Judges' Deskbook:
Employee Retirement Income Security Act of 1974 (ERISA)

Updated January 15, 2021

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Secretary's Order 1-2011, 77 Fed. Reg. 1088 (signed Dec. 21, 2011; published in the Federal Register on Jan. 9, 2012) (the Secretary of Labor delegated authority and assigned responsibility for the administration of DOL's responsibilities under ERISA):

1. *Purpose*. To delegate authority and assign responsibilities for the administration of the Department of Labor's responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA), Federal Employees' Retirement System Act of 1986 (FERSA), and certain other statutes.

2. *Authority and Directives Affected*. This Order supersedes Secretary's Order 3-2010 (September 2, 2010).

3. *Background*. ERISA places responsibility in the Department of Labor for the administration of a comprehensive program to protect the interests of participants and beneficiaries of private sector employee benefit plans. This Order delegates the Secretary of Labor's authority and assigns responsibility for ERISA and for specified other laws to the Assistant Secretary for Employee Benefits Security.

In particular, this Order delegates the Secretary's authority and assigns responsibility under sections 45R and 4980H of the Internal Revenue Code, as added by sections 1421 and 1513, respectively, of Public Law 111-148, the Patient Protection and Affordable Care Act, 124 Stat. 119 (2010). The duties delegated to the Assistant Secretary include authority and responsibility to define the term “seasonal worker” under 26 U.S.C. 45R(d)(5)(B) and 4980H(c)(2)(B)(ii).

All other authorities and responsibilities set forth in this Order were delegated or assigned previously to the Assistant Secretary for EBSA in Secretary's Order 3-2010, and this Order continues those delegations and assignments in full force and effect, except as expressly modified herein.

4. *Delegation of Authority and Assignment of Responsibilities.*

A. Except as hereinafter provided, the Assistant Secretary for Employee Benefits Security is delegated the authority and assigned the responsibilities of the Secretary of Labor—

(1) Under the following statutes, including any amendments:

(a) The Employee Retirement Income Security Act of 1974, as amended, except for subtitle C of Title III and Title IV (29 U.S.C. 1001-1232);

(b) The Welfare and Pension Plans Disclosure Act of 1958, as amended Public Law 85-836, 72 Stat. 997; Public Law 86-624, 74 Stat. 417; Public Law 87-420, 76 Stat. 35;

(c) The Federal Employees' Retirement System Act of 1986 (5 U.S.C. 8401-8479);

(d) The Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, 110 Stat. 1936;

(e) Section 311(b) the Children's Health Insurance Program Reauthorization Act of 2009, Public Law 111-3, 123 Stat. 65;

(f) Section 3001 of the American Recovery and Reinvestment Act of 2009 Public Law 111-5;

(g) Sections 18A and 18B of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. sections 218A and 218B, and the associated FLSA authorities in sections 9 and 11 (29 U.S.C. 209 and 211) to issue subpoenas and conduct investigations under sections 18A and 18B, and any other authority and responsibilities granted the Secretary to enforce sections 18A and 18B of the FLSA;

(h) Sections 45R and 4980H of the Internal Revenue Code, 26 U.S.C. 45R and 4980H; and

(i) As directed by the Secretary, such additional Federal acts similar to or related to those listed in paragraphs (a) through (h), above, that from time to time may assign additional authority or responsibilities to the Department or the Secretary.

(2) To request information the Internal Revenue Service (IRS) possesses for use in connection with the administration of Title I of ERISA of 1974.

B. *The Solicitor of Labor* is responsible for providing legal advice and assistance to all officials of the Department relating to the administration of the statutes listed in paragraph 4.A.(1) of this Order, for bringing appropriate legal actions on behalf of the Secretary, and representing the Secretary in all civil proceedings. The Solicitor of Labor is also authorized to request information the IRS possesses for use in connection with the administration of Title I of ERISA.

C. *The Inspector General* is authorized to request information the IRS possesses for use in connection with the administration of Title I of ERISA.

5. *Reservation of Authority*.

A. The submission of reports and recommendations to the President and the Congress concerning the administration of the statutes listed in paragraph 4.A.(1) of this Order and responsibilities under Subtitle C of Title III of ERISA are reserved to the Secretary.

B. The Pension Benefit Guaranty Corporation carries out responsibilities under Title IV of ERISA.

C. Except as expressly provided, nothing in this Order limits or modifies the provisions of any other Order, including Secretary's Order 4-2006 (Office of Inspector General).

6. *Effective Date*. This Order is effective immediately.

EBSA Order No. 1-08

EBSA Order No. 1-08 delegates authority and responsibility to the Director of the Office of Policy and Research to review ALJ decisions.

II. Overview

The Employee Retirement Income Security Act of 1974, or ERISA, protects assets placed in retirement plans by setting minimum standards for pension plans in private industry. ERISA does not require an employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards.

In general, ERISA does the following:

- Requires plans to provide participants with information about the plan including important information about plan features and funding. The plan must furnish some information regularly and automatically. Some is available free of charge, some is not.
- Sets minimum standards for participation, vesting, benefit accrual and funding. The law defines how long a person may be required to work before becoming eligible to participate in a plan, to accumulate benefits, and to have a non-forfeitable right to those benefits. The law also establishes detailed funding rules that require plan sponsors to provide adequate funding for the plan.

- Requires accountability of plan fiduciaries. ERISA generally defines a fiduciary as anyone who exercises discretionary authority or control over a plan's management or assets, including anyone who provides investment advice to the plan. Fiduciaries who do not follow the principles of conduct may be held responsible for restoring losses to the plan.

- Gives participants the right to sue for benefits and breaches of fiduciary duty.

- Guarantees payment of certain benefits if a defined plan is terminated, through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation.

- Section 502(1) of the Employee Retirement Income Security Act of 1974 (ERISA) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of Title I of ERISA or any other person, who knowingly participates in such breach or violation.

III. Standard of Review

[**Editor's note:** Review of an ALJ's decision was previously delegated to the Senior Policy Advisor for PWBA. The Director of the Office of Policy and Research of the EBSA currently reviews these decisions. *See* Section I: Statutory and Regulatory Authority for additional information.]

A. By the ALJ

In ***USDOL v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA Nov. 18, 1994), the Senior Policy Advisor cited to 29 C.F.R. § 18.43(b), which provides that the ALJ "shall have jurisdiction to decide all issues of fact and related issues of law," and he stated the following:

> [T]he ALJ has the power to try facts *de novo*. However, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent he finds them to be invalid. *Id.* at 8. Consequently, the Senior Policy Advisor determined that the ALJ could review the record *de novo* to determine the correct penalty amount to be assessed against Respondent.

See also ***USDOL v. Northwestern Institute of Psychiatry***, 1993-RIS-23 (PWBA, July 26, 1995) ("[t]he ALJ is not an appellate court, but rather functions in many ways as a court of original jurisdiction, hearing evidence").

In ***USDOL v. Plan Administrator, Thibeault Corp. of NE/T-Quip Sales & Leasing 401(k) Plan***, 2009-RIS-00068 (EBSA June 14, 2013), the Director of the Office of Policy and Research stated:

> The rules require the ALJ's decision to include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record, and it must be based upon the whole record. The penalty (if any) which may be included in the decision of the ALJ shall be limited to the penalty expressly provided for in Section 502(c)(2) of ERISA, and it shall be supported by reliable and probative evidence. 29 C.F.R. § 18.57.

