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Benefits Regulations And Legislation To Watch In 2020

By **Emily Brill**

Law360 (January 1, 2020, 12:04 PM EST) -- Benefits and executive compensation attorneys should keep an eye on the U.S. Securities and Exchange Commission's efforts to regulate proxy advisory firms, the U.S. Department of Labor's plan to pass fiduciary guidance, and Congress' intent to save struggling multiemployer pension plans in 2020.

They also might want to watch for DOL guidance on how plan sponsors can satisfy their fiduciary duties after losing track of plan participants, a blunder that can happen when a sponsor fails to log an address change.

Here, Law360 discusses four policy developments benefits and executive compensation attorneys should pay attention to in the coming year.

SEC Regulation of Proxy Advisory Firms

Proxy advisory firms advise shareholders on how to vote on corporate governance issues such as executive compensation and diversity policies. Heeding the voice of business interests, who argue that these firms have grown too powerful, the SEC has begun issuing regulations.

"There's been a growing concern that these firms have an outsize influence on shareholder issues like executive compensation," said James E. Earle, a partner at Troutman Sanders LLP. "They have their own methodologies on how they derive their voting recommendations, and some of that is quite opaque."

In August, a divided SEC approved guidance subjecting proxy advisory firms to tighter regulatory scrutiny. Business interests welcomed the move, but investors' advocates panned it, accusing corporate interests of trying to weaken a force that holds them accountable.

In October, a prominent proxy advisory firm sued the SEC over the guidance, calling it "arbitrary and capricious" and blasting its classification of the firms' voting advice as a "solicitation."

One month later, the SEC issued proposed regulations that would write much of the guidance's language into administrative law.

If these regulations go into effect, "it will probably mean that the degree of proxy advisory firms' influence in how public companies set their compensation programs is diminished," Earle said, making the battle over regulating these firms a key one to watch for executive compensation attorneys in 2020.

Executive compensation attorneys should also keep an eye on policy changes from proxy advisory firms themselves, said Dave Teigman, the head of the executive compensation practice at Cadwalader Wickersham & Taft LLP.

“Every year they update their policies, and these updates are always important for companies to be aware of,” Teigman said.

He said he views the changes proposed by influential proxy advisory firms ISS and Glass Lewis as “incremental,” rather than alterations to the firms’ framework.

A New DOL Fiduciary Rule?

What might a new DOL fiduciary rule look like?

It would likely regulate investment professionals’ conduct when advising workers who wish to roll over savings from employee retirement plans to individual retirement accounts, said Kevin Walsh, a partner at Groom Law Group.

“The DOL has fought to regulate the rollover space,” Walsh said.

It would also probably clarify when the rule applies and to whom, said Michael B. Richman, a partner at Morgan Lewis & Bockius LLP. When the Fifth Circuit vacated the DOL’s first fiduciary rule in 2018, DOL said that until it issued further guidance, employers should act as if they were covered by an exemption to the fiduciary rule, with certain limitations.

That directive raises the question: “Are we expecting some developments in the exemption area?” Richman said.

In any case, fiduciary guidance from DOL might be coming in 2020, as the agency placed the topic on its regulatory priorities list twice in 2019.

DOL’s fiduciary guidance will likely cover topics left addressed by the SEC’s Regulation Best Interest, which clarifies standards of conduct for brokers and investment advisers, Walsh said.

Aside from that, the rule at this point is a question mark, attorneys say.

“They wouldn’t repurpose the same fiduciary rule that was vacated, but will they touch on some of the same concepts?” Richman said. “At this stage, we really don’t know what to expect.”

Missing Participants, Missing Guidance

For the past five years, DOL has stepped up efforts to force benefit plans to locate “missing participants” — workers and retirees who are owed a check and aren’t getting it. But the agency hasn’t issued regulations or guidance to plan sponsors wondering what their responsibilities are in this department, attorn

Frustrated, plan sponsors have asked DOL to address this issue. Though the agency said it would, it hasn’t yet, Walsh said.

“The other big story of 2019 was the dog that didn’t bark. DOL has been very focused on missing participants for the past few years, and there’s been an expectation that there will be guidance, but the guidance hasn’t arrived,” Walsh said. “What are plan sponsors going to do in the absence of guidance?”

Elizabeth Goldberg, an associate at Morgan Lewis, said the guidance may come out in the form of a field assistance bulletin rather than through formal rulemaking.

Regardless of the form the guidance takes, she said, plan sponsors are hoping something arrives in 2020.

“There’s a lot of interest in there being guidance in this whole area of missing participants,” Goldberg said.

Multiemployer Plans Need Help

Another area of longtime concern that might be addressed in 2020 is the multiemployer plan funding crisis, which threatens the retirement security of millions of mostly blue-collar Americans in unions.

Several big multiemployer pension plans, which serve unionized workforces, are set to run out of money over the next seven years. And these plans’ safety net, a federal insurance program run by the government-chartered Pension Benefit Guaranty Corp., is on track to go belly-up in 2025, according to recent PBGC estimates.

Federal lawmakers promised they’d do something about this in 2018. They didn’t.

But in 2019, the U.S. House of Representatives passed a bill that would establish a new federal lending program for multiemployer pension plans. The bill was read for the first time in the Senate on Dec. 18.

“Among the issues I am watching closely is legislation on multiemployer pension reforms, particularly in the Senate,” said Gregory Ossi, a partner at Drinker Biddle & Reath LLP.

Two Republican senators published a white paper in November outlining their ideas on how to save the multiemployer pension system, which include funding plans in imminent danger of collapse and requiring workers — rather than just employers — to pay into PBGC.

That paper also proposed changing how withdrawal liability — the amount employers must pay when withdrawing from a multiemployer plan — is calculated. Withdrawal liability is a hot topic in the benefits space, serving as the subject of a much-watched Second Circuit case that settled in 2019.

“The withdrawal liability reforms could increase the amount of withdrawal liability an employer would owe to a plan, and even create withdrawal liability where none exists now,” Ossi said.

--Additional reporting by Tom Zanki, Rachel Graf and Dylan Moroses. Editing by Alanna Weissman.