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A U.S. Department of Labor Reset?

The U.S. Department of Labor (DOL) recently issued internal personnel guidance regarding the Employee Retirement Income Security Act of 1974 (ERISA) enforcement: Field Assistance Bulletin No. 2026-01 (FAB). This guidance seems to signal a meaningful shift in DOL priorities and methods of operation related to employee benefit plans.

The DOL regulates and investigates ERISA plans through its agency the Employee Benefits Security Administration (EBSA). EBSA has a surprisingly small staff relative to the number of benefit plans and the number of investigators and benefit specialists has dropped meaningfully during the second Trump administration.

The head of EBSA (the DOL's Assistant Secretary) laid out four enforcement priorities in the guidance, as follows:

- Focus enforcement on the most egregious conduct and significant harm
- Don't "regulate by enforcement," but instead provide clear, advance notice about how the DOL interprets what ERISA requires
- Obtain proper review by senior EBSA officials of all significant enforcement activity by field enforcement personnel
- Handle investigations in a timely and "responsive" fashion

Areas of Focus

- *Criminal*: The guidance says EBSA enforcement actions will prioritize criminal cases, to address the most significant harm to the employee benefits system.
- *Duty of Loyalty*: As to civil (not criminal) enforcement, the guidance establishes a clear lodestar. The emphasis is to be on breaches of the duty of loyalty – that is, on violations of the obligation of a fiduciary to act "for the exclusive purpose of

providing benefits to participants and their beneficiaries." Pursuant to the FAB, "a significant percentage of [EBSA's] resources must be focused on enforcement of loyalty breaches, or direct evidence of non-exempt prohibited transactions that involve impermissible conflicts of interest."

- *Prudence – Not So Much*: A very large portion of private party litigation alleging breaches of ERISA's fiduciary duties concerns allegations that fiduciaries did not act prudently in making fiduciary decisions. Like loyalty, the obligation to act prudently when making fiduciary decisions is one of ERISA's four fiduciary obligations (the other two being the obligation to diversify investments and to follow plan documents unless doing so would be inconsistent with ERISA).

  In explaining this focus on the duty of loyalty (including conflicts of interest), the guidance provides that while breaches of the duty of prudence can be important, the "costliest breaches of the duty of prudence tend to be accompanied by concomitant loyalty breaches."

  As to prudence, the guidance serves as a reminder that the view of the DOL and most courts is that the fiduciary duty to act prudently is effectively an obligation to follow a good process, not necessarily to guarantee an optimal result. Many refer to this as the "procedural prudence" formulation of ERISA's duty of prudence. The FAB provides:

  > To the extent any enforcement activity is solely based on a prudence breach, and given that ERISA is a law of process and not results, EBSA must avoid cases that unfairly second-guess process-based fiduciary judgments.

- *Environmental, Social, Governance (ESG) objectives = Bad*. In addressing EBSA's emphasis on breaches of the duty of loyalty, the guidance identifies as EBSA's highest priority targeting those who, acting in bad faith, improperly administer plan benefits or misappropriate (or aid in the misappropriation of) benefit plan assets. Not for the first time, the DOL applied this general loyalty principle to attack initiatives explicitly promoting ESG objectives. The types of disloyal conduct that are to receive EBSA's highest priority include "conduct designed to enrich [fiduciaries] or other goals unrelated to participants' best interests, such as the promotion of environmental, social, or governance objectives."

Regulate by Formal Guidance, Not Through Novel Theories Developed During an Investigation

In an earlier Executive Order issued by President Trump, government agencies were instructed to limit industry regulation "only [to] standards of conduct that have been publicly stated in a manner that would not cause unfair surprise." Consistent with this, the guidance issued to EBSA enforcement personnel provides "novel legal theories or interpretations of ERISA should not be first articulated during enforcement actions." Instead, EBSA should develop guidance and interpretations through ordinary regulatory and other formal (that is, "sub-regulatory") processes.

Based on the guidance, enforcement activities need to have a close connection with:

- The plain language of ERISA's text,
- Clearly established guidance in final DOL regulations or prominently published sub-regulatory guidance, or
- Clearly established court decisions.

