



Contemporary Compliance Issues

LORI WAICHMAN

ASSOCIATE, MOONEY, GREEN, SAINDON, MURPHY, AND WELCH

IVELISSE BERIO LEBEAU

VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL EMPLOYEE BENEFITS ADMINISTRATORS, INC. (NEBA)

Department of Labor Nominations



- ▶ Secretary of Labor - Lori Chavez-DeRemer
- ▶ Deputy Secretary of Labor - Keith Sonderling
- ▶ Assistant Secretary of Labor for EBSA - Daniel Aronowitz

Special Financial Assistance

- ▶ As of 2/28/2025:
 - ▶ **144** plans received \$70,894,998,650 in SFA, representing 1,528,409 participants
 - ▶ **28** plans under review requesting \$3,214,457,460, representing 345,147 participants
 - ▶ **112** plans with locked in with measurement date set and **116** plans on waiting list
 - ▶ E-filing portal closed as of end of February (Plans can still lock in measurement date)



Special Financial Assistance

- ▶ Update on repayment of SFA due to inaccurate census data
 - ▶ February 20, 2025: Letter from Committee on Education and Workforce to Attorney General requesting information on
 - “The steps DOJ is taking to ensure that taxpayer money is recovered after the Biden-Harris administration made improper payments to multiemployer pension plans.”
 - ▶ Letter states 60 plans received improper payments, 30 have repaid and “[t]herefore, no repayments have been made from the other 30 plans.”
 - ▶ Reality: No plans have refused to reimburse SFA received for deceased participants and remaining plans are working to confirm who is deceased and how much SFA is to be repaid.

Employer Withdrawal Liability Update

Yellow Bankruptcy (*In re Yellow Corp.* 23-11069)

- ▶ Filed on August 6, 2023 in Delaware Bankruptcy Court
- ▶ On November 22, 2024, Yellow submitted a Plan of Liquidation (“Plan”)
- ▶ Yellow contributed to nearly two dozen multiemployer plans, with EWL claims totaling over \$7 billion
- ▶ Nearly half of the plans received SFA, which, per PBGC’s Phase-In and No-Receivables regulations were not included in plan assets for purposes of calculating EWL
- ▶ Yellow contested treatment of SFA, but court upheld, stating PBGC has power to regulate and that the Phase-In and No-Receivables regulations are lawful



Employer Withdrawal Liability Update

- ▶ Discount Rate Litigation

- ▶ *Colo. Fire Sprinkler, Inc. v. Nat'l Automatic Sprinkler Indus. Pension Fund*, 725 F. Supp. 3d 1248 (D. Colo. 2024).

Held Segal Blend was *not* actuary's best estimate due to improper reliance on "circumstances he did not anticipate would occur."

- ▶ *Pension, Hospitalization & Benefit Plan of the Elec. Indus. v. ConvergeOne Dedicates Servs., LLC*, 730 F. Supp. 3d 4 (S.D.N.Y. 2024).

- ▶ Held Segal Blend was not based on the plan's actual investments and thus, was not actuary's best estimate.

Employer Withdrawal Liability Update

- ▶ Discount Rate Litigation Continued
 - ▶ Mich. Paving & Materials Co. v. Operating Eng'rs Loc. 324 Pension Fund, No. 23-cv-12019, 2024 BL 309997, 2024 US Dist Lexis 159157 (E.D. Mich. July 31, 2024)
 - ▶ GCIU-Employer Ret. Fund v. WestRock Co., No. 2:21-cv-08070-FWS, 2023 BL 124157, 2023 WL 3402617 (C.D. Cal. Mar. 10, 2023)
 - ▶ Ace-Saginaw v. Operating Eng'rs' Loc. 324 Pension Fund, No. 23-CV-11092, 2024 BL 96030, 2024 WL 1223532 (E.D. Mich. Mar. 20, 2024)
 - ▶ Nat'l Ret. Fund v. Domestic Linen Control Grp., No. 23-cv-5955 (AS), 2024 BL 262419 (S.D.N.Y. July 31, 2024)

