IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTIN L. WALSH, Secretary of Labor, United States Department of Labor[1] Petitioner, v. ALIGHT SOLUTIONS, LLC, Respondent.	No. 20-cv-02138 Judge John F. Kness

ORDER

The Secretary's [1] petition to enforce the administrative subpoena, as the subpoena's requests are modified in the Secretary's Reply brief [18], is granted. See accompanying Statement for details.

STATEMENT

I. Background

In July 2019, the Employee Benefits Security Administration (EBSA) of the United States Department of Labor began investigating Alight Solutions, LLC ("Alight" or "Respondent") to determine whether any violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) had occurred. (Dkt. 1-1 ¶

[1] Under Rule 25(d) of the *Federal Rules of Civil Procedure*, the Court recognizes Martin J. Walsh as the current Secretary of Labor and orders the case caption be amended accordingly. Fed. R. Civ. P. 25(d) ("The officer's successor is automatically substituted as a party. . . . The court may order substitution at any time, but the absence of such an order does not affect the substitution.").

2.) Respondent provides "recordkeeping, administrative, and consulting services" to ERISA plan clients. (*Id.* ¶ 3.) The agency's investigation was prompted, at least in part, by its discovery that

> Alight processed unauthorized distributions as a result of cybersecurity breaches relating to its ERISA plan clients' accounts. Further, in violation of its service provider agreements, Alight failed to immediately report cybersecurity breaches and the related unauthorized distributions to ERISA plan clients after its discoveries. In some instances, Alight failed to disclose cybersecurity breaches and unauthorized distributions to its ERISA plan clients for months, if at all. Alight also repeatedly failed to restore the unauthorized distribution amounts to its ERISA plan clients' accounts.
> (*Id.*)

As part of EBSA's investigation, the Secretary issued an administrative subpoena to Respondent. (*Id.* ¶ 4; *see* Dkt. 1-5 (the Subpoena).) The Subpoena "calls for all documents in [Respondent's] possession, custody, [or] control" in response to 32 inquiries. (Dkt. 1-5 at 5-10.) The Subpoena also specifies that, unless otherwise noted, "the time period covered by th[e] subpoena is from January 1, 2015, to the date of production." (*Id.* at 5.) The parties have discussed the Subpoena's requests (*see, e.g.*, Dkt. 1-1 ¶ 4; 15 ¶¶ 5, 11, 13), and the Secretary modified the scope of some of the Subpoena's requests in its briefing (*see* Dkt. 18 at 10-12). On April 6, 2020, the Secretary brought a petition in this Court to enforce the Subpoena. (Dkt. 1.)

II. Discussion

A. Enforcement of the Subpoena

The Secretary and Respondent agree that, for the Subpoena to be enforced, the Secretary must meet the following three requirements: (1) the Subpoena is within the authority of the agency, (2) the demand is not too indefinite, and (3) the information sought is reasonably relevant to the investigation. (*See* Dkt. 15 at 4, 18 at 5; *see also Chao v. Local 743, Int'l Bhd. of Teamsters*, 467 F.3d 1014, 1017 (7th Cir. 2006); *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987) (the court may enforce the subpoena "[a]s long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant…").) Separate from that three-part test, the Court is required to consider the potential burden of compliance on the Respondent. *See EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002).

1. Requirements to enforce the Subpoena

a. Requirement 1: The Subpoena must be within the agency's authority

The federal law under which the Secretary issued the Subpoena provides that the Secretary "shall have the power . . . to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter. . . ." 29 U.S.C. § 1134.

The subpoena power is broad. It permits the Secretary to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Chao*, 467 F.3d at 1017 (quotation and citation omitted); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 578 (1985) ("ERISA grants the Secretary of Labor broad investigatory powers"); *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (similar).

Respondent's argument—that the Subpoena power only extends to entities classified as "fiduciaries" under ERISA (*see* Dkt. 15 at 4-6)—is not supported by the text of the statute or by controlling case law addressing the scope of administrative subpoenas. The law under which the Secretary issued the Subpoena contains no such limitation; the only reference to "fiduciaries" is in a separate and irrelevant subsection governing the Secretary's delegation of investigations. *See* 29 U.S.C. § 1134(c). And the Seventh Circuit has recognized the sparsity of limitations on the Secretary's subpoena power in a similarly structured provision. *See Chao*, 467 F.3d at 1017.[2]

These authorities undercut Respondent's assertion that its non-fiduciary status absolves it from being required to respond to the Subpoena. Accordingly, because the Subpoena is within the Secretary's authority to issue, the first requirement of the test identified in *Chao* is satisfied. *See* 467 F.3d at 1017.