One effect of this approach may be the curtailment of what some consider to have been aggressive positions taken by the DOL in asserting that valuations of stock held in employee stock ownership plans (ESOPs), and particularly valuations relating to ESOPs' purchases of shares, have been improper. On that score, the guidance provides that until EBSA complies with a direction from Congress to provide "acceptable standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan," all pending and proposed ESOP valuation investigations need to be reviewed against the standards noted in the bulleted items above.

Check in With the Boss

Under the new guidance, the DOL's Assistant Secretary must be informed by field personnel of "significant enforcement activity," which is to include any proposed settlements or voluntary corrective actions. Significant issues that are to be run by the Assistant Secretary include:

- Novel legal theories or novel areas of enforcement

- Issues that are, or are reasonably likely to be, the subject of disagreement between federal courts of appeal (that is, where federal appeals courts are likely to disagree with one another, or already disagree with one another)
- Issues that will be resolved by adopting a position that deviates from a prior EBSA position, and
- Any other issues key field personnel believe may be of interest or importance to the Assistant Secretary

Investigations Should Not Drag on Too Long

Plan sponsors commonly complain about how long it takes EBSA to complete an investigation. The guidance notes this, stating that both the parties being investigated and Congress have expressed concern about open-ended and unduly lengthy investigations.

The guidance to enforcement personnel states that routine investigations involving less complicated issues, such as delinquent employee contributions, and disclosure and bonding violations, should be completed within 18 months unless there are exigent circumstances that are communicated to EBSA's Director of Enforcement.

More complex investigations are to be completed within 30 months, absent exigent circumstances. Exceptions to the 30-month rule may be made for cases where EBSA's enforcement activities are delayed for documented reasons that are beyond the control of EBSA's enforcement personnel.

The guidance also instructs EBSA professionals to take any available opportunities to provide compliance assistance to conscientious plan sponsors and service providers, even though investigations should continue to address egregious ERISA violations and matters involving significant harm.

We Disclosed this Guidance, But Do Not Quote It Back to Us

Although EBSA publicly disclosed its new guidance, the guidance notes that it is technically an internal DOL policy directed at EBSA and its employees. As a consequence, the DOL says the memorandum may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal. Nonetheless, one suspects that if a fiduciary or plan sponsor (such as an

employer) feels that EBSA investigative personnel are acting in a fashion not wholly consistent with the new guidance, a reference to the relevant provisions of the guidance might prove useful.

No Coordination of Activities with Plaintiffs' Attorneys

Attorneys representing ESOP fiduciaries have long believed that EBSA personnel sometimes share information with plaintiffs lawyers pursuing private litigation relating to alleged ERISA violations, particularly those involving ESOPs. This effectively became a matter of public record when, in a case before the federal trial court in Colorado, the court discovered and noted that EBSA had shared information with plaintiffs.[1] EBSA had been investigating the same transaction that was the subject of the plaintiffs' private litigation, though DOL was not a party to the litigation. The information that was shared by EBSA included documents it obtained from, and interviews with, the ESOP trustee being sued by the plaintiffs. This is notable, in part, because EBSA can, for example, issue subpoenas for documents and testimony without needing to bring a lawsuit, while potential private litigants are not able to do so.

The new EBSA guidance issued to enforcement personnel would seem to end this practice. The guidance provides that EBSA investigators and professionals must not do anything that compromises the DOL's independence, integrity, and credibility with the regulated or participant communities. And, the guidance notes, this includes eliminating any appearances that EBSA enforcement activities and priorities are being coordinated with plaintiff lawyers pursuing private lawsuits. The guidance specifies, in this regard, that the DOL's Inspector General is investigating the use of certain so-called "common interest" agreements between EBSA and private plaintiff law firms, which was the very practice noted in the *Harrison* decision.

This prohibition on coordinating activities with plaintiffs' counsel, when taken together with the instruction not to develop policy through litigation and the caution about challenges to ESOP valuations, appear to be a particularly positive set of developments for ESOP fiduciaries.

Time will tell the degree to which the new guidance will affect day-to-day EBSA enforcement practices, but the guidance does appear to signal a meaningful reset

of both EBSA's priorities and its processes.

This client alert was drafted by John L. Utz, an attorney in the Spencer Fane Overland Park, Kansas office. For more information, visit www.spencerfane.com.

[1] *Harrison v. Envision Management Holding Company, Inc Board of Directors* (D. Colo. 2025).

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