Investment Standards and ESG Considerations

- ▶ Current Rule: “all things being equal”
- ▶ *Utah v. Micone*, No. 2:23-CV-016-Z, 2025 BL 48535 (N.D. Tex. Feb. 14, 2025)
 - ▶ Held Rule permits, in full accord with the fiduciary's duties, a fiduciary to look to collateral factors to break a tie when investment options would equally serve the plan, and prudence would disallow investing in both.
- ▶ *Spence vs. American Airlines*, No. 23-cv-552, 2024 WL 733640 (N.D. Tex. 2024)
 - ▶ Held Plan fiduciaries breached duty of loyalty by allowing corporate interests to influence management and investment of plan assets.
- ▶ Prior Trump administration replaced “all things equal” standard with “economic equivalence” standard and added significant documentation requirements.



Compliance with the Mental Health Parity and Addiction Equity Act (MHPAE)

- ▶ Plans are not required to offer mental health/substance abuse disorder (MH/SUD) benefits
- ▶ Plans that offer both medical/surgical benefits (M/S) and MH/SUD benefits must ensure that financial requirements and treatment limitations meet required parity standards
- ▶ Consolidated Appropriations Act of 2021 (CAA 2021) expanded obligations to evaluate parity between M/S and MH/SUD benefits
- ▶ Tri-Agency MHPAEA Final Rule issued September 2024, effective November 2024, with requirements effective in 2025 and 2026

Compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA)

- ▶ MHPAEA requires that group health plans and issuers ensure parity for MH/SUD benefits in:
 - ▶ Financial requirements (Quantitative)
 - ▶ Treatment Limitations (Non-Quantitative)
- ▶ **CAA 2021 expanded obligations and requires health plans and issuers to perform comparative analyses of the design and application of Non-Quantitative Treatment Limitations (NQTLs)**
- ▶ Statutory language raises many questions and there has been limited guidance on how plans and issuers are to identify NQTLs and how to perform the comparative analysis

MHPAEA Final Rule

- ▶ Two Part Test: Group health plans must review NQTLs for MH/SUD to evaluate:
 - ▶ Design & Application
 - ▶ Relevant Data Evaluation
- ▶ New Standards for Comparative Analysis
 - ▶ Sets forth six content requirements
- ▶ Fiduciary Certification for ERISA Plans
 - ▶ Prudent Process to Engage a Qualified Service Provider
- ▶ Staggered effective dates for plan years beginning in 2025 and 2026
- ▶ **ERISA Industry Committee (ERIC) filed lawsuit challenging Final Rule in January 2025**
- ▶ New administration could withdraw Final Rule

2024 Report To Congress On Mental Health Parity

- ▶ Tri-Agency Report to Congress was submitted in January 2025, as required by the CAA 2021
- ▶ Report described results of investigations and identified NQTL factors that the agencies believe must be addressed to meet the CAA 2021 standards, such as:
 - ▶ Network Access and Network Composition
 - ▶ Provider Reimbursement Rates
 - ▶ Exclusion of treatments for certain conditions
 - ▶ Prior authorization
 - ▶ Concurrent care review
 - ▶ Reimbursement rates for in and out of network services

2024 Report To Congress On Mental Health Parity

- ▶ Report includes full settlement agreement between the DOL and a large multiemployer health fund
 - ▶ DOL determined that Fund's comparative analysis was deficient
 - ▶ Fund uses Cigna as a network provider
- ▶ Fund agreed to perform significant review and analysis of its plan design, compare network providers, consider a supplemental network, provide significant reporting
- ▶ *Report specifically refers to the settlement agreement as an example for other plans*
- ▶ Settlement agreement requires deeper and more active analysis than NQTL comparative analyses provided to plans

