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The EBSA Cracks Down on Retirement Plan Advisors

Advisors take heed: The DOL arm that rides herd over retirement plans is ramping up its enforcement efforts

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Prominent retirement planning officials are warning advisors to make sure that the retirement plans they advise are compliant with Department of Labor rules, as the DOL's regulatory arm responsible for policing these plans is cracking down.

So far this year, the DOL's Employee Benefits Security Administration (EBSA) has significantly raised its enforcement efforts in what Andy Larson, director of the Retirement Learning Center, says should serve as a wake-up call to advisors who advise retirement plans and plan sponsors.

In 2011, EBSA said it had closed 3,472 civil cases and obtained monetary results of nearly \$1.39 billion.

EBSA also closed 302 criminal cases that resulted in 129 individuals being indicted and 75 cases being closed with guilty pleas or convictions. DOL also wants to increase the number of its enforcement personnel from 913 to 1,003 this year.

Larson says those EBSA enforcement numbers are "astonishing" and warns that many advisors are surprisingly still unaware that the DOL has jurisdiction over them.

What's the biggest area EBSA is zeroing in on? Fiduciary negligence. EBSA is "seeing very high levels of non-compliance with fiduciary" duties. When the EBSA releases its repropoed fiduciary rule in the first half of this year, the rule "will affect advisors and their fiduciary role," not plan sponsors, Larson says.

In light of this, Larson said, advisors should ensure they have a "strong documentable fiduciary process."

As Larson notes, since the Employee Retirement Income Security Act (ERISA) was put into place, DOL and the Internal Revenue Service's Employee Plans Unit have had joint authority "to ride herd" over retirement plans. But service providers have gotten accustomed to the IRS taking the lead in enforcement actions, and have failed to notice over the last two years that the EBSA "is showing up through the unlocked back door and finding problems," Larson says.

Because the IRS has been the primary enforcer of ERISA rules, "service providers have developed their models to include mechanisms with IRS requirements," but may have failed to include "DOL-type protections in their service models," Larson says.

Larson recommends that "the plan sponsor should be asking advisors what they can do to help my plan comply with the DOL rules." Astute service providers, he says, will make sure "they have tools and mechanisms to help employers minimize their DOL liability."

Are You a Fiduciary or Not?

Kevin Watt, vice president of defined contribution at Security Benefit, agrees that for advisors, the big question now in the ERISA world is whether or not they are a fiduciary. Watt calls the issue a "seismic shift" and a "clear and present dividing line" that's occurring within firms. "You're either going to be an expert and be a fiduciary advisor named to the plan, or you're going to need to bring solutions to the table to keep you out of that role."

EBSA recently launched an expanded "regulatory impact analysis" to assess the impact of the department's repropoed fiduciary rule on ERISA plans and IRAs. Industry trade groups were asked by EBSA's Office of Policy Research on Dec. 15 to voluntarily assist EBSA in its fact-finding mission. In a meeting on Jan. 24, a number of those groups suggested that complying with the request would be difficult; nevertheless, the DOL afterwards set a deadline for those groups to submit data by Feb. 24. However, on Feb. 29, EBSA expressed disappointment that industry trade groups could not provide more data by the Feb. 24 deadline.

Among the groups opposed to the redefinition of fiduciary is the Financial Services Institute (FSI), which found in a recent poll that 72% of its independent broker-dealer advisor members opposed DOL's efforts on the matter. FSI CEO Dale Brown has called DOL's proposal a "misguided effort to expand their definition of fiduciary such that average Americans would have a difficult time finding affordable advice for their individual retirement accounts."

EBSA's regulatory agenda for 2012 says its repropoed rule amending the definition of fiduciary under the Employee Retirement Income Security Act is projected to be released in May.

Columbia Management Learning Center warned plan sponsors in a recent white paper that they have a "fiduciary responsibility to keep their plan in compliance with DOL rules and regulations at all times."

Because of the increased number of DOL enforcement staff, "the chance that the DOL could audit your plan is increasing," the white paper warns. "There is every indication the DOL is escalating audits of small plans," the paper says.

The paper also notes that during 2010, the DOL audited more than 3,100 plans and found that more than 73% of the plans were required to restore losses to the plan or take another type of corrective action to correct plan deficiencies. Furthermore, 96 individuals (e.g., plan officials, corporate officers and service providers) were indicted for offenses related to their plans.

From the audits, Columbia concluded, however, that a very small percentage of plans have true "bad guy situations"; the majority of violations generally come from oversight, errors and omissions by plan sponsors.

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