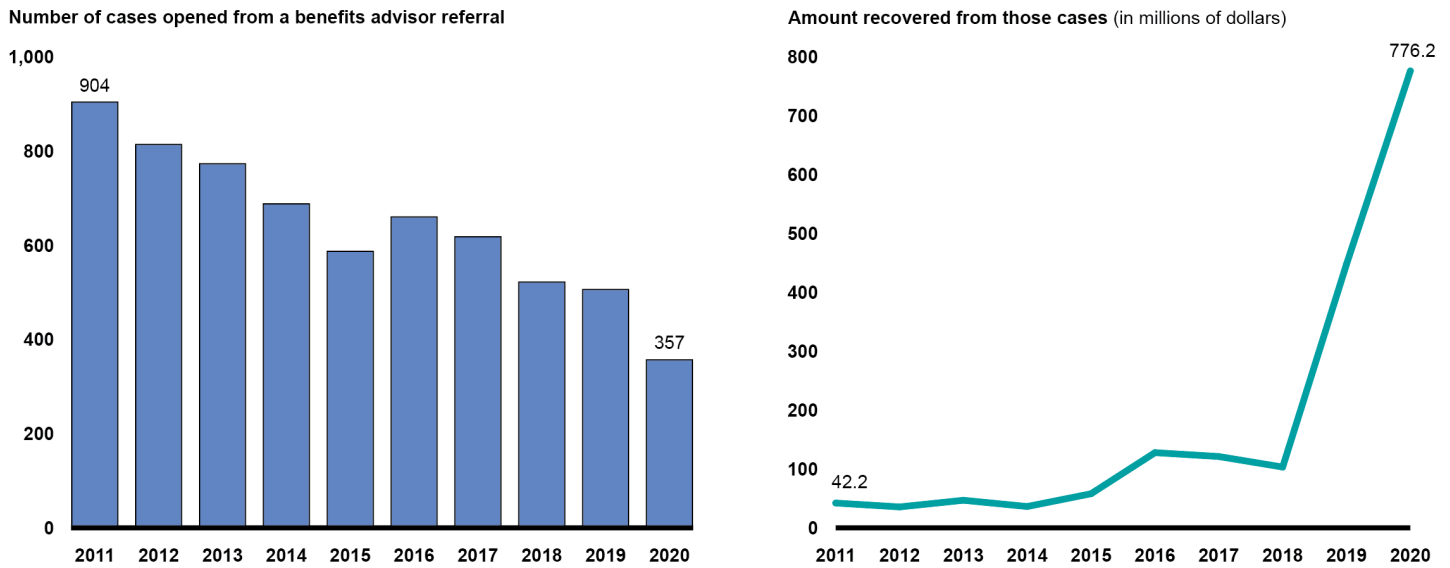
law. Benefits advisors are not empowered to interpret laws and regulations, but can point the callers to EBSA-issued compliance guidance or help them connect with EBSA officials responsible for interpreting laws and regulations, according to EBSA guidance.<sup>17</sup> In fiscal year 2020, about 11 percent of inquiries were from plan representatives seeking technical assistance.

Through their efforts to resolve individual plan-level issues, benefits advisors may identify fiduciary misconduct that needs to be further investigated. For example, EBSA's benefits advisor guidance provides benefits advisors with a list of "red flags" that might indicate the matter should be referred for investigation. For retirement issues, this includes a pattern of delayed contributions. For health plans, the list of red flags includes improper cost-sharing for or denial of health care claims with the potential to affect a significant number of participants. Benefits advisors may refer such cases to EBSA's investigative staff for further investigation. Over the past 10 years, the number of investigations based on benefits advisor referrals has dropped, along with the drop in the number of benefits advisor inquiries. Consistently, during fiscal years 2011-2020, less than one-half of 1 percent of benefits advisor inquiries led to open investigations. However, according to EBSA officials, benefits advisor referrals represent about one-third of all opened investigations and the monetary recoveries from cases referred by benefits advisors has grown significantly (see fig. 6). See step five below for more detail on recoveries.

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<sup>17</sup>Compliance guidance for retirement and health plans is available on EBSA's website. <https://www.dol.gov/agencies/ebsa/employers-and-advisers/small-business/compliance-assistance>.

**Figure 6: Number of EBSA Investigations Opened through Benefits Advisor Referrals and Annual Recoveries from Benefits Advisor Referred Cases Closed, Fiscal Years 2011-2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data. | GAO-21-376

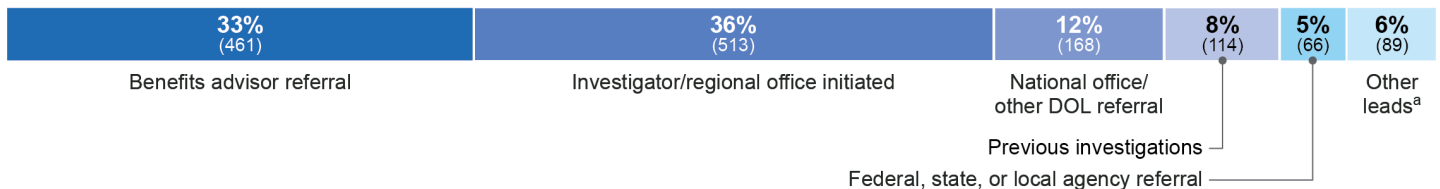
- Regional offices.** EBSA officials said investigators in the regional offices may identify compliance issues by reviewing Form 5500 data. Examples of potential compliance issues described in EBSA’s enforcement manual include inadequate diversification of investments or contributions to retirement plans not made in a timely fashion.<sup>18</sup> Investigators also track sources, such as bankruptcy filings, media reports, private litigation, and information from industry data compilers to identify potential violations for investigation.
- National office and other offices within the Department of Labor.** Investigators may receive referrals from EBSA’s Office of Enforcement and the Office of the Chief Accountant, and from sources in other divisions of DOL, such as Office of Inspector General.
- Federal, state, and local agencies and other entities.** EBSA officials said they have reciprocal arrangements with federal, state, and municipal government to share information, refer investigation

<sup>18</sup>DOL regulations generally require that employers deposit participant contributions as soon as it is reasonably possible to separate them from the employer’s assets, but no later than the 15th business day of the month following the month in which the participant contribution amount are received by the employer or otherwise would have been payable to the participant in cash. See 29 U.S.C. § 2510.3-102.

leads, and in some cases, jointly pursue investigations. When other enforcement agencies discover a possible ERISA violation, they may forward the lead to EBSA. Arrangements with certain agencies are formalized through memoranda of understanding. Regional offices may also develop relationships with other federal, state, and municipal enforcement agencies, including the Federal Bureau of Investigation and local police, to receive referrals, according to regional office officials we spoke with. For example, the U.S. Securities and Exchange Commission may refer a retirement plan investment advisor suspected of engaging in prohibited transactions—such as transactions between a plan and plan fiduciaries that benefit the fiduciaries rather than participants—to EBSA.

- **Previous investigations.** In the course of an investigation, the investigator may identify evidence of unrelated violations or possible criminal activities by plan fiduciaries and service providers and may open a separate case, as appropriate (see fig. 7).

**Figure 7: Sources of EBSA Investigations Closed in Fiscal Year 2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data. | GAO-21-376

<sup>a</sup>Other leads include confidential source leads and non-benefits advisor referrals

## Step Two: Case leads reviewed

EBSA management and staff review case leads to determine if an investigation should be opened, and if so, such cases are assigned to investigative staff, according to agency officials. In most cases, EBSA allows regional offices to decide how to staff investigations and which investigations to pursue based on EBSA priorities. EBSA staff decide whether to pursue an investigation based on the merits of the issue for investigation, including the egregiousness of the allegation, whether a correction has already been made, whether there are viable parties to pursue for corrective action, and whether the plan is a repeat offender. EBSA officials said that they prioritize potential investigations that originate from participant inquiries, address national and regional projects, and those that may result in large monetary recoveries or affect large numbers of participants. Regional office managers and investigators we spoke with agreed that the decision to pursue potential cases often involved investigators, their supervisors, the regional directors and deputy

regional directors, and at times, national office staff, including lawyers for the Office of the Solicitor. Similarly, regional office managers assign case leads to investigators. Regional office staff also noted that decisions about how investigations are staffed include consideration of availability, special expertise or training, and previous experience with similar issues or industries.

Step Three: Cases developed

Regional office officials we spoke with said they determined whether to develop a case by asking investigators to perform an initial review of available documentation to determine if potential case leads meet EBSA's enforcement priorities. These priorities include aligning with national or regional projects and cases affecting a large numbers of participants and beneficiaries or resulting in large monetary recoveries. In addition, EBSA's operating plan guidance notes that criteria for deciding which investigations to pursue should reflect a balance of plan sizes and types. The guidance further states that investigations of smaller plans are primarily a means to assess the conduct of fiduciaries and service providers to many plans. (see table 1).

