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# Rewards Policy Insider
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## District Court Sides with Department of Labor in Fight over Cryptocurrency Guidance

In a legal challenge to the Department of Labor's ("DOL") subregulatory guidance addressing cryptocurrency investments in retirement plans, a district court concluded that the plaintiff did not have the legal ability to challenge the guidance.

## Background

In March 2022, in the wake of news that some investment firms were beginning to market investments in cryptocurrency to 401(k) plans and amidst news headlines highlighting cryptocurrency's extreme volatility, DOL released Compliance Assistance Release ("CAR") 2022-01. The CAR provides subregulatory guidance to defined contribution plans that offer cryptocurrency and other digital assets as investments.

Specifically, the CAR cautions plan fiduciaries to exercise "extreme care" before they decide to add a cryptocurrency option to a 401(k) plan's investment menu for plan participants. The CAR also warns that DOL expects to conduct investigations into cryptocurrency investments in plans in the future. In addition, the CAR states that fiduciaries that allow cryptocurrency through a brokerage window – which gives a plan participant the ability to choose from additional, specialized investment options – could be the subject of an investigation. According to the CAR, fiduciaries responsible for overseeing or allowing cryptocurrency investment options in brokerage windows should expect to be questioned by DOL about how they can square their actions with their fiduciary duties of prudence and loyalty in light of the perceived risks of cryptocurrency.

In June 2022, ForUsAll, a firm that provides administrative services to 401(k) plans, filed a lawsuit against DOL in the U.S. District Court for the District of Columbia seeking to invalidate CAR 2022-01. The plaintiff argued that the guidance was unlawful because DOL did not follow the proper procedures laid out in the Administrative Procedure Act ("APA"), which requires certain types of agency rules to be issued using notice and comment procedures. Because CAR 2022-01 was released without allowing the public to comment first, ForUsAll argued that the guidance was void. Because the company specializes in access to cryptocurrency investments, ForUsAll argued that the guidance harmed its business by warning plans against cryptocurrency.

## District Court Sides with DOL

In its August 29, 2023 order in *ForUsAll, Inc. v. DOL*, the D.C. District court sided with DOL and dismissed the lawsuit on two grounds. First, the court found that ForUsAll did not have legal "standing" to bring the case because its requested remedy – striking down the CAR – wouldn't fix the alleged harm. ForUsAll alleged that the release of the CAR has caused about one-third of plans that had been in discussions with the company to add cryptocurrency had decided to pull out of the potential partnership. But the court concluded that, even if the court struck down the CAR, that would not provide any relief for the alleged loss of business because it was "speculative" that the plans would come back to the table.

Second, the court concluded that because CAR 2022-01 is not a "final agency action," it cannot be challenged in court in the first place. Under the APA, a legal challenge to an agency rule is only valid if the rule is a final agency action. Generally, this means that the action determines legal rights or obligations which can result in legal consequences if the parties involved fail to follow the

rule. The court concluded that the CAR is not a final agency action because it is merely the beginning of DOL's evaluation of cryptocurrency investments and is advisory – rather than binding – on plans.

### Outlook

This case has important implications regardless of whether a plan wants to offer cryptocurrency or other digital assets as investment options. For many stakeholders, it is concerning that the court dismissed ForUsAll's argument that its cryptocurrency business was harmed by the guidance, which explicitly warns plans that they could be investigated for allowing cryptocurrency investments. As a result, ForUsAll is left in a position where it has little recourse despite the fact that the guidance allegedly scared away potential clients.

The decision also implicates brokerage windows. The CAR implies (but doesn't state directly) that fiduciaries must monitor the cryptocurrency investments in a brokerage window, even though as a practical matter, there is no way for a fiduciary to monitor all of a brokerage window's investments. By siding with DOL, the court appears to be at odds with the reality that a fiduciary is not able to monitor a participant's potential investments in cryptocurrency through a brokerage window.

## Student Loan Repayments to Resume in October

More than 3 years after repayments on student loans owned by the Department of Education were suspended and a 0% interest rate was temporarily established due to the COVID-19 pandemic, many employees will resume – or begin – making monthly student loan payments in October. Interest accruals resumed in September. There are options available to employers that want to help.

### Educational Assistance Programs

Each year, employers can provide up to $5,250 of non-taxable "educational assistance" to an employee pursuant to a Code section 127 Educational Assistance Program. This gross income exclusion generally applies only to expenses incurred for the employee's education – i.e., tuition, fees, books, and supplies, etc.

However, through 2025 this exclusion applies to employer payments of employees' student loan debts.

Note that the $5,250 limit applies to all employer educational assistance provided to an employee. As a result, any payments employers make towards employees' student loans will reduce the available exclusion for other forms of educational assistance.

Educational assistance programs may not discriminate in favor of highly compensated employees. Additionally, no more than 5% of educational

assistance paid by an employer during a year can be provided to shareholders and 5% owners.