Id. at 4.

In ***USDOL v. Plan Administrator, Hago Manufacturing Co., Inc. Retirement Plan***, 2013-RIS-00055 (ALJ Feb. 3, 2017), the ALJ provides the following assessment of the ALJ's standard of review:

> OALJ's standard of review in Section 502(c)(2) cases is de novo for fact-finding, but deferential for EBSA's calculation of the penalty. The burden of proof is on the Complainant to establish that the Respondent violated ERISA and on the Respondent to show that the Complainant did not properly take into account the degree and/or willfulness of its failure or refusal to file a compliant annual report.

Id. at 3. The ALJ's decision was not appealed.

In ***USDOL v. Plan Administrator, White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan***, ALJ No. 2015-RIS-23 (EBSA May 28, 2019), the Director of the Office of Policy and Research at EBSA ("Director") affirmed the ALJ's grant of summary decision for EBSA. The Director stated that he "find[s] no fault with the ALJ's opinion," but did not address the proper standard of review. The ALJ had stated the following in his decision:

> OALJ's jurisdiction and the scope of this adjudication is defined by the regulations. An ALJ is only authorized to review EBSA's determination as part of the process of reaching final agency action. Two issues are relevant: 1) whether the administrator complied with the requirements of ERISA (the "liability question"); and 2) whether the administrator made a showing "of mitigating circumstances regarding the degree or willfulness of the noncompliance" (the "mitigation question"). 20 C.F.R. §§ 2560.502c-2(a)(1), (b)(1), (d); *see also U.S. Dep't of Labor, EBSA v. Plan Adm'r, Hago Mfg. Co., Inc. Ret. Plan*, No. 2013-RIS-00055, slip op. at 3-4 (ALJ Feb 3, 2017).

Id. at 4.

In ***USDOL, EBSA v. Plan Administrator, Dutch American Import Co., Inc., Employee Stock Ownership Plan***, 2009-RIS-14 at 4 (EBSA Jan. 26, 2012), the Director of the Office of Policy and Research at EBSA found that the ALJ improperly considered a post-Notice of Determination filing as a mitigating circumstance. The Director addressed the ALJ's application of the *de novo* standard of review:

> The ALJ's decision argues that the ALJ, pursuant to *de novo* authority, could do whatever it wanted in assessing a penalty, based on the evidence before it. This is correct insofar as the ALJ has the power to try facts *de novo*. However, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent the ALJ finds them to be invalid. Whether applying the arbitrary and capricious standard or the *de novo* standard of review, the ALJ could only reach the conclusion that DOL properly applied the law.

Id. at 5 (footnote omitted).

B. By the Director of the Office of Policy and Research for EBSA

In ***USDOL v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA Nov. 18, 1994), the Senior Policy Advisor for PWBA reviewed the ALJ's decision to determine whether it was supported by substantial evidence.

The Director of the Office of Policy and Research for EBSA currently reviews ALJ decisions. In ***USDOL v. Plan Administrator, Dutch American Import Co., Inc., Employee Stock Ownership Plan***, 2009-RIS-14 at 4 (EBSA Jan. 26, 2012), the Director of the Office of Policy and Research at EBSA reviewed the ALJ's decision and determined that there was "not a substantial basis in the decision of the ALJ for the ALJ to substitute her judgment as to the amount of the penalty for that of the DOL." The Director further found that "the ALJ erred in reducing the civil penalty without a finding that DOL abused its discretion . . . ." *Id.* at 6.

IV. Jurisdiction

A. Types of cases received by the OALJ

Administrative law judge hearings can be requested in eight types of ERISA matters:

- Civil sanctions under ERISA § 502(i) - 29 CFR Part 2570, Subpart A, §§ 2570.1 - 2570.12 "Prohibited transaction penalties"

- Civil penalties under ERISA § 502(c)(2) - 29 CFR Part 2570, Subpart C, §§ 2570.60 - 2570.71 Failure or refusal to file annual section 101(b)(1) report

- Civil penalties under ERISA § 502(c)(5) - 29 CFR Part 2570, Subpart E, §§ 2570.90 - 2570.101 Failure or refusal to file section 101(g) report by a multiple employer welfare arrangement (MEWA)

- Civil penalties under ERISA § 502(c)(6) - 29 CFR Part 2570, Subpart F, §§ 2570.110 - 2570.121 Failure or refusal to furnish documents requested under section 104(a)(6)

- Civil penalties under ERISA § 502(c)(7) - 29 CFR Part 2570, Subpart G, §§ 2570.130 - 2570.141 Failure or refusal to provide notice of diversification rights

- Issuance of findings under ERISA § 3(40) - 29 CFR Part 2570, Subpart H, §§ 2570.150 - 2570.159 Whether an entity is an employee welfare benefit plan under a collective bargaining agreement

- Civil penalties under ERISA § 502(c)(8) - 29 CFR Part 2570, Subpart I, §§ 2570.160 - 2570.171 Failure to timely adopt a funding improvement plan or rehabilitation plan - or to meet applicable benchmarks - with respect to a multiemployer plan which is in endangered and/or critical status

- Ex parte cease and desist order proceeding under Section 521 of ERISA (MEWAs) - 29 CFR Part 2571

OALJ primarily dockets one of these case types: § 502(c), in which the administrative law judge determines the appropriateness of penalties imposed on administrators of employee benefit plans for failure to comply with the reporting and disclosure requirements of ERISA.

B. Six year statute of limitations

[**Editor's Note:** this section, IV-B, was last updated in 2011 and has been included for historical value]

Pursuant to 29 U.S.C. § 1113, a party has six years to file a claim against a fiduciary under ERISA for breach of a fiduciary duty.

1. Date on which limitations period commences

b. Based on date of retirement

In ***Unisys Corp. Retiree Medical Benefit "ERISA" Litigation***, 242 F.3d 497 (3d Cir. 2001), the court addressed the issue of when the "date of the last action" constituting the breach occurred. The court noted that this date, in turn, determines the date on which the limitations period begins to run. The retirees maintained that the last action constituting part of the breach occurred when Unisys terminated the lifetime plans. However, the court disagreed and held that: . . . insofar as decisions to retire are concerned, a retiree's date of retirement is necessarily the last date upon which Unisys could have made a relevant misrepresentation or upon which a clarifying communication could have prevented detrimental reliance. Thus, the court concluded that the limitation of action period would properly run from the date of retirement for each employee. In this vein, summary judgment for Unisys was upheld with respect to the employees who asserted claims based on retirement decisions made more than six years before the suit was filed.

c. For failure to comply with disclosure and reporting requirements

In ***Warzecha v. The Nutmeg Companies, Inc.***, 48 F. Supp.2d 151 (D. Conn. 1999), plan participants brought an action against the plan administrator and trustees for alleged violations of ERISA. Citing to 29 U.S.C. § 1113 of the Act, Defendants argued that the action was time-barred because it was filed more than six years after the "accrual date." Initially, Plaintiffs argued that Defendants breached ERISA's disclosure and reporting requirements by failing to furnish Plaintiffs with summary plan descriptions for the 1989 and 1992 plan years as required by 29 U.S.C. §§ 1021(a), 1022(a)(1), and 1024(b). The court found, however, that Plaintiff's action with regard to the 1989 plan year was time-barred as Plaintiff's filed suit more than six years after the plan descriptions were required to be distributed under the statute. On the other hand, the count based on the 1992 plan was not time-barred. Similarly, with regard to the publication of annual reports as required by 29 U.S.C. § 1023, the report pertaining to the 1989 plan was time-barred, but the count related to the 1992 plan report was timely.