**Table 1: EBSA Investigator Case Development Activities**

Activity	Description
Collect financial reports	Collects and reviews recently filed financial reports, including the Form 5500 and any exemption applications pertaining to a prohibited transaction.
Develop investigative plan	Develops a plan for the investigative process, which include allegations, investigative leads, basis for investigation under the Employee Retirement Income Security Act of 1974, as amended (ERISA), any elements of proof needed to establish a violation, the scope of the proposed inquiry, planned investigative activity, the records to be reviewed, and interviews to be conducted. The plan is reviewed by the investigator's supervisor,
Contact plan representative	Sends the plan representative a letter informing them of the open investigation and requesting documentation. Generally, EBSA investigators try to obtain documents voluntarily, but they have subpoena authority to compel the submission of documents and records and to compel individuals to appear for interviews and testimony.

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## Step Four: Compliance or referral

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Activity	Description
Conduct site visits	Meets with plan representative onsite or virtually to conduct interviews and collect documents to help determine if there is an ERISA violation, the extent of the violation, and any non-monetary corrections required or monetary recoveries that are due. Certain investigations, such as those involving fiduciary compliance, complex investment strategies, or excessive fees charged by service providers may require an analysis of the plan's assets and investments by EBSA staff with a financial background or by contracted outside experts.

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Source: The Employee Benefits Security Administration (EBSA) Enforcement Manual, updated December 2019 | GAO-21-376

According to agency officials, EBSA investigators work to encourage plans to voluntarily comply with ERISA provisions whenever possible. Investigators negotiate with plans to make necessary changes in their administrative practices or to restore money to the plan or participants.

In cases where an agreement cannot be reached, investigators can refer the case to the Office of the Solicitor in their regional office for civil litigation. EBSA's solicitors may decline to initiate litigation in cases where the recoveries are too small to justify the expense of litigation. Since fiscal year 2010, fewer than 10 percent of investigations were referred for civil litigation and more than one-half of those resulted in litigation filed by the Office of the Solicitor.<sup>19</sup> Other cases may be resolved through voluntary compliance or settlements. EBSA officials told us that when investigators discover violations not under their purview, they may refer them to the appropriate federal or state agencies.<sup>20</sup>

Criminal investigations are opened when investigators detect a "badge of fraud," such as lying or concealing information, and investigators may consider referring the case for prosecution, according to EBSA officials. Regional office managers and investigators we spoke with agreed that

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<sup>19</sup>From fiscal years 2011 to 2020, EBSA referred a total of 1,784 cases for civil litigation and the Office of the Solicitor filed 925 complaints in the court based on those referrals (almost 52 percent).

<sup>20</sup>For example, IRS and the Pension Benefit Guaranty Corporation (PBGC) administer other requirements applicable to benefit plans. Namely, IRS has responsibility for ensuring that certain retirement plans meet applicable requirements to receive preferential tax treatment. PBGC operates two separate insurance programs (for single-employer and multiemployer defined benefit pension plans) monitors and works with underfunded retirement plans to help prevent pension losses. In addition, certain types of benefit plans are not covered by ERISA and thus not part of EBSA's oversight authority. Such cases may be referred to the appropriate federal enforcement agencies or the state insurance regulators.

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Step Five: Cases closed,  
results recorded

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the decision to refer cases to the Department of Justice for criminal prosecution often involved investigators, their supervisors, regional directors and deputy directors, and at times, national office staff, such as lawyers in DOL's Office of the Solicitor. The enforcement manual directs investigators who detect potential violations to contact the appropriate U.S. Attorney's Office at the earliest possible stage of an investigation to determine whether the office has interest in the case and the resources available to prosecute. In fiscal year 2020, EBSA referred 186 criminal cases to the U.S. Attorney's Office, which accepted 122 cases—about 66 percent.<sup>21</sup> The U.S. Attorney's Office may elect not to pursue a criminal referral due to workload or other concerns with the case. When the U.S. Attorney's Office declines a case, the investigators may refer the case to state or local prosecutors.

Civil investigations are closed when, for example, the investigators negotiate a resolution of the issues identified with the plan; litigation is completed; or the case is referred to another enforcement agency, according to EBSA officials.<sup>22</sup> Investigators record any results in their case tracking database. In fiscal year 2020, regional office staff closed 1,181 civil investigations (see fig. 8).

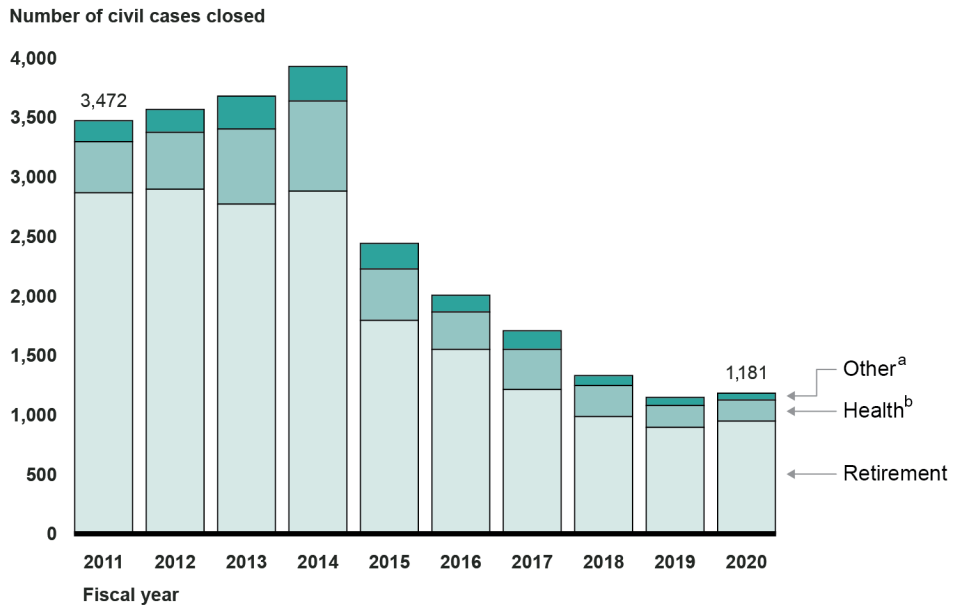
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<sup>21</sup>Criminal referrals may be accepted in a fiscal year other than when the cases were referred.

<sup>22</sup>EBSA's investigation protocols generally do not include a system for administrative appeals outside the context of civil penalties. According to EBSA officials, ERISA neither provides a system of administrative appeals of determinations of civil investigations. EBSA officials said that the agency may agree to mediation or arbitration in settling compliance issues and, should a case be brought in civil or criminal court, a defendant can seek to appeal any judicial decisions.



**Figure 8: EBSA Civil Investigations Closed, Fiscal Years 2011 through 2020**



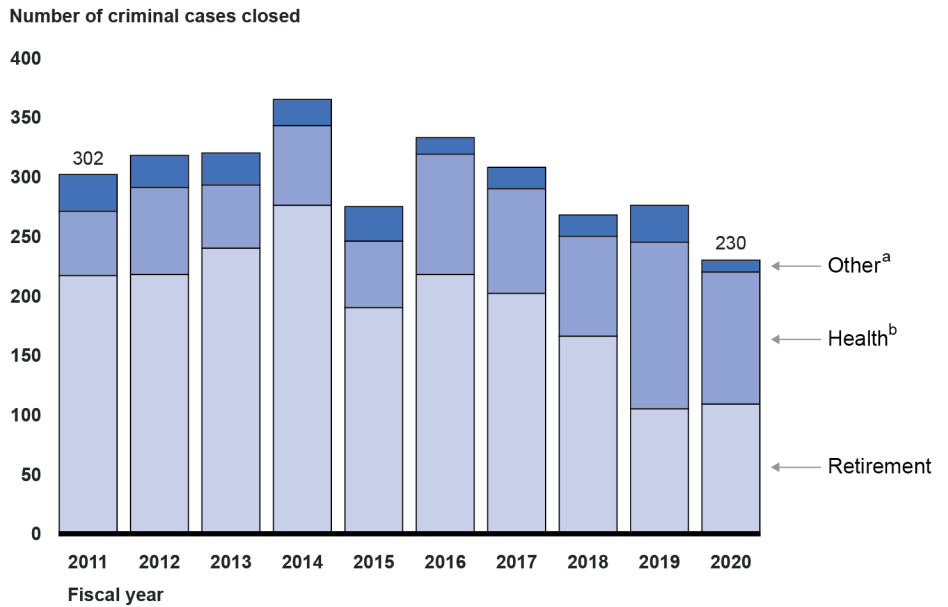
Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data. | GAO-21-376

<sup>a</sup>Other cases include investigations of certain welfare benefit plans, such as life insurance and disability insurance.

<sup>b</sup>EBSA officials told us that a large portion of health care plans are fully insured and are primarily under the authority of state insurance commissions.

Criminal investigations are closed when there are no violations found, the U.S. Attorney's Office declines to prosecute, or prosecution is completed. In fiscal year 2020, regional office staff closed 230 criminal investigations. That year, 70 individuals were indicted and 59 individuals entered guilty pleas or were convicted. (see fig. 9)

**Figure 9: EBSA Criminal Investigations Closed, Fiscal Years 2011 through 2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data. | GAO-21-376

<sup>a</sup>Other cases include investigations of certain welfare benefit plans, such as life insurance and disability insurance.

