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Thinking ESOPs: The Department of Labor Identifies New Enforcement Priorities

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In this article, the author discusses the Employee Benefits Security Administration's prior focus on ESOPs, the changes mandated by new Field Assistance Bulletin No. 2026-01, and how this should change Department of Labor enforcement in the ESOP space.

The Employee Benefits Security Administration (EBSA), the enforcement arm of the Department of Labor, periodically identifies areas and issues of primary enforcement priority. On April 14, 2026, Daniel Aronowitz, assistant secretary of labor and head of EBSA, issued new enforcement priorities in Field Assistance Bulletin (FAB) No. 2026-01, entitled "Guiding Principles for EBSA Enforcement Priorities."[1] These Guiding Principles signal a new era in DOL enforcement that promises to do away with DOL regulation by enforcement, particularly in the ESOP space.

This article discusses EBSA's prior focus on ESOPs, the changes mandated by the FAB, and how this should change DOL enforcement in the ESOP space.

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ERISA'S ESOP NATIONAL ENFORCEMENT PROJECT

Among various enforcement materials that EBSA issues for EBSA employees are the national enforcement priorities, which set forth general guiding principles, and national enforcement projects, which identify specific areas and issues where EBSA will focus its limited resources. In 2005, EBSA established the Employee Stock Ownership Plan (ESOP) National Enforcement Project, purportedly to "identify and correct ERISA violations in connection with ESOPs," and identified stock valuation as a particular area of focus for EBSA enforcement efforts.

EBSA's 2005 decision to focus enforcement resources on ESOP valuation issues was puzzling. This is because when ERISA was enacted in 1974, Congress clearly indicated that it wanted the DOL to issue a regulation to provide guidance to ESOP stakeholders on valuation issues in an ESOP stock transaction. Congress made this clear in ERISA's express standard for a permissible ESOP stock transaction, which requires "fair market value as determined in good faith" by the trustee pursuant to "regulations" by the DOL.[2]

After ERISA's passage, the DOL did not issue regulations on a good-faith determination of fair market value for purposes of an ESOP stock transaction. Instead, it started suing trustees for failing to comply with the DOL's opinions on valuation standards for a permissible ESOP stock transaction. The first federal circuit court case to consider these issues was *Donovan v. Cunningham*, where the Fifth Circuit rejected the DOL's positions on a good-faith determination of fair market value and chastised the DOL for failing to issue a regulation.[3] If, the court in *Cunningham* explained, the DOL wanted people to comply with the DOL's opinions on highly technical valuation concepts, the better and "fairer" approach is to issue a regulation, not file lawsuits.

By 1983, two branches of government had urged the DOL to address ESOP-transaction good-faith valuations standards by way of a regulation, not through enforcement efforts. In 1988, the DOL responded with a proposed regulation, but it was never finalized, and no court has adopted that proposal in its entirety.

Seventeen years after issuing — but never finalizing — the proposed regulation, EBSA identified ESOP valuations as a national enforcement project and began ramping up enforcement actions against ESOP stakeholders.[4] At this time, EBSA also retained purported valuation experts with backgrounds in private-equity transactions and initiated enforcement actions against ESOP trustees for failing to conduct due diligence and value a company the same way a private-equity buyer might.[5]

These were — and still are — radical positions on ERISA's requirements for a permissible ESOP transaction. Not only were they never announced to the public by way of a properly promulgated regulation,

but they bear little resemblance to the "good faith" assessment of "fair market value" that ERISA requires. In fact, and as the author has explained in court filings over the years, the "fair market value" standard required by ERISA is not the same as a price a private-equity buyer might prefer to pay for a company. Fair market value is a "standard of value" in the field of valuation, and it requires, among other things, consideration of both a hypothetical buyer and a hypothetical seller, who both want to maximize their returns. The price a private-equity buyer might prefer to pay for an asset is a different standard of value, called "investment value," that considers the preferred price a particular buyer might want to pay for a company. That is not the standard ERISA requires for a permissible ESOP stock transaction. Using "investment value as a proxy for fair market value" is as "irrational as using forced liquidation value of a similar company to establish fair market value for a healthy one."[6]

Faced with the immense power and resources of a governmental agency, many trustees began entering into process agreements with the DOL that required those trustees to comply with standards that are not consistent with ERISA's requirements. The DOL's enforcement actions also boosted efforts of private plaintiffs' firms to recruit named plaintiffs to sue over ESOP transactions and assert arguments similar to those of the DOL. The DOL even entered so-called "common interest" agreements with plaintiffs' law firms that were pursuing ESOP claims based on the same or very similar valuation positions the DOL asserted.

