COMMITTEE ON
EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

November 21, 2024

The Honorable Larry D. Turner
Inspector General
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Inspector General Turner:

The Committee on Education and the Workforce (Committee) has learned that the Department of Labor (DOL) shared confidential information involving at least six employee benefit pension plans with a plaintiffs' attorney.[1] DOL's Employee Benefits Security Administration (EBSA) gathered this confidential information during an investigation, and Michael R. Hartman, Counsel for DOL's New York Regional Solicitor's Office, shared this information with Cohen Milstein Sellers and Toll, PLLC (Cohen Milstein), a law firm known for pursuing class action lawsuits involving benefits plans, to use in a lawsuit against a fiduciary of the plans.[2] The information sharing arrangement is documented in a "common interest agreement" between DOL and Cohen Milstein dated April 21, 2023.[3] However, the agreement does not disclose when the information was shared.[4]

The scope and timing of discovery in a civil lawsuit is limited under the Federal Rules of Civil Procedure (FRCP), and discovery disputes are subject to supervision by the presiding judge.[5] However, DOL appears to be working in concert with plaintiffs' attorneys to circumvent the discovery protections of the FRCP by conducting a fishing expedition under the guise of an EBSA investigation and then supplying confidential information to plaintiffs' attorneys for use in private litigation against plan fiduciaries.

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[1] *See* Transcript of Proc. Before Magis. J. Braswell, No. 1:21-cv-00304-CNS-MDB, Document 164-2, at 21 (D. Colo. filed Apr. 25, 2024) (attached).
[2] *See* Common Int. Agreement, No. 1:21-cv-00304-CNS-MDB, Document 164-3 (D. Colo. filed Apr. 25, 2024) (attached).
[3] *Id.*
[4] *Id.*
[5] For example, FRCP 26(b) limits the scope of discovery to materials relevant to a plaintiff's claim. FRCP 33(a) limits the number of interrogatories that can be served on a defendant. However, EBSA's investigations are not subject to these rules.

A federal court harshly condemned the secret arrangement between DOL and Cohen Milstein.[6] The court explained:

> [Allowing such information sharing] could set a dangerous precedent. It would allow a government agency to weaponize private litigation against some target *before* confirming the target should be a target. Moreover, the government could litigate in the shadows, without giving the opposing party an opportunity to adequately probe and defend itself. The inverse is also true. A private litigant could leverage government powers for its own use in private litigation—*before* the government has sufficient grounds to leverage itself…. The Court cannot allow that to continue.[7]

Those who have been targets of DOL investigations and class action lawsuits involving benefits plans have long suspected that DOL has secretly shared information with class action law firms to give them a leg up in federal litigation, although this appears to be the first time such a cozy relationship has come to light. When an employee benefits plan fiduciary shares information with EBSA pursuant to an investigation, the plan fiduciary should have no reason to fear the information will be back-channeled to a class action lawyer and used against it. Indeed, both the *Freedom of Information Act*[8] and DOL procedures[9] contain mechanisms protecting confidential information collected during an investigation from disclosure. A "common interest agreement" pursuant to which DOL, in the midst of an open and ongoing investigation, secretly shares confidential information with a class action law firm is contrary to the public policy of encouraging plan fiduciaries to cooperate with EBSA investigations and to sponsor employee benefit plans voluntarily, eroding the public's trust in DOL as a regulator.

EBSA must immediately take steps to protect the confidentiality of information gathered during investigations and to reassure employee benefits plan fiduciaries that their cooperation during investigations will not lead to coercive actions from plaintiffs' attorneys. The Committee requests that the Office of the Inspector General (OIG) investigate this practice and publish a public report. Specifically, the Committee requests that the OIG examine the following:

1. The number of instances in which DOL shared information gleaned from EBSA investigations with outside law firms before any lawsuit had been filed related to the investigation.

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[6] *See* Order, Magis. J. Braswell, No. 1:21-cv-00304-CNS-MDB, Document 232 (D. Colo. filed Sept. 11, 2024) (attached).
[7] *Id.* at 16-17 (emphasis in original).
[8] 5 U.S.C. § 552(b)(7) (providing that disclosure does not apply to information compiled for law enforcement purposes to the extent such disclosure would reasonably be expected to interfere with law enforcement proceedings or be expected to constitute an unwarranted invasion of personal privacy).
[9] *See e.g.*, EBSA, Enforcement Manual, Release of Information, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/release-of-information.

2. The number of instances in which DOL shared information gleaned from EBSA investigations with outside law firms that do not have access to that information under normal discovery rules at the time it was shared.

3. An identification of those law firms with which DOL shared confidential information collected during an investigation.

4. The number of instances in which DOL shared information gleaned from EBSA investigations with a plaintiffs' law firm before a formal written "common interest agreement" or similar agreement had been executed or acknowledged.

5. The number of instances in which DOL directed resources to assist a plaintiffs' law firm in litigation, including moot court practices, strategy phone calls, expert advice, or any other assistance, and whether any of these instances exceeded the scope of DOL's statutory authority.

6. To the extent that DOL views plaintiffs' law firms as assisting DOL in its enforcement initiatives and regulatory goals, whether DOL is in compliance with procurement rules.

7. The criteria DOL uses to select which plaintiffs' law firms DOL will share information with pursuant to a common interest agreement.

8. An assessment of the monetary value of the information that DOL is providing to plaintiffs' law firms, including information provided to those firms that may be used to strengthen their claims against employee benefits plan fiduciaries and to increase the value of the plaintiffs' law firm's potential recovery and, with it, the firm's attorneys' fees. Questions would include: Does DOL determine the value of the information it shares with these law firms? Does DOL consider whether it is reasonable or appropriate to use confidential information collected during investigations to enrich plaintiff's law firms? Does DOL cap the value of information it shares with any plaintiffs' law firm? Does DOL receive anything of value in exchange for providing this valuable confidential information?

9. The extent to which any law firm or firms are the recipient of more DOL assistance than others. Questions would include: Are there revolving door relationships with these law firms, i.e., have any attorneys at these firms worked at EBSA, and have any EBSA attorneys worked at these firms? What does a search of emails and call logs between DOL and the firms reveal? To what extent do DOL employees communicate with plaintiffs' law firms using unofficial channels, such as personal cell phones or personal email accounts?

10. An assessment of the reputational risk to DOL resulting from sharing information gathered during EBSA investigations with plaintiffs' law firms.

11. The extent to which sharing information gathered during EBSA investigations with plaintiffs' law firms will have a negative impact on DOL's role promoting employee benefit plan sponsorship.

Thank you for your consideration of these requests.

Sincerely,

Virginia Foxx
Chairwoman

Enclosures