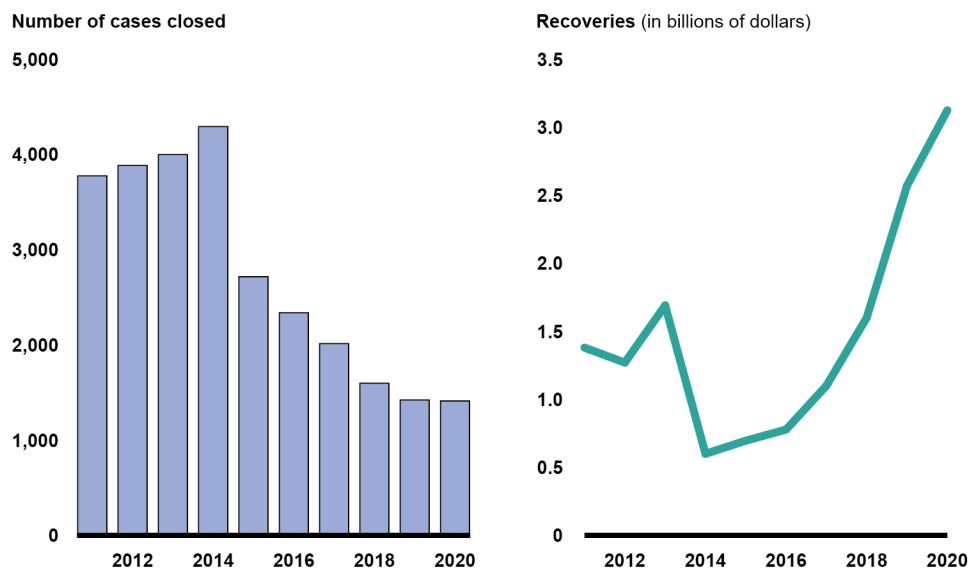
<sup>b</sup>EBSA officials told us that a large portion of health care plans are fully insured and are primarily under the authority of state insurance commissions.

Investigators track and record outcomes for civil and criminal cases, including plan and participant assets recovered and the rate at which referrals to the Department of Justice are prosecuted. EBSA officials noted that certain health plan outcomes are difficult to fully monetize. EBSA guidance notes that outcomes for health plan investigations include removing improper plan exclusions or limitations. As a result of its compliance and enforcement activities in fiscal year 2020, EBSA recovered over \$3.1 billion in direct payments to plans and participants.<sup>23</sup> EBSA reported that 67 percent of civil cases resulted in monetary results for plans or other corrective actions and 82 civil cases (7 percent) were

<sup>23</sup>The recoveries include plan assets restored, benefits paid to participants, and reversal of prohibited transactions, such as transactions between a plan and plan fiduciaries that benefit the fiduciaries rather than participants.

referred to the DOL's Office of the Solicitor for civil litigation.<sup>24</sup> (see fig. 10).

**Figure 10: EBSA Cases Closed and Monetary Recoveries, Fiscal Years 2011 through 2020**



Source: GAO analysis of Employee Benefits Security Administration (EBSA) case data and enforcement results fact sheets. | GAO-21-376

Note: In 2013, EBSA began a strategy to focus on cases that would result in large monetary recoveries for participants. In 2014, EBSA changed its method of counting recoveries to include only money paid back to plans, participants, and beneficiaries.

<sup>24</sup>The Division of Plan Benefits Security, within DOL's Office of the Solicitor, and regional office solicitors litigate retirement, health and other employment-related benefits cases.

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## EBSA Uses a Range of Strategies to Improve Investigative Processes and Seeks to Ensure Enforcement Quality through Training and Oversight

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### EBSA's Five Strategies Prioritize Maximizing Results for Participants

EBSA's operating plan noted that the agency directs its resources to maximize positive outcomes for plans and participants. The operating plan describes the strategies to achieve the goal, including (1) improving targeting techniques; (2) setting performance indicators to encourage results for plan participants and acceptance of criminal cases by federal prosecutors; (3) allocating resources to national enforcement projects, evolving issues, and major cases; (4) using investigative time efficiently, and (5) promoting cross-regional investigation to leverage resources.

**Strategy One:** Improving targeting techniques. To help identify plans for investigation, EBSA developed several targeting strategies. In fiscal year 2016, EBSA formed a national targeting group made up of regional and national office staff as part of an on-going effort to develop leads for investigations, monitor results, and report to regional offices on the effectiveness of targeting methods. EBSA continued these efforts in fiscal year 2019 by creating a team to evaluate past targeting criteria for plans at risk of investment conflicts, among other activities. In fiscal year 2020, EBSA began publishing an annual report to document case development and identify patterns to target investigations. The annual report is also a way for EBSA to share these practices across the regions.

**Strategy Two:** Setting performance indicators to encourage results for plan participants and acceptance of criminal cases by federal prosecutors. Prior to 2013, EBSA focused its investigator performance measure on cases closed, which incentivized pursuing simple cases. Since 2013, it has refocused the performance measure on recovering assets for participants, which has led to the pursuit of more complex and difficult investigations. In a 2012 white paper, EBSA noted that investigators should focus on "major cases" that could recover large

amounts of plan assets. EBSA’s annual operating plan guidance reflects the evolution in major cases and related changes to performance measures since that time. This guidance includes the types of compliance issues investigators should pursue, directions for steadily increasing the amount of time regional offices spend on major cases, and the monetary recoveries achieved per staff day. Major cases may include investigations of service providers with many plans and plan participants or systemic problems in the plan that may require significant asset management or administrative reforms.<sup>25</sup> Total monetary recoveries for participants more than doubled from fiscal year 2011 through 2020. The focus on major cases, which began in 2013, accounts for much of that growth, with nearly 80 percent of total recoveries from all sources coming from major cases in 2020. According to EBSA officials, major cases are more resource intensive; therefore, in that same period, the total number of investigations that were closed dropped by more than 62 percent. (See table 2 for major case recoveries from fiscal year 2016-2020).

**Table 2: EBSA Major Case Staff Days and Recoveries, Fiscal Years 2016 through 2020**

Fiscal year	Major case recoveries during period	Major case staff days during period	Major case recoveries per staff day
2016	\$276,799,800	17,357	\$15,947
2017	\$609,072,297	20,122	\$30,269
2018	\$1,055,858,668	16,772	\$62,956
2019	\$1,937,524,056	17,807	\$108,807
2020	\$2,491,694,236	18,418	\$135,288

Source: Data provided by the Employee Benefits Security Administration (EBSA) | GAO-21-376

Note: Prior to 2016, EBSA did not separately track certain major case outcomes

**Strategy Three:** Efficiently using investigative time. From fiscal years 2011 through 2016, EBSA selected a random sample of between 179 and 313 retirement plans for investigation annually, tracked the progress of

<sup>25</sup>According to EBSA, significant asset management reforms may include divestment of imprudent, undiversified or illiquid assets whether or not they have resulted in plan losses. It may also include reallocation of investments to comply with investment guidelines, or changes in investment guidelines to limit the plan’s risk of large losses. Significant administrative reform may include requirements for service providers, such as financial institutions to adopt practices to identify and correct abandoned plans, to restore employee contributions not credited to the retirement account in a timely manner, properly apply employer contributions, or change methodology for the reporting of plan asset values (e.g. custodian obtaining fair values for hard to value assets).

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the investigations, and analyzed the results. A similar program selected samples of 75 to 81 small health plans annually from fiscal years 2013 through 2015. In 2017, EBSA reported the results of both programs, and found that about 60 percent of all the plans sampled each year failed to comply with some aspect of ERISA.

According to EBSA, with the exception of those for employee stock ownership plans, investigations of plans identified through EBSA's targeting methods were more likely to identify a violation than the sampling study investigations. In addition, the agency determined that violations identified in the study included what the agency characterized as minor reporting or paper violations with little impact on plan participants. EBSA concluded that the study's data were meaningful in analyzing trends, but did not provide a strong measure of whether the benefit plan universe was in substantial compliance with all of ERISA's obligations. The agency further concluded that targeted investigations were more successful and decided to continue to focus on specific compliance issues and direct the agency's resources to investigations that will lead to the biggest impact—either in the amount of funds recovered or in the number of plan participants affected.<sup>26</sup>

To maximize resources, regional office officials may assign specialists and individuals with technical expertise to investigative teams. In some cases, these specialists act as leaders or supervisors for teams doing relevant investigations, while in other cases they act as experts available to all teams or as resources for other regional offices.

**Strategy Four:** Allocating resources to national enforcement projects, and emerging issues. In its operating plan guidance, EBSA stated that it establishes national enforcement projects by assessing current enforcement activities, identifying recent enforcement trends, analyzing industry activities and areas of noncompliance, and reviewing policy considerations to identify areas of potential risk in the employee benefit industry. Identifying national priorities also allows EBSA to shift its resources to evolving issues. For example, the operating plan describes new compliance responsibilities for plans and enforcement and regulatory

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<sup>26</sup>In its 2007 report, GAO recommended that EBSA evaluate the extent to which it could supplement its investigations with routine compliance examinations. See [GAO-07-22](#). Similarly, in 2019, GAO recommended that the agency analyze whether targeted reviews alone are effective in ensuring compliance with the mental health and substance abuse parity requirements for private, employer-sponsored group plans. See [GAO-20-150](#).