b. Requirement 2: The Subpoena cannot be too indefinite

Respondent also argues that the Subpoena is too indefinite to enforce. (Dkt. 15 at 6-12.) Specifically, Respondent contends that (1) the DOL has been "unwilling to engage in any discussion on a reasonable scope of the Subpoena"; (2) "the Subpoena

[2] There is, likewise, no jurisdictional basis (as Respondent argues) to decline enforcement of a subpoena merely because the Subpoena does not "reflect what alleged actual or imminent ERISA violation is under investigation or how [the Respondent's] business records are relevant to any such investigation." (Dkt. 15 at 6.) The relevant statute contains no such requirement, *see* 29 U.S.C. § 1134, and Respondent has not directed the Court to any separate authority for such a requirement.

requests are wholly unrelated to Alight's ERISA Plans"; (3) "the Subpoena's requests are so broad that the requests would require Alight to produce virtually every document concerning its ERISA business"; (4) the DOL has failed "to name or identify a single plan or security incident subject to its ongoing investigation"; and (5) the Subpoena "imposes an undue burden on Alight."

Respondent's concerns do not clearly pertain to the *indefiniteness* of the Subpoena but instead relate to the burden of compliance. Even if burdensome (a consideration addressed below), the Subpoena's requests are not "too indefinite." On the contrary, the Secretary outlined in 32 paragraphs (and numerous sub-paragraphs) its specific requests (Dkt. 1-5 at 5-8) and further clarified them during this litigation (*e.g.*, Dkt. 18 at 10-12). Having reviewed the requests, the Court cannot say that any one of them is *too* indefinite; to be sure, the language might be susceptible to differing interpretations at the margins, but that is a natural consequence of the limitations of language and provides a compelling justification for requiring the parties to continue to confer in good faith when issues arise. Nothing about the language of the modified requests, however, would justify relieving Respondent of its compliance obligation *in toto*.

c. Requirement 3: The information sought must be reasonably relevant to the investigation

An administrative request for records must, in addition to being within the agency's authority and not too indefinite, also be reasonably related to the investigation at issue. In the ERISA context, the proper scope of an investigation can be determined "only by reference to the statute itself; the appropriate inquiry is whether the information sought might assist in determining whether any person is violating or has violated any provision of Title I of ERISA. Clearly records identifying specific plans as well as records of the plans themselves fall within the scope of a proper ERISA investigation." *Donovan v. Nat'l Bank of Alaska*, 696 F.2d 678, 684 (9th Cir. 1983).[3] Some courts to address the issue of relevance have focused on whether the materials sought by the subpoena were "plainly irrelevant to lawful purposes of the DOL" and, absent that, have held that "it [i]s the duty of the district court to order" production of the requested materials. *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982).

The Secretary's requests—those in the Subpoena (Dkt. 1-5), as modified by the Secretary (Dkt. 18 at 10-12)—are reasonably relevant to an investigation of

[3] Respondent contends that "the information sought in *National Bank of Alaska* was significantly more tailored" than that sought by the Secretary here. (Dkt. 21 at 4.) But the reasoning of *National Bank of Alaska* did not turn on the breadth of the disputed subpoena. *National Bank of Alaska*'s reasoning applies with equal force here: acceptance of Respondent's position risks "paralyz[ing] the Department's enforcement program with regard to ERISA and, perhaps, any other departmental enforcement efforts." *Nat'l Bank of Alaska*,

compliance with ERISA. The genesis of the Department's investigation was EBSA's discovery that, among other things, "Alight processed unauthorized distributions as a result of cybersecurity breaches relating to its ERISA plan clients' accounts," "failed to disclose cybersecurity breaches and unauthorized distributions to its ERISA plan clients for months, if at all," and "repeatedly failed to restore the unauthorized distribution amounts to its ERISA plan clients' accounts." (Dkt. 1-1 ¶ 3.) The requests permissibly seek information that may be relevant to whether violations of ERISA have occurred.

2. Burden on Respondent

Having found that the three *Chao* requirements are met such that the Subpoena should be enforced, *see Chao*, 467 F.3d at 1017, the Court next considers whether the burden on Respondent weighs against enforcement in this case. There is a presumption that subpoenas should be enforced. *United Air Lines, Inc.*, 287 F.3d at 653. And "a court may modify or exclude portions of a subpoena only if the employer 'carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad.' " *Id.* (quoting *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980)). Analysis of the burden on a respondent is case-specific, and it requires this Court to balance the relevance of the Subpoena's requests against the burden of compliance. *Id.*