In ***Northwestern Institute of Psychiatry v. Martin***, 1993 WL 52553 (E.D. Pa., Feb. 24, 1993), Plaintiff, a plan administrator, sought relief from an $86,500 penalty assessed against it. PWBA assessed the penalty against Plaintiff based on Plaintiff's failure to comply with the Act's reporting requirements, including a failure to submit "statutorily required separate schedules covering plan assets held for investment and reportable transactions" as well as the Independent Qualified Public Accountant Report (IQPA). It was then noted that Plaintiff failed to file a "statement of reasonable cause" within 30 days of the deficiency and penalty assessment notice. Moreover, the statement was to be accompanied by a declaration indicating that the statement was made under penalty of perjury as required by 29 C.F.R. § 2560.502c-2(e). PWBA cited to 29 C.F.R. § 2560.502c-2 to argue that Plaintiff's failure to file a timely response constituted its acceptance of the facts alleged and a waiver of a right to appear and contest the facts contained in the notice. Plaintiff maintains, on the other hand, that PWBA abused its discretion in applying the regulations and improperly deprived it of a hearing. The court noted that, based on additional submissions by Plaintiff, PWBA subsequently concluded that Plaintiff complied with the Act's reporting requirements. The court held the following:

> Plaintiff, by timely filing a reasonable cause statement, believed it was securing the right for administrative review of Defendant's ensuing determination. Plaintiff should have been afforded the opportunity to correct or amend its reasonable cause statement. Under concepts of due process and fairness, Defendants must render a Determination and allow Plaintiff access to administrative review. As a matter of law, this Court concludes that the
> Secretary's application or interpretation of 29 C.F.R. § 2560.502c-2(e) and (f) was arbitrary, capricious, and an abuse of discretion and lacked a rational basis. The court concluded that the failure to file a statement of reasonable cause and a failure to file a declaration with the statement are two separate matters. The later circumstance should not operate to preclude administrative review.

d. For breach of fiduciary duty

In ***Warzecha v. The Nutmeg Companies, Inc.***, 48 F. Supp. 2d 151 (D. Conn. 1999), Plaintiffs alleged that Defendants breached their fiduciary duties in failing to make required contributions to the pension funds and in failing to advise Plaintiffs of this failure. The court stated that "[f]or purposes of Defendants' summary judgment motion, all parties agree that Plaintiffs were not aware of a possible problem with how Defendants calculated the contributions to Plaintiff's pension plans until October 1994" when the company held a meeting with its employees to explain contributions to the Nutmeg Plan. Since the civil action was brought in 1997, it was not time-barred.

2. Fraud or concealment tolls the statute of limitations period

In ***Unisys Corp. Retiree Medical Benefit "ERISA" Litigation***, 242 F.3d 497 (3d Cir. 2001), retirees filed a class action against their former employer, Unisys, for termination of post-retirement medical plans. Unisys argued that the action was barred by the six year statute of limitations contained at 29 U.S.C. § 1113 for an alleged breach of fiduciary duty. The retirees maintained that Unisys benefits counselors erroneously advised them that they were entitled to lifetime medical benefits. The retirees assert that the counselors failed to also advise them that the company's summary plan descriptions contained a "reservation of rights" clause permitting the company to terminate the plan at any time for any reason. As a result, the retirees argue that the statute of limitations period was tolled because of the employer's "fraud" or "concealment." The circuit court held, however, that the "fraud or concealment" provision at § 1113(2) was inapplicable:

> [I]f all that a plaintiff can show is that a counselor represented to him that he had guaranteed lifetime health care benefits or failed to give him accurate advice knowing that he believed he had such benefits, the fraud or concealment clause is inapplicable. In such cases, Unisys cannot be said to have taken affirmative steps, either as part of the

original breach of duty or thereafter, to cover up its breach. To the contrary, pursuant to the relevant provisions of ERISA, Unisys regularly distributed to its employees and retirees SPDs unambiguously explaining that the plan provisions calling for lifetime benefits could be amended at any time for any reason. The court further refused to apply the doctrine of equitable tolling to prevent the running of the statute of limitations. It stated that "superimposing . . . equitable tolling rules" on the limitations period contained at § 1113 would not be consistent with congressional intent or Supreme Court mandate. *See also* ***Caputo v. Pfizer, Inc.***, 267 F.3d 181 (2nd Cir. 2001) (the six year statute of limitations must be tolled in cases in which the fiduciary (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment, or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty).

C. ERISA coverage over employee pension benefit plan administered by a tribal government

In ***USDOL v. Plan Administrator, White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan***, ALJ No. 2015-RIS-23 (EBSA May 28, 2019), the Director of the Office of Policy and Research at EBSA ("Director") affirmed the ALJ's grant of summary decision for EBSA. First, the Director found that the White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan ("Plan"), an employee pension benefit plan administered by an Indian tribal government, is covered under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Director, stating that "the commercial nature of the participants' work is clear," found that the Plan is not exempted as a governmental plan. The Director explained that the Pension Protection Act amended the term "governmental plan" as used in the ERISA provisions to include plans established and maintained by tribal governments where substantially all employee services are performance as essential government functions and are not in the performance of commercial activities, regardless of whether the commercial activity is an essential government function. A subsequent Internal Revenue Notice grandfathered in certain tribal plans, allowing plans to qualify as governmental plans based on a reasonable and good faith interpretation of the amended definition. However, the Notice excluded plans where employees engaged in commercial activities including operating a hotel, casino, service station, convenience store, or marina, and Plan participants' activities fall into these categories.

D. Authority to adjudicate a penalty that has become final

In ***USDOL v. Plan Administrator, Cavallo Point Lodge 401(k) Plan***, 2015-RIS-00025 at 5 (ALJ Nov. 10, 2015), the ALJ found that the respondent's failure to file a Statement of Reasonable Cause resulted in the Notice of Intent to Assess a Penalty becoming final agency action 45 days after its service pursuant to 29 C.F.R. § 2560.502c-2(f). The ALJ found that OALJ does not have jurisdiction to adjudicate the issues presented because they were already determined in a final order. *Id.*