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requirements in the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE). The SECURE Act amended ERISA to establish a new type of multiple employer retirement plan called a pooled employer plan, and granted EBSA the authority to issue guidance to carry out the new provisions.<sup>27</sup> The operating plan further stated that this and other requirements of the SECURE Act would add a large new workload for the agency. In addition, the operating plan states that EBSA has already begun shifting resources from other activities to step up its efforts to assist and promote compliance among multiple employer welfare arrangements.<sup>28</sup> See app. I for a list of national enforcement projects.

Regional offices annually submit program operating plans with an analysis of their region, including issues, plan types, industries, and services specific to the region, according to EBSA officials. EBSA guidance states that regions should develop cases around local issues and take advantage of staff expertise in a particular area. EBSA guidance further states that regional directors should assess current enforcement activities, trends, and areas of noncompliance within the region's jurisdiction and ensure that risk assessment is an integral part of the identification and implementation of new regional priorities. Including a regional focus in developing investigation projects gives the regional office ownership and discretion over their work, which helps in recruiting and retaining regional staff, according to EBSA officials. Regional projects also act as pilot programs for projects that may be implemented nationally. For example, the national focus on retirement plans that have failed to keep track of vested participants who separated from their employer began as a regional office project. See app. II for a list of 2021 regional enforcement projects.

**Strategy Five:** Promoting cross-regional investigation to leverage resources. EBSA has included cross-regional investigations as an enforcement strategy since 2016. Such efforts leverage limited resources and focus on corrections that affect service providers who operate in

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<sup>27</sup>The SECURE Act amends ERISA to permit unrelated employers to join a new type of multiple employer retirement plan (pooled employer plan) and requires that providers to the pooled employer plan (pooled plan providers) register with DOL and comply with a number of plan requirements. DOL regulations describe registration requirements for pooled employer plans. See 29 C.F.R. § 2510.3-44.

<sup>28</sup>In its fiscal year 2020 operating plan, EBSA reported that the agency had been devoting about 62 full-time employees to MEWA-related work on an annualized basis, including 48 full-time employees working directly on enforcement and participant assistance.

multiple EBSA regions, according to EBSA’s operating guidance. EBSA officials said that combining the expertise and resources of several regions allows them to conduct large and complex investigations. EBSA has found that health care issues, in particular, routinely cross regional boundaries. In fiscal year 2020, EBSA opened 16 cross-regional investigations.

**EBSA Relied on Training, Written Protocols, and Management Oversight to Ensure the Quality of Its Enforcement Efforts**

The EBSA national office is responsible for ensuring consistency in enforcement efforts across regions. All enforcement staff receive the same training and instructional information, according to regional officials. In addition, officials noted that the national office reviews most work products. EBSA relies on training, written protocols, and management oversight to ensure the quality and consistency of its enforcement efforts.

**Training**

EBSA officials said they provide new investigators and benefits advisors with intensive new hire training. Investigators receive additional ongoing national and regional office training to keep them up-to-date on skills and relevant topics (see table 3).

**Table 3: EBSA Investigator Training Activities**

Training type	Topics covered	Frequency
<b>New investigator</b>		
	EBSA’s authority and plan compliance requirements under ERISA <sup>a</sup>	First year hired
	Fiduciary provisions and investigative techniques	First year hired
	Employee benefit plan accounting and financial analysis	Second year hired
	Criminal enforcement	One-time
<b>National office</b>		
	Advanced issues and techniques for experienced investigators, including complex and detailed material not covered in other courses, such as financial institutions, ESOPs, MEWAs, and health enforcement training	One-time
	Competency training on basic fiduciary provisions, investigative techniques, benefits advisor techniques, employee benefit plan accounting and financial analysis, criminal enforcement, advanced issues and techniques, and health enforcement training	One Time
	Ongoing enforcement issues, such as the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008	Ongoing
	Emerging enforcement issues, such as new laws. For example, in fiscal year 2020, investigators received training on the CARES Act and the Families First Coronavirus Response Act COVID-19 testing provisions	Ongoing
	Web-based training on specialized topics for health and financial cases	Ongoing



Training type	Topics covered	Frequency
	Technology training on software products used by EBSA and commercial online research databases, such as Westlaw	Ongoing
<b>Regional office</b>		
	Training from supervisors and specialists to provide investigators with investigation skills and to stay current with emerging compliance issues	Ongoing
	Mentorship program for new employees	Ongoing
<b>Specialized training</b>		
	Criminal training courses at the Federal Law Enforcement Training Center	Slots available on first come basis

Source: Employee Benefits Security Administration (EBSA) officials and the fiscal year 2021 program operating plan guidance. | GAO-21-376

<sup>a</sup>Benefits advisors also receive this training

According to operating plan guidance, new benefits advisors attend the initial 2-week ERISA training with new investigators. Benefits advisors also receive relevant training from the national and regional offices and may attend some training targeted to investigators.

## Written Protocols

As discussed earlier, EBSA also publishes a detailed publicly available enforcement manual with model letters, checklists, and other tools to aid investigators in their work. In addition to its annual operating plan and operating plan guidance, which lays out the strategic objective for enforcement based on annual resources, EBSA outlines specific procedures to accomplish that objective. Benefits advisors are provided standard operating procedures with guidance on specific topics.

## Management Oversight

EBSA officials told us that the national and regional offices ensure the quality of their enforcement efforts in several ways.

- **Documentation review.** National and regional office staff review investigation documentation for selected cases. Agency officials told us that for every case that results in monetary recoveries of over \$5,000 or significant non-monetary corrections, national office staff review the closing letter, proof of a plan's actions to correct non-compliance, investigation report, and other supporting documents to determine whether violations are properly cited. They also told us that they check for adequate proof that corrections have been made, such as restoration of plan assets and the completion of sufficient administrative corrections, among other things. Regional offices may also review investigation documentation. Team supervisors in the regional office or the Associate Regional Director review all cases on a quarterly basis before a case can be closed, according to officials at two regional offices.

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- **Peer review.** EBSA national and regional offices work together to conduct peer reviews of certain closed cases to identify widespread issues that they may need to focus on and also to identify best practices. Each region reviews a sample of files from another regional office to look at specific areas of focus, compile results, and develop a summary report, according to agency officials. A recent peer review focused on investigations related to the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 to assess industry trends and to determine if violations were fully addressed. Other areas of focus have included civil and criminal cases with a focus on accuracy of information in their investigation tracking database. Problems identified in reviews can be both substantive and procedural, and vary in importance. For example, peer reviews revealed that EBSA investigations of employee stock ownership plans are complex and require technical financial analysis to determine if plans overpaid for their employer stock. In response, EBSA provided training on the issues associated with employee stock ownership plans and created a valuation team to assist investigators working on those cases. In another instance, peer reviewers found that interview notes were not consistently retained and EBSA developed a policy to retain those notes.
  - **Performance review.** Regional office officials said that investigators receive ongoing feedback and formal mid-year and annual reviews from their management. Supervisors review investigation documents and discuss cases with investigators at least monthly, according to regional office officials.

Regional office supervisory staff oversee benefits advisors. Specifically, supervisors can listen in on benefits advisor phone calls and sample the information benefits advisors collect and the data they enter to verify that benefits advisors are following protocols and giving accurate information. EBSA officials said the agency is recording benefits advisor calls so that quality review does not need to take place in real time. EBSA also contracted with a survey company to conduct customer satisfaction surveys with participants who make inquiries to benefits advisors, from 2017 through 2020.

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## COVID-19 Presented Immediate and Long-Term Challenges for Benefit Plan Compliance and EBSA Enforcement

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### EBSA Officials and Industry Stakeholders Identified Immediate Challenges, Including Investigation Delays, New Processes, and Closed Courts

### Industry Stakeholders Identified Immediate Challenges Regarding Benefit Plans

Since the COVID-19 pandemic began in the U.S. in early 2020, EBSA and the benefit plans it oversees have faced many challenges in ensuring ERISA compliance, according to knowledgeable stakeholders and agency officials we interviewed. They described a number of issues related to COVID-19 that arose and were addressed quickly; for example, the abrupt shift to remote work.<sup>29</sup>

Stakeholders identified three key challenges benefit plans faced, which were a lack of agency guidance, delayed communication, and new health plan processes.

- **Lack of guidance.** The Families First Coronavirus Response Act (FFCRA) was enacted March 18, and the CARES Act was enacted on March 27, 2020. Due to the urgent need to facilitate a response to the pandemic, after both acts went into effect, DOL issued guidance and adopted temporary regulations to help implement the acts without proposing them for public notice and comment.<sup>30</sup> Both acts include

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<sup>29</sup>The knowledgeable industry stakeholders, from nine organizations, we interviewed represented differing areas of expertise and interest groups, including retirement and healthcare plans, service providers, and participants. We reviewed stakeholder organization responses to identify a range of compliance challenges they had experienced or expected to encounter. However, the information presented is not intended to represent consensus given the varying perspectives of the stakeholders and the organizations they represent. When we refer to stakeholders in the report, we are referring to the organizations they represent.

