

Insider

DOL issues final ESG rule

By Stephen Douglas and Bill Kalten

The Department of Labor (DOL) published a **final rule** under the Employee Retirement Income Security Act (ERISA) and a related **fact sheet** clarifying that plan fiduciaries may consider climate change and other environmental, social and governance (ESG) factors when they make investment decisions and when they exercise shareholder rights, including voting on shareholder resolutions and board nominations.

The final rule largely follows the rule proposed in late 2021, except for some changes in response to comments received (discussed below).¹ This rule replaces final rules published in 2020 during the Trump administration that, among other things, generally required plan fiduciaries to select investments and investment courses of action based solely on consideration of “pecuniary factors,” or those related to the financial risk or return of an investment.

Importantly, the final rule does not mandate that ESG factors be considered under every circumstance nor does it create an incentive for fiduciaries to favor ESG strategies when making investment decisions.

The final rule retains the core principle that ERISA’s duties of prudence and loyalty require plan fiduciaries to focus on relevant risk-return factors and consider the interests of participants and beneficiaries. In particular, the final rule:

1. Clarifies that a fiduciary’s duty of prudence must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis of

In This Issue

- 1 DOL issues final ESG rule
- 2 Since you asked: Can an employer offer health insurance to its board’s directors?

News in Brief

- 4 HHS and CMS release 2024 out-of-pocket expense limits

- a particular investment or investment course of action, which may include the economic effects of climate change and other ESG considerations
2. Replaces the so-called “tiebreaker” standard in the 2020 final rule (where collateral factors — including ESG factors — could only be considered when necessary to break a tie between competing investments that are economically the same) with one that requires the fiduciary to prudently conclude that competing investments equally serve the financial interests of the plan before the fiduciary may base a decision on collateral benefits other than investment returns
 3. Adds a new provision clarifying that fiduciaries do not violate their duty of loyalty solely because they take participants’ non-financial preferences into account when constructing a menu of prudent investment options for participant-directed individual account plans
 4. Makes it so that the standards applied to qualified default investment alternatives (QDIAs) are no different from those applied to other investments

¹ For more information on the proposed rule, see “[Proposed updates to rules on ESG factors and voting proxies](#),” *Insider*, November 2021.

5. Requires a plan fiduciary to focus on relevant risk and return factors when selecting a QDIA and not subordinate the interests of participants and beneficiaries to objectives unrelated to providing benefits under the plan
6. Retains the core principle that when a plan's assets include shares of stock, the fiduciary duty to manage plan assets includes the management of the shareholder rights related to those shares, discourages abstention as the normal course related to shareholder rights, and eliminates various safe harbors in the 2020 final rules that limited a fiduciary's obligation to vote on issuer's proposals in certain situations.

Going forward

The final rule takes effect, and becomes applicable, on January 30, 2023. For certain proxy voting provisions, applicability is delayed until December 1, 2023, to allow fiduciaries and investment managers additional time to review any proxy voting policies and guidelines and make any necessary changes.

For comments or questions, contact Stephen Douglas at +1 203 326 6315, stephen.douglas@wtwco.com; or Bill Kalten at +1 203 326 4625, william.kalten@wtwco.com.

Since you asked

Can an employer offer health insurance to its board's directors?

By Maureen Gammon, Anu Gogna, Ben Lupin and Kathleen Rosenow

Employers often have questions on practical considerations related to healthcare, retirement and other employee benefit regulations. In this "Since you asked" feature, we discuss the provision of health insurance to board members and their dependents.

//

Question:

Can our company provide benefits under our group health plan to members of the company's board of directors who are not employees? We would like to provide coverage for retention and recruiting purposes.

//

Answer:

Possibly, but various compliance concerns need to be addressed.

Multiple Employer Welfare Arrangement considerations

Covering non-employees (whether directors, board members or owners) under a company's benefit programs is likely to raise compliance concerns (assuming the written plan eligibility rules allow non-employees to enroll in coverage). For one, it is unclear whether a Multiple Employer Welfare Arrangement (MEWA) is created when health or other welfare benefits are provided to *non-employee* directors.

- A MEWA is defined as an employee welfare benefit plan providing benefits to the employees of two or more employers (*including one or more self-employed individuals*). If the board of directors consists of members who are not current employees of the company, this would technically classify the benefit plan as a MEWA, as the non-employees would be considered self-employed individuals.
- From a federal reporting standpoint, MEWAs are generally required to file an annual report with the federal government (Form M-1); however, the plan may qualify for an exemption to filing the annual Form M-1. More specifically, a group health plan is exempt if less

Insider is a monthly newsletter developed and produced by WTW Research and Innovation Center.

Insider authors

Ann Marie Breheny	Rich Gisonny	Brendan McFarland
Cindy Brockhausen	Anu Gogna	Steve Nyce
Gary Chase	Russ Hall	Kathleen Rosenow
Stephen Douglas	William Kalten	Maria Sarli
Maureen Gammon	Benjamin Lupin	Steven Seelig

Reprints

For permissions and reprint information, please email Joseph Cannizzo at joseph.cannizzo@wtwco.com.

More information can be found on the website: wtwco.com.