2024 Report To Congress On Mental Health Parity

- ▶ Some elements of settlement agreement:
 - ▶ Quarterly review of the adequacy of provider network
 - ▶ Collect and evaluate:
 - ▶ OON utilization and IN utilization
 - ▶ Wait times for new and existing patients
 - ▶ Time and distance measurements for network providers
 - ▶ Provider to member ratios
 - ▶ Retention of network providers
 - ▶ Telehealth
 - ▶ Identify network gaps and take affirmative steps to close them
 - ▶ Identify providers and facilities for recruitment to network
 - ▶ Compare network providers

No Surprises Act Compliance

- ▶ The No Surprises Act (NSA) was also part of CAA 2021
- ▶ NSA prohibits balance billing for participants if they receive:
 - ▶ Out of network emergency services
 - ▶ Out of network services at an in network facility
 - ▶ Air ambulances
- ▶ While participants are protected from unexpected billing, plans must pay out of network providers for non-contracted services, and need to determine participant cost-sharing

No Surprises Act Compliance

- ▶ NSA requires that plans determine a Qualifying Payment Amount (QPA) to use in calculating cost-sharing and paying OON providers
- ▶ NSA directed agencies to create rules for determining a QPA
- ▶ NSA requires that plans pay and negotiate pricing with OON providers using a QPA
- ▶ NSA provides Independent Dispute Resolution (IDR) process to determine pricing when a plan and OON provider cannot agree on price for OON services
- ▶ NSA directed agencies to create rules for the IDR process

No Surprises Act Compliance

- ▶ Tri-Agency regulations implementing NSA standards were promulgated in 2022; agencies also issued sub-regulatory guidance
- ▶ Regulations challenged in court by the Texas Medical Association
- ▶ District court invalidated major portions of the rules for establishing the QPA; Fifth Circuit affirmed in part and reversed in part in October 2024; petition for rehearing en banc filed December 2024
- ▶ Portions of rule remain blocked
- ▶ Proposed rules for IDR operations issued in November 2023 were not finalized

No Surprises Act Compliance

- ▶ Plans are experiencing challenges with pricing for OON providers
 - ▶ OON providers not negotiating and opting for IDR
 - ▶ OON providers seeking high pricing for services
- ▶ 2024 Brookings Institute Report
 - ▶ IDR often decisions exceed Medicare rates
 - ▶ Provider offers significantly exceed QPA
 - ▶ Providers seeking historic OON rates
 - ▶ Process not reducing costs as anticipated
- ▶ New administration will need to decide how to proceed with both Fifth Circuit case regarding validity of NSA rules and rulemaking for IDR process

ERISA Advisory Council 2024 Inquiry: Group Health Plan Claims and Appeals

- ▶ Council studied health plan claims and appeals procedures
- ▶ Considered 2023 study by the KFF noting low volume of appeals of health plan adverse benefit determinations
- ▶ Examined whether plan participants lack information or understanding of claim procedures
- ▶ Looked at Explanations of Benefits and whether they provide sufficient information to participants regarding reasons for claim denials
- ▶ Council's Report was presented at a public meeting and accepted by the Secretary
- ▶ Council's Report had not been made public and 2024 materials had been removed from website; restored on Wednesday!

ERISA Advisory Council 2024 Inquiry: Group Health Plan Claims and Appeals

1. Update DOL guidance to improve use of electronic communications for health plan claims
2. Develop model language and model forms for use in claims and appeals process
3. Examine how the DOL can collect useful data on health plan claims and appeals
4. Allocate additional resources to address systemic abuses or failures to comply with procedural requirements

ERISA Advisory Council 2024 Inquiry: Group Health Plan Claims and Appeals

5. Update existing regulations on urgent care claims
6. Develop and implement educational campaign to better inform claimants about appeal rights
7. Mandate that clinical determinations be made in account with generally accepted evidence-based standards of care and treatment
8. Develop standards for use of artificial intelligence in claims and appeals determinations

