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DOL ERISA ENFORCEMENT 2021 UPDATE

**Elizabeth Goldberg and Sage Fattahian
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DOL ENFORCEMENT BACKGROUND

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DOL Enforcement – Background

The DOL has civil and criminal investigatory and litigation enforcement authority over ERISA (including MHPAEA and ACA):

- Unlike some other federal agencies, the DOL's civil investigatory and litigation authority is independent of the DOJ.
- Criminal actions are handled by the DOJ (with DOL assistance).

The DOL has remedies available to it, including:

- Payments into the plan to restore losses
- Repayment of fees
- Monetary penalties for disclosure failures
- Remedial remedies such as the removal of plan fiduciaries, imposition of an independent fiduciary, and injunctive actions

The DOL can also:

- Issue press releases (creating reputational risk)
- Refer matters to other agencies (SEC, IRS, etc.) or to the DOJ for criminal enforcement



DOL Operations

National EBSA

- Within EBSA, enforcement is primarily directed from the National EBSA Office in Washington, D.C.
- The National Office sets enforcement priorities and supervises investigations and corrections of violations.

EBSA Regional Offices (10)

- Investigations are conducted at the regional level by investigators. There are 10 regional offices, plus five sub-regional district offices.
- Typically investigators have relevant specialized training or education, with many being lawyers or Certified Public Accountants.

DOL Office of the Solicitor

- Office provides general legal counsel to EBSA and handles all civil ERISA Title I litigation.
- Unlike many other federal agencies, the Solicitor Office's litigation authority is independent of the DOJ.

How Is the DOL Different from Private Plaintiffs?

Private Litigants

- Certain remedies not available to private litigations, such as certain penalties or claims related to fully funded defined benefit plans.
- Private litigants cannot engage in discovery until filing a complaint and surviving a motion to dismiss.
- Private litigation cases will typically be matters that are economical for litigation (i.e., class actions focused on certain claims, such as fees and expenses).

DOL

- The DOL's enforcement remedies are broader than those of private litigants.
- The DOL can subpoena documents before filing litigation and the DOL has a low bar for subpoenaing documents (e.g., does not need to have a definitive claim).
- The DOL can be interested in claims that are not economical for private litigants, such as small plan claims and prohibited transactions without significant monetary loss.
- The DOL can and does make and receive referrals from other regulators, including the IRS, the SEC, FINRA, and the OCC.

DOL Enforcement Is Robust

- In recent years, the DOL has continued its robust investigatory program of enforcing the fiduciary and prohibited transaction provisions of ERISA.
- With the arrival of the Biden administration, the DOL's ERISA enforcement program is expected to remain robust if not more aggressive.



In 2001, EBSA recovered

\$721 Million

Total monetary results



By 2020, EBSA had raised that number to

\$3.1 Billion

Can I Not Respond? Risk of Subpoena Enforcement



DOL Subpoena Enforcement Power

DOL subpoena enforcement power is very broad and typically supported by courts.



Recent DOL Subpoena Enforcement Example

In February 2021, the DOL filed subpoena enforcement in Illinois by recordkeeper.

- A national recordkeeper contested the DOL's investigatory authority because among other reasons, the service provider is not a fiduciary, the DOL has not articulated any conduct constituting a violation of ERISA, and the subpoena is too broad.
- The DOL objected and filed subpoena enforcement, arguing it "may seek information that 'might assist in determining whether any person is violating or has violated any provision of Title I of ERISA.'"

Considerations in Dealing with DOL

- First things first: Consider insurance notice.
- Each investigation/investigator will have their own style. There are limited guidelines as compared to other regulators (e.g., SEC).
- Attempt to build a cooperative relationship with the investigator/examiner.
 - Build a proactive relationship with your regulators (through internal and/or outside counsel).
 - Keep an open dialogue with DOL investigators in order to clarify any issues and address concerns.
 - In-person (or virtual) meetings, where possible, are often productive.
 - Keep good records!
- But there will be moments where pushing back is appropriate.

