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DOL's ERISA Enforcement Activity On The Rise

By **Elizabeth Goldberg and Matthew Hawes** (March 28, 2018, 10:45 AM EDT)

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Under the Employee Retirement Income Security Act of 1974, the Employee Benefits Security Administration, or EBSA, is the agency within the U.S. Department of Labor tasked with investigating and recommending civil and criminal enforcement actions related to ERISA's fiduciary duties. Each year EBSA publishes a "fact sheet" reporting statistics on those investigatory and enforcement activities. These fact sheets can highlight EBSA enforcement trends and initiatives, including priorities that EBSA may not have widely publicized. The recently released fact sheet for the 2017 fiscal year provides insight to the focus of EBSA's efforts.

The 2017 fiscal year enforcement statistics draw attention to the fact that EBSA remains an active enforcement regulator — even after the change in presidential administrations — and has the potential to obtain (and has obtained) significant monetary recoveries on behalf of retirement plans and plan participants. These statistics also reveal that EBSA is particularly focused on one enforcement initiative: its "Terminated Vested Participant Project," or TVPP, an initiative that is focused on whether pension plan fiduciaries have adequately searched for missing participants, informed deferred vested participants that retirement benefits are payable, and facilitated the payment of those benefits.

Importantly, awareness of these enforcement activities, and this particular TVPP initiative, allows retirement plan administrators to proactively review their procedures and consider improvements before EBSA makes inquiries.

Background on DOL ERISA Fiduciary Enforcement

As noted above, EBSA is the agency within the DOL that has the authority to investigate and enforce violations of the fiduciary duties under ERISA. In conducting these activities, EBSA employs more than 400 investigators (and auditors) nationwide. These investigators have extensive powers, including the ability to subpoena documents and conduct interviews and depositions. If EBSA identifies a violation of ERISA's fiduciary duties, the agency can refer the matter for civil or criminal litigation. According to EBSA, its investigatory jurisdiction covers nearly 681,000 retirement plans (plus 2.3 million health plans and a similar number of other welfare benefit plans), 143 million workers and their dependents, and assets of more than $8.7 trillion (as of Oct. 2, 2015).

EBSA 2017 Enforcement Statistics

The 2017 fact sheet presents a reminder of EBSA's enforcement powers. According to its enforcement statistics, during its fiscal year 2017 EBSA recovered $1.1 billion in direct payments to plans, participants and beneficiaries, including $682.3 million recovered in enforcement actions. In obtaining these monetary results, EBSA closed 1,707 civil investigations, with 65.3 percent of these cases resulting in monetary recoveries or other corrective action. EBSA referred 134 cases for civil litigation, and 50 civil cases were filed. In the criminal area, EBSA closed 307 cases (79 with convictions or guilty pleas) and assisted in indictments against 113 individuals.

Insights and Considerations for ERISA Plan Fiduciaries

A few insights can be gleaned from these statistics:

- First, these statistics underscore that EBSA's enforcement activities are on the rise. For example, as compared to fiscal year 2016 (read the report here), total recoveries rose 42 percent, from $777.5 million in 2016 to $1.1 billion in 2017. This includes enforcement action recoveries that nearly doubled, from $352.0 million in 2016 to $682.3 million in 2017. These numbers suggest that the arrival of the new administration has not diminished EBSA's enforcement efforts. Instead, EBSA remains an active enforcement agency and continues to vigorously investigate potential violations of ERISA's fiduciary duties.

- Second, in the statistics, EBSA specifically notes that "[o]f the $682.3 million recovered in its investigations, EBSA helped terminated vested participants in defined benefit plans collect benefits of $326.7 million due and owing to them." This statement is significant because it affirms that the agency is highly focused on its Terminated Vested Participant Project initiative, and that this enforcement priority is generating significant recoveries by the DOL from ERISA plans and plan fiduciaries. In fact, the $326.7 million cited recovery amount means that half of EBSA's fiscal year 2017 reported enforcement recoveries came from this TVPP initiative.

  By way of the background, EBSA rolled out this initiative starting around 2015 by investigating a sizable number of large defined benefit plans out of the Philadelphia regional office. Over the last few years, however, the initiative has spread across the country with reported investigations starting from regional offices coast-to-coast. The investigations are typically concentrated on defined benefit retirement plan procedures in three key areas: (1) locating missing participants, (2) notifying deferred vested participants that a retirement benefit is payable, and (3) commencing deferred vested benefit payments.

