

Retirement is a Hot Topic Across the Board: What Advisors Need to Know About ERISA Regulation, Legislation and Litigation

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Mr. Campbell concentrates his practice in Employee Benefits advice, specializing in ERISA Title I issues, including fiduciary conduct and prohibited transactions. He also serves as an expert witness in ERISA litigation. The former Assistant Secretary of Labor for Employee Benefits, head of the Employee Benefits Security Administration, Mr. Campbell was ERISA's primary Federal regulator and law enforcement official. He played a key role in ERISA retirement and health reform initiatives, and his regulatory and policy decisions had a fundamental impact on the structure and operation of ERISA plans, including:

- Proposing the initial 408(b)(2) service provider and 404(a)(5) participant disclosure regulations
- Issuing final regulations establishing Qualified Default Investment Alternatives (QDIAs), electronic fee disclosure, and participant access to investment advice
- Administering an enforcement program reporting more than \$2.6 billion in monetary results and more than 200 criminal indictments

Legislation: Congress is Working Hard on a Bill (Well, Really Three Bills)...and They Might Succeed!

- March: House passed SECURE Act 2.0 by vote of 414-5 after years of cooperation. Senate decided it can do better.
- June: Senate HELP Committee voice vote approves the Rise & Shine Act
- June: Senate Finance Committee reported the EARN Act (Enhancing American Retirement Now) by a vote of 28-0.
- The three versions overlap, but lots of differences to be reconciled—final bill (hopefully) to pass after the Nov. elections.
- Gomez Nomination for EBISA—lost bipartisan support, but likely to pass on a party line vote if VP Harris present to break tie.

What Do the Three Bills Do?

- ✓ New Plans must use auto-enrollment/auto-escalation (SA only).
- ✓ Matching employer contributions based on student loan repayments (SA/EARN)
- ✓ Increase tax credits for plans/participants (SA/RS/EARN)
- ✓ 403(b) plans may invest in CITs, be in MEPs (SA/RS/EARN)
- ✓ Technical changes facilitating in-plan annuities (SA/EARN)
- ✓ RMD age increased to 75 (SA/EARN)
- ✓ Address missing participants (RS/EARN)
- ✓ Increase catch-up contributions, require them to be Roth (SA/EARN)
- ✓ Emergency account/penalty free access (RS/EARN)
- ✓ Rollover simplification/auto portability (EARN)

Overview of Current DOL Initiatives

- New Spring 2022 Regulatory agenda just released—shows regulatory actions and scheduled dates for next 12 months.
- Cryptocurrency guidance—DOL announces it will investigate plans allowing direct investment by participants into crypto-related investments as DIAs or through brokerage windows. Governing by press release? Lawsuit filed against guidance.
- Retirement Income Disclosure—Missed February deadline for final rule, now scheduled for August. Likely to make substantive changes to projection methodology applicable next year.
- QPAM Exemption—proposed changes to key exemption for ERISA plan asset managers, nature of changes unknown. At White House for review, but not on regulatory agenda.

ESG and ERISA: the “Financial Factors” Rule

- Financial Factors rule did not prohibit ESG investing by ERISA plans, but it stirred up controversy and confusion.
- Following January 2021 Executive Order to review the new rule, DOL found that the Rule:
 - confused fiduciaries,
 - chilled investment in “appropriate” ESG vehicles, and
 - created a false “perception that fiduciaries are at risk” when selecting ESG investments
- DOL suspended enforcement, proposed new rule.

DOL Proposal ESG-Friendly

- Proposal states that prudent evaluation of plan investments “may often require” consideration of ESG factors.
- “Pecuniary” test eliminated—fiduciary may consider any factor it determines is material to risk/return analysis.
- Tie-Breaker—Fiduciaries may use “collateral benefits” to select investments that “equally serve the financial interests” of the plan with disclosure of the collateral benefit.
- QDIA—ESG-related investments may be QDIA’s.
- New agenda says final rule due December 2022.

DOL Fiduciary Rule—the New Interpretation

- February 2021—DOL reinterprets the 1975 Rule’s five-part test to expand reach. Not a new rule—a new interpretation.
- The effect? Most rollover recommendations in which you will have ongoing interaction with the client are now fiduciary:
 - ✓ Rescinds AO 2005-23A (it said most rollovers not fiduciary).
 - ✓ “Regular basis”—prior advice regarding retirement accounts is “ongoing” relationship; (b) intention to offer more advice after rollover is “anticipated ongoing”—either is regular basis.
 - ✓ “Mutual understanding” and “primary basis”—disclaiming fiduciary intention in “boilerplate fine print” not dispositive
 - ✓ One-time sales transaction not fiduciary
 - ✓ Lawsuits challenging new interpretation pending.

PTE 2020-02 Exemption—Fully Phased as of July 1.

- DOL finalized new class exemption, PTE 2020-02. Needed by most advisors to recommend rollovers.
 - ✓ Both financial institution (bank, insurance company, broker-dealer, RIA) and financial professional acknowledge fiduciary status in writing. Must disclose all material conflicts.
 - ✓ FI must mitigate conflicts—not same as Reg BI. FAQs bring back Obama-era guidance raising concerns regarding permissible bonus and incentives; role of supervision in mitigation; changes to compensation grids; other issues.
 - ✓ FI must conduct annual review on use, certified by leaders.
 - ✓ Rollover must gather specific plan data and disclose basis for best interest conclusion.

Best Interest Process for Rollover Recommendation

There is a **5-step process** for developing a best interest rollover recommendation:

- 1.** Information about retirement investor.
- 2.** Information about plan investments, services and expenses.
- 3.** Information about IRA investments, services and expenses.
- 4.** Objective analysis to determine option that is in the investor's best interest.
- 5.** Provide retirement investor with specific reasons why the rollover is in the investor's best interest (now in effect post-July 1).

New DOL Fiduciary Rule and Exemptions Coming

- DOL was scheduled to propose new rule to replace five-part test in December 2021, now scheduled for December 2022.
- DOL likely also to propose changes to PTE 84-24 (the annuity and insurance exemption) and more changes to PTE 2020-02.
- Lawsuits regarding new interpretation ongoing in Texas and Florida.
- Keep an eye on the states—Nevada resurrecting proposed fiduciary regulation for broker-dealers, MA law challenged in court.

Cybersecurity—New DOL Investigation Priority

- Cybersecurity is a growing issue due to theft and loss—plan fiduciaries need to take these issues into account.
- In April 2021, DOL issued three new guidance documents, one of which is aimed at plan fiduciaries. Now enforcement priority.
 - ✓ “Tips for Hiring a Service Provider”—cybersecurity should be part of your RFP process, fiduciary duty to protect plan assets.
 - ✓ “Online Security Tips”—directed at participants (use strong passwords, look out for scams, etc.)
 - ✓ “Cybersecurity Program Best Practices”—directed at service providers, lots of detail phrased as requirements.

DOL Enforcement Priorities

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