DOL CURRENT ENFORCEMENT PRIORITIES

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Official DOL Enforcement Priorities

- National Enforcement Priorities
 - “Major case enforcement” initiative
 - “Employee contributions” initiative
- National Enforcement Projects
 - Voluntary Fiduciary Correction Program
 - Abandoned Plan Program
 - Contributory Plan Criminal Project
 - Plan Investment Conflicts
 - Protecting Benefits Distribution
 - Health Enforcement Initiatives
 - Employee Stock Ownership Plans (ESOPs) Project

Current DOL Enforcement Priorities



**Newest DOL Focus:
Cybersecurity**



**Protecting Benefit
Distributions: TVPP/Missing
Participant Investigations**



**Plan Investment Conflicts:
Proprietary Funds and ESG**



**Emerging Issues: Private
Equity and Target Date Funds,
Cryptocurrency**



Mental Health Parity Act



Other Areas of DOL Focus

CYBERSECURITY

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Cybersecurity Incidents Involving ERISA Plan Assets Are Happening and the Threat Is Likely to Increase



General Exposure of Cybersecurity Theft

Cyberattacks are the fastest growing crime in the US with a global cost of over \$6 trillion annually.



Increasing Incidents of Data Theft

Social Security theft, for example.



Increasing Reports of Plan Theft

Public report of plan participant's account being accessed and unauthorized distributions of \$245K, \$400K and \$99K.



Nexus Between ERISA's Fiduciary Duties and Cybersecurity

ERISA's duty of prudence

Requires fiduciaries to act with prudence and diligence.

ERISA fiduciary duty to protect plan assets from cybersecurity incidents

It has become generally accepted that ERISA fiduciaries have *some* responsibility to mitigate the plan's exposure to cybersecurity events.

But it is not clear what is expected of a fiduciary with respect to cybersecurity risks.

Cybersecurity incidents

Are increasingly happening and ERISA plan assets are being targeted.

DOL Guidance

On April 14, 2021, the DOL issued guidance addressing the cybersecurity practices of:

Plan Sponsors

Service Providers

Plan Participants

Plan Sponsor Guidance: Six Tips for Hiring a Service Provider

Six Tips for Plan Sponsors Hiring a Service Provider

- Ask about the service provider's data security standards, practices, policies, and audit results and benchmark those against industry standards.
- Analyze the service provider's security standards and security validation practices.
- Evaluate the service provider's track record in the industry.
- Ask about past security events and responses.
- Confirm that the service provider has adequate insurance coverage for losses relating to cybersecurity and identity theft events.
- Ensure that the services agreement between the plan fiduciary and the service provider includes provisions requiring ongoing compliance with cybersecurity standards.

12 Cybersecurity Best Practices

Practices 1–6

- Have a formal and well-documented cybersecurity program.
- Conduct prudent annual risk assessments.
- Have a reliable annual third-party audit of security controls.
- Clearly define and assign information security roles and responsibilities.
- Have strong access-control procedures.
- Ensure that any assets or data stored in a cloud or managed by a third party are subject to appropriate safeguards.

Practices 7–12

- Conduct periodic cybersecurity training.
- Implement and manage an SDLC program.
- Have an effective business resiliency program addressing BCDR and incident response.
- Encrypt sensitive data, stored and in transit.
- Implement strong technical controls in accordance with best practices.
- Appropriately respond to any past cybersecurity incidents.

Cybersecurity DOL Investigatory Initiative

What is the DOL asking about?

- Senior DOL official: “I don't think they would be surprised by the kinds of questions they would get from our investigators” based on the guidance.
- DOL requests have covered categories like:
 - ✓Policies and Procedures
 - ✓Assessments and Audit Reports
 - ✓Technical Controls and Practices
 - ✓Insurance Coverage
 - ✓Prior Cybersecurity Events and Responses

What can the DOL do? What is the risk?

