

3 DOL Moves Benefits Attorneys Will Be Watching For

By **Kellie Mejdrich**

Law360 (July 3, 2023, 11:58 AM EDT) -- The U.S. Department of Labor is expected to issue a report on health insurers' compliance with mental health parity laws, propose regulations on retirement plan rollovers, and weigh in on who's eligible to manage retirement investments covered by federal benefits law.

Here's a look at three actions from the agency that benefits attorneys will be watching for in the second half of 2023.

Mental Health Parity Report

An annual report summarizing compliance with a law designed to ensure health insurance plans provide equal coverage of mental health and substance use disorder treatments compared with surgical and medical contexts is months overdue but expected soon.

Under a spending bill passed at the end of 2020, the DOL and other federal agencies must report annually on employee group health plans' and insurance issuers' compliance with the law, and the deadline for this year was in October. The DOL's top employee benefits official, Assistant Secretary for Employee Benefits Security Lisa M. Gomez, **said at a benefits law conference** in May that the report was expected in the coming months.

Gomez also said during a policy forum hosted by the Employee Benefit Research Institute in Washington, D.C., on May 11 that the department had been putting in an "unprecedented amount of resources into enforcement" of the law.

Congress in 2008 passed the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act, which requires employer health plans' limitations on mental health and substance use disorder treatments be no more stringent than what's applied in other contexts, such as medical or surgical care.

But only in 2020 did Congress give crucial new authority to the DOL to enforce the law, including through new reporting requirements designed to force companies to demonstrate their plans weren't illegally restricting care. Agencies gave every plan they surveyed **a failing grade** in their first report on implementation of the new requirements in January 2022.

It's widely expected that health plans will again receive poor grades on their compliance with mental health parity laws, in part because third-party administrators have resisted information requests from insurers on these coverage details.

Matt Lavin, partner at Arnall Golden Gregory LLP who represents workers, said he thinks the DOL should have the ability to fine plan administrators that don't comply with the law — something the U.S. House of Representatives **passed in a bill** last year, when Democrats held the majority, but isn't expected to pursue under Republican control.

Lavin said from the perspective of employee group health plan participants, "it's become more difficult than ever to receive adequate benefits."

As to what he's looking for in the report, Lavin said he hopes the DOL becomes "very definitive in what it expects as far as parity compliance" for third-party administrators, and sets out specific benchmarks for things like network adequacy, for example.

DOL Fiduciary Rule

The DOL blew past a deadline of December to propose a new regulation outlining how Employee Retirement Income Security Act investment duties apply to rollover solicitations, which attorneys have been looking out for since President Joe Biden took office.

According to an updated regulatory agenda the department released in June, the proposal's new due date is sometime in August. Attorneys have been looking out for possible new regulations from the DOL outlining how ERISA investment duties apply to rollover advice for a fee after an earlier attempt was **invalidated by the Fifth Circuit** in 2018.

The Fifth Circuit panel's decision to invalidate the rule essentially reinstated the DOL's five-part test from 1975 for determining fiduciary duties. That led the DOL under former President Donald Trump to **propose** — and in the final weeks of his administration in December 2020 to **finalize** — a new exemption to ERISA's prohibited transaction rules allowing investment managers to provide rollover advice for a fee and receive certain types of compensation. A preamble to that exemption also explained the DOL's view on how the 1975 five-part test applied to rollover situations.

Andrew Oringer, partner and general counsel at The Wagner Law Group who represents employers, said he doesn't expect the DOL to walk away from attempting to regulate rollover solicitations in the fiduciary rule, given that's been an "extremely central part of the whole initiative."

But "it's a very complicated path at this point," Oringer said, pointing to court rulings against the DOL's previous interpretations of when rollover solicitations are subject to fiduciary duties under ERISA.

