October 27, 2022

The Employee Retirement Income Security Act of 1974, as amended, ("ERISA") provides in Section 408(a) that the U.S. Department of Labor ("Department") "…shall establish an exemption procedure …" through which the Department "… may grant a conditional or unconditional exemption … from all or part of the restrictions imposed by [ERISA Sections 406 and 407(a)]." In so doing, the Department has current rules governing the granting or denials of exemptions pertaining to conduct that falls within the purviews of ERISA Sections 406 and 407(a) ("Current Rules").

On March 15, 2022, the Department published its Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications ("New Rules") in which it gives notice that it will amend the Current Rules. Thereafter, the Department held a public hearing and extended the comment period for the New Rules.

It is settled law that a federal government agency cannot enact rules that contradict a federal statute. However, as explained below, the Department disregards this basic legal tenet in the New Rules; a section of the New Rules is unlawful because it rejects a private contractual right that is permitted in ERISA Section 410(b)(3).

Contractual Right Permitted under ERISA Section 410(b)(3):

The U.S. Congress, **and not the Department**, authorized in ERISA Section 410(b)(3) that an employer or an employee organization may indemnify a fiduciary through the purchase of an insurance policy.

ERISA Section 410 provides in pertinent part that:

(a) Except as provided in sections [405(b)(1)] and [405(d)] of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude—

> ...
>
> *(3)* ***an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.***
>
> [Emphasis Supplied]

<u>New Rules' Unlawful Provision</u>:

The New Rules provide in [pertinent part of] Section 2570.34(f)(2) that the written agreement for the qualified independent:

> ***<u>may not</u>*** *...(i) [c]ontain any provisions that violates ERISA section 410; (ii)* ***[i]nclude any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary*** *by the plan* ***or other party*** *for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work...*
>
> [Emphasis Supplied].

<u>Conclusion</u>:

Section 2570.34(f)(2) violates the contractual right that is provided in ERISA Section 410(b)(3) because it prohibits all types of agreements that may indemnify a plan fiduciary's liability even if such agreement is an insurance policy that is purchased by the "<u>other party</u>" that is not an ERISA plan, such party like an "*employer or an employee organization.*"

The cited section of the New Rules –which goes beyond the scope of a procedural rule authorized in ERISA Section 408(a)– seeks to reject a statutorily granted right, thereby depriving

"an employer" or "an employee organization" their substantive right to obtain insurance policies that would indemnify a fiduciary's liability, in violation of ERISA Sections 410(b)(3).

Unlike in ERISA Section 410(b)(1) in which a plan is permitted to get an insurance policy to cover a fiduciary's liability <u>only</u> "… *if such insurance permits recourse by the insurer against the fiduciary* …," ERISA Section 410(b)(3) does **<u>not</u>** require insurance "recourse" as a condition precedent for an employer or an employee organization to cover a fiduciary's liability.

Also, the Department contradicts itself in Section 2570.34(f)(2) because it provides that the fiduciary must adhere to ERISA Section 410, which logically requires adherence to subsections (a) and (b)(1)-(3) in ERISA Section 410, thereby permitting an insurance policy that is purchased by either an *employer* or an *employee organization* to cover a fiduciary's liability.

It appears that the Department intentionally disregards the rights that are provided in ERISA Section 410(b)(3). This is supported by the mere fact that the Department fails to recognize the language in ERISA Section 410(b) stating that "***<u>[n]othing in this subpart shall preclude</u>***…" – *meaning that nothing in ERISA Section 410(a) "**shall preclude**" the right of an employer or an employee organization to obtain insurance policies that cover a fiduciary's liability under ERISA*. Thus, the Department's action would be arbitrarily and capricious if it enacts Section 2570.34(f)(2) of the New Rules to contradict ERISA Section 410(b)(3).

Further, the Department erroneously believes that a fiduciary's wrongful conduct undertaken while acting within the scope of an administrative exemption [that has been issued pursuant to ERISA Section 408(a)] falls under the jurisdiction of a "*state*" legal claim, as indicated by using such term in Section 2570.34(f)(2).

Such view is inconsistent with the language in ERISA.

A violation of an exemption granted pursuant to ERISA Section 408(a) is remedied only through a "civil action" under the authority that Congress provided in ERISA Sections 502(a)(2), (3), and (5).

Additionally, ERISA Section 502(e)(1), provides in part that "… *the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section [101(f)(1)] of this title*" – which statutory section refers to each of the following persons: a defined benefit plan administrator, the Pension Benefit Guaranty Corporation, a labor organization, and an employer. As such, no state law claim can arise from an exemption conditionally granted under ERISA Section 408(a).

Therefore, Department should act in accordance with established law and permit an employer or an employee organization to cover a fiduciary's liability through the purchase of insurance policies as provided in ERISA Section 410(b)(3), and the Department should not include jurisdictional language that ERISA precludes.