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Fiduciary Re-Proposal, Fee Disclosures On Deck for 2015; MEPs Wait in the Wings

Top employee benefit issues for the Department of Labor in 2015 are similar to those in 2014: a re-proposal that would expand the definition of ''fiduciary'' under the Employee Retirement Income Security Act and guidance on plan fee disclosures.

Meanwhile, practitioners and retirement policy observers also are looking forward to progress on relaxing the rules on multiple employer pension plans to allow unaffiliated employers to participate in those plans.

Practitioners and commentators have shifted into wait-and-see mode for the DOL's most debated initiative in the past several years, its re-proposal of the fiduciary rules.

A new version of the fiduciary rules, also called the conflict-of-interest rules, is scheduled to be released in January, according to the DOL's regulatory agenda (226 PBD, 11/24/14), but they have yet to be sent to the Office of Management and Budget for Review and whether they will be issued soon is far from certain.

The proposed rulemaking would amend the DOL's definition of ''fiduciary'' under Section 3(21)(A) of ERISA to more broadly define as fiduciaries, employee benefit plans and individual retirement accounts persons who render investment advice to plans and IRA holders for a fee.

The DOL has found itself in a holding pattern after initially proposing to redefine the term ''fiduciary'' in October 2010 (203 PBD, 10/22/10), but withdrawing the proposed rule less than a year later, citing a need to do further economic analysis (182 PBD, 9/20/11).

The re-proposal is ''obviously very important to us, it's important to'' Labor Secretary Thomas E. Perez, said Phyllis C. Borzi, assistant labor secretary for the EBSA. Perez has been involved in various meetings with industry groups, as well as with the White House and Treasury Department, to gather constructive comments that would help ''find a sweet spot'' in developing the guidance, she said.

As for when the new proposal will actually be released, Borzi said, ''I can't tell you anything about the timing because I don't know.''

Some commentators expressed doubts that the re-proposal will address their concerns.

Kent A. Mason, a partner at Davis & Harman LLP in Washington and outside counsel to the American Benefits Council, said that based on what he's seen so far, ''there remains a great deal of concern about what the re-proposal will look like.'' He said that he is hopeful that the proposed guidance will resolve the concerns that the ABC has had.

Judy A. Miller, director of retirement policy at the American Society of Pension Professionals & Actuaries in Arlington, Va., said the fiduciary re-proposal ''just totally makes everything else pale by comparison.''

Miller said that she is looking forward to seeing whether her group's concerns are addressed in the re-proposed rules. ''If the concerns aren't addressed, it'll be time to talk to Congress about intervening. But until you know what's in the rules, it's hard'' to intervene, she said.

ABC and ASPPA have expressed concerns with the original proposal's lack of guidance on prohibited transaction exemptions that would address the treatment of broker-dealers who work with smaller investors.

Members of Congress have also expressed concerns with the expected re-proposal. For example, in January 2014, 30 House Democrats signed a letter asking to have a ''dialogue'' with Perez about the agency's re-proposal before the rules are submitted to the Office of Management and Budget (17 PBD, 1/27/14).

In August 2013, 10 Senate Democrats sent a letter to the OMB expressing their concerns that the re-proposed rule would work at ''cross-purposes with efforts by the Securities and Exchange Commission's to create a uniform standard of care for broker-dealers and investment advisers'' (153 PBD, 8/8/13).

Karen Friedman, executive vice president and policy director of the Pension Rights Center in Washington, said that she is hoping that the DOL will be able to move ahead on the rules without congressional interference.

''We are hopeful that Congress will no longer put up obstacles to try to stop them from doing their job, because we think this whole lobbying effort to stop the Department of Labor from doing what it's supposed to do is undemocratic. And I don't know if it's completely unprecedented in our area, but it's fairly outrageous,'' she said.

Plan Fees. While practitioners wait for the re-proposal, the DOL has attempted to use its amicus brief program to urge courts to treat plan service providers as fiduciaries (226 PBD, 11/24/14).

The amicus briefs the agency has filed conflict with an advisory opinion on service providers the DOL released in 1997, said Michael J. Prame, a principal with Groom Law Group Chartered in Washington.

Advisory Opinion 1997-16A ''said that a service provider would not be a fiduciary if it had the ability to add or substitute an investment option if there was sufficient advance notice given to the plan sponsor fiduciaries on the disclosure regarding the fee impact and other requirements. So there was basically a negative consent approach,'' Prame said.

