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The Law360 Guide To Federal Benefits Policy In 2021

By **Emily Brill**

Law360 (July 2, 2021, 12:19 PM EDT) -- New federal policies on retirement plans' cybersecurity and socially conscious investing practices have rocked the employee benefits world so far in 2021, and attorneys say they're keeping an eye on the potential impact of what's to come: a new fiduciary rule and the SECURE Act 2.0.

Here, Law360 offers a guide for benefits policy wonks on what's happened so far this year and what may be coming down the pike.

Cybersecurity Guidance

The U.S. Department of Labor's benefits division in April released its first-ever guidance on how employee benefit plans should mitigate cybersecurity risks.

The guidance arrived five years after Employee Benefits Security Administration's advisory group urged the agency to set cybersecurity standards for plans and one month after the Government Accountability Office called on EBSA to do the same. Around that time, the GAO had released a flurry of reports on cybersecurity, collectively outlining a need for the federal government to "urgently pursue critical actions to address major cybersecurity challenges" in various sectors.

The guidance arrived in three parts: one document geared toward employers, another intended for plan administrators and a third targeting the workers who participate in retirement plans. In all three documents, EBSA included tips for protecting workers' data from cyber criminals.

Benefits attorneys paid particular attention to the paperwork geared toward employers and plan administrators, noting that DOL will probably assess compliance with the standards outlined in these documents during plan audits.

"This guidance is coming in conjunction with the DOL saying it's going to be conducting investigations into plan sponsor behavior related to cybersecurity risk," said Liz Goldberg, a benefits partner at Morgan Lewis & Bockius LLP. "We've already received some indications they're starting those investigations. So it's a significant upping of the stakes for plan sponsor-fiduciaries."

Goldberg noted that DOL also seems interested in interrogating the use of private equity funds in target-date funds and compliance with mental health parity laws by group health plans.

ESG Guidance

In March, the DOL tabled Trump-era regulations that were seen as limiting retirement plans' ability to make socially conscious investments. And two months later, Democratic lawmakers proposed amending the Employee Retirement Income Security Act to give legal protections to plans that make such investments.

These moves have signaled to benefits attorneys that 2021 may be the year the federal government definitively embraces so-called ESG funds, which attempt to advance environmental, social and corporate governance goals, in retirement plans.

Such an embrace would let retirement plan managers breathe a "collective sigh of relief" in a world in which socially conscious funds are becoming an ever larger fixture of the financial landscape, benefits attorneys have said.

A record-setting $51 billion — 25% of all new investments — poured into ESG funds last year, according to the research firm Morningstar. But plan managers were hesitant to invest in them after former President Donald Trump's regulations, which suggested they could face federal scrutiny for such moves. That landscape has now changed, attorneys said.

"The expectation is we will see more support for ESG and hopefully more guidance about what plan fiduciaries should consider when deciding whether to consider ESG factors in their investment decisions," said Allison Sizemore, the chair of the U.S. employee benefits and executive compensation group at Reed Smith LLP.

SECURE Act 2.0

As lawmakers consider a bill that could streamline retirement plans' ESG investing, they'll also consider legislation that could make a variety of changes to plans themselves.

Officially dubbed the Securing a Strong Retirement Act and nicknamed the **SECURE Act 2.0**, the bill would expand the investment options available to retirement plans run by nonprofits or governments, automatically enroll workers in newly established 401(k) plans and raise the age at which retirees must collect benefits from 72 to 75.

Many management-side benefits attorneys feel anywhere from neutral to positive about the bill, saying its changes will likely affect plan participants more than employers. Some, like Olshan Frome Wolosky LLP's Stephen Ferszt, say they're skeptical that the bill will accomplish its goal of boosting Americans' retirement savings.

"There's a conscious effort to change various kinds of benefits, but I'm not sure if it's the most efficient or the smartest," said Ferszt, who chairs his firm's benefits practice group. "A lot of this legislation is giving people more opportunities to save for retirement: expanding auto-enrollment, increasing contribution amounts. But the one piece they don't take into account is some of the folks who are now eligible don't have enough disposable income to save."

Fiduciary Rule

Like other federal agencies, the U.S. Department of Labor released a list of its regulatory priorities this spring. On that list was a priority that has been a thorn in the side of the agency and the courts for years: figuring out when investment advisers bear special responsibilities under ERISA.

To accomplish this policy goal, the DOL will again delve into what makes an investment adviser a fiduciary under ERISA endowed with the obligation to act only in their clients' interests.

The Obama administration released a regulation defining "investment advice fiduciary" in 2016, but it was struck down in the courts in 2018. The Trump administration then set a definition that consumer protection advocates worried wasn't strong enough.

In February, President Joe Biden's administration allowed Trump's policy to take effect as planned, but benefits attorneys said they always knew more federal action was coming.

"Most practitioners expected that it wouldn't be the last word on fiduciary investment advice, and further guidance is expected either in the form of subregulatory announcements or actual additional regulations," Sizemore said. "The general expectation is that there will be an attempt to more clearly delineate the extent to which investment advisers are considered fiduciaries, particularly in the rollover advice context."

--Editing by Haylee Pearl and Vincent Sherry.