<sup>30</sup>Twice a year federal agencies, including DOL, publish a list of regulations that they are working on or will consider within the next 12 months. They typically open each proposed regulation for comment for several weeks or more. In addition to allowing stakeholders to provide input, the advance release of the regulatory agenda allows the parties affected to track regulations as they go through the rulemaking process and to prepare for issuance and compliance.

provisions that amended ERISA or apply as if they were included in ERISA, and are enforced by EBSA. An industry stakeholder we interviewed expressed concerns about plans' ability to remain compliant as they interpreted and implemented COVID-related provisions prior to receiving guidance. For example, both acts include provisions requiring group health plans and individual health insurance issuers to cover certain items and services related to diagnostic testing of COVID-19 with no cost-sharing. One stakeholder noted that although it was clear plans were required to cover COVID-19 diagnostic testing with no cost-sharing, some testing was done for other purposes, such as for employees returning to work or for contact tracing, which they noted would not normally be covered by health plans.<sup>31</sup> Subsequent guidance clarified that only testing for medically appropriate diagnostic purposes was required to be covered by health plans.

In the months following enactment of the FFCRA and CARES Acts, DOL, HHS, and Treasury (the Departments) issued a series of FAQs and guidance about FFCRA and CARES Act implementation (see table 4).

**Table 4: Selected DOL, HHS, IRS, and Treasury FAQs and Notices on FFCRA and CARES Act Implementation**

Date	Agency	Title	Content
April 11 and June 23, 2020	DOL, HHS, and Treasury	FAQs (for workers and employers)	Provides guidance on the Families First Coronavirus Response Act (FFCRA) and CARES Act implementation and other health coverage issues related to COVID-19.
April 28, 2020	DOL	COVID-19 FAQs for Participants and Beneficiaries	Helps employer-sponsored benefit plan participants and representatives affected by the COVID-19 outbreak understand their rights and responsibilities under Title I of ERISA.
April 28, 2020	DOL, in coordination with HHS, Treasury, and IRS	Disaster Relief Notice 2020-01, Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak	Announces the extension of deadlines established in ERISA for furnishing certain notices or disclosures to participants, if the plan acts in good faith and furnishes the notices as soon as practicable.

<sup>31</sup>FFCRA requires that plans cover certain diagnostic testing for COVID-19 without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements on plan participants.

Date	Agency	Title	Content
May 4, 2020	DOL and IRS	Joint Notice, Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak	Extends certain time frames for group health plans, disability and other welfare plans, pension plans, and participants and beneficiaries of these plans during the COVID-19 National Emergency.
February 26, 2021	DOL, in coordination with HHS, Treasury, and IRS	Disaster Relief Notice 2021-01: Guidance on Continuation of Relief for Employee Benefit Plans and Plan Participants and Beneficiaries Due to the COVID-19 (Novel Coronavirus) Outbreak	Clarifies that the extension of the deadlines in Disaster Relief Notice 2020-01 and the Joint Notice do not extend beyond the earlier of one year from the first eligible date for relief or 60 days after the end of the National Emergency.

Source: GAO Analysis of Department of Labor (DOL), Employee Benefits Security Administration (EBSA) Department of Health and Human Services (HHS), Internal Revenue Service (IRS), and Department of Treasury (Treasury) documents | GAO-21-376

- Mail Delays.** As early as April 2020, the United States Postal Service warned of delivery delays due to COVID-19 and two of the leading global delivery companies, United Parcel Service and FedEx, suspended their service guarantees. According to one industry stakeholder, benefit plans were concerned mail delays would result in participants not receiving timely benefit checks. Other stakeholders realized that closed print shops could result in missed deadlines for mailing plan documents and benefit statements to participants, also leading to noncompliance. Another stakeholder described difficulty in providing documents requested by EBSA in situations when plans could not access their mail or paper records due to stay-at-home orders.

The CARES Act amended ERISA to give DOL the authority to postpone certain ERISA filing deadlines for a period of up to 1 year in the case of a public health emergency. As mentioned earlier, Disaster Relief Notice 2020-01 announced the extension of certain timeframes for employer-sponsored benefits plans. Further, the notice states that plans may use electronic means to communicate with participants who would reasonably have access to electronic means, such as email and text messages.<sup>32</sup>

- New health plan processes.** The Patient Protection and Affordable Care Act requires group health plans to notify participants not later

<sup>32</sup>On May 27, 2020, EBSA issued a rule, *Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA* that adopted a new, additional safe harbor for plan administrators to use electronic media, as a default, to furnish information to participants of retirement plans subject to ERISA, effective July 27, 2020. The rule does not apply to health plans.

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Agency Officials Identified Immediate Challenges for EBSA Enforcement

than 60 days prior to implementing a material modification of the terms of the plan or coverage, and generally prohibits health insurance issuers from modifying insurance policies mid-year.<sup>33</sup> According to one stakeholder, some health plans responded to the pandemic by quickly increasing telehealth offerings, which they said initially placed them at risk of violating ERISA by expanding telehealth services out of cycle and without notifying participants in advance. The FAQs issued in April 2020 clarified that plans may increase the availability of telehealth and remote care services by adding benefits, or reducing or eliminating cost-sharing, without prior notification of such material modifications and without regard to restrictions on mid-year coverage changes.

A stakeholder described a challenge related to ensuring appropriate coverage of COVID-19 testing. In order for health plans to ensure they are only covering testing for diagnostic purposes and not for employment or contact tracing purposes, plans may need to add a code to their billing system to indicate the reason for the test. The stakeholder stated that although health plans were making the necessary coding changes, those changes were not consistently applied. When health plans' coding changes are inconsistently applied, it could result in differences in payment for COVID-19 testing.

In some cases, EBSA officials raised the same issues as industry stakeholders, such as the challenge of adapting to remote work. EBSA officials also described some unique challenges, including delays in their investigations, modifications to investigative processes, and closed courts.

- **Delayed investigations.** Agency officials described several factors affecting investigation timeframes. The main challenge was delays in receiving data and documents from plans that affected all cases, especially when requested materials were not available electronically and offices were closed. A particular challenge cited by one regional office official was delays in receiving health claims data for investigation. Claims processing came to a halt as health plans added new codes to their systems and, when plans returned to processing

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<sup>33</sup>ERISA requires plan administrators to provide participants with information about their retirement and health benefits including plan rules, financial information, and the operation and management of the plan. If there are changes to what the plan provides or how it operates, participants must be informed of those material modifications. The April 2020 FAQs stated that HHS, DOL, and Treasury will not take enforcement action against a plan that changes the benefits or cost-sharing structure of its plans mid-year to provide increased coverage related to the diagnosis or treatment of COVID-19.

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claims, there were significant delays due to plan staff not being in their offices, coupled with restrictions on sending confidential information from outside their facilities.

- **Modified investigation processes.** EBSA investigators may conduct some of their audit work, including document review and interviews, onsite. When we spoke with EBSA national office officials in September 2020, investigators were conducting all audits virtually because EBSA's entire staff was teleworking, although one regional office had begun limited onsite interviews. Temporary closures and reduced operations of many businesses impaired investigators' ability to complete critical interviews and delayed EBSA's pursuit of actions to correct non-compliance.

EBSA also added a new component to all civil health investigations. Investigators began to review claims data to verify compliance with FFCRA and CARES Act provisions, for example, ensuring COVID-19 testing was covered without cost-sharing by the patient.

- **Closed courts.** Beginning in March 2020, districts across the U.S. closed federal courthouses and a growing number of courts switched to conducting all or most proceedings through conference calls and video conferences. In the following months, some districts suspended grand juries. Several EBSA officials said that closed courts and the inability to convene grand juries initially slowed or stalled criminal court cases. However, by September, agency officials told us that virtual hearings were more frequent, courts were resuming postponed trials, and the Department of Justice had achieved convictions and managed appeals of EBSA-referred cases in some regions.
- **Increased outreach.** EBSA's benefits advisors conduct education and outreach events for workers, employers, plan representatives, and members of Congress. Since the beginning of the pandemic, EBSA dramatically increased the number of dislocated worker events beyond its target for fiscal year 2020. These events are designed to educate employees facing job loss about their rights under the law. According to EBSA, between January 1 and November 15, 2020, EBSA held 3,162 rapid response sessions for dislocated workers.<sup>34</sup> EBSA also reported increasing the number of employer-oriented COBRA compliance webinars, from 10 webinars in 2019 to 52 between January 1 and November 15, 2020. Officials said they expect to continue offering more webinars if job losses increase.

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<sup>34</sup>These events took place virtually or by conference call. In comparison, EBSA conducted 945 dislocated worker events in 2019, almost all in person.

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EBSA Officials and Industry Stakeholders Anticipate Long-Term Challenges, Including Locating Participants, Economic Effects, and Changes to Health Coverage

Stakeholders and agency officials we interviewed described potential long-term challenges due to the pandemic.