That negative consent provision is important because a service provider might have thousands of plans across the country. If it wanted to make changes to its investment platforms, it would be ''nearly impossible to get positive consent'' on a timely basis from each plan, he said.

Indirect litigation in a pair of DOL amicus briefs filed in 2014 conflicts with the advisory letter, Prame said.

In *Leimkuehler v. American United Life Insurance Co.*, 7th Cir., No. 12-1081, 4/16/13(74 PBD, 4/17/13), the DOL argued that American United Life Insurance Co.'s ability to delete or substitute the funds available to participants was sufficient to impose fiduciary status on AUL. The DOL acknowledged in its amicus brief that AUL never actually used its contractual authority to alter the funds available to participants, but insisted that the insurer exercised its authority by continuing to invest in its chosen mutual funds rather than less expensive funds and share classes.

In *Santomenno v. John Hancock Life Ins. Co.*, 2014 BL 267210, 3d Cir., No. 13-3467, 9/26/14(188 PBD, 9/29/14), the DOL urged the U.S. Court of Appeals for the Third Circuit to reverse a district court decision in favor of John Hancock Life Insurance Co. and find that the company acted as a fiduciary in managing a lineup of Section 401(k) plan investment options

Both the Seventh and Third circuits rejected the DOL's arguments.

Despite those losses, Prame said that he expects the agency to ''push this point in 2015,'' that the ability to add, delete or substitute makes a plan service provider a fiduciary under ERISA.

''They won't stop with just a couple of circuits,'' he said.

He might not have to wait long.

In *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 2014 BL 351329, S.D. Iowa, No. 4:14-cv-00102-SMR-HCA, 12/10/14) (241 PBD, 12/17/14), which is similar to *Leimkuehler* and *Santomenno*, the U.S. District Court for the Southern District of Iowa granted Principal Life Insurance Co.'s motion to dismiss, finding that the provider wasn't acting as a fiduciary under ERISA when it established the fees challenged by McCaffree Financial Corp. This was true even though the parties disputed whether the fees had been clearly and sufficiently disclosed, the court said.

The case has been appealed to the U.S. Court of Appeals for the Eighth Circuit. If the DOL does submit an amicus brief in *McCaffree*, the deadline for it could be as early as Feb. 24.

'Ollie North Approach.' Among other items the DOL has been working on is a final rule under Section 408(b)(2) of ERISA that would require service providers to provide a fee disclosure guide to plan sponsors.

The proposed rules followed final fee disclosure rules released in February 2012 (22 PBD, 2/3/12), which Borzi called ''an important achievement,'' because they required service providers to disclose information about fees. ''And that's a real breakthrough,'' she said.

The proposed rule (RIN 1210-AB53), issued in March 2014, would require retirement plan service providers to furnish a guide, much like a ''road map,'' that would help fiduciaries locate specific information within their documents, such as the compensation the provider receives (48 PBD, 3/12/14).

Trade groups, however, have asked the DOL to put a hold on its fee disclosure guide project. A joint Jan. 5 letter signed by 11 organizations, including the American Benefits Council, the ERISA Industry Committee, the Insured Retirement Institute, the Plan Sponsor Council of America and the SPARK Institute, said that feedback from plan sponsors was inconsistent with a conclusion that a guide is needed (4 PBD, 1/7/15).

''There is nothing'' in the letter ''they haven't said before orally and in writing,'' Borzi said.

The guidance is important because small plan sponsors can be overwhelmed with the amount of information they get from their service providers, Borzi said.

''One of the things I've been worried about in these 408(b)(2) disclosures is the Ollie North approach,'' she said.

Oliver North, of Iran-Contra fame in the 1980s, complied with a congressional subpoena by inundating Congress with ''every single piece of paper so he could insulate himself from the argument that 'you didn't tell us this,' '' Borzi said.

The Ollie North approach sparked the fee disclosure guide project, because as with North, Borzi said she was concerned ''that there were some in the industry that would overwhelm'' small employer plan sponsors with information that wouldn't be useful to them.

Olivia S. Mitchell, executive director at the Pension Research Council at the Wharton School of the University of Pennsylvania, said that despite the attention paid to the fiduciary re-proposal, a higher priority for the DOL might be its guidance on defined contribution plan distributions and fee disclosures.

