

CLIENT ALERT

DOL Reportedly Entered Information Sharing Agreement with Plaintiffs' Law Firm

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On Thursday, November 21, Virginia Foxx, Chairwoman of the House Committee on Education and Workforce, issued a letter to the U.S. Department of Labor's ("DOL") Office of the Inspector General requesting an inquiry into the DOL's apparent sharing of confidential information with a private law firm involved in ERISA litigation against an employee benefit plan and its fiduciaries.¹ The DOL apparently came into possession of the confidential information through an investigation conducted by the DOL's Employee Benefits Security Administration ("EBSA") and shared the confidential information with the law firm under the terms of a formal "Common Interest Agreement" (the "Agreement").² This appears to be the first confirmed instance of the DOL entering this type of confidential information-sharing agreement. And it evinces an unusual degree of cooperation between the government and a private law firm involved in ERISA litigation. Further, the existence of the Agreement carries meaningful implications for ERISA plan sponsors and fiduciaries, especially those that have been or may be the subjects of a DOL investigation involving ERISA matters.

¹ The Committee on Education and the Workforce's Letter is available [here](#).

² The Agreement is available [here](#).

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The Agreement, which was originally entered into on April 21, 2023, came to light approximately one year later during a discovery dispute in a private action arising out of an employee stock ownership plan (“ESOP”) transaction.³ Likely for strategic reasons, the Plaintiffs, former employees of a company sold as part of the ESOP transaction, sought to obtain a demand letter sent by the DOL—which was concurrently investigating the ESOP transaction—to the ESOP’s trustee, one of the Defendants. The ESOP trustee refused to produce an unredacted copy of the letter, and the Plaintiffs moved to compel its production. Through that discovery dispute and several that followed, the Court and Defendants became aware that not only had Plaintiffs already obtained from the DOL the letter they were seeking to compel, but Plaintiffs had entered into—and were ordered to produce—the Agreement between them and the DOL. The Defendants and the Court also learned that the DOL had sent additional documents to Plaintiffs, including EBSA investigation interview summaries, over which the Plaintiffs unsuccessfully sought to exert work product protection privilege vis-à-vis their common legal interest with the DOL.

The implications of the DOL entering into the Agreement with the Plaintiffs’ law firm, and of potentially having entered into other, similar information-sharing agreements, are significant. Unlike a typical private litigant, the DOL has broad investigative authority to inquire into potential ERISA violations. Most notably, the DOL can issue subpoenas without the existence of pending litigation, a power that private litigants do not enjoy. Affording private litigants access to the documents and testimony developed during a DOL investigation would, at a minimum, give private litigants a meaningful head start on discovery, not to mention potentially offering them access to insights and documents they would not have otherwise been able to obtain had they been limited to typical discovery methods.

Parties to these information-sharing agreements may also obtain documents and testimony which were provided against the backdrop of their production being in the spirit of cooperation—at least until this development—with an investigating regulator, rather than a hostile civil litigation. As an agency with enforcement authority, the DOL enjoys a degree of prosecutorial discretion when evaluating the impact of an investigation subject’s cooperation on any applicable penalty, should a penalty be assessed at all. This incentive structure between regulator and the regulated entity does not map analogously to the civil litigation context. The value of cooperation will likely be eroded if it comes to pass that information divulged during the course of DOL investigations may be later shared with private litigants.

Given this development, ERISA plan sponsors and fiduciaries that find themselves in a private ERISA action should endeavor to identify and understand the nature and scope of any cooperation between the DOL and the opposing parties. This is especially true for any entity which suspects or knows that it is or may be the subject of a DOL investigation.

³ See *Harrison v. Envision Management Holding, Inc. Board of Directors et al.*, Case No. 1:21-cv-00304-CNS-MDB, ECF No. 164 (D. Colo., Apr. 25, 2024).

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