

December 2019

**Client Advisory**

## DOL's Enforcement Results Reach An All Time High of \$2.5 Billion

The Employee Retirement Income Security Act (ERISA) is the statute that protects both retirement and health plans. The United States Department of Labor (DOL), Employee Benefits Security Administration (EBSA) is the agency entrusted to enforce ERISA and in particular the rules for reporting and disclosure, vesting, participation, funding, and fiduciary conduct. The DOL just announced that it had restored in fiscal year 2019 over \$2.5 billion to employee benefit plans, participants and beneficiaries.

Recoveries stemming from DOL investigations amounted to \$2.02 billion, a significant increase from DOL's recovery of \$1.1 billion in fiscal year 2018. Moreover the DOL has consistently over the past 3 years had an over 60% success rate in finding violations (67% in 2019). Now is a good time to conduct a DOL compliance review and possibly avail yourself to the DOL's amnesty program described more below.

One area that is low hanging fruit for the DOL is delinquent contributions in 401(k) plans. Many plan sponsors (fiduciaries) are not depositing contributions on a timely basis. The regulations have long provided that the contributions be deposited as soon as reasonably possible. If the DOL opens an investigation, they will request payroll records over the past 6 years and find the quickest date a deposit was made to a participant's account and make that date the rule (e.g. if they find that in one payroll cycle contributions were made to the plan in one (1) day, then they will argue that all contributions for that year and preceding years could have been made in one (1) day). The DOL upon identifying delinquencies will issue you a findings letter asserting that you have violated your fiduciary duties under ERISA and that the plan had extended credit to the plan sponsor, which is a prohibited transaction under ERISA.

Any delinquencies will be subject not only to interest on the delinquencies but also to civil penalties (e.g., ERISA 502(l) penalty is 20% on the entire amount involved). Furthermore, the DOL will make a referral to the IRS, which is in charge of assessing hefty prohibited transaction excise taxes (the calculation of these taxes essentially operates like a pyramid scheme).

A preemptive strike to a DOL investigation is to conduct an internal compliance review before the DOL comes knocking. We can help you determine what is a reasonable time frame for depositing the contributions and document it for the record. After determining the time frame, we would sample certain months/years to ascertain if the contributions met this timeline. If we find delinquencies, we can apply to the DOL's Voluntary Fiduciary Correction Program. (VFCP).

In fiscal year 2019, the DOL recovered \$14.6 million via the VFCP. Under the VFCP, one of the 11 transactions that can be corrected is delinquent contributions. To be eligible to apply under the VFCP, the plan sponsor must not be under investigation by the DOL or under audit by the IRS. The benefits of this program are: much lower interest rates assessed, possible waivers of the penalties and prohibited transaction excise taxes, and a "clean bill of health" from the DOL that the violations were accurately corrected.

If you have any questions about meeting your fiduciary duties and other ERISA requirements, feel free to call [José M. Jara](tel:6464524014) at (646) 452-4014. See also his ERISA chapter "Specific Corporate Compliance Challenges by Practice Area: ERISA," in *Corporate Compliance Practice Guide: The Next Generation of Compliance*, Lexis 2018. [Click here to view the chapter.](#) The following are few excerpts:

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## [1] Review of Plan Documents, Policies, and Procedures

A starting point for complying with ERISA's fiduciary requirements is to review the plan's governing documents. Certainly upon appointment as a fiduciary, or as soon thereafter as possible, the plan document and summary plan description ("SPD") should be reviewed and a determination should be made as to whether the plan is being operated in compliance with those documents. A determination should also be made as to whether the plan document or SPD need to be amended.

With respect to plan investments, the fiduciaries must first ascertain whether the plan has an investment policy statement ("IPS") and guidelines and, if the plan has no such statement, the fiduciaries should adopt one. If an IPS is in place, it should be reviewed in light of current economic conditions. In 1994, the DOL issued Interpretive Bulletin 94-2 encouraging plan fiduciaries to adopt written statements of investment policy. Interpretive Bulletin 94-2 also states that compliance with ERISA's prudence requirement requires maintenance of proper documentation of the activities of the investment manager and of the named fiduciaries of the plan in monitoring the investment manager.

### Warning:

Fiduciaries remain personally liable if they select or retain an investment manager or consultant when it is not prudent to do so. See *California Ironworkers Field Pension Trust v. Loomis Sayles in Co.*, 259 F.3d 1036 (9th Cir. 2001); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987).

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## [3] Fiduciary Training

Plan fiduciaries should have formal and continuous fiduciary training. In fact, during DOL investigations, when government officials interview

plan fiduciaries, one question that is guaranteed to be asked is whether the fiduciary can describe what she thinks are her fiduciary duties under ERISA.

Additionally, fiduciary training is extremely useful given that ERISA, a complicated law to begin with, is constantly evolving and that litigation in this area is at an all-time high. The ability to detect issues and know when to consult with trusted advisors is critical. Detecting fiduciary issues early can help prevent lawsuits and government investigations. In addition, with counsel, a breach may be detected and corrected through the DOL's Voluntary Fiduciary Correction Program or the Delinquent Filer's Voluntary Correction Program.

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