

# Subpoenas

1. **Statutory Authority - ERISA Section 504(c).** The Secretary has the following authority:
  - a. To administer oaths,
  - b. To compel the attendance of witnesses, and
  - c. To access and copy documentary evidence.
2. **Subpoena Duces Tecum.** This subpoena requires a person or organization to appear at a specified time and place to produce requested documents and testify as to their authenticity.
3. **Subpoena Ad Testificandum.** This subpoena requires a named individual or corporation to appear at a specified time and place to testify under oath. There is a transcript of this testimony.
4. **Accommodation Subpoena.** This subpoena is issued at the request of a person or entity willing to testify or produce documents. The subject requests the subpoena to protect them from the consequences of cooperating without a legal requirement.
5. **Subpoena Request - EBSA Form 207.** Generally, EBSA seeks to obtain documents through voluntary production of records. However, EBSA has the discretion to issue a subpoena to obtain document production even before attempting to obtain records voluntarily through a document request letter. PBSO or the appropriate RSOL reviews and approves subpoena requests and subpoenas issued by the designated issuing official. Each subpoena requires a separate request. The subpoena request should include a copy of the subpoena. To request a subpoena, complete [Form 207](#):

The *ad testificandum* subpoena justification should contain:

- a. The individual's relationship to the plan and the reason the testimony is necessary to the investigation;
- b. The estimated number of days stenographic services are required;
- c. The name of the individual taking the testimony or the Investigator/Auditor assigned to the case, if different; and

d. Whether there is any reason to rush the preparation of the transcript.

6. **Review, Approval, and Distribution of the Subpoena Request.**

a. **Review by the Regional Office.** Regional Directors are delegated the authority to execute and issue administrative subpoenas, subject to direction and guidance. In their absence or in the event of potential conflict of interest or other compelling reason, Regional Directors may delegate authority to execute and issue administrative subpoenas to the Deputy Regional Director, Associate Regional Director, Senior Advisor for Criminal Investigations (in connection with criminal investigations) or other staff designated by written notice. The Regional Directors shall review the subpoena request initiated by their offices, initial and date the bottom of the page, and forward the subpoena request form, along with the subpoena, to the appropriate SOL Office for review and approval. Regional Directors may issue accommodation subpoenas directed to individuals or entities not covered by the Right to Financial Privacy Act without PBSO or RSOL approval. SOL must approve all subpoenas, including accommodation subpoenas, when signed by someone other than the Regional Director or the Deputy Regional Director.

b. **Review by the PBSO or by RSOL.** PBSO or the RSOL will review each subpoena submitted for legal sufficiency. SOL must approve each subpoena to ensure it can judicially enforce the subpoena if the subpoenaed subject fails to comply with the subpoena.

7. **Preparation of the Subpoena EBSA Form 200.** EBSA uses one subpoena format for both subpoenas *ad testificandum* and subpoenas *duces tecum*.

a. EBSA serves the original subpoena, EBSA [Form 200](#) on the subpoena subject (Subject Copy). The Subject Copy, which requests specific records, should not include the Return of Service and Certification of Compliance sections on the back. The Subject Copy should be completed as follows:

i. **Subject.** At the top to the right of the printed word "To," enter the subject's name and address. If service is on a legal entity other than an individual, such as an employee benefit plan or corporation, immediately above the name of the entity insert the words "Custodian of Records."

- ii. **Investigator/Auditor.** The next sentence of the printed form, "You are hereby required to appear before" should include the name of the person, usually the Investigator/Auditor, who will receive the documents or testimony pursuant to the subpoena.
- iii. **Place of Production.** On the third line of the form, enter the room number and street address at which production of documents and/or testimony is required. The fourth line should contain the city, state, and zip code. If the subpoena is an accommodation and no contest is expected, the place of production should be mutually convenient to the person providing the evidence and the Investigator/Auditor. If a contest is likely, the Regional Office should be the place of production to assure proper control of the production and evidence if protested. If the subpoena specifies the Regional Office as the place of production but it becomes evident after service of the subpoena that no contest is likely, the Investigator/Auditor may accept a more convenient place for inspecting the documents or taking testimony.
- iv. **Date and Time.** On the fifth line of the form, enter the day, month, year, and time at which production of documents or testimony is required. If the time for production changes after the subpoena is signed, but before being served, the Regional Office issues the subpoena as prepared with a cover letter noting the new time, or a new subpoena must be prepared. Never make changes on the face of the subpoena.
- v. **Subject of Investigation.** The sixth line should contain the case name identified on the EBSA case opening form.
- vi. **Description of Documents.** If the subpoena requests three or more documents, enter "See attachment" and describe the documents on a separate sheet of paper. Draft all descriptions of documents to fit the case as well as the subpoenaed subject.