Industry Stakeholders Identified Long-Term Challenges for Benefit Plans Identified by

Challenges stakeholders raised included issues directly resulting from COVID-19 or related legislation and other issues, such as difficulty locating individuals who are entitled to retirement benefits (“missing participants”) that existed prior to the pandemic and were expected to worsen.

- **Reporting deadlines.** Some stakeholders we spoke with described EBSA as accommodating and found the guidance regarding compliance with FFCRA and CARES Act requirements to be helpful. Stakeholders also told us plans had taken advantage of deadline extensions and other relief. However, the same stakeholders said that given the burden and uncertainties caused by the pandemic, plans would appreciate further extension of reporting deadlines and greater flexibility regarding plan compliance and plans’ responsiveness to request for documentation related to investigations.
- **Missing participants.** Retirement plan administrators have an obligation to keep accurate and up-to-date records on plan participants and take appropriate actions to find missing former employees, so the plan can pay promised benefits when they come due. EBSA officials told us that many missing participants are not aware of their benefits and, without the plan’s diligent efforts, may never receive their benefits.

Several stakeholders mentioned the challenge of locating missing participants, which existed prior to COVID-19, and their desire for



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additional guidance about the steps plans must take to locate them.<sup>35</sup> These stakeholders said they expected the increase in job loss due to the pandemic would lead to more missing participants and would make finding them even more difficult.<sup>36</sup>

- **Economic effect.** COVID-19 may exacerbate the problem of inadequate retirement savings if employers or employees reduce contributions, or if employees take a loan or early distribution from their account.<sup>37</sup> Starting in March 2020, some employers reduced, delayed, or suspended their retirement plan contributions to reduce costs. At the same time, the CARES Act provided relief for retirement plan participants in the form of enhanced access to plan distributions and plan loans.<sup>38</sup> Based on experience during the economic downturn of 2007 through 2009, employees may also decrease contributions to

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<sup>35</sup>In a January 2018 report, GAO recommended that the Secretary of Labor issue guidance on sponsors' obligations under ERISA to prevent, search for, and pay costs associated with locating missing participants. See GAO, *Workplace Retirement Accounts: Better Guidance and Information Could Help Plan Participants at Home and Abroad Manage Their Retirement Savings*, [GAO-18-19](#) (Washington, D.C.: Jan. 31, 2018). On January 12, 2021, DOL released guidance documents on missing participants, including recommended search, notice, and record retention practices for plans.

<sup>36</sup>Job loss may also result in relocation. A Pew Research survey conducted in early June 2020 found that 22 percent of U.S. adults moved due to the pandemic or knew someone who did. Among those who relocated due to the pandemic, 8 percent said the most important reason for their relocation was job loss.

<sup>37</sup>GAO has reported on the potential consequences of retirement plan participants tapping into their accrued savings before retirement under certain circumstances, which can result in a permanent loss of retirement savings. See GAO, *401(k) Plans: Policy Changes Could Reduce the Long-term Effects of Leakage on Workers' Retirement Savings*, [GAO-09-715](#) (Washington, D.C.; Aug. 28, 2009) and GAO, *Retirement Savings: Additional Data and Analysis Could Provide Insight into Early Withdrawals*, [GAO-19-179](#) (Washington, D.C.; Mar. 28, 2019).

<sup>38</sup>The CARES Act temporarily allowed for certain coronavirus-related withdrawals from retirement accounts and waived the additional 10 percent tax for early withdrawals from retirement accounts for certain coronavirus-related withdrawals by individuals affected by COVID-19. See Pub. L. No. 116-136, § 2202(a), 134 Stat. at 340-42. In addition, the Act modified loan rules for defined contribution plans by increasing the maximum loan balance allowed for new loans (taken between March 27 and 180 days thereafter) and extending the due date for new or existing plan loan payments until December 31, 2020, by one year. See Pub. L. No. 116-136, § 2202(b), 134 Stat. at 342. It is, however, optional for employers to choose to amend their plans to adopt the early withdrawal and modified loan rules of the CARES Act. Pre-retirement withdrawals of retirement savings could potentially affect a participant's retirement security in the form of future reduced defined contribution pension balances.

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their retirement accounts.<sup>39</sup> Stakeholders we spoke with described concerns about future financial consequences for retirement plans, such as the effect of lower market returns on pension payment obligations, retirement plan matches, and their benefits obligations.

Similarly, stakeholders described potential challenges for health plans such as difficulties paying health claims due to reduced cash flow. Compounding the challenge for health plans, stakeholders anticipate a surge in health care claims when participants seek care or treatment they delayed during the pandemic.

- **New health coverage extensions.** On May 4, 2020, IRS and EBSA issued a joint notice that extended deadlines affecting certain benefit plans, including those related to COBRA coverage, special enrollment periods, and benefit claims and appeals. The joint notice extends several time frames until 60 days after the announcement of the end of the national emergency, including (1) the period during which a qualifying individual can elect COBRA continuation coverage, (2) the date for making COBRA premium payments, and (3) the date to file a benefit claim or appeal a denied claim.<sup>40</sup> In February 2021, DOL, in coordination with HHS, Treasury, and IRS, issued a joint notice clarifying that the extensions would last until 1 year from the date participants were first eligible for relief or 60 days after the announced end of the National Emergency, whichever comes first.

According to some stakeholders, health plans and employers expressed concerns about allowing separated employees to enroll in COBRA at any time during the period of extension and the uncertainty regarding how long extensions might last. Although once participants enroll in COBRA they would generally have to pay back premiums<sup>41</sup>,

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<sup>39</sup>According to an April 8, 2020 article from the Urban Institute, during the Great Recession, about 4 in 10 employees reduced their 401(k) contribution by at least 39 percent. Richard W. Johnson, *Seven Ways the COVID-19 Pandemic Could Undermine Retirement Security* (Washington, D.C.: Urban Institute, 2020).

<sup>40</sup>COBRA continuation coverage laws are administered by several agencies. The Departments of Labor and the Treasury have jurisdiction over private-sector group health plans. The Department of Health and Human Services administers the continuation coverage law as it applies to state and local governmental health plans. DOL's interpretive responsibility for COBRA is limited to the disclosure and notification requirements of COBRA. IRS, within the Department of the Treasury, has issued regulations on COBRA provisions relating to eligibility, coverage, and payment. Both the Departments of Labor and Treasury share jurisdiction for enforcement of these provisions.

<sup>41</sup>The American Rescue Plan Act of 2021 provides for premium assistance for COBRA continuation coverage for eligible individuals through September 30, 2021. See Pub. L. No. 117-2, § 9501(a), 135 Stat. 4, 127-28.

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Agency Officials Identified  
Long-Term Challenges for  
EBSA Enforcement

according to one stakeholder, the health plan would also have to cover the cost of any care that occurred since the employee's loss of employer-sponsored coverage. As a consequence, because COBRA coverage is often an expensive option, enrollment may only be beneficial to those most in need of medical care, according to one stakeholder. The challenge for health plans is conducting the necessary risk assessment to price their products due to the uncertainty about when or if a given separated employee would choose COBRA enrollment, according to the same stakeholder. The challenge for employers is potentially higher health plan premiums.

EBSA officials described a number of potential long-term challenges due to COVID-19. One challenge relates to changes in EBSA's typical operations—limited travel—and two challenges may require greater outreach and enforcement actions—businesses failures and fraud.

**Limited travel.** According to EBSA officials, plan personnel, service providers, and others involved in investigations prefer that any interviews during the course of a criminal investigation be conducted in-person so that they have their legal counsel at their side. Travel restrictions due to COVID-19 slowed down investigation progress for some of these high-stakes cases.

**Business failures.** EBSA officials said that due to many businesses failing, there could be a number of challenges related to benefit plans.

- *Abandoned plans.* When a business is in financial distress or bankruptcy, participants' retirement benefits may be at risk if the employer sponsoring the plan abandons it. Beginning in fiscal year 2018, EBSA introduced a national enforcement project called Protecting Benefits Distribution, designed to ensure that participant retirement benefits from abandoned plans are protected and expeditiously distributed to avoid losses.<sup>42</sup> EBSA expected to see a significant increase in distressed plans due to the pandemic.

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<sup>42</sup>According to EBSA officials, in 2018 the agency introduced the Protecting Benefits Distribution national project to help ensure participants' benefits are protected when a business is in financial distress or files bankruptcy. Through this project, EBSA takes steps to assess whether plan contributions have been paid to the plans' trust, advise all affected plans of the bankruptcy filing, address unpaid health plan claims, and provide assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries, according to EBSA officials. EBSA officials also said that the agency takes action to help ensure abandoned plans are properly administered or expeditiously dissolved. In addition, EBSA confirms that service providers are not charging abandoned plans unreasonable fees and draining the remaining participants' accounts.