- At a minimum, the DOL can subject plans to long (multi-year) and resource-taxing investigations.
- At worse, the DOL can make findings of fiduciary breach.
 - Although breach findings are probably more likely only if the DOL is investigating after a breach incident.
- But it is too early to predict where the DOL is going.

Cybersecurity: Tips for Fiduciaries

Basic (Possible) Proactive Steps

- Review the DOL guidance and consider following the steps in the DOL guidance.
- Consider a checklist evaluation that incorporates recent DOL guidance.
- Evaluate insurance policies.

Enhanced (Possible) Proactive Steps

- Consider an enhanced self-assessment, such as:
 - ✓ Review provider contracts.
 - ✓ Review internal data security protections.
 - ✓ Conduct internal trainings on cybersecurity.
 - ✓ Review plan documents and communications.
 - ✓ Create a cybersecurity policy.

PLAN INVESTMENT CONFLICTS

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Plan Investment Conflicts

- The Plan Investment Conflicts Project (PIC) began in fiscal year 2016.
- Focuses on concerns pertaining to compensation and conflicts of interest by fiduciary service providers to ERISA plans and around ERISA plan assets, such as:
 - Conflicts of interest that may lead to conflicted decision-making processes, imprudent application of investment guidelines, and payment of excessive fees.
 - Whether a plan's fiduciaries are adequately engaging in due diligence related to such plan investments and service providers in order to address conflicts of interest.
- Fits within traditional DOL focus on enforcing ERISA's core fiduciary duties and prohibited transaction rules, especially by service providers.

Plan Investment Conflicts

- Examples of enforcement measures under the PIC include:
 - Service providers (such as advisors, insurance brokers, etc.) collecting higher than disclosed fees or improper compensation from ERISA plan assets.
 - Prohibited transactions involving investments.
 - Proprietary fund investments by mutual fund companies.
 - Whether plan assets are being used to pay nonplan expenses.
 - Whether there are loans using plan assets that run afoul of the prohibited transaction rules.
 - Improper or undisclosed compensation, such as undisclosed indirect compensation.
 - Criminal investigations of potential fraud, kickback, and embezzlement involving investment managers and advisers to plans and participants.

PIC DOL Enforcement: Tips for Fiduciaries

- Under DOL guidance and fiduciary case law, process is paramount
- Certain practices can help build a prudent process, including:
 - Document, document, document.
 - Make delegations to experts, including investment advisory.
 - Review delegations periodically and carefully.
 - Have and follow a written investment policy and other policies.
 - Provide initial and periodic fiduciary training.
 - Have regular meetings of fiduciary committees with documentation.

PIC DOL Enforcement:

Environmental, Social, and (Corporate) Governance factors and considerations

E

Environmental

- Climate Change
- Biodiversity
- Natural Resources
- Carbon Emission
- Air and Water Pollution

S

Social

- Health and Safety
- Labor Standards
- Product Liability
- Privacy and Data Security

G

Governance

- Diversity and Inclusion
- Transparency
- Board Independence
- Ownership and Ethics
- Executive Compensation

PIC DOL Enforcement: ESG Investigations

- The use of ESG factors in investment decision-making can implicate ERISA's fiduciary duties.
- The key issue is how ESG factors fit within the fiduciary's obligation to act prudently and solely in the interest of plan participants.
- The DOL had been conducting enforcement examinations on the use of ESG factors and proxy voting by plan fiduciaries and fiduciary service providers.
 - These investigations are being conducted out of multiple DOL regional offices.
 - The document requests indicate that the DOL is examining whether, and how, fiduciaries are making investment decisions or voting proxies based on ESG considerations.

ESG: Tips for Fiduciaries

- Proactive steps can be taken for plans with ESG funds (or reliance on ESG factors), such as:
 - Using the standards in the current “pecuniary factors” rule, even if they are not technically being enforced by the DOL.
 - Applying an approach that applies the same standards as non-ESG funds or factors (and avoid ESG screens).
 - Use enhanced or independent fiduciary evaluation for ESG funds.
 - Limit ESG options to a brokerage window.