If the subpoena is for testimony only and no documents are required, write "None" for the description of documents. In most circumstances, however, documents will also be required to provide reference material in order to help the witness remember names, dates, places, and events.

- vii. **Signature Block.** The first line of the signature block will identify where the subpoena is signed, followed by the day, month, and year of signature. Below that, the subpoena will be signed on the signature line immediately below which will be typed the name and title of the person signing the subpoena.
- b. A copy of the subpoena, EBSA Form 200B (Office Copy), which includes the Return of Service section, is retained in the Regional Office case file. The Office Copy should be completed as follows:
  - i. **Subpoena.** Duplicate the information provided in the Subject Copy (Subject, Place of Production, Date and Time, Subject of Investigation, Description of Documents, Signature Block, etc.).
  - ii. **Return of Service.** Complete this section with the service of the subpoena completed. The person serving the subpoena will check the block certifying the manner of subpoena service. This person will also provide the date of service for the subpoena, his or her name, and official title.

## 8. **Serving the Subpoena.**

- a. **Service by Mail.** EBSA should serve subpoenas by certified or registered mail, return receipt requested. Delivery should be restricted to that subject. However, the Regional Office may send the subpoena to the subject's legal counsel, if counsel agreed in advance to receipt on behalf of the client. In such cases, the subpoena cover letter should memorialize that the subject's legal counsel has agreed to accept service of the subpoena on behalf of its client. If possible, arrange service in advance by phone or through the subject's counsel.

A letter should accompany a subpoena. (See [Figure 1](#), [Figure 2](#), [Figure 3](#), [Figure 4](#), and [Figure 5](#) for model letters.) The letter should include the specific number of the certified or registered letter to provide evidence that it related to the specific subpoena.

When service is complete, check the second box of the return of service and keep a copy of the return receipt with the copy of the subpoena.

- b. **Service in Person.** EBSA may serve a subpoena in person when it is impractical to serve an individual by mail, with a copy mailed. Personal service is complete when the subpoena is:

- i. Delivered directly to the subject,
- ii. Left at the subject's residence with a person of suitable age and discretion residing there fulltime, such as a spouse, or
- iii. Left with the person in charge at the office or place of business of the subject.

9. **Altering the Subpoena after Service.** Investigator/Auditor should confirm in writing any agreements to alter any significant requirement in the subpoena after served. Such requirements may include date and time testimony will be taken or the categories of documents to be produced.

10. **Voided Subpoenas.** If a subpoena becomes void or not served within 45 days of the issuance date, it returns to the issuing office with an explanation. The Regional Office destroys the subpoena and the action recorded.

11. **Subpoena Enforcement.** If a subject fails to respond properly to a subpoena, PBSO or RSOL should judicially enforce the subpoena. The Regional Office should send the subpoena and a request for enforcement to PBSO or the appropriate RSOL. The attorney will assist the Investigator/Auditor with preparing an affidavit to be filed in the proceeding.

PBSO or RSOL may not enforce a subpoena when:

- a. The subpoena was improperly served;
- b. The subpoena was altered or in some other way voided;
- c. Approval and signature were based on erroneous information; or
- d. Circumstances changed, making enforcement inappropriate.