In addition to its fee disclosures project, the DOL is set to release a proposed rule (RIN 1210-AB20) later this year (226 PBD, 11/24/14) that would require that pension benefit statements for defined contribution plans include lifetime income illustrations, such as projections of a plan participant's account balance at retirement and how much that would amount to on a monthly basis in a form of an annuity.

''You can potentially show an immediate benefit from driving down fees and protecting people's lifetime income streams. I think we don't really know because this is a government with two years' life left in it, so we're focusing a lot on what's going to be the legacy of this administration. But I think they would probably be very proud to have regulations out on payouts and on fees,'' she said.

Lifetime income streams will indeed remain an important issue going into 2015, not only for the DOL, but also for Treasury and on Capitol Hill, said Rhonda G. Migdail, of counsel at Keightley & Ashner LLP in Washington.

''I believe that lifetime income issues will continue to be an ongoing priority on both the regulatory and legislative agendas during 2015, said Migdail, who, before joining Keightley & Ashner, was a manager in the IRS's Employee Plans division.

''Additional guidance on issues relating to lifetime income from retirement plans is already part of the Department of the Treasury 2014-2015 Priority Guidance Plan and ongoing discussions on the Hill have recognized the need to ensure that Americans do not outlive their savings once they retire,'' Migdail said.

MEPs. During 2014, there were also a number of recommendations and proposals made to relax the requirements for multiple employer plans by amending ERISA's commonality requirements to allow more employers to participate in MEPs.

Under ERISA's commonality requirement, a MEP can consist only of employers that have a common bond and exercise direct or indirect control over the plan, typically by geographic area or similar industry. MEPs are currently found, for example, among rural electric companies and farming cooperatives.

Bills from Sen. Tom Harkin (D-Iowa) (S. 1979), who retired at the end of last year (28 PBD, 2/11/14), and Sens. Susan Collins (R-Maine) and Bill Nelson (D-Fla.) (S. 1970) (20 PBD, 1/30/14) would have allowed for the creation of ''open MEPs.''

The American Benefits Council, in its 2014 report ''A 2020 Vision: Flexibility and the Future of Benefits,'' also promoted the concept of open MEPs (185 PBD, 9/24/14).

MEPs predated ERISA but were grandfathered into the benefits law when it passed in 1974, but since then, the DOL ''has systematically and methodically used its authority to eliminate the possibility of any new ones,'' said Joshua Gotbaum, who served as director of the Pension Benefit Guaranty Corporation from 2010 to August 2014 (134 PBD, 7/14/14).

Congressional interest in MEPs has been around since at least 2011 (207 PBD, 10/26/11).

That legislation wasn't passed in 2014 to expand MEP participation was a ''tragedy,'' said Gotbaum, a guest scholar in the economic studies program at the Brookings Institution in Washington.

To encourage more MEPs, employers must know that the rules would lessen the burden of ERISA's fiduciary duty requirements, Gotbaum said.

A critical factor in employers' lack of interest in joining any type of MEP under current law is the ''bad apple rule.'' Under that rule, if one of the participating employers in a MEP performs a disqualifying act, then all the other participating employers will be considered as having performed that disqualifying act.

Three things prevent more employers from offering defined benefit-type plans, said Gotbaum: cost, volatility and ''regulatory overkill.''

''We punish employers for offering employee benefit plans. We make them fiduciaries, and they don't want to be fiduciaries. And as long as we do that, they're going to look for ways to pay their employees without dealing with the departments of Labor and Treasury,'' he said.

The ''critical point'' of the Harkin legislation, titled the USA Retirement Funds Act, is that it would have imposed no fiduciary duty on the employer, he said.

That Republicans and Democrats have sponsored or co-sponsored MEP legislation shows that there is interest on both sides of the aisle in these plans, said Friedman, of the Pension Rights Center.

Friedman said her organization supported the Harkin bill because it was a pooled plan, and would have had a strong regulatory body with a board of trustees overseeing the plans. ''We support the right kind of MEP,'' she said.

Karen Ferguson, director of the Pension Rights Center, said that for open MEPs to work, they would need ''incredibly strong oversight and protections and even licensing of the fiduciaries.''

''So, yes, there is a lot of interest in that, and there will be a lot of discussion in 2015 about it.''

Even though Congress is dominated by one party this year, it is still going to spend ''an awful lot of time trying to figure out what it wants to do now that is urgent,'' which means that it's unclear where MEP legislation might be introduced, Gotbaum said.

MEPs: The DOL Response. The history of fraudulent multiple employer welfare arrangements makes some people, including the DOL, very nervous about open MEPs.

