# Pension Advisors and Prison Wardens – The Reality Show

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Retirement fiduciaries could end up spending a long time in the slammer for certain breaches of federal law governing employee pension and benefit plans. As has been widely reported in the last few months, the U.S. Department of Labor's Assistant Secretary responsible for the administration of the Employee Retirement Income Security Act of 1974 (ERISA), has publicly suggested that the department, in conjunction with the U.S. Department of Justice, intends to step-up its efforts regarding the enforcement of ERISA's criminal provisions against plans and their fiduciaries. This is not an entirely new effort. In the fiscal years ending in 2007 and 2008 alone for example, 390 reported criminal investigations were reported leading to 216 indictments. The Assistant Secretary's comments do seem to indicate that enforcement of these provisions is now a priority.

ERISA governs the majority of employee benefits plans in the United States, including penalty provisions. Originally, criminal fines for individuals were limited to $5,000 and potential imprisonment of up to one year. However, the Sarbanes-Oxley Act of 2002 dramatically increased these penalties to a maximum of $100,000 for individuals and potential imprisonment up to 10 years. Criminal fines for entities other than individuals increased from $100,000 to a maximum of $500,000. These increased penalties apply not only to event-specific situations like a failure to provide a black-out notice, but also to ERISA's other plain-vanilla reporting and disclosure requirements.

The federal criminal provisions that explicitly relate to employee benefit plans are codified under Title 18 of the U.S. Criminal Code and Title 29 of ERISA. Title 18 provides for a fine (determined under federal sentencing guidelines) and/or imprisonment of up to five years for theft or embezzlement from an employee benefit plan or providing false statements or concealment of facts in relation to documents required by ERISA. In addition, Title 18 provides for a fine (again, determined under federal sentencing guidelines) and/or imprisonment of up to three years upon conviction of offering, accepting or soliciting to influence operations of an employee benefit plan.

Separately, ERISA contains three additional criminal enforcement provisions, which could send a fiduciary to jail for up to 10 years with a fine up to $100,000. Under ERISA Section 501, regarding the violation of ERISA's reporting and disclosure requirements (designed to disclose significant information about the plan and its transactions, provide rights and benefits data to participants and detail the responsibilities of fiduciaries); and ERISA Section 511, regarding coercive interference with a participant's rights under an employee benefit plan (designed to keep employers from terminating or harassing employees to prevent them from getting their vested pension rights or through willful use of actual or threatened fraud, force, or violence), fines of up to $100,000 and/or 10 years of imprisonment may be imposed. Finally, pursuant to ERISA Section 411, with respect to serving as a fiduciary or service provider of an employee benefit plan after being convicted of certain crimes such as robbery, bribery, extortion, embezzlement, perjury, murder, certain drug offenses, labor union violations, and other ERISA offenses, violators are subject to fines of up to $10,000 and/or five years imprisonment.

In addition, the Department of Labor and Department of Justice have also made use of other, more general criminal provisions in the enforcement of ERISA, including: 18 U.S.C. Section 371 (conspiracy), 18 U.S.C. Section 1341 (mail fraud) and 18 U.S.C. Section 1343 (wire fraud); and while ERISA generally pre-empts any state law that relates to an employee benefit plan, ERISA Section 514(a) and (b)(4) specifically provide that ERISA does not pre-empt generally applicable state criminal laws.

In the past, the Labor Department has taken action and convicted plan administrators and others for failure to file the Form 5500, annual return/reports, or to provide participants with summary plan descriptions, summary annual reports and accrued benefits statements. Additionally, they have aggressively pursued those who have violated the prohibited transactions rules. In her remarks, the Assistant Secretary outlined situations where "egregious" conduct might merit criminal prosecution. For example, where an employer untimely remits, if not outright converts, salary reduction or other contributions to a retirement or health plan, or where Forms 5500 are filed with information known to be false. She also mentionedthat the criminal prosecution would occur where multiple-employer welfare arrangements engaged in health care fraud.

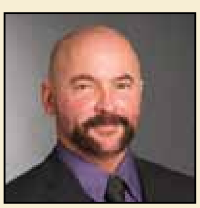
Among ERISA criminal violations, cases for embezzlement of plan funds or untimely contributions are perhaps the most common. For example, in 2009 at least six individuals were charged with embezzling funds from an employee benefit plan. The Labor Department may also recommend a case for criminal prosecution based on an employer's untimely remittance of plan contributions. Though intent is a required element for criminal liability, a showing of reckless disregard for plan assets may also establish liability. (*United States v. Krimsky,* 230 F.3d 855, 860-61 (6th Cir. 2000)).

Another common type of criminal prosecution involves either failing to file a Form 5500 or filing a Form 5500 with false information. In a peculiar discontinuity, because the Sarbanes-Oxley Act increased criminal penalties under ERISA but not under 18 U.S.C Section 1027, a criminal failure to file Form 5500 exposes an individual to up to 10 years imprisonment, while a criminal filing of Form 5500 with false information carries a prison term of up to five years.

Less common prosecutions have involved coercive interference in violation of ERISA Section 511. For example, in August 2008, charges were filed alleging that the defendant threatened an ERISA plan participant after the defendant learned that the participant had contacted the Labor Department to seek assistance in collecting benefits owed to him under a benefit plan. *(United States v. Smith*, 5:08-mj-00343-GJD (N.D.N.Y. Aug. 18, 2008)). Other cases involve offering, accepting or soliciting fees, kickbacks, etc., to influence operations of employee benefit plans, in violation of 18 U.S.C. Section 1954. See [*United States v. Giblin], 2:09-mj-03505-MF (D.N.J. Jan. 1, 2009)*..

As you can appreciate, not all these cases involve some well devised, complicated or sinister plot. Simply stated, those individuals who act as fiduciaries of a plan – plan sponsors, plan administrators, service providers and their advisors – need to understand the potential criminal penalties under ERISA and related legislation when taking action in connection with the plan.

Plan sponsors also need to ensure they exercise care in the appointment of fiduciaries and that there are effective checks and balances in operating and maintaining a plan. Third-party administrators, advisors and other service providers must be vigilant regarding the actions taken by their clients regarding the plans they service. The message from the Department of Labor and Department of Justice is clear - plan fiduciaries and services providers who fail to exercise the care required of them by law do so at their own peril.



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