Daily Labor Report
Deep Dive

Ex-Benefits Enforcers Assemble to Counter Trump Shifts in Court

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Summary by Bloomberg AI

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- A group of former Department of Labor officials and lawyers are providing a bulwark in court against what they view as Trump administration shifts away from protecting participants in health and retirement plans.
- The former officials, including veterans of the Employee Benefits Security Administration, have come out in support of workers in separate legal disputes and have written to lawmakers to oppose a bill that would make it harder for workers to sue employers over their benefits plans.
- The effort is seen as unusual, with the former officials cautioning against the department's positions and seeking to raise awareness about the other side of issues and to "speak for the people who seem to be forgotten in this equation."

A group of former Department of Labor officials and lawyers are providing a bulwark in court against what they view as Trump administration shifts away from protecting participants in health and retirement plans.

Veterans of the Employee Benefits Security Administration and the Plan Benefits Security Division in the labor solicitor's office have come out in support of workers since late January in separate legal disputes over pension de-risking and an employee stock ownership plan. They also wrote to lawmakers this month to oppose a bill that would make it harder for workers to sue employers over their benefits plans.

Although ex-government officials can often sign onto friend-of-the-court briefs and issue statements criticizing new administrations, it's unusual to see an organized effort among the small fraternity of former high-ranking DOL officials cautioning against the department's positions.

EBSA’s current leader, Daniel Aronowitz, has been vocal in his desire to curb what he sees as excessive litigation from the plaintiff’s bar against plan sponsors and fiduciaries over fees and losses. That has translated into changes in the agency’s enforcement priorities, as well as a slew of pro-employer amicus briefs from the DOL, with some worker-side exceptions.

“The Department of Labor seems determined to make it harder for participants and beneficiaries to make their claims,” said Tim Hauser, who worked at the department as a career official since 1991 before retiring in December after serving as EBSA’s deputy assistant secretary for program operations. “Somebody needs to step up and make sure that opposing view is heard. That was motivational for us.”

The effort also includes former Democrat-appointed EBSA leaders Phyllis Borzi and Ali Khawar; former DOL lawyers William Taylor and Karen Handorf; and Daniel Maguire, who served in EBSA’s Office of Health Plan Standards and Compliance Assistance.

A DOL spokesperson said the department is “restoring balance to the system—we are pro ERISA.”

“We will continue to execute on our mission to ensure the security of America’s voluntary employee benefits plan system,” they said.

‘Different Mindset’

Traditionally, the agency’s approach hadn’t changed much from administration to administration, with the exception of environmental, social, and governance issues, said Borzi, the Obama administration’s EBSA head.

“Everybody understood the point was to ensure participants were protected,” Borzi said. “There might have been minor variations here and there, but there is an entirely different mindset, and that’s troubling.”

But other Employee Retirement Income Security Act practitioners cautioned against the idea that EBSA isn’t supporting workers.

“There’s a misperception that the current Department of Labor is very pro-employer to the detriment of participants,” said Rick Nowak, a partner with Mayer Brown who represents plan sponsors, administrators, and fiduciaries.

Nowak argued the department is re-calibrating by seeking to curb frivolous litigation while allowing meritorious claims to proceed. He said there has been a significant uptick in class actions targeting large retirement plans, something that could harm participants by causing fiduciaries to invest more cautiously.

There is a shared goal of protecting participants’ benefits, but there is a “disagreement over how to get there,” he said.

Raise Awareness

Borzi acknowledged it's unlikely the former officials' effort will get EBSA to change course. The goal, she said, is to raise awareness about the other side of issues and to "speak for the people who seem to be forgotten in this equation."

Borzi and Khawar, who led EBSA during the Biden administration, submitted an amicus brief Jan. 30 in support of Lockheed Martin Corp. workers after the DOL told the US Court of Appeals for the Fourth Circuit that the workers didn't have standing to sue in a pension plan dispute.

The full group asked the Eleventh Circuit last week for permission to file an amicus brief urging the court to eliminate a rule that forces participants to exhaust a benefit plan's administrative remedies before suing over an alleged fiduciary breach. The rule is unique to that circuit.

The DOL also opposed that Eleventh Circuit rule in a recent amicus brief, but noted it would not "reflexively support plan participants in every case."

Additionally, the former officials submitted a letter to House Education and Workforce Committee Chairman Tim Walberg (R-Mich.) and Ranking Member Bobby Scott (D-Va.) before the panel considered legislation to raise the burden on plaintiffs who sue plan fiduciaries. The bill passed out of committee on a party-line vote.

"It's not the political party that drives our concern," Borzi said. "It's the peeling away of the protections, the longstanding protections, that bother us."

Jeff Hahn, a partner at Stris & Maher LLP who previously litigated ERISA cases at the DOL, said the group's success will partly depend on their persuasiveness.

Courts have traditionally taken into account amicus briefs from individuals or groups with deep knowledge of the subject of the case, he said.

Future Actions

The former officials said they don't have a formal structure for deciding when to weigh in. They also noted that researching, writing, and filing briefs can be expensive and time consuming, and the group doesn't have the resources of the government or the industry.

But they said they expect to continue to make their voices heard.

Khawar said the group's expertise isn't limited to retirement issues, a sign they may weigh in on cases and legislation around health-care plans and other topics.

Members of the group will also be watching as EBSA prepares to address ESG investing and issue regulations allowing more investments in alternative assets like private equity in retirement plans.

“It is important that someone’s speaking up for this other perspective that’s just going to be ignored from the decision-making process otherwise,” Khawar said.

Kevin Walsh, fiduciary practice leader at Groom Law Group, said he worried the push could set off a chain reaction where former officials file briefs criticizing each change in administration.

“It’s not good for folks when a policy area as important as this becomes a political football,” Walsh said.

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