In addition to the Fifth Circuit, Oringer pointed to a **Florida federal court's invalidation** in February of interpretive guidance in a **frequently-asked-questions document** from 2021, which had further explained the preamble from the 2020 transaction exemption. That was based on a finding that policy contained in the FAQ document conflicted with federal benefits and administrative procedure laws.

The Florida court said its analysis was guided by a New York federal court's decision from September in private class action litigation that analyzed how ERISA fiduciary duties apply to rollover transactions. The court's decision to **dismiss that suit** against the Teachers Insurance Annuity Association of America was based on the court finding that TIAA was not an ERISA fiduciary when it recommended rollovers.

In the DOL suit, U.S. District Judge Virginia M. Hernandez Covington said the agency's interpretation in the FAQ had attempted to capture rollover transactions outside the scope of ERISA. Judge Covington said that amounted to an arbitrary and capricious interpretation of current law in violation of the Administrative Procedure Act.

Specifically, Judge Covington rejected the Employee Benefits Security Administration's interpretation of how one prong of the 1975 five-part test, known as the regular basis prong, applied to rolling money out of a retirement plan and into an individual retirement account.

A Texas federal magistrate judge on Friday also recommended a court **rule against the DOL's interpretation** on how fiduciary duties apply to rollover transactions in another lawsuit challenging the agency's 2020 exemption.

"It's starting to be at least arguably clear that if the DOL wants to continue to pursue its initiative regarding the ERISA regulation of rollover solicitations, there's going to need to be some change to the applicable regulatory language, and that any such change would itself need to withstand judicial scrutiny," Oringer said Friday after the Texas ruling came out.

Jeff Ross, chair of the executive compensation and ERISA department at Fried Frank Harris Shriver & Jacobson LLP, who represents employers, said regarding the DOL's proposal on the fiduciary rule, "I think the question is going to be how much they've learned from their experiences in litigation, and how focused they're going to be in terms of targeting particular behavior that they're concerned

with."

Ross said he hopes the DOL will leave the five-part test in the rule but add "new interpretive guidance around the five-part test by way of notice-and-comment rulemaking."

QPAM Transaction Exemption

Attorneys are closely watching to see how the DOL finalizes a proposal that would dramatically reshape how institutional investment managers can access ERISA-regulated retirement funds, using what's called a qualified professional asset manager, or QPAM, exemption to prohibited transaction rules imposed under ERISA.

The DOL's **proposed exemption** from last July generated **significant blowback** from retirement and financial industry groups as well as many benefits attorneys, including those representing large institutional investment managers.

The DOL said in its proposal that changes to the exemption were prompted by a growing number of financial firms, including very large banks, **seeking waivers** in recent years from the QPAM exemption's criminal disqualification rules. The agency said the proposed changes were needed to protect plans and make clear that foreign criminal convictions are as disqualifying as domestic ones for the purposes of obtaining the exemption, following ambiguity on the point during the Trump administration.

But some of the more technical aspects of the proposal, such as new requirements on record-keeping and indemnity provisions tied to potential disqualification, have triggered some of the loudest protest from industry groups and other critics.

The QPAM exemption is widely used by investment firms — such as banks, savings and loan institutions or insurance companies — because it allows them to engage in a broad range of business without compromising their ability to handle ERISA-regulated retirement plans as well.

Oringer, who testified on the proposal during a DOL **public hearing** in November, said he thinks the exemption is close to being finalized.

"It is going to be significant just how close the department stays to some of their proposals, which did rankle some people in the financial community," Oringer said.

"I think the department wants to be careful that whatever it does, that it doesn't materially cut back on the exemption's utility and usability," Oringer said.

Other attorneys have questioned whether stiff political headwinds during Biden's first term might delay work on the proposal.

Fried Frank partner Ross said that on QPAM, he'd prefer if the DOL opted for the regulation to "fall off the docket, because I'm not sure what they can do to come out with something that actually is necessary and makes sense."

"They need to think really hard about what's actually bothering them and write something that's extremely targeted to that," Ross said.

--Editing by Bruce Goldman and Aaron Pelc.