This has led to an upset in the balance Congress sought to strike between preventing fiduciary abuse and protecting plan stakeholders from unreasonable regulatory and litigation burdens. Boilerplate lawsuits were filed with generic critiques of valuations (valuations that plaintiffs had not even seen), and most of those survived motions to dismiss. Many meritless cases were settled, and others resulted in odd court decisions reflective of judges' struggle with ERISA standards.

Concerned with this imbalance, Aronowitz had signaled for many months that he intended to end abusive enforcement practices in the ESOP space. On January 15, 2026, Aronowitz officially ended the ESOP National Enforcement Project. Then, on April 14, 2026, Aronowitz issued the FAB that identified four new enforcement priorities and explained EBSA's positions on key enforcement-related issues.

EBSA'S NEW ENFORCEMENT PRIORITIES

The four enforcement priorities in the FAB are:

1. Focusing enforcement on the most egregious conduct and significant harm.

2. Ensuring, whenever possible and consistent with their mission, that EBSA does not regulate by enforcement and instead promotes fairness, prior notice, and clarity to the regulated community.

3. Requiring proper review by senior agency officials of all critical enforcement initiatives.

4. Committing to timely and responsive enforcement.

The first two priorities are the most interesting with respect to EBSA ESOP action. Historically, EBSA has accused ESOP trustees of not making a good-faith assessment of fair market value if EBSA's purported valuation expert disagrees with almost any subjective decision of the trustees' valuation advisor. Of course, a trustee is entitled to rely reasonably on a valuation advisor, and the valuation advisor is entitled to make subjective valuation decisions. The DOL's disagreement with the valuation advisor's subjective valuation decision is not an example of egregious conduct. It is an attempt to regulate by enforcement without prior and clear notice to the ESOP community.

The new enforcement priorities should end, or at least curb, DOL attempts to impose its valuation opinions on the ESOP community through aggressive action against trustees.

THE FOUR GUIDING PRINCIPLES

The FAB also contained four guiding principles for EBSA's enforcement priorities that further indicate that EBSA will end its efforts to impose its valuation will on ESOP trustees.

High Harm, High Priority

First, "EBSA will prioritize investigations evidencing the most egregious conduct or significant harm." EBSA will prioritize both criminal cases and cases where facts support a "breach" of ERISA's duty of loyalty, meaning instances where a fiduciary actually acts for the benefit of someone other than the plan's participants. EBSA's "highest priority" will be those who, in "bad faith," improperly administer benefits or misappropriate benefits intended for workers. This includes "goals unrelated to participants' best interests, such as the promotion of environmental, social, or governance objectives."

EBSA will focus on instances where there is "direct evidence of nonexempt prohibited transactions that involve impermissible conflicts of

interest." Importantly, the FAB recognizes that ERISA's duty of prudence is "a law of process and not results," and Aronowitz indicated that "EBSA must avoid cases that unfairly second-guess process-based fiduciary judgments."

Compliance Through Clarity

Second, "EBSA will not regulate through enforcement whenever possible." In order to promote "fairness," EBSA "must provide clear and advance notice to the regulated public about its interpretation of ERISA and fiduciary responsibilities." Such advanced notice is consistent with a President Trump Executive Order that directed governmental agencies to limit industry regulation "only [to] standards of conduct that have been publicly stated in a manner that would not cause unfair surprise."

This means that "novel legal theories or interpretations of ERISA should not be first articulated during enforcement actions." Unless otherwise authorized by EBSA's director of enforcement and Aronowitz or his delegate, "all enforcement activity" must have a "close nexus" to:

(1) the plain language of ERISA's text;

(2) clearly established guidance in final Department regulations or prominently published sub-regulatory guidance; or

(3) clearly established case law.

The FAB specifically mentions ESOPs and the Work Act's directive in 2022 for the DOL to promulgate a regulation on "acceptable standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan." "All pending and proposed ESOP valuation investigations must be reviewed against this guiding principle of fairness."

Leadership-Led Enforcement

Third, "all proposed significant enforcement activities must be reviewed by EBSA's leadership." Matters of "significance" include:

- Novel legal theories or novel areas of enforcement.

- Issues that are, or are reasonably likely to be, the subject of circuit court splits.

- Issues that will be resolved by adopting a position that deviates from a prior EBSA position.

- Any other issues that the deputy assistant secretary for program operations, director of enforcement, or any regional director independently believes may be of interest or importance to the assistant secretary.