V. Evidence

A. Breach of fiduciary duty–burden of proof

1. Secretary's burden to establish breach of fiduciary duty

In ***Rodrigues v. Herman***, 121 F.3d 1352 (9th Cir. 1997), the Secretary alleged that Rodrigues engaged in prohibited transactions in violation of ERISA by investing plan money in a partnership in which the plan had no legal interest, but Rodrigues did have an interest. A settlement resulting in a consent decree was approved by the ALJ. In the consent decree, Rodrigues did not admit any wrongdoing. However, the Secretary also reserved the right to assess a civil money penalty under § 502(l) of ERISA based on amounts recovered through the settlement which were actually paid by the plan to the partnership in violation of ERISA. The Secretary subsequently assessed a penalty against Rodrigues in the amount of $32,999.80 and denied his request for a waiver of the penalty. Rodrigues sought relief in district court alleging that the Secretary exceeded her statutory authority in assessing the penalty. The circuit court affirmed the district court's finding of summary judgment in favor of the Secretary. Initially, the court noted that it is the Secretary's burden to establish that a breach of fiduciary duty occurred. Under the terms of the settlement, Rodrigues admitted no wrongdoing and the court disagreed with the Secretary's position that she "need not prove that there has been a breach when (she) has secured a settlement agreement with a party." The court reasoned that there may be a situation where no breach occurred but the "fiduciary agreed to a settlement to avoid an expensive legal battle." However, the court concluded that, based on the record before it, there was a fiduciary breach as a matter of law. In particular, the court viewed the facts in a light most favorable to Rodrigues and noted that it was clear that Rodrigues "breached a common law trust duty to keep trust property separate and clearly designate such property as property of the trust." The court concluded that, "[b]y failing to abide by such a fundamental trust law duty, Rodrigues failed to exercise care and diligence of 'a prudent man acting in a like capacity and familiar with such matters.'" (citing to 29 U.S.C. § 1104(a)(1)(B)).

VI. Discovery

A. Admission based on failure to respond to "Notice of Intent"

In ***USDOL v. Optical Corp. of America***, 1999-RIS-60 (ALJ Nov. 23, 1999), the ALJ ordered that the administrative proceeding be dismissed on grounds that Respondent was not entitled to a hearing pursuant to 29 C.F.R. § 2560.502c-2(f) because Respondent failed to file "a statement of reasonable cause following a Notice of Intent to Assess a Penalty." It was determined that Respondent's failure to file the statement constituted a waiver of the right to a hearing and an admission of the facts alleged in the Notice of Intent.

In ***USDOL v. Cavallo Point Lodge 401(k) Plan***, 2015-RIS-00025 at 5 (ALJ Nov. 10, 2015), the ALJ found that the respondent's failure to file a Statement of Reasonable Cause resulted in the Notice of Intent to Assess a Penalty becoming final agency action 45 days after its service pursuant to 29 C.F.R. § 2560.502c-2(f). The ALJ found that OALJ does not have jurisdiction to adjudicate the issues presented because they were already determined in a final order. *Id.*

B. ALJ denial of discovery request

In ***USDOL v. Plan Administrator, White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan***, ALJ No. 2015-RIS-23 (EBSA May 28, 2019), the Director of the Office of Policy and

Research at EBSA ("Director") affirmed the ALJ's grant of summary decision for EBSA. First, the Director found that the White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan ("Plan"), an employee pension benefit plan administered by an Indian tribal government, is covered under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Director, stating that "the commercial nature of the participants' work is clear," found that the Plan is not exempted as a governmental plan. The Director explained that the Pension Protection Act amended the term "governmental plan" as used in the ERISA provisions to include plans established and maintained by tribal governments where substantially all employee services are performance as essential government functions and are not in the performance of commercial activities, regardless of whether the commercial activity is an essential government function. A subsequent Internal Revenue Notice grandfathered in certain tribal plans, allowing plans to qualify as governmental plans based on a reasonable and good faith interpretation of the amended definition. However, the Notice excluded plans where employees engaged in commercial activities including operating a hotel, casino, service station, convenience store, or marina, and Plan participants' activities fall into these categories.

The Director found that the ALJ did not improperly deny White Mountain's request for discovery regarding EBSA's internal procedures and activities because "the facts sought were not relevant to this proceeding, and could not have changed its outcome."

VII. Preemption of State Law

A. Preemption established

In ***Egelhoff v. Egelhoff***, 121 S. Ct. 1322 (2001), the Supreme Court held that ERISA preempted a state statute, which provided for automatic revocation of the designation of a divorced spouse as the beneficiary of a non-probate asset. The Court concluded, to the contrary, that the state law was in direct conflict with ERISA requirements that the plan be administered, and benefits paid, in accordance with plan documents. The preemptions provisions at 29 U.S.C. § 1144(a) provide that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. Citing to ***Shaw v. Delta Air Lines, Inc.***, 463 U.S. 85, 97 (1983), the Court reiterated that a state law relates to an ERISA plan "if it has a connection with or reference to such a plan." The Court stated that it must be determined whether the scope of the state law interferes with the objectives of the ERISA. Under the facts before it, the Court held that:

> The (state) statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern.

The Court cited to 29 U.S.C. §§ 1102(b)(4), 1102(8), and 1104(a)(1)(D) to state that ERISA directly addresses beneficiary payments. The Court concluded, therefore, that the state statute improperly interfered "with nationally uniform plan administration." *See also* ***Bullock v. Equitable Life Assurance Society of the United States***, 259 F.3d 395 (5th Cir. 2001) (preemption found where state statute addresses an area of exclusive federal concern and it directly affects the relationship among traditional ERISA entities, *i.e.* the employer, plan administrators, fiduciaries, participants, and beneficiaries).

B. Preemption not established

In ***Boyle, et al. v. Anderson, et al.***, 1994 U.S. Dist. LEXIS 4931, Case No. 3-93-359 (D. Minn. Apr. 12, 1994), plan trustees argued that ERISA preempted the state's collection and reporting requirements as well as its spending caps and two percent provider tax "insofar as that tax is passed on to health benefit plans covered by" ERISA.1 The court concluded that Plaintiff did not have standing to challenge the state's reporting and spending cap requirements. It further held that the provider tax portions of the state statute were not pre-empted by ERISA. With regard to a lack of standing, the court noted that "Plaintiffs have failed to show that they are in any way injured by the reporting requirements of (the state), which do not apply to these Plaintiffs." The same was true of Plaintiffs' challenge to the state's spending cap provisions–Plaintiffs did not have standing to challenge the cap because the provisions did not apply to them. With regard to the provider tax, Plaintiffs established standing to sue and argued that the provider tax was preempted by ERISA insofar at the tax was passed through to the plans. Citing to ***Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., Inc.***, 947 F.2d 1341, 1344-45 (8th Cir. 1991), the court set forth seven factors to be considered in determining whether a state statute of general application is preempted by ERISA:

> (1) whether the state law negates a provision of an ERISA plan; (2) whether the state law affects regulations between primary ERISA entities; (3) whether the state law has an impact on the structure of ERISA plans; (4) whether the state law has an impact on the administration of ERISA plans; (5) whether the state law has an economic impact on ERISA plans; (6) whether preemption of the state law is consistent with other ERISA provisions; and (7) whether the state law is an exercise of traditional state power.

