

January 4, 2010

The Criminal Provisions of ERISA

As has been widely reported, the Assistant Secretary of the U.S. Department of Labor (DOL) responsible for the administration of ERISA has publicly suggested that DOL, in conjunction with the U.S. Department of Justice (DOJ), intends to invoke with greater frequency the criminal provisions applicable to ERISA plans. The government has not overlooked these provisions in the past; for example, reported 188 and 202 criminal investigations, leading to 115 and 101 indictments, respectively, in its FYE 2007 and 2008. The Assistant Secretary's comments, however, appear to signal an increased emphasis on these provisions in the enforcement of ERISA.

The federal criminal provisions that explicitly relate to employee benefit plans are codified in two places. Three provisions are included in the U.S. criminal code.

| Provision of Title 18 | Criminalized Conduct | Penalty |
|-----------------------|--|---|
| § 664 | Theft or embezzlement from an employee benefit plan | Fine* and/or up to five years imprisonment |
| § 1027 | False statements or concealment of facts in relation to documents required by ERISA | Fine* and/or up to five years imprisonment |
| § 1954 | Offer, acceptance, or solicitation to influence operations of employee benefit plans | Fine* and/or up to three years imprisonment |

*Fine determined under federal sentencing guidelines

The labor law title of ERISA separately contains three other criminal enforcement provisions.

| Provision of ERISA | Criminalized Conduct | Penalty |
|--------------------|---|---|
| § 411 | Serving as a fiduciary or service provider of an employee benefit plan after being convicted of certain crimes, such as robbery, bribery, extortion, and embezzlement | Up to \$10,000 fine and/or five years imprisonment |
| § 501 | Violating ERISA's reporting and disclosure requirements | Up to \$100,000 fine and/or 10 years imprisonment for an individual |
| § 511 | Coercive interference with a participant's rights under an employee benefit plan | Up to \$100,000 fine and/or 10 years imprisonment for an individual |

The DOL and DOJ have also made use of other, more general criminal provisions in the enforcement of ERISA, including 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1341 (mail fraud); and 18 U.S.C. § 1343 (wire fraud). In addition to federal violations, conduct related to employee benefits plans may also violate state law. While ERISA generally preempts any state law that relates to an employee benefit plan, ERISA does not preempt generally applicable state criminal laws. ERISA § 514(a), (b)(4).

In her remarks, the Assistant Secretary suggested some particular fact patterns where "egregious" conduct might merit criminal prosecution, specifically including:

- An employer's untimely remittance, if not outright conversion, of salary reduction or other contributions to a retirement or health plan;

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- Forms 5500 filed with information known to be false; and
- Multiple-employer welfare arrangements (MEWAs) 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, just in October and November 2009, at least six individuals were charged with embezzling funds from an employee benefit plan. As indicated by the Assistant Secretary, DOL may also recommend a case for criminal prosecution under 18 U.S.C. § 664 based on an employer's untimely remittance of plan contributions. The U.S. Court of Appeals for the Ninth Circuit has stated that § 664 goes beyond traditional concepts of embezzlement and imposes liability for intentional breach of fiduciary duties. *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980). The U.S. District Court for the Eastern District of New York has held that untimely remittance can constitute embezzlement. *United States v. Panepinto*, 818 F.Supp. 48, 50 (E.D.N.Y. 1993). Though intent is a required element for criminal liability under § 664, 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 § 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 are prosecutions alleging:

- Coercive interference in violation of ERISA § 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 DOL seeking assistance in getting benefits owed to him under the plan. *United States v. Smith*, 5:08-mj-00343-GJD (N.D.N.Y. Aug. 18, 2008); or
- Offering, accepting, or soliciting fees, kickbacks, etc., to influence operations of employee benefit plans, in violation of 18 U.S.C. § 1954. For example, in January 2009, the administrator of an ERISA-regulated education fund was charged with violating § 1954, among other statutes, on the basis of allegations that, in exchange for hiring an audio visual company to perform work for the fund, the administrator received discounted audio visual equipment for his personal use and free labor in his residence. *United States v. Giblin*, 2:09-mj-03505-MF (D.N.J. Jan. 1, 2009).



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