### Matching Contributions

For plan years beginning after December 31, 2023, sponsors of 401(k), 403(b), and governmental 457 plans can make "matching" contributions based on employees' student loan repayments. As a result, employees who feel they can't afford to both make student loan repayments and contribute to their retirement plans might still be able to accumulate some retirement savings.

Employers that want to offer this student loan matching contribution option will need to amend their plans to do so. In order to receive the match for a year, employees will need to certify they have made eligible loan payments for that year. The special matching contributions will have to be made annually, but they do not have to be made as frequently as other matching contributions are required to be made.

The IRS is expected to issue guidance on the student loan matching contribution option in the near future.

### Other Options

Employers that offer financial planning as a benefit, either through an Employee Assistance Plan or otherwise, might encourage employees to leverage those offerings to help with budgeting for their student loan payments.

## House Leaders Introduce Bill to Enhance Group Health Plan Transparency and Lower Employer Costs

A bipartisan group of key House committee leaders introduced the "Lower Costs, More Transparency Act" (H.R. 5378) on September 8. The proposed bill would impose significant new transparency requirements on health care providers, pharmacy benefit managers (PBMs), and group health plans, and also eliminate barriers to group health plans gaining access to information about cost and quality of care, among other things.

### Focus on Pharmacy Benefit Managers

Although the proposed bill does not target PBMs exclusively, it focuses a fair amount of attention on them.

One provision would establish a semi-annual reporting requirement by PBMs to employers. This report would have to include "detailed data on prescription drug spending, including the acquisition cost of drugs, total out-of-pocket spending, formulary placement rationale, and aggregate rebate information."

Another provision would prohibit group health plans and their PBMs from interfering with a pharmacy's ability to tell participants if their plan's required cost sharing for a particular drug is greater than the amount they would be required to pay without using their coverage.

The bill also would amend ERISA section 408(b)(2), which provides a prohibited transaction exemption for "reasonable arrangements" between plans and service providers, to more specifically define what is "reasonable" in the group health plan context. In particular:

- Any contract between a group health plan and a provider, network of providers, third party administrator, or PBM, among others, would not be reasonable unless it allows the plan fiduciary to audit or review all de-identified claims or encounter information; and
- Any contract between a group health plan and a PBM would have to include full disclosure of the PBM's direct and indirect compensation from all sources, including fees, rebates, alternative discounts, copayment offsets, etc.

Finally, the bill would prohibit PBMs that contract with Medicaid Managed Care Organizations from using spread pricing. Instead, states would reimburse PBMs for an administrative fee for their services.

## Health Plan Transparency

The bill would require group health plans to establish an internet-based self-service tool that participants could use to obtain information about their required cost-sharing with respect to a specific item or service furnished by a provider. In addition to the cost-sharing information, also required would be the network rate (if the provider is in-network) or the maximum allowed amount (if the provider is out of network), the amount the participant has already accumulated towards any deductible and out-of-pocket maximum, and any prior authorization or other medical management requirements, etc.

This self-service tool apparently would be an enhanced version of the tool required by the transparency in coverage regulations and the No Surprises Act.

Additionally, the bill would require group health plans to publicly make available certain "rate and payment" information, and update it monthly. The required rate and payment information would include:

- For each covered item or service (except drugs), the in-network rate;
- For each covered drug, the in-network rate plus the average amount the plan paid for such drug (net of rebates, discounts and price concessions) dispensed or administered during a specified 90-day period; and
- For each covered item or service, the amount billed and allowed during a specified 90-day period for each such item or service furnished out-of-network.

Also of note, the bill would establish specific statutory transparency requirements for hospitals, clinical diagnostic laboratories, imaging, and ambulatory surgical centers.

## Outlook

The lead cosponsors of H.R. 5378 are Chair Rodgers and Ranking Member Mallone of the Energy and Commerce Committee, Chair Foxx of the Education and Workforce Committee, and Chair Smith of the Ways and Means Committee.

Currently there is no Senate companion bill, and it isn't clear how the Senate would react if the House passes the bill.

In a normal year, the fact that all the relevant Committee chairs support a bill would significantly enhance its chances of being enacted. But with the House Speaker's office now vacant and yet another budget showdown looming, this year is anything but normal. Still, anything with bipartisan support could find its way into an omnibus spending bill.

Updates will appear in future editions of Rewards Policy Insider as events warrant.

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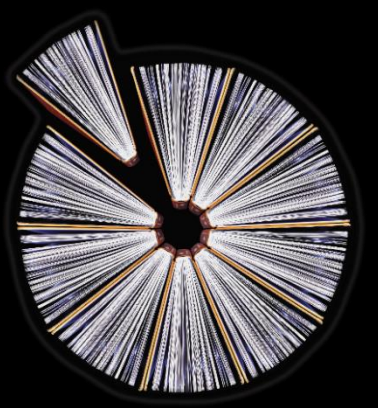

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