"The Deputy Assistant Secretary for Program Operations, the Director of Enforcement, and each Regional Director must inform EBSA's Assistant Secretary (or his delegate) of significant enforcement activity, including proposed settlements and voluntary corrective actions." The FAB requires reporting to leadership with a fair and clear description of the matter's significance, a detailed summary of the matter evidencing rationale for the enforcement recommendation, and all material and written correspondence between EBSA and the investigation's subject.

Responsive Regulation, Quicker Results

Fourth, "EBSA's enforcement must be responsive and timely." No longer will EBSA tolerate "open-ended and unduly continue for extended periods of time." Routine investigations "such as delinquent employee contributions, disclosure and bonding violations, should be completed within 18 months, unless there are exigent circumstances that are communicated to the Director of Enforcement." "More complex investigations must be completed within 30 months unless there are exigent circumstances. Consideration will be given for any cases in which EBSA's enforcement activities are delayed for documented reasons beyond the control of EBSA's enforcement personnel." The director of enforcement (or designee) also must conduct quarterly reviews of any civil investigation open longer than these timeframes and take appropriate corrective action to ensure EBSA is meeting its priorities.

EBSA personnel are also directed to "take any available opportunities to provide timely compliance assistance to conscientious plan sponsors and service providers under EBSA's jurisdiction."

ADDITIONAL COMMENTS

Interestingly, the FAB also prohibits EBSA investigators and professionals from doing "anything that compromises the Department's independence, integrity and credibility with the regulated or participant

communities." This includes "eliminating any appearance that EBSA enforcement activities and priorities are being coordinated with plaintiff lawyers pursuing private actions," with a footnote referring to an investigation by the DOL's inspector general of common interest agreements with private plaintiff law firms.

IN SUMMARY

- EBSA's new enforcement priorities signal a shift away from "regulation by enforcement" in the ESOP space, promising greater clarity, fairness, and leadership oversight in Department of Labor actions.

- The April 2026 FAB introduces four guiding principles that emphasize focusing enforcement on egregious conduct, avoiding surprise legal interpretations, and requiring timely, leadership-led case reviews.

TAKEAWAYS

Taken at face value, the FAB should end efforts by the DOL to try and hold ESOP trustees liable if the DOL disagrees with subjective valuation determinations made by the trustees' independent valuation advisors. Such an approach was misguided from the start. ERISA permits an ESOP trustee to cause an ESOP stock transaction if the transaction is for "fair market value *as determined in good faith*" by the trustee. As so many courts have held, this standard is not a valuation standard, it is primarily a standard of conduct. A trustee who retains an expert, independent valuation advisor is entitled to rely reasonably on that advisor, and doing so does not require the trustee to second-guess valuation decisions or dictate what valuation approaches the advisor employs.

There are, however, uncertainties that remain. Career DOL employees already have many enforcement actions in progress, and it appears they are not backing off their attempts to impose their valuation opinions on ESOP stakeholders. There also have been instances where career DOL employees have slow-rolled changes mandated from leadership. The FAB does, however, require leadership approval of significant enforcement activities. There may be instances where targets of enforcement actions may have to bring to leadership's attention enforcement actions that violate the FAB's directive.

In the end, the FAB seeks to return the legal standards for permissible ESOP transactions back to where Congress had always intended. Trustees are afforded deference in determining the price an ESOP pays or receives for stock. Their decisions are not to be second-guessed if the decisions are the result of a good-faith process. That has always been the standard.

NOTES

1. https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2026-01.

2. 29 U.S.C. § 1002(18).

3. Donovan v. Cunningham, 716 F.2d 1455, 1473 (5th Cir. 1983).

4. In a 2015 interview, Timothy Hauser, the deputy assistant secretary for program operations of the Employee Benefits Security Administration, discussed purported problem areas in ESOP transactions on which EBSA was focused. Hauser identified valuation issues. See Q&A with Tim Hauser of the U.S. Dep't of Labor, Insights (Spring 2015), at 74-75, available at https://willamette.com/insights_journal/15/spring_2015_8.pdf.

5. See, e.g., Puntillo Report, Solis v. First Bankers Trust Services, Inc. et al., No. 12-cv-4450, 2014 WL 11770110 (D.N.J. Aug. 14, 2014) (opining that ESOP trustee has duty to act as "a sophisticated investor, such as a private equity firm, performing diligence that met the standard of care and custom and practice of such investors in a similar transaction").

6. MISUSING FAIR MARKET VALUE, 11 Value. Strateg. 12, 16, 2008 WL 761920, 4.