Respondent argues that compliance "would require thousands of hours of work just to identify potentially responsive documents" in addition to the "time and expenses outside counsel would incur reviewing, de-identifying, and producing those materials." (Dkt. 15 at 11-12; 15-1 ¶¶ 19-20.) In its Sur-Response, Respondent continues to insist on the burden threatened by the Subpoena even after the Secretary modified those requests in its Reply brief. (Dkt. 21 at 3.) Respondent argues that "the requests would still require [it] to pull, review and produce thousands, if not tens of thousands, of documents related to its ERISA business." (*Id.*)

Weighing the relevance of the requests against the burden on the Respondent, which the Court does not take lightly, the Court finds that the balance favors the Secretary. As explained above, the requests, as modified, are relevant to the Department's investigation and fall within the Secretary's broad investigatory authority. Moreover, although the burden of compliance is potentially significant, that burden does not outweigh the potential relevance of the requests. This is particularly true considering the presumption that subpoenas should be enforced. *United Air Lines, Inc.*, 287 F.3d at 653. Respondent must not merely show that the Subpoena is "burdensome," but that it is "*unduly* burdensome." *Id.* (emphasis added). Indeed, the Seventh Circuit has previously upheld the district court's enforcement of subpoenas in cases in which the responding party estimated that compliance would

---

696 F.2d at 682. In short, to the extent the Parties dispute the correct interpretation of *National Bank of Alaska*, the Court is more persuaded by the Secretary's interpretation.

require more than 200,000 hours. *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 648 (7th Cir. 1995). In short, because the relevance of the Subpoena outweighs the burden on Respondent, the burden of compliance does not justify refusing to enforce the Subpoena.

B. Respondent's request for a protective order

Respondent requests that, if the Court orders enforcement of the Subpoena, it "enter a protective order limiting the scope of the Subpoena to de-identified plan data [*i.e.*, plan data without client- or participant-identifying information] involving only those ERISA Plans where the DOL alleges that a cybersecurity incident occurred." (*E.g.*, Dkt. 15 at 15.) Respondent claims that full compliance with the Subpoena threatens, among other things, the "confidential information of Alight's clients, their employees and their plan participants." (*Id.* at 2.) But Respondent has not formally moved for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure. Nor has Respondent pointed to any provisions governing the Secretary's subpoena power that permit the Court to selectively enforce the Subpoena and protect what Respondent claims to have "a contractual and legal responsibility" to keep confidential. (*Id.* at 14.) Respondent nonetheless insists that it has "more than satisfied the requirements for a protective order under Fed. R. Civ. P. 26(c)." (Dkt. 21 at 7.)

Respondent has not shown "good cause" for why a protective order limiting the Subpoena to "de-identified" data should be entered. *See, e.g.*, *U.S. Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n.*, 481 F.3d 936, 942 (7th Cir. 2007) (rejecting need for a protective order where "the burden of compliance with the subpoena, even without a protective order to cushion the effect of compliance, [wa]s speculative and [wa]s outweighed by the investigatory needs of the [agency]"). Respondent cites various federal laws in arguing that "Alight's confidential data and, more importantly, the confidential data of Alight's clients and plan participants are entitled to protection under federal law." (Dkt. 15 at 13 (citing 5 U.S.C. § 552(b)(4); 18 U.S.C. § 1905; 29 C.F.R. § 70.26).)

Respondent's citations belie its request for a protective order and, instead, demonstrate why there is no need for the Court to issue a protective order concerning de-identified data. One of the laws—the Freedom of Information Act (FOIA)—provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are not subject to the general categories that the agency (in this case, the Department of Labor) is required to make available to the public. 5 U.S.C. § 552(b)(4). The Secretary thus acknowledges the Department's obligation "to follow FOIA and its exemptions." (Dkt. 18 at 14.) Another law cited by Respondent criminalizes federal employees' disclosure of "the identity . . . of any person, firm, partnership, corporation, or association." 18 U.S.C. § 1905. As with the

FOIA exemption, that law protects from disclosure Respondent's confidential information.

Absent "good cause" for believing the information requested in the Subpoena is uniquely at-risk as a result of disclosure, the Court declines to enter a protective order. Put another way, Respondent has not shown why the Secretary, who is bound by law to protect confidential information, should not be entitled to receive records beyond those containing de-identified data. Accordingly, the Respondent's request for a protective order is denied. Having made that decision, however, the Court notes that Respondent can still seek the entry of a confidentiality order under this District's local rules. If Respondent believes it can satisfy the requirements for a confidentiality order, *see, e.g.*, *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999), it may present its request by way of a separate motion.[4]

C. Temporal scope of the Subpoena

A separate point of contention is the relevant date range covered by the Subpoena. This order, of course, obligates Respondent to comply with the Subpoena as modified in the Secretary's Reply brief. (*See* Dkt. 18 at 10-12). Specifically, the Subpoena requires Respondent to produce all requested documents "in [its] possession, custody, [or] control" from the period starting "January 1, 2015, [and ending on] the date of production." (Dkt. 1-5 at 3.)[5] There is debate, however, about whether Respondent should be required to produce documents from as far back as 2015. That debate, it seems, stems from the fact—as Marsha Dodson notes in her declaration—that Respondent was "form[ed] in May 2017." (15-1 ¶ 4.)