## 12. **Administrative Depositions.**

- a. **Uses.** Sworn testimony may be useful if:
  - i. A matter is likely to be referred for litigation;
  - ii. Testimony is the only evidence available to establish a necessary element of proof;
  - iii. There is a need to obtain a clear and definite statement from a witness;

- iv. An important witness may be unavailable at the time of discovery or trial;
  - v. A critical witness refuses to voluntarily speak to an Investigator/Auditor; or
  - vi. A clear explanation of a complex factual or technical matter is needed.
- b. **Witness Fees and Mileage Reimbursement.** EBSA pays deposition witnesses the same fees and mileage paid to witnesses called in federal court. The witness claims reimbursement on Claims for Witness Attendance Fees, Travel and Miscellaneous Expenses, Form SF-1156. If it is necessary to stay overnight, EBSA may authorize per diem expenses in advance.
- c. **Arrangements.** The site for depositions should be the Regional Office unless the witness and the Investigator/Auditor agree upon another location. The deposition should occur in a private room large enough to accommodate multiple people. The Investigator/Auditor must arrange for a court reporter and for an attorney from PBSO or the RSOL. In special circumstances, an Investigator/Auditor may take the deposition.
- d. **Format.** The court reporter should use the deposition format in [Figure 6](#). The court reporter generally swears in the witness, but an Investigator/Auditor may administer the oath, if appropriate.

[Figure 7](#) contains introductory language. The language:

- i. Identifies the witness;
- ii. Advises the witness of his/her right to counsel;
- iii. Introduces the witness' counsel, if present;
- iv. Advises the witness of his/her fifth amendment right against self-incrimination;
- v. Advises the witness his/her testimony is being given under penalty of perjury;
- vi. Confirms no threats or promises were made; and
- vii. Informs the witness he/she may order a copy of the deposition transcript from the court reporter.

- e. **Immunity.** No Department employee has the authority to grant either express or implied immunity to a witness.

13. **Custody of Documents.** When you receive documents, carefully note the documents received and safeguard the records in case they become necessary for potential legal or administrative action. Use EBSA's internal systems to process electronic information. See [Collection and Preservation of Evidence](#) for additional guidance on preservation of evidence.

- a. **Copies of Documents.** Copies are acceptable if the individual is willing to provide the copies and/or pay copying costs.
- b. **On Site Inspection of Documents.** If the subpoena calls for a large number of documents and production of documents interferes with the normal functioning of the subpoenaed subject, make less burdensome arrangements for access to subpoenaed documents. (See [Figure 5](#)). For example, the originals may remain in the subject's office with a written agreement that the Investigator/Auditor can have access to the documents at a particular place during specified hours, and with no interference. The written agreement should also allow access to the documents and permission to copy them in the future. Prepare an index of all the documents produced if inspected on site.
- c. **Receipts for Books, Records, and Documents.** It may be necessary to take possession of the originals of documentary evidence or property such as books, records, canceled checks, bank statements, receipt books, invoices, vouchers, letters, memoranda, or other materials provided pursuant to a subpoena or furnished voluntarily by an organization or individual. In such cases, the Investigator/Auditor provides a signed, dated, and itemized Document Receipt, EBSA [Form 220A](#), for the material and retains a receipt copy in the case file.
- d. **Return of Documents.** Upon return of the described documents to the owner or responsible individual, ask for the return of the original receipt and have the party receiving the documents acknowledge the return in writing. See EBSA [Form 220B](#), Return of Documents.
- e. **Record of Documents Examined.** Complete a Report of Records Examination, EBSA [Form 202C](#), if you review, but do not copy materials produced.

**14. Documents Covered by the Right to Financial Privacy Act.** The Right to Financial Privacy Act (RFPA)<sup>(1)</sup> preserves the confidentiality of financial records while allowing access for legitimate law enforcement activities.

- a. **Permitted Disclosure.** The RFPA permits a financial institution<sup>(2)</sup> to disclose financial records to EBSA where EBSA reasonably describes the requested records, and, if the specific requirements of the RFPA are met, either:
  - i. The customer authorizes such disclosure;
  - ii. The records are disclosed in response to an administrative subpoena that complies with the RFPA; or
  - iii. The records are disclosed in response to judicial subpoena that complies with the RFPA.
- b. **Coverage.** The RFPA applies only to financial records of individuals or partnerships of five or fewer individuals. The RFPA does not protect corporations, associations, larger partnerships, employee benefit plans, or other legal entities. When requesting documents not protected by the RFPA, it is good practice to enclose a cover letter to the financial institution explaining why the RFPA does not apply (See [Figure 8](#)).
- c. **Certification of Compliance Requirement.** The Regional Director must certify to the financial institution that EBSA complied with all applicable provisions of the RFPA (See [Figure 9](#)).

Good faith reliance by the employees and agents of the financial institution upon this certification of compliance absolves the institution, its employees, and its agents of civil liability for any improper disclosure of records.