ERISA Advisory Council 2024 Inquiry: Group Health Plan Claims and Appeals

9. Expand requirements that medical judgments be made by persons with appropriate clinical training
10. Issue guidance on when actions taken by third party administrators are fiduciary rather than ministerial
11. Seek recommendations regarding document retention policies
12. Require that plans cover costs of services or medication once authorization has been given

ERISA Advisory Council 2024 Inquiry: Group Health Plan Claims and Appeals

- ▶ NEBA submitted written testimony and testified
- ▶ NCCMP submitted written testimony
- ▶ Shared experience regarding multiemployer plan claims and appeals procedures for self-funded plans that are self-administered or jointly administered
 - ▶ Informal Resolutions of Claim Denials
 - ▶ Control over Plan Design by Trustees
- ▶ Plans that are insured or have ASO arrangements where the carrier manages claims and appeals are subject to same issues as other insured group health plans

Additional Updates: QPAMs

- ▶ QPAM PTE 84-14
 - ▶ Proposed PTE would have:
 - ▶ Restricted entities from getting QPAM status.
 - ▶ Made it harder to get individual QPAM status and easier for status to be revoked.
 - ▶ If QPAM status was revoked, entity would have been required to immediately stop investing, allow plan to terminate contract, and indemnify plan for damages.
 - ▶ Final PTE:
 - ▶ Removed significant portion of requirements and restrictions.
 - ▶ Final PTE requires QPAMs to notify DOL if it intends to rely on PTE, and DOL has published list online (“Entities Relying on PTE 84-14”).

Additional Updates: Fiduciary Rule

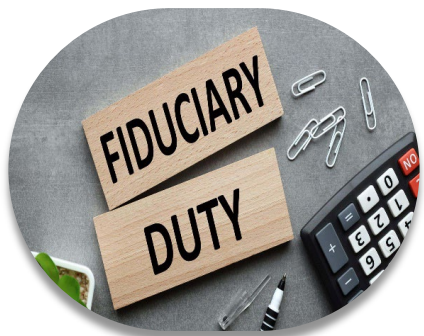
- ▶ Retirement Security/Fiduciary Rule

- ▶ Five-part test in use since 1975:

- ▶ (1) render advice as to the value of securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

- ▶ Two-part test - April 2024:

- ▶ (1) The person either directly or indirectly makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation..., or (2) The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.
 - ▶ Effective date set for September 23, 2024 was delayed, stayed due to litigation (*Federation of Americans for Consumer Choice Inc. v. DOL*, E.D. Tex., No. 6:24-cv-00163) and now likely will not go into effect per Regulatory Freeze.



Additional Updates: CIAs

▶ DOL Common Interest Agreements

- ▶ *Harrison v. Envision Management Holding, Inc. Board of Directors et al* (Case No. 21-cv-00304)
 - ▶ Class action complaint alleged breaches of fiduciary duties and prohibited transactions related to stocks purchased by ESOP.
 - ▶ Plaintiffs contend that ESOP participants share a common interest with DOL in Defendants' return of the amount the ESOP overpaid for a stock purchase.
 - ▶ September 25, 2024: District Court for the District of Colorado issued an order affirming the Magistrate Judge's ruling invalidated CIA between plaintiffs and DOL.
 - ▶ The District Court also denied the plaintiffs' request for a stay to allow them to seek a writ of mandamus in the 10th Circuit.
- ▶ November 2024: Rep. Virginia Foxx called on OIG to commence investigation into common interest agreements.

Additional Updates: Retirement Plan Litigation

▶ Litigation

▶ *AFGE, AFL-CIO v. United States OPM* (3:25-cv-01780)

- ▶ AFL-CIO, with AFGE, AFSCME, SEIU, CWA filed TRO to stop DOGE access to DOL data and documents. On February 7, 2025, DDC said organizations had no standing and denied TRO.

▶ *King et al v. USA*, No. 23-1956

- ▶ Appeal in Federal Circuit, class action alleging MPRA benefit reduction to enable plan to obtain SFA was a 'taking' under the Fifth Amendment. Arguments scheduled March 6, 2025.