Initially, the court noted that a statute is of "general application" when it "does not treat ERISA plans differently from non-ERISA plans." It found that the state statute at issue, by its language, applied to all health care providers, "and the passthrough of the tax potentially affects all third-party purchasers." As a result, the court concluded that the statute was of general application and the factors set forth in ***Arkansas Blue Cross*** were applicable. In this vein, Plaintiffs argued that the state statute "increase(d) costs to employee benefit plans in order to provide benefits to uninsured individuals who are not beneficiaries of the plans and, thus, violates the "'exclusive benefits' provision of ERISA." The court disagreed to find that states often exercise police power which, in turn, will increase the cost of doing business in the state and the beneficiaries of the state regulations are not necessarily those persons who pay the increased costs. The court concluded that Congress did not intend for ERISA to be interpreted so broadly that it would preempt state policing regulation. Under the particular facts before it, the court determined that the "provider tax does not negate a plan provision or conflict with other ERISA statutory provisions." The court then addressed the effect of the state statute on ERISA entities and the plan structure and noted that:

> If the state law alters the relationships among the primary ERISA entities–the employer, the plan, the plan fiduciaries, and the beneficiaries–and thereby alters the structure of the plan, this factor weighs in favor of preemption. Plaintiffs maintained that persons who are not plan beneficiaries nevertheless received benefits from the plan through the provider tax such that they were "effectively added as new beneficiaries to the plans," thus altering the plans. The court resolved, to the contrary, that this argument would lead to the impermissible and overstated conclusion that every state law resulting in any

> increased plan costs such as a sales tax, environmental regulations, or minimum wage laws, are preempted by ERISA.

The court concluded that, because the state's provider tax did not have a "significant effect on primary ERISA entities," this element did not support preemption. The court then looked to whether the provider tax imposed an administrative burden and concluded that it did not. The court stated that there was no significant intrastate administrative impact as plan administrators did not have "to consider claims on an individual basis to determine the proper payee." Moreover, the court determined that the provider tax did not affect interstate administration. It noted that, through discovery, Plaintiffs admitted that their plans were "equipped to accommodate differences in costs for similar procedures" and that "the amounts they pay for similar services at different locations can vary by more than two percent." The court held that the provider tax, which is passed through to the plans, does not support preemption because it does not impose "significant" additional interstate or intrastate administrative difficulties in the operation of ERISA plans. The court then considered the "economic impact" factor in assessing whether the state statute was preempted. Initially, it noted that the circuit courts are divided with regard to the importance of economic impact as a factor in determining preemption under ERISA. The Second and Fifth Circuits have held that it is a significant factor, ***E-Systems, Inc. v. Pogue***, 929 F.2d 1100 (5th Cir. 1991) and ***The Travelers Ins. Co. v. Cuomo***, 14 F.3d 708, 721 (2nd Cir. 1993), whereas the Third Circuit has held that economic impact alone is insufficient to support preemption. ***United Wire, Metal & Machine Health and Welfare Fund v. Morristown Memorial Hosp.***, 995 F.2d 1179 (3rd Cir.), *cert. denied*, 114 S. Ct. 382 (1993). The court found that any economic impact imposed by the provider tax was minimal. In particular, it did not involve "direct taxation or services offered by ERISA plans." The court concluded that the impact of the tax on ERISA plans was "tenuous, remote, and peripheral," which did not support a finding of preemption. With regard to the final factor to be considered, the court concluded that the state provider tax statute constituted an exercise of traditional state power. Specifically, the court found that it was long-recognized that a state's inherent police powers included regulating health care. Consequently, the court determined that the state provider tax was not preempted by ERISA on this ground.

Common law breach of contract claim not preempted

In ***Warzecha v. The Nutmeg Companies, Inc.***, 48 F. Supp.2d 151 (D. Conn. 1999), Plaintiffs argued that Defendants violated state laws in failing to contribute to Plaintiff's pension plans and in failing to pay agreed compensation to Plaintiffs. The court concluded that all but one of the state claims was time-barred. With regard to the viable state claim, the court analyzed whether it was preempted by ERISA and concluded that it was not. Initially, the court stated:

> [W]e first consider whether Plaintiffs' breach of contract claim depends upon the existence of an ERISA plan to show liability, such that the merits of Plaintiffs' common-law claims are contingent upon the rights conferred by the ERISA plan. We also consider whether Plaintiffs' breach of contract claim has a ‘clear connection with a plan by mandating employee benefit structures and administration or by providing alternative enforcement mechanisms.'(citations omitted).

Id. at 160. Upon review of the parties' arguments, the court noted that the focus of Plaintiffs' arguments was that "Defendants did not pay them wages or reimburse them for gasoline credit card charges according to the terms of an oral or implied employment contract." The court found, therefore, that this cause of action could be brought regardless of the existence of the ERISA plan. Moreover, the court noted that:

> . . . although Plaintiffs' breach of contract claim refers to the Defendants' misuse of Nutmeg Plan funds (by effectively shifting funds from the Plaintiffs' pension plans to cover excess weekly wages and reimbursements for the gasoline credit card charges), the Plaintiffs' breach of contract claim does not attempt to restructure employee benefits, affect the Nutmeg Plan's administration, or create an alternative enforcement mechanism. As a result, the court held that the common law breach of contract claim was not preempted by ERISA.

VIII. Relief

A. Assessment of civil money penalty

1. Failure to file independent qualified public accountant report (IQPA)

In ***USDOL v. Dynapace Corp.***, 2005-RIS-88 (ALJ Jan. 10, 2007), the ALJ upheld a penalty assessment of $86,500.00 where Respondent failed to file the required IQPA along with a schedule of assets held for investment. Although Respondent argued that it had fewer than "40 active employees" due to layoffs, the ALJ noted that "the plan's participant count ‘exceeded 100' when the accounts of active participants and those participants terminated from the company were added together." The ALJ noted that Respondent could not utilize the simplified annual reporting procedures because it had more than 100 participants at the "*beginning of the plan year*" (emphasis in original). From this, it was determined that the IQPA should have been filed. Because the plan administrator did not demonstrate "good faith" or "diligence" in complying with ERISA's requirements, the penalty amount of $86,500.00 would not be waived. *See also* ***USDOL v. Tile Finishers Local 88 NY, BAC Savings Plan***, 2208-RIS-20 (ALJ, June 3, 2008) (EBSA’s assessment of $5,000.00 was proper on grounds that IQPA report was filed 530 days after the initial due date and EBSA demonstrated “scrupulous compliance with the regulatory requirements for imposition of a penalty”); ***USDOL v. Product Mgt., Inc.***, 2007-RIS-113 (ALJ, Feb. 23, 2009) ($50,000 penalty for failure to file IQPA report affirmed where plan administrator received multiple notices about requirements for IQPA, but failed to comply); ***USDOL v. Tile Finishers Local 88 NY, BAC Savings Plan***, 2008-RIS-20 (ALJ June 3, 2008) ($5,000 penalty for failure to file a timely IQPA report affirmed); ***USDOL v. Plan Administrator Arsenson Office Furnishings, Inc. p/s 401(K) Plan***, 2007-RIS-111 (ALJ May 2, 2008) (EBSA’s assessment of $2,500 penalty for failure to timely file a IQPA report, which was abated by 95% of the original penalty assessed, was affirmed; the assessment was not arbitrary, capricious, or unreasonable); ***USDOL v. New Design Construction Co.***, 2007-RIS-9 (ALJ May 4, 2007) (affirming assessment of $5,545 for failure to file a timely IQPA report). In ***USDOL v. Callaghan & Callaghan, Inc.,*** 2005-RIS-99 (ALJ Apr. 24, 2006), the ALJ affirmed the assessment of a $2,167.00 penalty by the Employee Benefit Security Administration (EBSA) against Respondent for failure to timely file its IQPA. Initially, the ALJ noted that a penalty assessed by the EBSA will generally not be disallowed by a judge, unless the judge finds that EBSA "has acted in an arbitrary, capricious, or unreasonable manner." The ALJ determined that EBSA did not act in an arbitrary, capricious, or unreasonable manner. EBSA initially proposed to assess a penalty of $43,350.00 against Respondent based on calculations supported by the regulations but, upon request by Respondent for a waiver of the penalty for reasonable cause (*i.e.* it took corrective action and filed its IQPA), EBSA reduced the proposed penalty by 95 percent to $2,167.00. EBSA explained that the remaining penalty amount was proper because Respondent failed to originally file an acceptable annual report, or to timely correct deficiencies in the originally filed report. Notably, the ALJ found that internal miscommunications between the Respondent and its accountant as well as alleged erroneous advice from an "unidentified EBSA employee," resulting in the IQPA not being timely filed, did not give rise to a finding that EBSA's assessment was improper; rather, the ALJ noted that ERISA "places responsibility for accurate, complete, and timely reporting on the plan administrator" and Respondent's "failure to take steps to ensure that the IQPA was properly filed does not demonstrate good faith or diligence in the performance of its responsibilities as a plan administrator."