- d. **Customer Authorization.** Where EBSA uses a customer's authorization for disclosure of financial records under the RFPA, the customer must write, sign, and date that authorization. That authorization must:
  - i. Authorize disclosure within no more than three months;
  - ii. Permit the customer to revoke the authorization before disclosure;
  - iii. Identify the records in question;
  - iv. Specify EBSA's authority to obtain the records in question;
  - v. Specify EBSA's purpose for seeking records in question; and



vi. State the customer's rights under the RFPA.

See [Figure 10](#).

e. **Customer Notice Requirements.** Where EBSA seeks financial records from a financial institution under the RFPA through either an administrative subpoena or a judicial subpoena, EBSA must send a notice to the customer.

i. This notice must reasonably specify the purpose, under ERISA, of the investigation.

ii. This notice also must contain the following quoted language:

"Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose:"

[Here, describe the purpose of the investigation.]

"If you desire that such records or information not be made available, you must:"

1. "Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records."
2. "File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts" in these locations:
  - the location of the financial institution;
  - the residence of the customer;
  - the District of Columbia; or
  - the location of the employee benefit plan.

3. "Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to":

[Regional Director, address]

4. "Be prepared to come to court and present your position in further detail."
5. "You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights."

"If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."

- iii. Along with the notice, provide the customer a copy of the subpoena and blank motion and affidavit forms suitable for filing in court if properly completed (See [Figures 11a-e](#)). The customer may then move to quash the subpoena. If notice to the customer will seriously jeopardize the investigation, a court order can delay the required notice to the customer up to 90 days.
- f. **Costs.** The RFPA provides that the government must pay the financial institution any reasonable costs directly incurred in searching for, reproducing, or transporting the records requested.
- g. **Civil Penalties.** RFPA violations may result in a \$100 penalty, actual damages, punitive damages for willful or intentional violations, court costs, and attorney's fees. Additionally, OPM may investigate and impose disciplinary action against the responsible government official.
- h. **Custody of Documents.** Keep documents obtained pursuant to the RFPA segregated, since there are certain prohibitions against giving the documents to others, including other government agencies. (See [Release of Information](#), paragraph 5 and [Collection and Preservation of Evidence](#), paragraph 1.e.2).

15. **Documents Covered As Protected Health Information (PHI).** The HIPAA Privacy Rule, 42 CFR part 2, and associated regulations preserve the confidentiality of health records while allowing access for legitimate law enforcement activities.

a. **Permitted Disclosure.** The Privacy Rule generally prohibits disclosure of PHI unless the patient authorizes the disclosure or the disclosure meets one of the "permitted uses or disclosures" or "standards" set forth in the Rule. Among those standards is the production of PHI to a "health oversight agency" for "health oversight activities."

i. A covered entity may disclose PHI to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; ...civil, administrative, or criminal proceedings or actions; or other activities necessary for the appropriate oversight of...entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards. See 45 C.F.R. §164.512(d)(1)(iii).

ii. "Health oversight agency" means, among other things, a United States agency authorized to oversee the healthcare system. 45 C.F.R. §164.501.2. EBSA clearly meets this standard. As a government agency charged with conducting audits, investigations, and general oversight activities with respect to ERISA-covered health benefit plans, EBSA is a "health oversight agency." See 65 Fed. Reg. 82462, 82492, 82529 (Dec. 28, 2000) (preamble to the HIPAA Privacy Rule naming EBSA (then called the Pension and Welfare Benefits Administration) as an example of a health oversight agency).

iii. In addition to the health oversight standard, disclosure of PHI pursuant to Subpoena may meet other uses permitted under the HIPAA Privacy Rule. The Rule also allows disclosure of PHI (1) to a law enforcement official; (2) in the course of judicial or administrative proceedings; or (3) as otherwise required by law. See 45 C.F.R. 164.512(a), (e) & (f).

b. **Special Requirements for Substance Use Disorder Records Subject to 42 CFR part 2.** Any request from EBSA for PHI that includes a request for substance use disorder records must:

i. Be part of an open investigation by EBSA;