PROTECTING BENEFIT DISTRIBUTIONS: TVPP / MISSING PARTICIPANT INVESTIGATIONS

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Protecting Benefits: TVPP (Missing Participants) Investigations

- Since 2015, the DOL has had an investigatory initiative, the Terminated Vested Participant Project (TVPP) that is focused on whether plans and service providers have taken sufficient steps to search for, outreach and encourage payment starts for terminated vested participants that are missing.
 - Many plans and service providers have been subject to lengthy investigations that require significant plan resources.
 - Especially early on, the DOL was making findings of breaches of fiduciary duty.
 - The DOL is continuing the TVPP, but possibly with a less adversarial approach.

Background: Different Types of “Missing Participants”

Participants that cannot be located (e.g., bad address, missing information).

Nonresponsive participants at normal retirement date (NRD) or required beginning date (RBD).

Participants who are likely deceased, but the death cannot be confirmed.

Participants with uncashed checks or stopped payments.

Beneficiaries who cannot be located or identified.

New DOL Sub-regulatory Guidance

Missing Participant – Best Practices for Pension Plans

Suggested practices for fiduciaries seeking to navigate missing participant issues.

Compliance Assistance Release No. 2021-01: Terminated Vested Participant Project Defined Benefit Pension Plans

Instructions to DOL investigators on TVPP investigations.

Missing Participant – Best Practices Guidance: Four Categories

1. Maintain Accurate Census Information

2. Implement Effective Communication Strategies

3. Improve Missing Participant Searches

➤ *Note this is the category that was already addressed in existing DOL guidance.*

4. Document Procedures and Actions

Observations on Risks

- The DOL acknowledged that “[n]ot every practice . . . is necessarily appropriate for every plan:”
 - Plan fiduciaries “should consider what practices will yield the best results in a cost-effective manner.”
 - Plan fiduciaries are permitted to consider “the size of a participant’s accrued benefit and account balance as well as the cost of search efforts.”
 - The appropriate steps to locate and communicate with a missing or nonresponsive participant “will depend on the facts and circumstances particular to a plan and participant.”
- ***Nonetheless, the DOL (or private litigants) may attempt to frame the DOL guidance as a baseline of expected practices.***

Guidance 2: Compliance Assistance Release No. 2021-01 (TVPP Guidance to Investigators)

- Identifies errors that the DOL looks for, such as:
 - Systemic errors in plan recordkeeping and administration,
 - Inadequate procedures for identifying and locating missing participants and beneficiaries,
 - Inadequate procedures for contacting term-vested participants and beneficiaries of deceased term-vested participants, and
 - Inadequate procedures for addressing uncashed distribution checks.
- Articulates examples of what the DOL views as insufficient practices, such as:
 - “Continuing to deliver required communications to a known ‘bad address’ without taking steps to verify the correct address.”
 - Plans with “clearly flawed data” such as birthdates of “1/1/1900” or names of “John Does.”
- Outlines how cases are closed

TVPP Investigations: Tips for Fiduciaries

- If in an investigation, use DOL guidance to your advantage.
- If not yet under investigation, now is a good time to get missing participant program in order.
- DC plans could become area of new focus.
- Uncashed checks could become a new focus.

MENTAL HEALTH PARITY

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Basics of Mental Health Parity

- Group health plans that provide medical/surgical benefits and also provide mental health or substance use disorder benefits must comply with mental health parity requirements under the Mental Health Parity Act (MHPA) (1996) and the Mental Health Parity and Addiction Equity Act (MHPAEA) (2008) requirements:
 - Annual or lifetime limits
 - Parity as to financial requirements and quantitative treatment limitations
 - Parity as to nonquantitative treatment limitations
- No requirement to offer mental health or substance use disorder benefits

How Are Mental Health Benefits Defined?