  The issue of benefit payments — and in particular the payment of benefits at the participant's required beginning date (that is, in connection with the participants reaching age 70 and a half) — has long been a focus of IRSretirement plan audits. By contrast, EBSA's investigatory interest in this topic is fairly new. According to EBSA, through these investigations it has discovered that some retirement plans have insufficient, or poorly followed, procedures for locating missing participants. In addition, EBSA has indicated that at least a few of the plans seem to have significant record-keeping problems, with the consequence that the plans cannot pay participant benefits when required. According to EBSA, these types of facts represent potential breaches of ERISA's fiduciary duties — this despite the fact that the only formal guidance issued by the DOL concerning a plan fiduciary's duties for locating missing participants is found in Field

Assistance Bulletin 2014-01, which addresses only terminated defined contribution plans. Notwithstanding the lack of existing DOL guidance on this duty, the DOL has reportedly issued a number of "findings letters" to plan administrators alleging violations of ERISA related to such "missing participant" and/or record error facts, and demanding corrective actions.

Although EBSA's focus on defined benefit plan missing participant and benefit payment issues may be fairly new, the TVPP initiative has quickly become a high priority for the agency and was recently described as a "major enforcement initiative" in EBSA's response to the January 2018 Government Accountability Office report on retirement plan missing participant issues (released on March 8, 2018). Moreover, EBSA's statement in the 2017 fact sheet trumpeting the agency's recoveries provides a clear indication that EBSA is not only seeking to change the practices of ERISA plan fiduciaries but it also is highly focused on obtaining monetary recoveries for participants through this initiative.

What Comes Next with the TVPP?

As the scope (and industry understanding) of the TVPP initiative continues to expand, the DOL's investigations and activities related to missing participants have garnered more attention from other agencies, such as the IRS and the Pension Benefit Guaranty Corporation (PBGC), which may impact the future of the TVPP initiative. For example, in late 2017, the IRS released an examination memorandum providing guidance to IRS auditors about how to evaluate missing participants and required minimum distribution situations. The memorandum seemed to contradict certain positions taken by the DOL in the TVPP and went so far as stating that an examiner should not challenge a retirement plan for failing to timely start required minimum distributions to a missing participant so long as the plan has undertaken certain efforts to locate and contact the participant. Similarly, on Dec. 22, 2017, the PBGC published revisions to its Missing Participants Program, which, among other things, expanded the program to terminating defined contribution plans and set forth diligent search requirements that included an "explicit and concrete 'checklist' of [participant search] steps" for a terminating defined benefit plan. This checklist is more narrow than the required search steps the DOL has suggested in various TVPP investigations.

At the same time, there appears to be increasing pressure on the DOL to issue guidance in the area of missing participants. In its January 2018 report, the GAO examined issue of retirement plan missing participants and recommended to the secretary of labor that guidance be provided to ongoing retirement plans on the obligations to prevent, search for, and pay costs associated with locating missing participants. Notably, in its response to the report, EBSA expressly agreed "that additional guidance may be helpful to aid plan sponsors and plan fiduciaries of ongoing plans in meeting their existing fiduciary obligations to search for missing participants and to pay benefits," and further indicated that "EBSA is considering the need for additional guidance" in this area.

Until such guidance is issued, however, the DOL appears to be using the TVPP initiative to effect — some might even say "coerce" — change in retirement plan procedures. Moreover, in the meantime, there is no reason to believe that TVPP investigations will not continue.

Proactive Steps for ERISA Plan Fiduciaries

The validity of the DOL "findings" in its ongoing TVPP initiative may be debatable. As noted above, there is little existing DOL guidance in this area, and the DOL's focus on the existence of missing participants, and record-keeping errors, may be overly reliant on outcomes, and therefore inconsistent with ERISA's long-standing and well-established standard of fiduciary compliance that is based on a prudent process rather than outcomes.

Nevertheless, in light of EBSA's continued enforcement activities in general, and its significant focus on this particular TVPP initiative, ERISA plan fiduciaries may want to consider appropriate steps to ensure that their plans are in compliance with ERISA. This can include revisiting plan procedures related to fiduciary compliance, and especially plan procedures for addressing both missing participants and gaps in plan records. For example, fiduciaries may want to consider a comprehensive fiduciary legal audit of their plans, or a targeted undertaking to conduct a missing participant search and/or a demographic data clean-up initiative. More generally, these EBSA investigations are a reminder that fiduciaries should take care to memorialize their activities and document efforts to fulfill their fiduciary duties in case of a future DOL inquiry, whether related to this TVPP initiative or another EBSA enforcement focus.

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