DOL Proposal Will Block Participant Lawsuits

By Eileen Appelbaum *Wed, Apr 1, 2026*

A plan sponsor, according to the DOL proposal, 'is responsible for the prudent selection of the manager but is not liable for the individual investment decisions of that manager.' So writes the co-director of the Center for Economic and Policy Research.

On March 30, the Department of Labor (DOL) released its proposed regulations to implement President Trump's Executive Order (EO) allowing employers to include private equity, private credit funds, crypto, and all manner of risky alternative assets in defined contribution retirement plans — mainly 401(k) plans — without worrying about employees suing them over high fees or poor performance.

The President released EO 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," in August 2025. It instructs the Department of Labor and the Securities and Exchange Commission to develop "safe harbors" that will protect employers from being sued by employees who believe that their employer inappropriately allowed high fee or risky investments in their retirement accounts.

Access to workers' nest eggs has long been a goal of the private equity industry. It has lobbied hard for this protection for employers as it wants to tap into the $9 billion in workers' 401(k) accounts. ERISA, the Employee Retirement Income Security Act of 1974, has strict requirements for retirement account investments. Employers have a fiduciary responsibility for assuring that these investments are prudent, and can be sued by workers for including retirement assets that don't meet this standard.

Workers have successfully sued their employers for breach of fiduciary duty for failing to do due diligence in the selection of investments, failing to monitor their performance, and paying high fees. The overarching goal of the proposed regulation, according to the DOL, is to alleviate litigation risk for

employers, who would then be free to expose workers' retirement accounts to alternative investments.

While ERISA does not identify categories of investment to be avoided and employers have always had the ability to include these assets in workers' retirement accounts, only 4 percent of defined contribution plans offered alternative investments in 2024.

Litigation is not the only concern that employers have. Complexity, illiquidity, lack of transparency, and lack of worker complaints about current offerings are other reasons that employers have not pursued alternative investments.

The central theme of the proposed regulations is that:

1. ERISA does not preclude employers from including alternative investments in direct contribution retirement accounts including, notably, 401(k) plans;
2. ERISA requires that employers be prudent in selecting a menu of investment choices that workers can choose from;
3. Prudence has to be exercised in considering six factors that go into a decision to include any investment in workers' retirement accounts: performance, fees, liquidity, valuation, benchmarking, and the complexity of the investment;
4. Prudent processes at the time the employer makes the decision to include the investment, and not results, is what matters for the liability of the employer.
   Safe harbors are provided in the proposed regulation, that is, processes for considering each of the six factors that, if followed, protect the employer from being sued by employees;
5. As an example of a safe harbor, an employer cannot be considered imprudent for selecting an investment alternative with higher fees than another investment with lower fees and the same risk profile if, for instance, the value proposition for making the investment includes better customer service;
6. A fiduciary that follows the processes described in the

> proposed regulation is "presumed to be reasonable and is entitled to significant deference" by the courts and should "be able to confidently rely on that determination without undue fear of litigation."

But here's the DOL's bottom line: Seeking assistance from an investment advice fiduciary or an investment manager that is an ERISA fiduciary gets the employer off the hook altogether. The employer, according to the DOL, "is responsible for the prudent selection of the manager but is not liable for the individual investment decisions of that manager."

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