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- *More “missing” participants.* As mentioned by industry experts, an increase in job loss may lead to an increase in missing retirement plan participants. In addition, failing businesses may struggle to keep updated records for participants vested in company retirement plans. EBSA officials told us that the agency focuses on the participants who may face financial hardship if they don’t receive their promised retirement benefits on time and without excessive fees, especially during economic downturns. As a result, the increase in missing participants may lead to a greater need for related enforcement investigations.
  - *MEWA solvency.* In fiscal years 2018 and 2019, EBSA reported investigating a number of large failed multiple employer welfare arrangements with substantial unpaid claims, prompting EBSA to start a MEWA Solvency Project in fiscal year 2019. The project is designed to proactively identify insolvent plans to either rehabilitate them or dissolve them; pursue potential instances of criminal fraud; and protect participants from being left untreated, uninsured, and burdened with large unpaid medical bills. According to EBSA staff, current economic conditions resulting from the pandemic may cause some employers participating in such an arrangement to drop out, making it difficult to get claims paid.

**Fraud.** If more firms become insolvent and economic problems worsen, EBSA officials said they expect to see an uptick in certain categories of fraud. One official described the possibility that a plan representative might use money that should be placed in retirement accounts to instead pay bills, which is illegal. As EBSA reviews health care claims for compliance with CARES Act and FFCRA provisions, officials said they anticipate finding fraud, such as false claims for nonexistent services, and non-compliance, such as nonpayment of claims. EBSA also expects to continue to participate in COVID-19 health fraud task forces, that have identified several fraud schemes related to COVID-19 testing.

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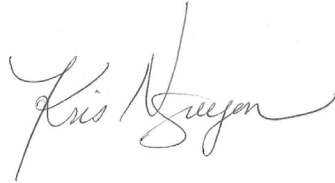
## Agency Comments

We provided a draft of this report to the Department of Labor (DOL) for review and comment. DOL provided technical comments, which were incorporated as appropriate.

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We are sending copies of this report to the appropriate congressional committees, the Secretary of the Department of Labor, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-2660 or [NguyenTT@gao.gov](mailto:NguyenTT@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix IV.

A handwritten signature in black ink that reads "Kris T. Nguyen". The signature is written in a cursive style with a large, prominent initial "K".

Tranchau (Kris) T. Nguyen,  
Director  
Education, Workforce, and Income Security

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*List of Addressees*

The Honorable Patrick Leahy  
Chairman  
The Honorable Richard Shelby  
Vice Chairman  
Committee on Appropriations  
United States Senate

The Honorable Ron Wyden  
Chairman  
The Honorable Mike Crapo  
Republican Leader  
Committee on Finance  
United States Senate

The Honorable Patty Murray  
Chair  
The Honorable Richard Burr  
Republican Leader  
Committee on Health, Education, Labor, and Pensions  
United States Senate

The Honorable Gary C. Peters  
Chairman  
The Honorable Rob Portman  
Republican Leader  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Rosa DeLauro  
Chairwoman  
The Honorable Kay Granger  
Republican Leader  
Committee on Appropriations  
House of Representatives

The Honorable Robert C. "Bobby" Scott  
Chairman  
The Honorable Virginia Foxx  
Republican Leader  
Committee on Education and Labor  
House of Representatives

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The Honorable Frank Pallone, Jr.  
Chairman  
The Honorable Cathy McMorris Rodgers  
Republican Leader  
Committee on Energy and Commerce  
House of Representatives

The Honorable Bennie G. Thompson  
Chairman  
The Honorable John Katko  
Republican Leader  
Committee on Homeland Security  
House of Representatives

The Honorable Carolyn B. Maloney  
Chairwoman  
The Honorable James Comer  
Republican Leader  
Committee on Oversight and Reform  
House of Representatives

The Honorable Richard E. Neal  
Chairman  
The Honorable Kevin Brady  
Republican Leader  
Committee on Ways and Means  
House of Representatives

The Honorable Mark DeSaulnier  
Chairman  
Subcommittee on Higher Education and Workforce Investment  
Committee on Education and Labor  
House of Representatives

The Honorable Frederica Wilson  
House of Representatives

# Appendix I: Employee Benefits Security Administration (EBSA) National Projects, Fiscal Years 2011 through 2021

EBSA establishes national projects annually to target widespread benefit plan problems that officials have identified as causing the greatest hardship for the largest number of participants. Regional office officials are expected to place particular investigative emphasis on national projects. Between fiscal years 2011 and 2021, four areas have remained continuous national projects for EBSA: (1) contributory plan crimes, (2) employee stock ownership plans, (3) plan investment conflicts, and (4) protecting benefits distributions. Over the past 10 years, EBSA has also conducted a series of health-related national projects focused on health fraud and multiple employer welfare arrangements, health benefits security, and, most recently, various health enforcement initiatives. In fiscal years 2018 through 2021, the health-related national initiatives include MEWA financial solvency and fraud, the Paul Wellstone and Pete Domenici Mental Health Parity Addiction Equity Act of 2008, emergency services, and health service provider self-dealing. Brief descriptions of each project are included in the table below.

**Table 5: EBSA National Projects, Fiscal Years 2011 through 2021**

Project	Description	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Contributory plan crimes	Pursue criminal prosecution of those who commit crimes involving employee contributions to retirement and health plans	●	●	●	●	●	●	●	●	●	●	●
Employee stock ownership plans	Ensure that plan fiduciaries buy and sell plan sponsor stock at fair market value; avoid conflicts of interest; and monitor for corporate waste and malfeasance	●	●	●	●	●	●	●	●	●	●	●
Plan investment conflicts	Investigate issues related to 1) fiduciary service provider compensation and 2) conflicts of interest in relation to plan asset vehicles, receipt of improper or undisclosed compensation, and fiduciary due diligence <sup>a</sup>	●	●	●	●	●	●	●	●	●	●	●



**Appendix I: Employee Benefits Security  
Administration (EBSA) National Projects,  
Fiscal Years 2011 through 2021**

Project	Description	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Protecting benefits distributions	Protect participants' retirement benefits and ensure they receive benefits expeditiously to avoid losses resulting from fiduciaries' failure to properly manage the assets or from the assets' abandonment	●	●	●	●	●	●	●	●	●	●	●
Health fraud/multiple employer welfare arrangements (MEWA)	Address the issue of health fraud recidivism and MEWA financial insolvency	●	○	○	○	○	○	○	○	○	○	○
Health benefits security	Investigate proper plan administration and claims payments, undisclosed fees, and compliance with claims procedure rules and health care laws under Part 7 of Title I of ERISA <sup>b</sup>	○	●	●	●	●	●	●	○	○	○	○
Health enforcement initiatives	Emphasize investigations on MEWA financial solvency and fraud, mental health parity, emergency services, and service provider self-dealing <sup>c</sup>	○	○	○	○	○	○	○	●	●	●	●

Legend: ● = area of focus for the fiscal year; ○ = not an area of focus for the fiscal year

Source: GAO analysis of Employee Benefits Security Administration (EBSA) documents | GAO-21-376

<sup>a</sup>Fiduciary due diligence is the establishment of a process that helps protect the plan and participants.

<sup>b</sup>Part 7 of Title I of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) provides protections for participants and beneficiaries of group health plans and health insurance coverage offered in connection with group health plans.

<sup>c</sup>Self-dealing occurs when fiduciaries deal with plan assets for their own self-interest, among other things.

# Appendix II: Employee Benefits Security Administration (EBSA) Regional Projects, Fiscal Year 2021

EBSA regional offices develop projects to address regional issues, industries, and services. Each year, a prior regional project may be continued or discontinued, and new projects may be proposed. Regional projects also act as pilots for potential expansion into a national project.

**Table 6: EBSA Regional Projects, Fiscal Year 2021**

Regional office	Project name	Description
Atlanta	None	The Atlanta Regional Office is in a state of transition in fiscal year 2021 as it posts and fills the open Associate Regional Director position. Due to the transition, it does not have a 2021 regional project and is focusing investigative efforts on national projects; multiple employer welfare arrangements; and plan investment conflicts.
Boston	Government contractor project <sup>a</sup>	Investigate pension and health benefit plans established by government contractors for the benefit of workers on government-funded construction projects to ensure that (1) the plan fiduciaries are taking action to collect all “fringe benefit” contributions owed to the plan, and (2) the plans operate in a fashion that actually benefits the participants rather than the service providers whose fees are paid from plan assets.
	Nutritional counseling initiative	Focus on self-funded plans whose benefits wrongfully exclude or limit coverage for nutritional counseling for the treatment of behavioral health conditions. Evaluate the plans’ compliance with the applicable provisions of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), specifically requirements for non-quantitative treatment limitations <sup>b</sup> applicable to mental health or substance use disorder benefits.
	Taft-Hartley medication treatment assistance initiative <sup>c</sup>	Evaluate health plans’ and service providers’ compliance with MHPAEA by focusing on self-funded Taft-Hartley plans whose benefits exclude or restrict treatments for opioid use disorder, including FDA-approved medication assisted treatments.
Cincinnati	Plan sponsor compensation initiative	Identify plan sponsors that are wrongfully receiving compensation from their own plan(s), paid to either the plan sponsor, its employees, or affiliates.
Chicago	Collectively-bargained plans initiative	Review imprudent or conflicted investment products and strategies, service provider selection and monitoring, and fees charged by multiemployer plan service providers. Also review cost allocation, trustee expenses, and leases, focusing on large plans that have not been investigated recently, or at all.
Dallas	At-risk midsize plans project	Focus on mid-size pension plans (those with 100-500 participants) that are holding investments that have historically created violations due to fiduciaries unwittingly engaging in a prohibited transaction or by being imprudent. Where possible, focus on plans that have fiduciary investment control of pooled assets, such as profit sharing plans, and aim to open cases that meet multiple at-risk areas.
Kansas City	Group life insurance initiative	Review group life insurance for compliance with the Employee Retirement Income Security Act of 1974, as amended, (ERISA), with a specific focus on premiums wrongfully retained by life insurance carriers on policies that were never active due to Evidence of Insurability requirements.