The Supreme Court has explained (in the context of FOIA) that "possession or control is a prerequisite to . . . disclosure." *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980). In *Kissinger*, the Court held that an agency did not unlawfully "withhold records" when the agency "cannot be said to have had possession or control of the documents at the time the requests were received." *Id.* at 155. The Court also recognized the longstanding rule that "an individual does not improperly withhold a document sought pursuant to a subpoena by his refusal to sue a third party to obtain or recover possession." *Id.* at 154 (citing *Amey v. Long* (1808) 103 Eng. Rep. 653, 657 (K.B.)).

---

[4] *See* N. Dist. of Ill., *Confidentiality Orders*, https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=776.

[5] The "possession, custody, or control" language is also found in Rule 45 of the *Federal Rules of Civil Procedure*, which governs civil subpoenas. *See* Fed. R. Civ. P. 45(a)(1)(A)(iii). Courts routinely enforce administrative subpoenas with similar language. *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. Ekasala*, 62 F. Supp. 3d 88, 95 (D.D.C. 2014); *Nat'l Lab. Rels. Bd. v. DN Callahan, Inc.*, 2018 WL 4190153, at *6 (E.D.N.Y. Aug. 7, 2018), report and recommendation adopted, 2018 WL 4185704 (E.D.N.Y. Aug. 31, 2018); *E.E.O.C. v. Wal-Mart Stores E., LP*, No., 2014 WL 1159786, at *5 (E.D. Ky. Mar. 17, 2014).

That reasoning applies equally here. Respondent cannot produce what it does not have. Respondent is accordingly directed to produce all documents within its "possession, custody, [or] control" from the relevant time period; if it does not have anything within its possession, custody, or control to produce from the period before it had its current legal existence, it should respond to the Subpoena accordingly.[6]

D. Equitable Tolling of Statute of Limitations

As his final request for relief, the Secretary asks the Court to equitably toll the statute of limitations "from the date the Petition was filed on April 6, 2020, until sixty days after all documents are produced by Alight." (Dkt. 18 at 15.) The doctrine of equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Chapple v. Nat'l Starch & Chem. Co. & Oil*, 178 F.3d 501, 505-06 (7th Cir. 1999) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)).

There is, however, no pending action by the Secretary seeking affirmative relief in which a statute of limitations could presently be put at issue. Before the Court could decide an equitable tolling question, it would first be required to "distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). Because the Secretary has not brought in this case any affirmative claim against Respondent (or any other entity of which the Court is aware), the Court is not able to answer that threshold inquiry or assess the appropriateness of equitable tolling. It will be up to a future court to address any question of equitable tolling, within the context of a specific case. *Cf. Hill v. Madison County*, 983 F.3d 904, 906-07 (7th Cir. 2020) (decision whether to assess a "strike" under 28 U.S.C. § 1915(g) is "commit[ted] to a later tribunal").

III. Conclusion

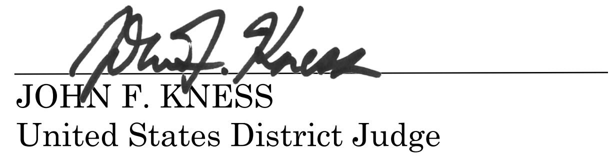
For the reasons above, the Secretary's petition to enforce the administrative subpoena (Dkt. 1), as the subpoena's requests are modified in the Secretary's Reply brief (Dkt. 18), is granted. The Court declines to enter a protective order. If

[6] The Secretary argues that Respondent waived any argument for narrowing the time period covered by the Subpoena. Specifically, the Secretary says that, "[b]ecause Alight did not make this argument [that there should be a time limit imposed on the production based on a corporate spin-off date in May 2017] in its brief . . . the Court [should] order Alight to respond to each request with documents for the entire period from January 1, 2015 to the final date of production." (Dkt. 18 at 14.) Citing Dodson's declaration, Alight responds that it "has repeatedly informed the DOL [that] Alight as a business did not exist prior to May 1, 2017." (Dkt. 21 at 7.) Having resolved the scope question on other grounds, the Court declines to resolve the waiver question.

Respondent seeks the entry of a confidentiality order, it should file an appropriate motion. A status hearing will be set by separate order.

SO ORDERED in No. 20-cv-02138.

Date: October 28, 2021



JOHN F. KNESS
United States District Judge