- Three tools can be used to define mental health benefits:
 - Current version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5);
 - Current version of the International Classification of Diseases (ICD-10); or
 - State guidelines
- Substance use disorder benefits can be defined in accordance with applicable federal and state law and generally recognized standards of current medical practice

Parity Requirements

- Lifetime & Annual Dollar Limits
 - May not impose a lifetime dollar limit or an annual dollar limit on mental health substance use disorder benefits that is lower than the lifetime or annual dollar limit imposed on medical/surgical benefits
 - Consider Essential Health Benefits under ACA
- Financial Requirements and Quantitative Treatment Limitations
 - May not impose a financial requirement (deductibles, copay, coinsurance) or quantitative treatment limitation (visit limitations, treatment limitations) in any benefit classification that is more restrictive than the predominant financial requirement or quantitative treatment limitation of that type of benefit that is applied to substantially all medical/surgical benefits in the same classification

Parity Requirements

- Classifications include:
 - Inpatient, in-network;
 - Inpatient, out-of-network;
 - Outpatient, in-network;
 - Outpatient, out-of-network;
 - Emergency care; and
 - Prescription drugs

Parity Requirements

- Nonquantitative Treatment Limitations (NQTL)
 - Medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;
 - Prior authorization or ongoing authorization requirements;
 - Concurrent review standards;
 - Formulary design for prescription drugs;
 - For plans with multiple network tiers (such as preferred providers and participating providers, network tier design);
 - Standards for provider admission to participate in a network, including reimbursement rates;

Parity Requirements

- Nonquantitative Treatment Limitations (NQTL) (cont.)
 - Methods for determining usual, customary, and reasonable charges;
 - Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective;
 - Exclusion of specific treatments for certain conditions; and
 - Restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the plan
- Not an exhaustive list

Consolidated Appropriations Act (CAA)

- The CAA now imposes a statutory obligation on plans that provide medical/surgical benefits and mental health or substance use disorder benefits to perform and document comparative analyses of the design and application of the plan's NQTLs that are imposed on mental health or substance use disorder benefits.
- Effective February 10, 2021.
- If the plan is not in compliance with this requirement, there is a 45-day corrective action period.
- If noncompliance is not corrected within the 45-day corrective action period, notification must be sent to all individuals enrolled in the plan that the plan is not in compliance.

Comparative Analysis

- Comparative analysis must be sufficiently specific and detailed to demonstrate processes, strategies, evidentiary standards or other factors used in developing NQTLs are comparable and applied no more stringently on mental health/substance use disorder (MH/SUD) benefits than to medical/surgical benefits
- FAQ guidance: at minimum the comparative analysis of each NQTL must meet nine specific elements:
 - Clear description of the specific NQTL, plan term and policies at issue
 - Identification of the MH/SUD and medical/surgical benefits to which the NQTL applies within each benefit classification, and a clear statement as to which benefits identified are treated as MH/SUD and which are treated as medical/surgical

Comparative Analysis

- FAQ guidance: at minimum the comparative analysis of each NQTL must meet nine specific elements (cont.):
 - Identification of any factors, evidentiary standards or sources, or strategies or processes considered in the design or application of the NQTL and in determining which benefits, including both MH/SUD benefits and medical/surgical benefits, are subject to the NQTL. Analysis should explain whether any factors were given more weight than others and the reason(s) for doing so, including an evaluation of any specific data used in the information
 - To the extent the plan or issuer defined any of the factors, evidentiary standards, strategies, or processes in a quantitative manner, it must include the precise definition used and any supporting sources

Comparative Analysis

- FAQ guidance: at minimum the comparative analysis of each NQTL must meet nine specific elements (cont.):
 - The analysis (for each NQTL) should explain whether there is any variation in the application of a guideline or standard used by the plan between MH/SUD and medical/surgical benefits and, if so, describe the process and factors used for establishing that variation
 - If the application of the NQTL turns on specific decisions in administration of the benefits, the plan should identify the nature of the decisions, the decisionmaker(s), the timing of the decisions and the qualifications of the decisionmaker(s)
 - If the plan's analyses rely upon any experts, the analyses should include an assessment of each expert's qualifications and the extent to which the plan ultimately relied upon each expert's evaluations in setting recommendations regarding both MH/SUD and medical/surgical benefits

