

New Republican Discrimination Bill Adds Little to Current Law: Lawyers

A new Republican bill purports to prevent discrimination in corporate retirement plans. Lawyers say it's not fit for purpose.

By **Bridget Hickey** | September 18, 2023

A Republican bill that would ban race as a factor in the investments corporate pensions and other plans are able to choose is winding its way through the House of Representatives.

The bill is part of a wider right-wing political effort to weaken corporate diversity initiatives but has little practical application, as the law already requires fiduciaries to act solely in the financial interest of plan participants, according to lawyers who specialize in pension regulations.

The “No Discrimination in My Benefits Act,” sponsored by Representative **Bob Good**, a member of the ultraconservative House Freedom Caucus, would amend the Employee Retirement Income Security Act of 1974 to prevent plan fiduciaries from taking race, color, religion, sex or national origin into consideration when selecting a fiduciary, counsel, employee or service provider.

Good told FundFire the bill was in response to a **letter** sent by Democratic lawmakers to companies, “demanding” that they outline their efforts to hire based on “immutable characteristics – rather than their experience, their expertise, their knowledge, their skill [and] their competence.”

Under the **Biden** administration, the **Department of Labor** has “increasingly put pressure on companies to consider factors such as race and sex in the decisions that they make,” he said.

The June 2022 letter from Democratic lawmakers asked 25 companies for data on their pensions’ use of women–and minority–owned asset managers as well as information on the pensions’ commitments to increasing opportunities for diverse firms.

Good’s proposed legislation is part of a suite of bills introduced by Republicans aimed at pushing back against the Biden administration’s final **regulations** that set out the parameters for environmental, social, and governance investing. The rule states that a fiduciary under the act, also called Erisa, may use ESG investing to improve risk-adjusted returns but not to obtain collateral benefits, which would include moral or ethical concerns.

The bills represent “a pretty fundamental misunderstanding” of these “neutral” regulations, said **Josh Lichtenstein**, a partner at **Ropes & Gray**.

Good’s proposed amendment would not change how plan fiduciaries evaluate service providers because “fiduciaries have never been charged with the ability to, quote unquote, discriminate,” he said.

However, the bill could impact some of the factors considered under the so-called “tiebreaker” principle, which allows a fiduciary to consider collateral benefits outside of investment returns only if evaluating two investments of equal economic merit. These provisions are rarely used, Lichtenstein said.

He labelled the bill a “messaging exercise” to challenge the idea of hiring managers that make deliberate efforts to promote diversity and to signal the priorities of a hypothetical future Republican administration.

Under the **Trump** administration, the Department of Labor sought to curtail ESG investing by creating a rule that required fiduciaries to select investments based on a “pecuniary” standard. The language did not explicitly ban ESG investing but was **deemed** to have a chilling effect.

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The intention behind this bill and future legislation is similar, said Lichtenstein.

Fiduciaries that invest with a manager that makes deliberate efforts to promote diversity may “worry” that hiring that manager will be seen to be considering race inappropriately, creating a “chilling effect, based on perceived hostility within the government,” he said.

The suite of bills also provides a “blueprint” for state Republican lawmakers looking to legislate against ESG and diversity, equity, and inclusion programs, he added. State pensions are not governed under Erisa, but some operate investment programs with the express purpose of hiring managers from underrepresented groups.

Women–and minority–owned firms represented just 1.4% of U.S. based assets under management as of 2021, according to research by the **Knight Foundation**, which also found that these firms perform at a level comparable to that of predominantly white, male owned managers.

From a technical perspective, the bill is an “awkward fit,” said **Mark Greenstein**, an attorney with **The Wagner Law Group**, who spent nearly 25 years working for the Department of Labor’s Employee Benefits Security Administration, or EBSA, the division which interprets Erisa law.

“Nobody within EBSA likely has any kind of expertise with regard to race, age, sex discrimination, because they never would have had to deal with that professionally,” he said. “There is a big body of law outside of Erisa, outside of benefits law, that addresses that. Plunking something down in the middle of Erisa, where the agency interpreting that portion of the law has limited or no expertise, would be very awkward and problematic in my view.”

The bill is “part of a comprehensive and well-coordinated effort by the Right to eliminate consciousness of race and gender under the law, and to intimidate people who are trying to diversify,” said **Robert Raben**, founder of the **Diverse Asset Managers Initiative**.

The U.S. Supreme Court's June **decision** to reject affirmative action in collegiate admissions has sparked a wave of activity by conservative lawmakers and activists targeted at DEI initiatives.

A reverse-discrimination **lawsuit** filed last month against a venture capital firm offering grants to Black women business is predicted to have wide-ranging implications for diversity initiatives, including those within the asset management industry.

Raben suggested that if Good's legislation passes, it could provide lawyers and regulators with a tool to diversify the industry by pushing back against plans with a roster of all-white and all-male investment managers.

The bill is unlikely to pass in the senate, which has a Democratic majority.

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