Planning for Your Next DOL Investigation Just Got Easier

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Spoiler alert. We are about to reveal the secret to learning what the U.S. Department of Labor’s Employee Benefits Security Administration (“EBSA”) will be focused on the next time it investigates your employee benefit plans? Ready? Just ask.

Last week, EBSA announced an overhaul of its national enforcement projects for fiscal year 2026—the most significant EBSA has made in recent years—in some cases realigning them with statements previously made by the new administration. According to EBSA, national enforcement projects indicate the areas that will guide enforcement, suggesting that this is where EBSA will focus its attention in investigations.

So what are those national enforcement projects? They fall into several categories, many of which are expected, including the following:

- **Cybersecurity.** In light of the risk of fraud and financial loss, EBSA stated that its investigations will continue to evaluate how plans and service providers protect against cybersecurity threats.

Proskauer’s Perspective: Plan sponsors and fiduciaries should continue to review and assess periodically the cybersecurity practices of providers that maintain or have access to participant and other sensitive data or funds and confirm that they have adequate contractual protections with those providers. In addition, sponsors and fiduciaries that maintain plan data themselves should be ensuring that their internal environments have protections in line with cybersecurity best practices. This is not a “one and done” exercise, given the rapidly developing environment. For example, the DOL’s standards and industry best practices are evolving as AI and other new technologies evolve.

- **Mental Health and Substance Use Disorder.** EBSA stated that it will be focusing on the most serious violations that prevent access to these benefits. EBSA noted that it will be looking at whether plans are imposing barriers to care, including burdensome claims processes, unjustified treatment exclusions and unreasonable limits on care, and incorrect provider directories.

Proskauer's Perspective: Although the DOL and other agencies have rejected the September 2024 regulations finalized by the prior administration (as discussed here [Departments Press Pause on Final Mental Health Parity Regulations | Compensation & Benefits Blog]), this is another reminder that the Mental Health Parity and Addiction Equity Act and its 2013 regulations, as well as the Consolidated Appropriations Act, 2021, remain in effect and an enforcement priority. This means that plan sponsors and fiduciaries should continue to review their quantitative and non-quantitative treatment limitations on mental health and substance use disorder benefits to ensure that they are reasonable, justified and consistent with the statute and guidance that remains in effect.

- **Surprise Billing.** EBSA will be focusing enforcement efforts on the implementation of the No Surprises Act ("NSA"), which attempts to prevent surprises from certain medical bills from out-of-network providers, such as where there is an emergency, where an out-of-network provider renders services in an otherwise in-network facility, or where an air ambulance is needed. Where NSA applies, participants are entitled to in-network cost sharing, the participant cannot be balance billed, and there is an independent dispute resolution process to determine what the plan will pay the provider. EBSA stated that its investigations will look at whether plans are complying with NSA, including applying the proper cost sharing, providing required communications, applying the required definition of emergency services (which relies on a prudent layperson standard), and timely paying and complying with the dispute resolution process.

Proskauer's Perspective. Notably, EBSA stated that it would be seeking to address these issues at the service provider level to maximize the impact of its enforcement. Nonetheless, we expect that EBSA will continue to investigate these issues (and service providers) through the investigation of individual plans, so plan sponsors and fiduciaries will still want to communicate with providers to confirm they have the appropriate processes in place.

- **Protection of Benefit Distributions.** While some of the focus in this area will be on abandoned plans, there are two other notable areas of enforcement. First, EBSA will be reviewing pension plan practices to notify participants who are approaching normal retirement age and required minimum distribution age, although it noted that it expects less of a need for enforcement given recently issued guidance and its Lost and Found Database, which still seeks to get traction. Second, EBSA will be looking at sponsors that are in distress to prevent losses to plans from misuse of plan assets, delinquent contributions, and unreasonable expenses.

Proskauer's Perspective. Plan sponsors and fiduciaries should confirm that their administrators have compliant procedures to locate missing participants and that they affirmatively reach out to terminated vested participants both when they are approaching normal retirement age and when they are approaching required minimum distribution age. In addition, plan sponsors that are in distress should be prepared for an increased risk of investigation.

- **Retirement Asset Management.** EBSA will be looking at whether plan fiduciaries have a reasonable process for selecting and monitoring 401(k) investment options. Through its plan investigations, EBSA will be looking at investment consultants and managers, including whether they have any conflicts of interest.

Proskauer's Perspective. As has always been the case, plan sponsors and fiduciaries should vet their investment consultants and managers for conflicts of interest and ensuring that compensation is reasonable. This can be done through both diligence questions and reviewing required disclosures, such as Section 408(b)(2)-required disclosures.

- **Other Areas.** EBSA will continue its 16-year old criminal project to limit theft in the 401(k) plan context, including the misuse of employee's electric deferrals and theft of plan assets or information. EBSA will also continue its efforts to prevent fraudulent Multiple Employe Welfare Arrangements.

Proskauer's Perspective. Notably missing from EBSA's enforcement priorities is investigations related to employee stock ownership plans, which has been a significant priority in prior years. This is a significant (albeit not surprising) shift relative to prior administrations' focus on valuation and other ESOP issues. Plan sponsors should keep in mind that enforcement priorities change from time to time (items are often removed and added back), especially when presidential administrations change.

Next steps

Armed with knowledge of EBSA's enforcement priorities for the upcoming year, plan sponsors and fiduciaries should consider whether their practices are in line with the DOL's expectations. It is never a bad idea to conduct a "self-audit" to consider whether the plan has taken the appropriate steps to be in a position to respond effectively to a DOL investigation if its number is called.

Related Professionals

- **Joseph E. Clark**
  Senior Counsel
- **Robert M. Projansky**
  Partner
- **Russell L. Hirschhorn**
  Partner
- **Seth J. Safra**
  Partner