Publication company

WTW
Research and Innovation Center
800 N. Glebe Road
Arlington, VA 22203
T +1 703 258 7635

The articles and information in Insider do not constitute legal, accounting, tax, consulting or other professional advice. Before making any decision or taking any action relating to the issues addressed in Insider, please consult a qualified professional advisor.

than 1% of participants are non-employee directors, and the plan would not be a MEWA “but for” coverage of non-employee directors. This does not mean that the arrangement is not a MEWA but only that no Form M-1 filing is required.

- MEWAs do not qualify for ERISA preemption from a state regulatory perspective, so the plan potentially would be subject to state laws specifically regulating MEWAs, including any filing and licensing requirements similar to rules imposed on insurers licensed to operate in the state. For example, California law requires self-funded MEWAs to obtain a certificate of compliance from the Department of Insurance in order to operate within the state. But under California law, the Department of Insurance ceased providing such certificates in 1995, effectively preventing the formation of any new MEWAs. In addition, since state law would likely apply, state mandated benefit rules may apply to the arrangement (e.g., requiring the plan to cover medical procedures it would not otherwise cover).

Tax considerations

Generally, the coverage for the *non-employee* director cannot be pre-tax under the cafeteria plan rules, although there is a special rule for certain “dual status” individuals (i.e., directors who are also employees).

- If non-employees are permitted to participate in employer-sponsored benefits, they cannot participate on a tax-favored basis in the same way as employees.
- Under the general rule, directors who are not employees of the company (“outside directors”) cannot participate in the company’s cafeteria plan. This is the case whether or not the directors receive fees for their services as directors. The 2007 proposed cafeteria plan regulations expressly provide that the term “employee” does not include a “self-employed individual.” The regulations list examples of self-employed individuals: a sole proprietor, a partner in a partnership, and a director serving on a corporation’s board of directors who does not otherwise provide services to the corporation as an employee. Contributions made by non-employees should be made on an after-tax basis, and contributions made by the employer should be treated as additional taxable compensation.
- The regulations also provide a special rule for certain “dual status” individuals. Under the dual status rule, an individual who is an employee and provides services to his or her employer as a director or independent contractor (e.g., an individual who is both an employee and a director of a C corporation) is eligible to participate in the employer’s cafeteria plan, although solely in his or her capacity as an employee. For example, assume one of the company’s employees

Generally, the coverage for the non-employee director cannot be pre-tax under the cafeteria plan rules.

also serves on the company’s board of directors. Her annual compensation as an employee of the company is \$80,000; she also receives \$5,000 in directors’ fees each year. She can participate in the company’s cafeteria plan in her capacity as an employee and can elect to make salary reductions from her employee compensation for benefits under the plan; however, she cannot elect to reduce her directors’ fees for benefits under the plan. Note that if the company is an S corporation, the dual-status rule will not apply to any employee-directors who are also shareholders owning more than 2% of company stock at any time during a year.

- In addition, directors who are not employees cannot participate in a health reimbursement arrangement or health flexible spending account. Note: Non-employees may make contributions to health savings accounts (HSAs) as long as they are otherwise eligible (i.e., enrolled in a qualifying high-deductible health plan, have no other disqualifying coverage and cannot be claimed as a tax dependent). Any contributions made by the non-employee to an HSA should be made on an after-tax basis, which then may qualify for an above-the-line deduction on his or her individual tax return (Form 1040).

Takeaways

- Companies offering coverage to directors and their dependents under their group health plan need to make sure they (or their third-party administrators) have the ability to do so on an *after-tax* basis.
- MEWA considerations must be discussed with legal counsel, as such an arrangement may need to be registered in various states (assuming it is permitted by state law).
- A possible alternative for directors would be the company paying *taxable cash* (with or without a gross-up) and helping them find individual health insurance coverage.

For comments or questions, contact Maureen Gammon at +1 610 254 7476, maureen.gammon@wtwco.com; Anu Gogna at +1 973 290 2599, anu.gogna@wtwco.com; Ben Lupin at +1 215 316 8311, benjamin.lupin@wtwco.com; and Kathleen Rosenow at +1 507 358 0688, kathleen.rosenow@wtwco.com.

News in Brief

HHS and CMS release 2024 out-of-pocket expense limits

By Maureen Gammon and Ben Lupin

The U.S. Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) have issued the **2024 annual dollar limits on cost sharing**. The maximum annual limitation on cost sharing that a group health plan can impose for 2024 is **\$9,450** for individual coverage and **\$18,900** for family coverage (compared with \$9,100 and \$18,200, respectively, for 2023).

As a reminder, under a new policy that begins in 2023, HHS will publish the premium adjustment percentage, maximum annual limitation on cost sharing, reduced maximum annual limitation on cost sharing and required contribution percentage by January of the year preceding the applicable benefit year (so by January 2023 for the 2024 benefit year). The guidance released by HHS and CMS reflects that new policy and sets forth the 2024 dollar limits.

CMS also issued the proposed **Notice of Benefit and Payment Parameters for 2024** (including a **fact sheet**).

About WTW

At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organizational resilience, motivate your workforce and maximize performance. Working shoulder to shoulder with you, we uncover opportunities for sustainable success — and provide perspective that moves you. Learn more at [wtwco.com](https://www.wtwco.com).



[wtwco.com/social-media](https://www.wtwco.com/social-media)

Copyright © 2022 WTW. All rights reserved.

INSIDER-2022-012

[wtwco.com](https://www.wtwco.com)