A MEWA is defined by ERISA as any employee welfare benefit plan or other arrangement that is established or maintained by two or more employers to offer or provide welfare benefits to their employees.

Fraudulent, or sham, MEWAs aren't MEWAs at all. Instead, as the DOL and Treasury have said, the operators of these fraudulent enterprises are typically just con artists.

''In our mind, there's really not a discernible difference between the structure they want to allow in these open MEPs and the MEWA structure which we've had so much trouble with over the years,'' Borzi said.

The DOL most recently ruled on MEPs in 2012, in a pair of advisory opinions, 2012-03A and 2012-04A, both dated May 25. In the former opinion, the DOL held that a consolidation of several unrelated abandoned plans wasn't a single plan under ERISA (102 PBD, 5/29/12). In the latter opinion, the agency said that an open MEP retirement plan maintained for employees of a limited-purpose corporation designed to operate the plan and for the employees of unrelated employers wasn't a single multiple employer plan under ERISA (102 PBD, 5/29/12).

''My concern is none of the proposals that I've seen—and I can't say that I've seen all of them—but none of them seem to address our consumer protection concerns,'' Borzi said.

The commonality requirement sets an accountability mechanism so that promoters aren't able to decide on their own their fees or what they'll provide, she said.

''What I want to know is, what do you suggest we do to provide the consumer protection that's essential to make sure we don't have the whole range of scandals like we had with MEWAs?'' she said.

Retirement Plan Vehicles. With the enactment of crucial and controversial provisions to ERISA regarding multiemployer defined benefit plans included in federal budget legislation passed by Congress in December (see related article in this issue) (242 PBD, 12/18/14), Congress may be less interested in significant retirement legislation this year, Miller said.

The revisions regarding multiemployer plans was a ''major event,'' Miller said, ''but with multis out of the way, I'm not sure barring tax reform that there will be a vehicle for positive retirement savings provisions.''

However, some legislators have expressed serious interest in retirement issues, such as Sen. Orrin G. Hatch (R-Utah), chairman of the Senate Finance Committee, who introduced the Secure Annuities for Employee (SAFE) Retirement Act (S. 1270) in July 2013 (132 PBD, 7/10/13), along with Sen. Ron Wyden (D-Ore.), ranking member of the Finance Committee, Miller said.

Efforts to bolster Social Security's disability insurance fund solvency also could provide a vehicle for retirement proposals, said Jason J. Fichtner, senior research fellow at George Mason University's Mercatus Center in Arlington, Va.

House rules for the 114th Congress, contained in H. Res. 5, prohibit the House from considering legislation that would shift payroll revenue from the portion of the Social Security system that pays out retirement benefits, the Old-Age and Survivors Insurance Trust Fund, to help the deeply troubled Disability Insurance Trust Fund, unless it would improve the solvency of the combined funds.

The disability insurance fund is expected to be unable to pay its scheduled full benefits starting in 2016—election season—even though the combined trust funds are set to remain solvent until 2033 (145 PBD, 7/29/14).

The rule ''forces Congress to actually have a debate and consider necessary reform options to the program. A payroll tax reallocation can still pass the House, the rule just requires that any legislation to do so be accompanied by reforms. No more kicking the can 20 years down the road again,'' he said.

The rule also opens up possibilities for representatives and senators to add in their pet retirement projects, Fichtner said.

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Reports of Surge in DOL Auditors Greatly Exaggerated, Borzi Says

Whatever the Department of Labor's Employee Benefits Security Administration does on enforcement in 2015, it won't be with a major influx of 1,000 new employees, an idea that seems to have cropped up in some reports.

The error in some cases appears to stem from a misreading of the EBSA's fiscal year 2015 budget request, which shows that the EBSA asked for 1,017 full-time employee positions, which would add 32 to the number of full-time-equivalent employees approved for FY 2014.

Some practitioners and others apparently read that to mean that the EBSA had more than doubled its workforce.

''We don't have 1,000 employees,'' said Phyllis C. Borzi, assistant labor secretary for the EBSA.

To correct another error, the fines and penalties the EBSA brings in don't generate revenue for the agency. Instead, any recoveries are directed to participants' accounts, and any fines the EBSA assesses are sent to the Treasury Department, Borzi said.

In FY 2014, the EBSA recovered nearly $600 million for direct payment to employee benefit plans, participants and beneficiaries (4 PBD, 1/7/15).

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