- ii. EBSA must agree (in the subpoena or request for documents) that it will:
  - 1. Maintain and destroy the patient identifying information (as defined at 42 C.F.R. § 2.11) in a manner consistent with the policies and procedures established under 42 C.F.R. § 2.16;
  - 2. Retain records in compliance with applicable federal, state, and local record retention laws;
  - 3. Comply with the limitations on disclosure and use in 42 C.F.R. § 2.53; and
  - 4. Not seek confidential communications made by a patient to a Part 2 program in the course of diagnosis, treatment, or referral for treatment. (To the extent parties need to redact information to comply with this requirement, they should discuss with EBSA first.)
- c. **Custody of Documents.** Keep documents with PHI and 42 CFR part 2 labeled and segregated, since there are certain prohibitions against giving the documents to others, including other government agencies, in addition to destruction requirements.

## 16. Administrative Subpoenas Used in Criminal Investigations.

Before issuing an administrative subpoena in a criminal investigation, Investigators/Auditors should arrange with the Senior Advisor for Criminal Investigations to review the civil case file for the desired material (See [Criminal Investigations](#), paragraph 17). Criminal administrative subpoenas should be reviewed by the Senior Advisor for Criminal Investigations and do not need review by PBSO or RSOL.

Subpoenas issued in criminal investigations follow the same procedures as civil investigations, including the RFPA procedures at paragraph 14, above. Differences in criminal investigations are:

- a. EBSA does not issue subpoena *ad testificandum*.
- b. U.S. Attorney's Office (USAO) must enforce subpoenas.
- c. **Subpoena Duces Tecum.** This subpoena requests a person or organization to appear at a specified time and place, to produce documents and to testify as to their authenticity.

- d. **Accommodation Subpoena.** This subpoena is issued at the request of a person or entity willing to testify or produce documents. The subject requests the subpoena to protect them from consequences of cooperating without a legal requirement.
- e. **Authority to Execute Subpoena.** Every RD has the authority to execute and issue administrative subpoenas. RDs may delegate this authority:
  - i. In the Regional Director's absence;
  - ii. In the event of a conflict of interest; or
  - iii. For other compelling reason.

RDs may delegate the authority to execute subpoenas to the Deputy Regional Director, Senior Advisor for Criminal Investigations, or other staff designated by written notice.

- f. **Serving the Subpoena.** EBSA serves subpoenas by certified or registered mail, return receipt requested. Subpoenas issued in criminal investigations should include a cover letter that specifically identifies the criminal investigation.
- g. **Subpoena Enforcement.** EBSA should only issue non-accommodation administrative subpoenas in criminal investigations if the USAO for the district where the investigation Subject resides indicates they will take appropriate action to ensure compliance. While the Solicitor's Office has legal authority to seek to enforce all administrative subpoenas, it is their general policy to defer to the U.S. Department of Justice concerning the enforcement of administrative subpoenas issued in criminal cases.

17. **Parallel Investigations.** Exercise caution when handling parallel civil/criminal investigations. See [Criminal Investigations](#), section 4.

18. **Obtaining Documents in the Possession of a Grand Jury<sup>(3)</sup>.** In order to obtain documents from a grand jury, you must issue a subpoena *duces tecum* to the custodian of the documents. The custodian must respond that the requested material is in the possession of the grand jury.

It is important that the subpoena describe the documents with as much specificity as possible. Upon receipt of response, take the following steps:

- a. Ask the custodian (or the custodian's attorney, if appropriate) to give written authorization to the U.S. Attorney in charge of the grand jury, to

grant Investigators/Auditors access to the documents asked for in the subpoena.

- b. If the custodian refuses to voluntarily permit access to the documents, refer the subpoena to PBSO or the RSOL, with a request that a "non-6(e) Order"<sup>(4)</sup> be obtained.

Access to the documents by this method avoids the restrictions imposed if disclosure is made pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. This is because a "non-6(e) Order" preserves the Secretary's independent right of access to such documents.

- c. If a "non-6(e) Order" is unsuccessful, EBSA may refer the subpoena to PBSO or the RSOL with a request to obtain release of the material pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

This rule prohibits disclosure of any matters occurring before the grand jury, except when a court directs preliminarily to or in connection with a judicial proceeding. A strong showing must be made of a particular need or compelling necessity. If EBSA obtains disclosure of the subpoenaed documents pursuant to this rule, there may be restrictions placed upon the use of information obtained.