In ***USDOL v. Schneiderman's Furniture, Inc.***, 2000-RIS- 40 (ALJ Mar. 23, 2001), the ALJ concluded that the penalty assessed against Respondent in the amount of $2,500.00 was proper. She noted that the original penalty assessment of $50,000.00 was reduced by 95 percent to account for Respondent's compliance. However, it was determined that the remainder of the penalty amount totaling $2,500.00 was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. In particular, the ALJ noted that Respondent failed to timely file the required independent qualified public accountant report within the 45 day time period which PWBA allowed for Respondent to come into compliance. Rather, Respondent did not comply fully for an additional two and one-half months. In ***USDOL v. Compgraphix, Inc.***, 1999-RIS-53 (ALJ Oct. 14, 1999), the ALJ upheld PWBA's assessment of a $50,000 penalty against Respondent for failure to include the report of an independent qualified public accountant (IQPA) as required by ERISA at 29 U.S.C. § 1023(a)(3)(A). Respondent argued that it had established reasonable cause for failure to file the IQPA report:

> Comgraphix notes that the auditor's fee is a plan expense payable out of plan assets and Comgraphix's exhibits demonstrate that the plan had no assets with which to pay for the audit, making it impossible for Comgraphix to file the 1996 IQPA report for Plan 001. The ALJ found, however, that $13,853 of the plan's assets were in interest-bearing cash such that it could have afforded the audit and the fact that the plan "had assets available at the end of 1996 but soon thereafter did not have sufficient assets to pay of an audit underscores the importance of ERISA's reporting and disclosure provisions."

The ALJ further stated that, without the independent audit, it could not be determined whether there were fiduciary breaches in the plan's administration. As a result, the $50,000 penalty was upheld.

2. Engaging in prohibited transactions

In ***Rodrigues v. Herman***, 121 F.3d 1352 (9th Cir. 1997), the Secretary alleged that Rodrigues engaged in prohibited transactions in violation of ERISA by investing plan money in a partnership in which the plan had no legal interest, but Rodrigues did have an interest. The court concluded that, based on the record before it, there was a fiduciary breach as a matter of law. In particular, the court noted that it was clear that Rodrigues "breached a common law trust duty to keep trust property separate and clearly designate such property as property of the trust." The court concluded that, "[b]y failing to abide by such a fundamental trust law duty, Rodrigues failed to exercise care and diligence of ‘a prudent man acting in a like capacity and familiar with such matters.'" (citing to 29 U.S.C. § 1104(a)(1)(B)). Having determined that a breach of fiduciary duty was established, the court then sought to define "applicable recovery amount" under § 502(l) for purposes of assessing a civil money penalty. Citing to ***Mertens v. Hewitt Assoc.***, 508 U.S. 248, 259-61 (1993), the court upheld the penalty assessment despite Rodrigues' argument that he did not "pay the Plans out-of-pocket" and, thus, "there was ‘no recovery' as a matter of law." It was noted that the *Mertens* Court held that equitable transfers of assets and property may constitute an "applicable recovery amount" even in the absence of a

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monetary damage award. Here, Rodrigues assigned a ten percent in the partnership to the Plans according to the settlement agreement. As a result, the § 502(l) penalty was properly assessed on this amount.

3. Failure to comply with terms of settlement agreement

In ***USDOL v. Current Development Corp.***, 1996-RIS-67 (ALJ Feb. 22, 2000), the ALJ was confronted with PWBA's allegations that Respondent failed to abide by the terms of a settlement agreement. In particular, Complainant alleged that Respondent failed to pay the penalty as required by the agreement and it failed to timely file a Form 5500 C/Rs and participant beneficiary statements. The ALJ noted that the agreement specifically provided that he would retain jurisdiction until compliance with the agreement was accomplished. The ALJ determined that Respondent's failure to fulfill the terms of the agreement returned the parties to the *status quo ante*, *i.e.* the positions of the parties as they existed prior to execution of the agreement).Testimony revealed that the Form 5500 C/Rs was not timely filed because the company president "never took the time to manually take the information from the work papers, put it on statements and get it out." The ALJ concluded that this reason did not excuse compliance with the agreement. The ALJ upheld the imposition of a $198,000 fine by the Administrator as within his authority to impose pursuant to 29 C.F.R. § 2560.502c-2. Moreover, he concluded that the $15,000 penalty negotiated in the agreement was reasonable. By *errata* dated March 2, 2000, the ALJ corrected certain monetary calculations in his February 2000 decision. The revised order directed payment of a total penalty of $38,062.00 within 30 days, which comprised one percent of the total penalty amount of $2,096,200.00, plus certain late charges. The ALJ further concluded that, if payment was not timely made, then Respondent would be required to pay a total of $2,311,300.00 in penalties and sanctions.

B. Date of commencement of penalty

In ***USDOL v. Spalding and Evenflo Companies, Inc.***, 1992-RIS-19 (PWBA Nov. 18, 1994), Spalding failed to timely submit independent qualified public accountant reports for each of its three welfare plans. The Senior Policy Advisor noted that "[t]he regulations define the date on which the administrator failed or refused to file as the ‘date on which the annual report was due (determined without regard to any extension for filing).'" Under the facts of the case before him, the Senior Policy Advisor stated that calculation of the penalty must begin on August 1, 1989, "the day after the original July 31, 1989 filing deadline for the Forms 5500s." He noted that "[t]he regulations do not provide for deviations from this starting date for penalty calculations" except that they do provide for "a tolling of time for calculating penalty amounts in situations in which the plan administrator files a statement of reasonable cause . . .." As a result, the Senior Policy Advisor held that the ALJ erred in calculating the penalty amount from the date on which PWBA first notified Spalding that its reports were deficient. The Senior Policy Advisor reiterated that the "burden of accurate and complete reporting and disclosure is on ERISA plan administrators and fiduciaries, who must meet the requirements of the statute and regulations thereunder" and, therefore, "[t]he date for complying with the annual reporting requirements is the date that the annual report is due, not the date on which a PWBA reviewer first notes a failure or deficiency." He further stated that allowing a plan administrator to violate the disclosure requirements without penalty until PWBA notifies him of the violation improperly shifts the burden "of compliance from the plan administrator to the supervising agency," which is "not only insupportable as a matter of law but illogical as a matter of fundamental policy."

