

LEGAL UPDATE

Election 2024: ERISA and the Proposed New Labor Secretary – Look(ing) for the Union Label?

Andrew Oringer, Esq., Mark Greenstein, Esq., Stephen Wilkes, Esq.,
Susan Rees, Esq. and Marcia S. Wagner, Esq.

President-Elect Trump has proposed Rep. Lori Chavez-DeRemer as the next Secretary of Labor. The selection is particularly notable for the clear pro-union leanings of the nominee of a Republican president-elect.

Any effort to handicap how Rep. Chavez-DeRemer's possible leadership may impact the conduct of the Department of Labor (DOL) on specific ERISA-related issues is arguably a fool's errand, particularly at the extremely early stage. As with many federal agencies, the handicapping is complicated not only by uncertainty about how the political appointee will act but also by considerations of how the appointee will interact with non-political career staff at the agency. However, merely setting the stage for what could be in store may be at least somewhat less daunting.

The impact of changes in the President's party on the ERISA world has been palpable in certain policy issues over the years as administrations go between Democratic and Republican. A recent sampling is:

- After years of a pendulum-like swing in sub-regulatory advice as administrations changed, the previous Trump DOL adopted a prudence/loyalty regulation that was arguably negative to the consideration of environmental, social and governance (generally referred to as "ESG") factors by plan fiduciaries. The Biden DOL then adopted an amendment to the regulation (which has thus far survived judicial scrutiny) that was perceived as less negative to the consideration of such factors. More generally, the first Trump administration was widely seen as hostile to ESG overall, while the Biden administration generally promoted ESG-oriented themes.
- The first Trump administration seemed in some ways to be ambivalent about expanding the reach of ERISA's fiduciary provisions. The Trump DOL declined to pursue an appeal of the rejection by the U.S. Court of Appeal for the Fifth Circuit in *Chamber of Commerce of the United States of America v. U.S. Department of Labor*, 885 F.3d 360 (2018), of the Obama administration's amended fiduciary rule, but then attempted to reinterpret the original 1975 rule in an expansive way. The Biden administration not surprisingly continued those reinterpretive efforts, and then, after the courts rejected the DOL's reinterpretation, adopted a "Retirement Security Rule" as yet another attempt (thus far again judicially rejected) to amend and expand the reach of the 1975 rule itself.

- The DOL under the first Trump administration issued an Information Letter in 2020 on private equity investments with a distinctly positive tone. The Biden DOL supplemented that letter in 2021 to change its tone, taking a more cautionary approach to alternative investments.
- The Biden DOL put out a 2022 Compliance Assistance Release that struck a cautionary note regarding cryptocurrency in participant-directed retirement plans. President-Elect Trump has evidenced general, maybe even enthusiastic, support of cryptocurrency.
- The Trump DOL put out 2020 guidance limiting the international reach of the anti-criminal rules in the class exemption for so-called "qualified professional asset managers" (also known as "QPAMs"). The Biden DOL rejected that guidance, and then proceeded to amend the QPAM Exemption expressly to confirm that rejection as well as to make a host of other restrictive changes.

Some of the above related to actual legal changes. Some (for example, in the case of private equity and cryptocurrency) were more in the nature of tonal shifts in approach. The ESG-related changes had elements of both.

In contrast to the state of play of the legal rules and their interpretation, a more common thread from administration to administration has been that basic enforcement efforts continue apace. Regardless of whether any particular current administration is perceived as pro- or anti-business, the DOL has continued to pursue the interests of participants and beneficiaries who are faced with allegedly noncompliant plan sponsors, allegedly breaching fiduciaries and the like. In this regard, however, questions may arise as to the effect on the DOL generally of any cuts in staffing or budget that may occur during the upcoming Trump administration.

The choice of an apparently pro-labor head of the DOL may cast real additional doubt on what a Trump DOL will do on any number of specific matters. Now even less clear is the extent to which the ERISA-related decisions, strategies, and approaches of the first Trump administration will carry over to the second. It is also noted that it may be appropriate to view the potential for any continuing or new DOL action through the prism of the Supreme Court's rejection, in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), of the deference to administrative rulemaking previously established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

In any event, as to general enforcement activity, as opposed to rulemaking and other interpretive activity, the DOL's consistent attention to protecting participants and beneficiaries from carelessness and malfeasance may well be safe.

Part of the reason for uncertainty about the future is that there are a number of distinct stakeholder groups, including, among others, plan sponsors, participants and beneficiaries, fiduciaries, financial institutions, vendors, and unions. Each of these may have a different perspective on any particular issue. As just one example, some may view ERISA's prohibited transaction provisions as protective, while others may see them as

objectionable and unnecessary (or at least overbroad) impediments. Indeed, larger sponsors and organizations may have different perspectives from smaller sponsors and organizations.

We will be watching these meaningful and consequential developments as decisions and events unfold.

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Marcia S. Wagner is the Managing Director of *The Wagner Law Group*. She can be reached at 617-357-5200 or Marcia@WagnerLawGroup.com.