Additional Updates: PBM Related Litigation

- ▶ Lewandowski v. Johnson & Johnson (D.N.J. 2024):
 - ▶ Employee brought suit against J&J alleging breach of fiduciary duty in connection with managing prescription drug benefit pricing
 - ▶ January 24, 2025: District Court issued order on Defendants' Motion to Dismiss
 - ▶ Dismissed breach of fiduciary duty claims for lack of Article III standing
 - ▶ Did not dismiss claim alleging failure to provide documents
- ▶ Navarro v. Wells Fargo & Company, (D. Minn. July 2024)
 - ▶ Similar breach of fiduciary duty claims to J& J case
- ▶ New Lawsuits Challenging Copay Assistance Programs:
 - ▶ Gluesing v. Prudentrx LLC & Caremark RX LLC, (D.R.I. Dec. 26, 2024)
 - ▶ Gurwitch v. Save on SP LLC, et al., (W.D.N.Y. Jan. 3, 2025)

Additional Updates: Health Plans

▶ **HIPAA Privacy Rule to Support Reproductive Health Care Privacy**

- ▶ April 2024 Final Rule created new HIPAA standards for the privacy of reproductive health care
- ▶ HHS page on this Final Rule includes this note:
 - ▶ Per a court order, HHS is required to restore this website as of [February 11, 2025 at 11:59 p.m]. Any information on this page promoting gender ideology is extremely inaccurate and disconnected from the immutable biological reality that there are two sexes, male and female. The Trump Administration rejects gender ideology and condemns the harms it causes to children, by promoting their chemical and surgical mutilation, and to women, by depriving them of their dignity, safety, well-being, and opportunities. This page does not reflect biological reality and therefore the Administration and this Department rejects it.
- ▶ Was challenged in court
- ▶ Likely will be withdrawn

Additional Updates: Health Plans

▶ **ACA Section 1557 Nondiscrimination Rules**

- ▶ Final rule April 2024
- ▶ Long history of battling rules
 - ▶ 2016 Obama Administration: expanded nondiscrimination on basis of gender with broad definition; challenged in court
 - ▶ 2020 Trump Administration: new rules eliminated expansive definition of gender
 - ▶ 2024 Biden Administration: new rules expanding nondiscrimination on basis of gender
 - ▶ 2025 Trump Administration: Executive Order directs HHS to review regulations, including Section 1557 rules; Executive Order with definitions of male and female
- ▶ Anticipate that these rules will be withdrawn

Additional Updates: Apprenticeship Plans

- ▶ Registered Apprenticeship Programs have EEO and affirmative action obligations pursuant to 29 CFR Part 30 (revised in 2016)
- ▶ Executive Order essentially eliminated Office of Federal Contract Compliance (OFCCP) enforcement of EEO/AA obligations, banned DEIA in the federal government workforce, and encouraged the private sector to eliminate DEIA
- ▶ No mention of EEO and AA requirements for apprenticeship programs
- ▶ Some states have MOUs with the DOL and state agencies enforce registered apprenticeship program standards

Looking Into the Future



- ▶ Executive Orders
 - ▶ EO 14215 – Requires that independent agencies, such as PBGC, “conform closely” with White House Priorities.
 - ▶ EO 14192 - Mandates that agencies eliminate 10 regulations for every new regulation.
- ▶ Project 2025
 - ▶ Calling for “greater scrutiny and reporting requirements for multiemployer plans” including requiring *more* reporting by plans to PBGC. (Page 609).
 - ▶ Encouraging Congress to create “safe harbor” for independent contractors to participate in employer-provided benefits. (Page 591).
 - ▶ Recommending DOL issue regulations that encourage greater participation in employee stock ownership plans (ESOPs). (Page 610).
 - ▶ Encouraging the DOL to prohibit ERISA retirement plans from investing plan assets based on any factor other than investor risks and returns, specifically environmental, social, and governance (ESG) factors. (Page 606).



QUESTIONS