

DOL Enforcement Bulletin Signals Major Shift for ERISA Plan Fiduciaries

A Practical Guidance® Article by José M. Jara, Fox Rothschild LLP



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This article addresses a recent shift in ERISA enforcement proceedings by the Department of Labor through its Employee Benefits Security Administration.

Key Points

- ERISA enforcement shift (FAB 2026-01): Prioritizes egregious misconduct, participant harm, and fiduciary loyalty breaches; flags ESG-driven decisions as potential disloyalty.
- No regulation by enforcement: Limits actions to ERISA text, final regs, guidance, and case law; curbs novel theories; impacts ESOP valuation and prudence-only claims.
- Centralized, time-limited enforcement: Leadership review of significant matters; 18–30 month timelines; reinforces independence from plaintiff firms.

Last month the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) issued Field Assistance Bulletin 2026-01, titled "Guiding Principles for EBSA Enforcement Priorities." [FAB 2026-1](#). Signed by EBSA Assistant Secretary Daniel Aronowitz, this memorandum represents a meaningful recalibration of how EBSA intends to exercise its enforcement discretion under ERISA going forward.

For plan sponsors, fiduciaries, and service providers, this bulletin offers some reassurance, but also warrants careful attention.

Focusing on Egregious Conduct

The bulletin's first and most significant principle is a commitment to prioritize investigations involving the most egregious conduct or significant harm to plan participants.

On the criminal side, EBSA will focus resources on the most significant threats to the employee benefits system. In civil enforcement, the agency will prioritize cases where facts support a breach of the duty of loyalty — actions taken for purposes other than "the exclusive purpose of providing benefits to participants and their beneficiaries."

Notably, EBSA has specifically highlighted conduct designed to advance "environmental, social, or governance objectives" (ESG) as an example of disloyalty that diverts fiduciary focus away from participant interests. While the agency affirms it will continue to enforce both the duties of loyalty and prudence, it has signaled that pure prudence-based cases — those that risk "second-guessing process-based fiduciary judgments" — will be deprioritized absent accompanying loyalty concerns.

No More Regulation by Enforcement

The second guiding principle is that EBSA commits not to regulate through enforcement whenever possible. The agency states it will limit enforcement to "standards of conduct that have been publicly stated in a manner that would not cause unfair surprise."

In practice, this means that the factual predicate for all enforcement activity must have a close nexus to:

- The plain language of ERISA's text
- Clearly established guidance in final regulations or prominently published sub-regulatory guidance –or–
- Clearly established case law.

Novel legal theories or interpretations of ERISA must not be first articulated during enforcement actions – they should be reviewed and processed through the ordinary regulatory and sub-regulatory process. Any exception requires written approval from both EBSA's Director of Enforcement and the Assistant Secretary.

This has particular relevance for Employee Stock Ownership Plan ("ESOP") valuation investigations. The bulletin specifically notes that all pending and proposed ESOP valuation investigations must be reviewed against this fairness principle until EBSA complies with the Congressional directive to provide "acceptable standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan."

Senior Leadership Review

Third, the bulletin mandates that all proposed significant enforcement activities be reviewed by EBSA's leadership. The Deputy Assistant Secretary for Program Operations, the Director of Enforcement, and each EBSA Regional Director must inform the Assistant Secretary (or his delegate) of significant enforcement matters. "Significant" matters include novel legal theories, circuit court splits, positions deviating from prior EBSA positions, and any other issues of importance to the Assistant Secretary. This added layer of centralized review should bring greater consistency and predictability to EBSA enforcement across all regions.

Timely and Responsive Enforcement

Finally, EBSA has set concrete deadlines for its investigations. Routine investigations involving less complicated issues – such as delinquent employee contributions, disclosure violations, and bonding violations – should be completed within 18 months. More complex investigations must be completed within 30 months unless exigent circumstances exist. The Director of Enforcement must conduct quarterly reviews of any civil investigation exceeding these timeframes and report to leadership.

Independence from Private Plaintiffs

One final point worth flagging: the bulletin explicitly states that EBSA investigators "will not do anything that compromises the Department's independence, integrity and credibility," including "eliminating any appearance that EBSA enforcement activities and priorities are being coordinated with plaintiff lawyers pursuing private actions." This is noteworthy given that DOL's Inspector General is currently investigating the use of certain common interest agreements between EBSA and private plaintiff law firms.

Takeaways for Plan Sponsors and Fiduciaries

This bulletin does not create enforceable rights and is expressly described as an internal Department of Labor policy directed at EBSA and its employees.

But the practical impact of the bulletin should not be underestimated. For plan sponsors and fiduciaries exercising good-faith, process-driven decision-making, it signals a more measured and predictable enforcement posture. For defense counsel, it provides leverage to push back on investigations built on novel theories, open-ended timelines, or attenuated harm.

For more information, please contact José M. Jara at jjara@foxrothschild.com or another member of Fox Rothschild's ERISA Litigation Practice Group.

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- [Field Assistance Bulletin 2026-01](#), Guiding Principles for EBSA Enforcement Priorities

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José focuses his practice on the Employee Retirement Income Security Act (ERISA) and employment litigation and counseling. He has extensive experience in representing corporations, tax-exempts, associations, pension funds, boards of trustees, Employee Stock Ownership Plans (ESOPs), defined benefit and defined contributions plans, multiple employer plans, multiemployer plans, and executives in areas of employment, ERISA, and other employee benefits law matters.

José's practice includes representing clients under investigation by the U.S. Department of Labor's (DOL) Employee Benefits Security Administration and defending clients from lawsuits filed by DOL's Office of the Solicitor regarding civil and/or criminal violations of ERISA.

He defends plan sponsors, boards of directors and fiduciaries against ERISA class action litigation alleging breach of fiduciary duty under ERISA, including excessive fees, imprudent investments, delinquent employee contributions and improper valuation of employer stock. In addition, José provides legal advice to plan sponsors and fiduciaries on fiduciary responsibilities, plan fees and expenses, plan asset regulations and ERISA-prohibited transactions and exemptions.

He also works with clients to correct retirement plan errors under the IRS Employee Plans Compliance Resolution System, fiduciary violations under the DOL Voluntary Fiduciary Correction Program and annual reporting failures under the DOL Delinquent Filer Voluntary Compliance Program.

José advises clients on a broad range of labor and employment law issues such as wrongful termination, sexual harassment and discrimination, restrictive covenants, retaliation and matters related to labor law such as grievances, arbitrations and collective bargaining. He also defends companies against EEOC charges and DOL wage and hour investigations, conducts interactive harassment training, carries out internal investigations and drafts employment and severance agreements.

In addition, José assists clients with professional liability insurance matters, providing legal counsel on Directors & Officers (D&O), fiduciary and Employment Practices Liability (EPL) insurance issues. He has served as monitoring and coverage counsel and provided legal advice to underwriters on a variety of provisions of the insurance policy.

José speaks frequently on ERISA and employment law topics. He recently delivered presentations on DOL and IRS Health and Welfare Plan audits, Fiduciary Issues in ESG Investing, ERISA Prohibited Transactions and Exemptions, 2021 Employment Law Issues on the Enforcers' Radar, ESOP challenges and enforcement activity, and sexual harassment in the workplace, among other subjects.

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