C. Grounds for waiver of Section 502(c) penalty; “reasonable cause”

1. Not established

a. Bankruptcy, consolidation, departure of officers

In ***USDOL v. Synergy Mfg. Technology, Inc.***, Case No. 2005-RIS-20 (ALJ Feb. 21, 2007), Respondent argued that reasonable cause existed for reduction or abatement of a $50,000 penalty assessed for failure to file a IQPA report for the 2002 plan year. Specifically, the company stated that "consolidation of the company's subsidiary locations caused year 2002 records to be unavailable" and that it had requested the records from its bank and payroll service. In a subsequent pleading, Respondent elaborated to state that it had filed for bankruptcy and closed several locations. Moreover, during the time period in question, the company's chief financial officer died and the comptroller from one of the branches left the company and was "not helpful" in obtaining the records. The ALJ concluded that the proffered circumstances did not constitute "reasonable cause" and stated:

> [Respondent's] attempt to pin the company's failure to timely file the IQPA report on the tail of a deceased corporate officer or a departed comptroller would not demonstrate good faith or diligence in Respondent's performance of its duties as plan administrator. Nor would these factors present reasonable cause for the more than 16-month delay in filing the IQPA report. Further, Synergy's misunderstanding concerning the due date for the annual report does not render its amended report timely filed.

Slip op. at 8.

b. Plan participants totaled 100 at beginning of plan year

In ***USDOL v. Dynapace Corp.***, 2005-RIS-88 (ALJ Jan. 10, 2007), the ALJ upheld a penalty assessment of $86,500.00 where Respondent failed to file the required IQPA along with a schedule of assets held for investment. Although Respondent argued that it had fewer than "40 active employees" due to layoffs, the ALJ noted that "the plan's participant count ‘exceeded 100' when the accounts of active participants and those participants terminated from the company were added together." The ALJ noted that Respondent could not utilize the simplified annual reporting procedures because it had more than 100 participants at the "*beginning of the plan year*" (emphasis in original). From this, it was determined that the IQPA should have been filed. Because the plan administrator did not demonstrate "good faith" or "diligence" in complying with ERISA's requirements, the penalty amount of $86,500.00 would not be waived. *See also* ***USDOL v. Plan Administrator, Stover Industries, Inc.***, 2006-RIS-7 (ALJ Mar. 15, 2007) (penalty of $44,400.00 assess for failure to file IQPA).

c. Plan terminated

In ***USDOL v. Compgraphix***, Case No. 1999-RIS-53 (ALJ Oct. 14, 1999), the plan administrator declined to file an annual report on grounds that the plan had been terminated and there were no funds to pay for an audit. Moreover, the plan administrator asserted that it relied on erroneous legal advice that, under its circumstances, an annual report could be filed without an accompanying audit report. The ALJ noted that, under the regulations, "the Department anticipates that [ERISA section] 502(c) penalties will be waived to the extent that reasonable cause is demonstrated by the plan administrator."

54 Fed. Reg. 26892 (1989). Although "reasonable cause" is not defined in the regulations, the ALJ noted that the regulations offer sufficient flexibility "to ensure that appropriate consideration is given to good faith and diligent efforts by the administrator to comply with the annual reporting requirement." As a result, the ALJ noted that the civil money penalty under Section 502(c)(2) is determined by "taking into consideration the degree of willfulness of the failure to file the annual report." 29 C.F.R. § 2560.502c-2(b)(1).

The ALJ rejected Compgraphix's reliance on erroneous legal advise for three reasons:

(1) the advice was "at best secondhand" as there was no evidence that the plan administrator sought the legal advice directly; (2) even if the advice was given directly to the plan administrator, it was not excused from the "attorney's nonfeasance or negligence"; and (3) the plan administrator was advised by the Department that the IQPA (audit report) was required. The ALJ stated:

> To date, despite being advised that the IQPA report was required, Compgraphix has not filed the IQPA report not is there any evidence the Compgraphix has made any attempt to comply. Considering the extraordinary length of time that has transpired since PWBA advised Compgraphix that the IQPA report was required, I can give little weight to any argument that any part of the penalty should be waived because Compgraphix relied on incorrect legal advice.

Further, the ALJ noted that, during the year that the plan administrator was required to obtain and file an IQPA, there were sufficient assets in the plan to cover the costs. Therefore, the ALJ found the plan administrator's argument that there were no funds to pay for an audit unpersuasive. Indeed, the ALJ reasoned that "[t]he fact that Plan 001 had assets available at the end of 1996 but soon thereafter did not have sufficient assets to pay for an audit underscores the importance of ERISA's reporting and disclosure provisions." Because the plan administrator failed to file the required IQPA report and did not demonstrate "reasonable cause" to modify the $50,000 civil money penalty assessed by the PWBA, the ALJ upheld the assessment on summary judgment. In its request for summary decision, the PWBA also requested that the corporate veil be pierced and liability for the civil money penalty be imposed on the corporate officers and directors. However, the ALJ declined to pierce the corporate veil on summary judgment stating that the PWBA "has presented no facts which would warrant piercing the corporate veil as to any corporate officer or director . . .."

d. Illness, death, and difficulty gathering information not sufficient

In ***USDOL v. Plan Administrator, Precision Wire Products, Inc.***, 2007-RIS-141 (ALJ Sept. 10, 2008), the ALJ held that the Plan Administrator did not demonstrate “reasonable cause” sufficient to warrant waiver of the imposition of a penalty. He reasoned:

> Respondent simply argues that it should not be required to pay the $6,000 abated penalty because the Plan Administrator encountered obstacles associated with illness, death, and difficulty in gathering information for the audit. Respondent mistakenly compares these obstacles of limited duration to an act of god like a hurricane to excuse the long periods of time where there was absolutely no attempt by the Plan Administrator to respond in good faith to EBSA’s . . . request letters . . . .

Slip op. at 8.

e. Noncompliance after receipt of Notice of Rejection purportedly based on good faith understanding does not constitute reasonable cause or non-willful conduct

In ***USDOL v. Plan Administrator, White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan***, ALJ No. 2015-RIS-23 (EBSA May 28, 2019), the Director of the Office of Policy and Research at EBSA ("Director") affirmed the ALJ's grant of summary decision for EBSA. First, the Director found that the White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan ("Plan"), an employee pension benefit plan administered by an Indian tribal government, is covered under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The Director found that the ALJ properly considered mitigating factors. The ALJ found that noncompliance after receipt of EBSA's Notice of Rejection purportedly based on a good faith understanding did not constitute reasonable cause or non-willful conduct.

f. Filing an acceptable report after EBSA has issued its Notice of Determination not a mitigating circumstance under the regulations

In ***USDOL, EBSA v. Plan Administrator, Dutch American Import Co., Inc., Employee Stock Ownership Plan***, 2009-RIS-14 at 6 (EBSA Jan. 26, 2012), the Director of the Office of Policy and Research at EBSA reviewed the ALJ's decision. He found that a plan administrator's filing of an acceptable report after the EBSA issued the Notice of Determination assessing a civil money penalty was "not relevant and cannot provide any basis for reducing the penalty."