Comparative Analysis

- FAQ guidance: at minimum the comparative analysis of each NQTL must meet nine specific elements (cont.):
 - A reasoned discussion of the plan's findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors, and sources identified within each affected classification, and their relative stringency, both as applied and as written. Include citations to any specific evidence considered and any results of analyses indicating the plan is or is not in compliance with MHPAEA
 - The date of the analysis and the name, title and position of the person or persons who performed or participated in the comparative analysis
- Supporting documentation
- DOL self-compliance tool

What We Are Seeing

- Group health plans under a current DOL audit have been subpoenaed for the comparative analyses
- Short turn-around times to produce (generally two weeks)
- Insufficiency letters if nine requirements are not addressed
 - A deeper probe, including claims data
 - Short turn-around times (generally two weeks)
- Initial findings letter
 - 45-day corrective action period
- If still not in compliance
 - Seven day period to notify participants

Comparative Analysis: Self-Insured Plans

- Self-insured group health plans likely do not have access to the medical policies, management standards, provider payment schedules and other NQTL documentation needed to complete comparative analyses
 - Must coordinate with third-party administrator for medical and Rx benefits
 - Administrative services agreement
- Don't wait, ensure comparative analyses are complete and ready for disclosure

EMERGING ISSUES: PRIVATE EQUITY AND TARGET DATE FUNDS, CRYPTOCURRENCY

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Emerging Issues: Possible New Areas of DOL Focus

Private Equity and Target Date Funds

- DOL Information Letter 06-03-2020 approves inclusion of private equity in managed asset allocation fund (e.g., target-date fund) in a 403(b) or 401(k) plan.
- But DOL has recently stated that it intends to reevaluate this guidance.
- These statements have been made by the DOL at a time there are signs of heightened scrutiny of TDFs—including from Congress and from plaintiffs in private litigation.

Cryptocurrency

- Following the lead of other regulators, the DOL has issued public statements expressing concern about ERISA plans investing (directly or through funds) in cryptocurrency.
 - Speaking at a conference, Acting Assistant Secretary Ali Khawar noted that the DOL is concerned about the fiduciary implications of investments with cryptocurrency exposure.

OTHER AREAS OF DOL FOCUS

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Other Areas of Current and Possible DOL Focus

**Late Contributions and
Loan Repayments**

**Required Plan
Documents, Disclosures
and Bonding**

Claims and Appeals

**Trade Error
Corrections**

Hard to Value Assets

IRAs

QUESTIONS?

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Biography



Elizabeth (Liz) Goldberg

Pittsburgh

+1.412.560.7428

elizabeth.goldberg@morganlewis.com

Liz advises employee benefit plan sponsors and service providers to those plans (including financial service firms) on ERISA US Department of Labor (DOL) enforcement investigations, DOL ERISA regulatory matters, and ERISA fiduciary counseling and compliance.

Liz has broad experience representing both plan and service provider clients in DOL ERISA investigations. Liz has worked on more than 30 such DOL investigations including matters that have involved significant monetary disputes or enterprise risk. In assisting in such matters, Liz draws on her prior work experience that includes six years at the DOL's Office of the Solicitor, primarily as an ERISA litigator.

Biography



Sage Fattahian

Chicago

+1.312.324.1744

sage.fattahian@morganlewis.com

Sage counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

Sage also consults with clients to design and implement innovative, cost savings designs, such as high-deductible health plan/health savings account (HDHP/HSA) combinations, health reimbursement arrangements (HRAs), and health flexible spending accounts (FSAs). Sage represents health and welfare plan clients facing federal agency audits and helps them to limit their liability through comprehensive legal review.

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