

## ERISA Advisory Council Examines Outsourcing

The ERISA Advisory Council has identified outsourcing as an issue to study in 2014. The council's goals are to understand current practices and developing trends, and to identify steps the DOL should take that would be helpful for plan sponsors, participants, and service providers. The council has convened two meetings on this topic so far, with another scheduled for next week.

### Background

For 2014, the ERISA Advisory Council is [considering](#) the outsourcing of employee benefit plan services. In selecting this issue, the council observed that the management and administration of benefit plans is increasingly complex and that outsourcing permits a plan sponsor to focus on its core business rather than benefit plan management. The council also noted that there is an emerging trend toward the outsourcing of functions that had been traditionally retained by plan sponsors — for example, administrative and investment committees. The council expressed concern in its statement on the issue that the allocation of risk and responsibility under outsourcing contracts may not be well understood by plan sponsors and plan fiduciaries.

The council intends to focus on:

- Identification of current practices and trends about the types of services being outsourced, and market differences based on plan type, size, or type of provider
- Clarifying the ERISA framework for outsourcing, including areas where further DOL guidance is needed

### What is the ERISA Advisory Council?

Section 512 of ERISA provides for the establishment of the ERISA Advisory Council. The council's role is to advise the secretary of labor and submit recommendations on the secretary's duties under ERISA.

The council consists of 15 members appointed by the secretary of labor. Nine members represent the interests of employees, employers, and the general public. The remaining six represent insurance, corporate trust, actuarial counseling, investment counseling, investment management, and accounting.

The council periodically selects issues that it wishes to examine, and typically holds one or more meetings on its selected issues. After examining an issue, the council usually drafts and submits a report to the secretary that details its findings and any specific recommendations.

- Identification of best practices in selecting and monitoring outsourced service providers
- For fiduciaries, exploring the different ERISA fiduciary roles and co-fiduciary liability
- Identification of contracting practices — such as termination rights and liability caps
- Examination of insurance coverage and ERISA bonding of outsourced service providers

The council has held [two meetings](#) on outsourcing so far — June 18, 2014 and August 19, 2014. The council heard witness testimony during both meetings.

## June 18 Meeting

Witnesses who testified at the June 18 meeting on outsourcing included an employer, a law professor, and organizations that provide outsourcing services. Several witnesses testified to the benefits of outsourcing — specifically that it allows plan sponsors to gain access to specialized expertise and technology, while also taking advantage of the economies of scale to reduce costs. One witness expressed concern about any eventual DOL guidance that might result from the council's investigation — cautioning that employer flexibility and freedom to outsource is critical, and that additional layers of complexity for plan sponsor decision-making are not helpful.

Other witnesses suggested a number of recommendations that the council could make to the DOL, including:

- Providing industry information to plan sponsors on the range of outsourcing options available, including different types of expertise, business models, and financial incentives
- Offering compliance assistance to plan sponsors to help them decide what to outsource and who to select — including due diligence guidance and measurement of provider performance
- Identifying any contract terms required under ERISA and those terms that ERISA disallows
- Creating standards for liability coverage in the context of outsourced fiduciary functions

## August 19 Meeting

This meeting included testimony from several outsourcing companies, a business advocacy group, and a participant advocacy group. Among the recommendations made by witnesses at this meeting were:

- Updating DOL guidance on the sponsorship and creation of multiple employer plans since such plans involve the delivery of outsourced plan functions, as well as the development of best practices guidelines for such plans
- Permitting outsourcing providers to file an aggregated Form 5500 on behalf of all of their clients
- Clarifying when record-keeping is ministerial rather than fiduciary in nature, and when outside experts — such as lawyers, accountants, and actuaries — become fiduciaries as a result of their professional advice
- Making education from the DOL available to plan sponsors on the outsourcing of plan investment implementation, so that sponsors understand the model and have the necessary information when hiring and reviewing performance
- Providing additional guidance on ERISA's bonding requirements

## In Closing

The [next meeting](#) of the council is September 29. The announced purpose of the meeting is to discuss reports and recommendations to the secretary of labor on a number of issues, including the outsourcing of employee benefit plan services. We'll report on the outcome of that meeting in a future *For Your Information* publication.

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