D. Assessment against "plan administrator"

In ***USDOL v. Synergy Mfg. Technology, Inc.***, Case No. 2005-RIS-20 (ALJ Feb. 21, 2007), Complainant asserted that liability for the $50,000.00 penalty assessed against Synergy for failure to file an IQPA for its 2002 plan year should be shared the plan's administrator, Mr. Hicks. In support of its argument, the Department noted that Mr. Hicks signed the Form 5500 as the "plan administrator" and he "personally sold Synergy to a successor . . . ." The Department added that Mr. Hicks' refusal to execute a settlement agreement in this matter as well as his failure to respond to the ALJ's orders constituted evidence of Mr. Hicks' attempts to "avoid liability by all means." The ALJ disagreed and concluded that an individual's failure to execute a settlement agreement is not evidence of avoiding liability as "no one is *required* to settle a case" (emphasis in original). Further, the ALJ noted that Mr. Hicks was not listed as a party in the settlement agreement, nor was he afforded proper notice and an opportunity to be heard at the hearing. In particular, the notice of hearing specified Synergy as the potentially liable Respondent and the Department did not move for Mr. Hicks to be joined as a party to the case.

Moreover, the ALJ cited to 29 U.S.C. § 1002(16)(A)(i) and (ii), which provides that a plan administrator is either (1) a person specifically designated by the terms of the plan's operating instrument, or (2) in the absence of such designation, then the plan administrator is the plan's sponsor. Here, the ALJ noted that the plan's operating instrument was not offered as evidence such that he could not legally conclude that Mr. Hicks was the designated "plan administrator." Finally, in an amended 2002 annual report, "Synergy states that the Board of Directors of the company administers the plan . . . ." Based on the foregoing factors, the ALJ declined to hold Mr. Hicks liable for the assessed penalty.

IX. Types of dispositions

A. Consent decree

The regulatory provisions at 29 C.F.R. § 2570.65 provide the following with regard to the submission of a consent order or settlement:

> At any time after the commencement of a proceeding, but at least five (5) days prior to the date set for hearing, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such and the duration thereof shall be in the discretion of the administrative law judge after consideration of factors such as the nature of the proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement which will result in a just disposition of the issues involved.

29 C.F.R. § 2570.65(a).

With regard to the submission of findings and an order disposing of part or all of the matter, the regulations require that the following provisions be included:

(1) the order shall have the same force and effect as an order made after full hearing;
(2) the entire record on which any order may be based shall consist of the notice and the agreement;
(3) a waiver of any further procedural steps before the administrative law judge;
(4) a waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and
(5) the order and decision of the administrative law judge shall be the final agency action.

29 C.F.R. § 2570.65(b).

B. Dismissal

1. Rejected as untimely–submitted less than five days prior to hearing date

In ***USDOL v. Life Printing and Publishing Co.***, 1999-RIS-49 (ALJ Sept. 7, 1999), the ALJ rejected a *Stipulation for Dismissal and Order* because it was filed less than five days prior to the scheduled hearing date in violation of 29 C.F.R. § 2570.65(a) and (c). In particular, the agreement was submitted the day prior to the hearing date. Moreover, neither party responded to the pre-hearing order. As a result, the ALJ concluded that PWBA failed to offer any proof in support of its position, the civil money penalty assessment was reversed, and judgment was entered in favor of Respondent.

2. For lack of party

In ***USDOL v. Continue Care Holding Corp.***, 2002-RIS-10 (ALJ June 10, 2003), the ALJ granted Complainant's motion to dismiss its claim involving a $50,000 penalty assessment on grounds of "lack of party." In particular, Complainant asserted that pursuit of the penalty and proper IQPA would be "fruitless and futile" because Respondent was broke and defunct and its certificates of needs have been sold."

3. Default judgment

In ***USDOL v. Plan Administrator, DGA Inc. 401(k) Profit Sharing Plan***, 2018-RIS-00072 (ALJ Feb. 26, 2019), the ALJ issued an Order of Default Judgment against the respondent. The respondent had not filed its prehearing exchange or a response to an Order to Show Cause instructing the respondent that failure to respond or comply with the court's orders could result in entry of a default judgment and assessment of the civil money penalty. The ALJ cited 29 C.F.R. § 18.57(b):

> If a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include the following: (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; (iv) Staying further proceedings until the order is obeyed; (v) Dismissing the proceeding in whole or in part; or (vi) Rendering a default decision and order against the disobedient party.

Id. at 2.

C. Failure to comply with terms of settlement agreement

In ***USDOL v. Current Development Corp.***, 1996-RIS-67 (ALJ Feb. 22, 2000), the ALJ was confronted with PWBA's allegations that Respondent failed to abide by the terms of a settlement agreement. In particular, Complainant alleged that Respondent failed to pay the penalty as required by the agreement and it failed to timely file a Form 5500 annual report and participant beneficiary statements. The ALJ noted that the agreement specifically provided that he would retain jurisdiction until compliance with the agreement was accomplished. The ALJ determined that Respondent's failure to fulfill the terms of the agreement returned the parties to the *status quo ante*, *i.e.* the positions of the parties as they existed prior to execution of the agreement). Testimony revealed that the Form 5500 annual report was not timely filed because the company president "never took the time to manually take the information from the work papers, put it on statements and get it out." The ALJ concluded that this reason did not excuse compliance with the agreement. The ALJ upheld the imposition of a $198,000 fine by the Administrator as within his authority to impose pursuant to 29 C.F.R. § 2560.502c-2. Moreover, he concluded that the $15,000 penalty negotiated in the agreement was reasonable. By *errata* dated March 2, 2000, the ALJ corrected certain monetary calculations in his February 2000 decision. The revised order directed payment of a total penalty of $38,062.00 within 30 days, which comprised one percent of the total penalty amount of $2,096,200.00, plus certain late charges. The ALJ further concluded that, if payment was not timely made, then Respondent would be required to pay a total of $2,311,300.00 in penalties and sanctions.

D. Summary decision

In ***USDOL v. New Design Construction Co.***, 2007-RIS-9 (ALJ May 4, 2007), the ALJ granted summary judgment against Respondent, which failed to submit a timely IQPA report despite repeated

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DOL requests for the document. In upholding assessment of a $5,545.00 civil penalty against Respondent, the ALJ dispensed with Respondent's argument that it never received the EBSA's earlier requests for the IQPA. The ALJ noted that Respondent failed to present this allegation in its earlier "Reasonable Cause Statement" to the Department. Moreover, the ALJ rejected Respondent's allegation that a government representative extended the deadline to file the IQPA:

> Assuming that Respondent is correct that it contacted (the departmental representative) and received additional time to submit the IQPA, such a fact would still not preclude summary judgment in light of the warnings set forth in bold print in the (Notice of Rejection) and the (Notice of Intent to Assess Penalty) that no extension would be allowed as the law does not allow for extensions of time to respond.

Slip op. at 4.

In ***USDOL v. Plan Administrator, Gordon & Silver, Ltd. 401(k) Profit Sharing Plan***, 2017-RIS-00031 (ALJ Aug. 8, 2019), the ALJ granted summary decision against the respondent. The complainant sought an order affirming the penalty assessed in EBSA’s Notice of Determination. The respondent, apparently no longer in active operation, had not opposed the motion.