Recent Decision Spotlights Coordination Between DOL and Plaintiffs' Firms

Defending ERISA claims against an enterprising plaintiffs' bar is challenging enough. That task becomes even more challenging when the Department of Labor (DOL) is working behind the scenes to support private-sector litigants. For example, the DOL has the power to issue subpoenas for documents and testimony without any pending litigation, which private plaintiffs cannot do. The DOL, as regulator, can exert pressure on sponsors, fiduciaries, and others to sit for interviews, even if no litigation is pending. Private plaintiffs and their lawyers do not have these advantages – unless the DOL secretly helps them.

To date, evidence of such public-private enforcement coordination has been limited. But should defense counsel be more concerned about the possibility of the DOL supporting a private plaintiff in pending litigation? And if such support is occurring, are defendants entitled to access all communications between plaintiffs' counsel and the DOL about the matter? A recent ruling by a District of Colorado magistrate judge in *Harrison v. Envision Management Holding, Inc. Board of Directors et al.* suggests the answer to both questions is "yes."

In *Harrison*, the plaintiffs were former employees of a company that was sold as part of an ESOP transaction. The plaintiffs sued the ESOP's fiduciaries for various ERISA violations arising out of the ESOP's acquisition of the company. The plaintiffs brought suit in the District of Colorado on behalf of all ESOP participants and the parties eventually proceeded to discovery.

Meanwhile, behind the scenes, the DOL had also been investigating the same transaction. Using its investigative subpoena powers, the DOL, which was not a party to any litigation related to the transaction, had obtained documents from, and conducted interviews of, among others, the ESOP trustee being sued by the private plaintiffs as part of a broader investigation of the trustee by the DOL (whose investigation also covered other transactions). Unbeknownst to those targets, the DOL was sharing information obtained through that investigation with the private plaintiffs, pursuant to a "common interest agreement."

The scheme came to light when, as part of discovery, the plaintiffs sought to obtain a demand letter sent to the ESOP's trustee, one of the ESOP's fiduciaries, by the DOL, presumably to get that letter, in which the DOL purportedly accused the trustee of breaching its fiduciary duties, into the record. The trustee refused to produce an unredacted copy of the letter, and the plaintiffs moved to compel its production. The scheme came crashing down when the court subsequently learned that the plaintiffs had not only already obtained the letter directly from the DOL, but also had been receiving additional documents from the DOL throughout the plaintiffs' litigation pursuant to the common interest agreement.

Upon learning of the plaintiffs' coordination with the DOL, the court immediately ordered the plaintiffs to produce the common interest agreement and log all documents it had received from the DOL. Among these were summaries of interviews the DOL conducted as part of its own investigation into the ESOP. When the plaintiffs asserted a common interest privilege and refused to produce these interview summaries, the defendants moved to compel their production.

The court ultimately granted the defendants' motion to compel. In so holding, the court concluded that there was not a sufficiently common legal interest between the plaintiffs and the DOL and that the DOL had therefore waived privilege over the interview summaries when it shared them with the plaintiffs.

Thompson Hine Takeaways

The exposure of the secret relationship between the DOL and *Harrison* plaintiffs made waves throughout the regulated community and confirms many sponsors' and other fiduciaries' concern that information provided to the DOL (or any other regulator) while cooperating with an investigation might improperly be shared. Importantly, the use of common interest agreements like the one in *Harrison* does not appear to be an isolated incident or out of the ordinary. The DOL commented publicly on *Harrison*, saying that common interest agreements "are a well-established legal tool" that "are used by government and private litigants alike."[1] Similarly, a spokesperson from the plaintiffs' firm in *Harrison* stated that common interest agreements "have been entered into by different administrations for decades."[2]

But the *Harrison* ruling suggests that courts may not look kindly on this kind of back-door information sharing and highlights the need for regulated parties and litigants to be proactive in avoiding or uncovering similar arrangements. Specifically, we recommend:

- **Protect information**. Companies and other parties asked to provide information to the DOL should get explicit agreement from the DOL not to share information with third parties except where required by law.
- **Ask questions early on**. Defense counsel should seek to identify DOL coordination at the outset of any case through targeted discovery requests.
- **Force the parties to establish the common interest privilege.** If an information-sharing arrangement is discovered, the DOL and third party must meet the high burden of establishing the existence of common interest privilege. The *Harrison* court squarely rejected the plaintiffs' argument that ERISA affords special protection to communications between the DOL and third parties; rather, the DOL's communications are subject to the same privilege and waiver analyses as any other communications. The parties must establish a common *legal* – as opposed to financial or commercial – strategy.

The *Harrison* decision has also sparked interest on Capitol Hill. Republicans on the House Committee on Education & the Workforce cited the ruling in a recent letter to the DOL's inspector general calling for an investigation into information sharing between the DOL and outside law firms. The findings of any investigation could provide even greater insight into the extent of DOL-plaintiff coordination in private litigation.

FOR MORE INFORMATION

For more information, please contact:

Edward G. "Ned" Babbitt
513.352.6753
212.908.3916
Ned.Babbitt@ThompsonHine.com

David Whaley
513.352.6681
David.Whaley@ThompsonHine.com

Brian J. Lamb
216.566.5590
Brian.Lamb@ThompsonHine.com

Nate Ingraham
202.973.2784
Nate.Ingraham@ThompsonHine.com

Dominic DeMatties
202.973.2744
Dominic.DeMatties@ThompsonHine.com

Katherine B. Kohn
202.973.2782
Katherine.Kohn@ThompsonHine.com

or any other member of our Employee Benefits & Executive Compensation group.

[1] https://www.napa-net.org/news/2024/11/dol-improperly-shares-information-with-plaintiffs-bar-house-republicans-allege/

[2] https://www.plansponsor.com/ebsa-criticized-for-sharing-retirement-plan-information-with-plaintiff-law-firm/