**Appendix II: Employee Benefits Security  
Administration (EBSA) Regional Projects,  
Fiscal Year 2021**

<b>Regional office</b>	<b>Project name</b>	<b>Description</b>
	Plan sponsor investment incentive project	Investigate the alternative investments portfolios of large defined benefit plans and master trusts, <sup>d</sup> including fiduciary due diligence; investment monitoring; valuation; management, performance, and other fees; and conflicts of interest.
	Collective investment fund (CIF) project	Focus on CIFs, which are tax-exempt, pooled investment funds maintained by a bank or trust company. Examines potential issues such as excessive operating expenses; imprudent investments; conflicts of interest in securities transactions; and accounting or investment transaction irregularities.
	Opioid Parity Analysis project	Focus on disparity in benefits available for mental health and substance use disorder conditions, such as opioid addiction, compared to medical and surgery benefits. Examine any barriers to treatment that impede ability of participants and beneficiaries to overcome addiction.
Los Angeles	Prototype plan review project	Review publicly available prototypes of fully-insured health plans marketed to large and small group health plans in an effort to obtain global correction of ERISA non-compliance. Reviews include evidences of coverage, certificates of coverage, group agreements, and summaries of benefits.
New York	Qualified professional asset manager (QPAM) criminal conviction <sup>e</sup>	Target investment managers acting as a QPAM, including affiliates and more than 5 percent owners, who have unwittingly acquired an entity or hired an individual who has been convicted or released from prison as a result of certain felonies involving the abuse or misuse of plans and their assets within the last 10 years.
	Stop filer project	Identify plan fiduciaries who have stopped filing the required annual report, which can suggest a broader pattern of mismanagement or an intentional effort to conceal wrongdoing.
Philadelphia	Network accuracy and adequacy for mental health and other areas project	Test the accuracy and adequacy of networks for mental health providers and other providers offered by health plans to ensure compliance with MHPAEA rules on non-quantitative treatment limitations as well as to ensure that provider directories offered by plans are accurate. Seek to ensure that the mental health benefits and other benefits advertised to participants in their plan documents accurately reflect the availability of those benefits.
	Federal facility contractors project	Focus on companies or unions that provide ERISA-covered benefits to contractors, such as security guards or janitors, at federal facilities. The objective is to protect the benefits of these workers by ensuring that promised retirement and health benefits were provided in accordance with ERISA and the documents governing the plans.
San Francisco	None	In place of a regional project, the San Francisco Regional Office is testing targeting strategies and tracking the results. If a strategy shows a significant probability of detecting ERISA violations and a significant number of targets, the strategy will be developed into a future regional initiative. In addition, the office is leading or participating in more cross-regional cases.

Source: GAO analysis of Employee Benefits Security Administration (EBSA) documents. | GAO-21-376

<sup>a</sup>EBSA refers to this as the Prevailing wage project.

<sup>b</sup>Non-quantitative treatment limitations are non-numerical limits on the scope or duration of benefits for services and treatment provided under a plan.

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**Appendix II: Employee Benefits Security  
Administration (EBSA) Regional Projects,  
Fiscal Year 2021**

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<sup>c</sup>A Taft-Hartley plan (more commonly known as a multiemployer plan) is a collectively bargained pension plan maintained by multiple employers, usually within the same or related industries, and a labor union.

<sup>d</sup>A master trust is a single trust for multiple plans sponsored by one employer.

<sup>e</sup>Prohibited Transaction Exemption 1984-14 allows various parties who are related to plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by qualified professional asset managers that are independent of the parties in interest and meet specified financial standards. See 75 Fed. Reg. 38,837 (July 6, 2010).

# Appendix III: Top 10 Employee Retirement Income Security Act of 1974 (ERISA) Violations Identified in Investigations

EBSA regional offices conduct investigations of retirement and health plans to detect and correct violations of Title I of ERISA and related criminal laws. EBSA investigators identified 4,273 violations in the 1,411 investigations closed in fiscal year 2020. This included 3,776 retirement plan violations from 1,056 closed investigations and 377 health plan violations from 288 closed investigations. In fiscal year 2020, EBSA also closed 67 investigations of other plans that identified 120 violations. The ten most frequent violation categories account for almost 97 percent of all violations. A single investigation may result in multiple violations.

**Table 7: 10 Most Common ERISA Violation Categories Found in EBSA Investigations Closed, Fiscal Year 2020**

	<b>Violated provision</b>	<b>Description</b>	<b>Number identified in retirement cases</b>	<b>Number identified in health care cases</b>	<b>Number identified in other cases<sup>a</sup></b>
1	Fiduciary imprudence (29 U.S.C. § 1104(a)(1)(B))	Plan fiduciaries shall discharge their duties solely in the interest of plan participants and beneficiaries and with the care, skill, prudence, and diligence	869	78	30
2	Exclusive purpose (29 U.S.C. § 1104(a)(1)(A))	Plan fiduciaries shall discharge their duties solely in the interest of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration	793	58	24
3	Fiduciary self-dealing (29 U.S.C. § 1106(b)(1))	Plan fiduciaries shall not deal with the assets of the plan in their own interest or for their own account, among other things	543	55	24
4	Prohibited transactions with a party in interest (29 U.S.C. § 1106(a))	Plan fiduciaries shall not cause the plan to engage in a transaction if that transaction constitutes, among other things, a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan	457	42	16
5	Failure to follow plan documents (29 U.S.C. § 1104(a)(1)(D))	Plan fiduciaries shall discharge their duties with respect to a plan solely in the interest of participants and beneficiaries and in accordance with the documents and instruments governing the plan	344	24	7
6	Improper benefit to employer (29 U.S.C. § 1103(c)(1))	The assets of a plan shall not inure to the benefit of (i.e., improperly benefit) an employer, but shall be held for the exclusive purpose of providing benefits to the participants and beneficiaries of the plan	235	17	4

**Appendix III: Top 10 Employee Retirement  
Income Security Act of 1974 (ERISA) Violations  
Identified in Investigations**

	<b>Violated provision</b>	<b>Description</b>	<b>Number identified in retirement cases</b>	<b>Number identified in health care cases</b>	<b>Number identified in other cases<sup>a</sup></b>
7	Duty of disclosure: plan descriptions and summary plan descriptions (29 U.S.C. § 1021 and 29 C.F.R. pt. 2520)	Plan information shall be provided periodically and written in a manner reasonably calculated to be understood by the average plan participant	183	26	0
8	Bonding (29 U.S.C. § 1112)	Every plan fiduciary and every person who handles funds or property of a plan shall be bonded unless otherwise exempt	159	2	8
9	Reporting violation : annual reports (29 U.S.C. §§ 1021 and 1023)	The administrator of an employee benefit plan must file an annual report, which includes certain financial statements and an opinion from an independent qualified accountant	84	3	0
10	Failure to establish trust (29 U.S.C. § 1103(a))	All assets of an employee benefit plan must be held in trust by one or more trustees, who are to be named in the plan or trust instrument or appointed by a person who is a named fiduciary	55	0	0

Source: Employee Benefits Security Administration (EBSA) Enforcement Management System Manual and data and the Employee Retirement Income Security Act of 1974 (ERISA), as amended | GAO-21-376

Notes: A single investigation may find multiple violations.

<sup>a</sup>Other cases include investigations of service providers where the type of plan was not recorded and investigations of non-health insurance employer-provided welfare benefits, such as disability or life insurance.

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# Appendix IV: GAO Contact and Staff Acknowledgments

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## GAO Contact

Kris Nguyen at [nguyentt@gao.gov](mailto:nguyentt@gao.gov) or 202.512.2660

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## Staff Acknowledgments

In addition to the contact named above, Tranchau (Kris) Nguyen (Director), Amber Yancey-Carroll (Assistant Director), Margaret Weber (Analyst in Charge), Julie Anderson, and Anne Hopewell made key contributions to this report. Also contributing to this report were James Bennett, John Dicken, Kirsten Lauber, Joel Marus, Michelle Munn, Kristi Peterson, Kate van Gelder, and Adam Wendel.

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Stephen J. Sanford, Acting Managing Director, [spel@gao.gov](mailto:spel@gao.gov), (202) 512-4707  
U.S. Government Accountability Office, 441 G Street NW, Room 7814,  
Washington, DC 20548

