Law Requires Pension Data Protection, Academic Says

By David Brandolph

July 8 — Pension plan fiduciaries that fail to take reasonable steps to protect the private information of plan participants risk liability under federal benefits law, a law school professor said.

To comply with the fiduciary duty provisions of the Employee Retirement Income Security Act, pension plan fiduciaries should be including the protection of participant private information on their checklist of items to address, along with investment menu, fees and other criteria considered to be part of prudent conduct, said Edward A. Zelinsky, professor of law at the Benjamin N. Cardozo School of Law at Yeshiva University in New York.

The fiduciary duty provisions of ERISA Section 404(a)(1), which require plan fiduciaries to act prudently and for the exclusive purpose of plan participants, were drafted to be flexible and to adjust to new circumstances arising over the passage of time, Zelinsky told Bloomberg BNA on July 7.

As an example of how these provisions have adjusted over time, Zelinsky said that in the past, pension plans didn't use mutual funds and fees weren't an issue for defined benefit plans that bore the risk of poor investment performance. Today, in a world that has been steadily shifting to defined contribution plans, he said it has become part of ERISA's prudence standard for defined contribution plan fiduciaries to not only use mutual funds as part of their individual account plan lineup, but also to justify any decision not to use index funds or other measures to limit plan fees.

Zelinsky said plans today face new challenges regarding the vulnerability of the participant information they are storing and sharing with their third-party providers, including the potential loss of participants' financial assets and the theft of their identity. Under these new circumstances, it would seem prudent for plan fiduciaries to be taking reasonable steps to protect this information from being stolen or otherwise compromised, he said.

Emergence of Prudence Standard

What exactly are reasonable steps for plan fiduciaries to take? Zelinsky said that will be determined by the facts and circumstances. The prudence standard regarding plan information security will eventually emerge as a product of regulation, academic commentary and ultimately, by litigation, similar to the process of prudent conduct that developed regarding plan fees, he said.

Until a concrete prudence standard emerges, Zelinsky advised plan fiduciaries to inquire into what others are doing and to seek expert advice on how best to secure participant data.

Zelinsky said that in addition to his law school teaching and writing, he serves as a trustee of a 401(k) plan. In that capacity,
he has in the past been satisfied by the fact that the plan uses one of the major financial industry third-party record keepers and that this vendor has said it takes sufficient precautions to protect participant financial and other personal information.

Getting such assurances, by itself, may no longer satisfy ERISA's prudence standards, Zelinsky said. It may be that plan trustees need to also inquire into the vendor's past experience, to evaluate the precautions the vendor takes and to increase monitoring of these third-party providers, he said.

If a plan is self-administering its plan assets and self-monitoring its procedures and own employees, the fiduciary responsibility to protect its participant private information would be even greater, Zelinsky said.

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