

HOT TOPICS IN EMPLOYEE BENEFITS: WHAT WE'RE SEEING

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Retirement Plan Issues and Considerations

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Retirement Plan Issues and Considerations

- Potential retirement plan legislation later in 2021
- New cybersecurity guidance from the Department of Labor (DOL) and considerations for plan sponsors and fiduciaries

Potential Retirement Plan Legislation

- Proposed retirement plan bills under consideration by both the US House and Senate:
 - *The Securing a Strong Retirement Act of 2021* (so-called, "SECURE Act 2.0"*), which was unanimously approved by the House Ways and Means Committee in early May 2021 for consideration and debate by the full House.
 - *The Retirement Security and Savings Act*, which was reintroduced in the current congressional session of the Senate by Senators Rob Portman (R-OH) and Ben Cardin (D-MD) on May 21, 2021 (the bill previously was introduced in the last congressional session, but there was no progress on the bill due to competing legislative priorities).
- Long-running bipartisan support for the bills suggests there is a reasonably good chance of passage in the future (but of course no guarantees!)

* *The Setting Every Community Up for Retirement Enhancement Act of 2019 – SECURE Act*

Potential Retirement Plan Legislation

- Exact provisions of the competing bills differ in some respects — some provisions are identical and other provisions reflect consistent design and policy consideration; key points common to both bills include provisions to:
 - Expand automatic enrollment and automatic increase provisions in retirement plans
 - Increase the age at which "required minimum distributions" from retirement plans must commence from age 72 to age 75
 - Increase the amount of "catch-up" contributions that older employees can contribute to retirement plans
 - Encourage and facilitate retirement savings for employees with student loans by permitting employers to make matching contributions to retirement plans on the basis of student loan repayments
 - Expand retirement plan participation for lower-income employees and the employees of small employers through various approaches, including tax credits, the shortening of the maximum period of required eligibility for part-time employees from three years to two years, and pooled plan arrangements
 - Encourage and facilitate the use of lifetime income options

Cybersecurity Issues and Considerations

- On April 14, 2021, the DOL issued three pieces of subregulatory guidance addressing cybersecurity
- Background leading up to guidance:
 - Well-publicized instances of cybersecurity breaches in many different contexts
 - A few isolated cases involving retirement plans (primarily identify theft)
 - Potentially much more unreported activity
 - Government Accounting Office (GAO) report identifying the importance of strong cybersecurity security practices for the retirement plan industry
 - No specific laws or rules establishing cybersecurity requirements for retirement plans
 - DOL informal statements that plan sponsors/fiduciaries are responsible for safeguarding participants' retirement plan benefits

Nexus Between ERISA's Fiduciary Duties and Cybersecurity

ERISA's duty of prudence

Requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

ERISA fiduciary duty to protect plan assets from cybersecurity incidents

It has become generally accepted that ERISA fiduciaries have *some* responsibility to mitigate the plan's exposure to cybersecurity events.

But, prior to this guidance, it was not clear what the DOL expected of a "prudent" fiduciary with respect to cybersecurity risks.

Cybersecurity incidents

Are increasingly happening and ERISA plan assets are being targeted.

Cybersecurity Issues and Considerations

- New DOL guidance sets forth the DOL's views of the steps that plan fiduciaries must take to demonstrate prudence on cybersecurity matters
- Guidance has three distinct components:
 - Fiduciary-focused component – “Tips for Hiring a Service Provider with Strong Cybersecurity Practices”
 - Provider-focused component – “Cybersecurity Program Best Practices”
 - Participant-focused component – “Online Security Tips”

Cybersecurity – Plan Fiduciary Focused Component

- Steps that fiduciaries should consider in hiring a service provider include the following:
 - Ask about the service provider's data security standards, practices, policies, and audit results and benchmark those against industry standards
 - Analyze the service provider's security standards and security validation practices
 - Confirm that the agreement with the service provider permits the plan fiduciary to review cybersecurity compliance audit results
 - Evaluate the service provider's track record in the industry (e.g., security incidents, litigation, etc.)
 - Ask about past security events and responses
 - Confirm that the service provider has adequate insurance covering losses relating to cybersecurity and identity theft events, including losses caused by both internal and external threats
 - Ensure that the services agreement between the plan fiduciary and the service provider includes provisions requiring ongoing compliance with cybersecurity standards

Cybersecurity – Service Provider Focused Component

- Best practices that service providers should implement to mitigate cybersecurity risks
 - Documented Program: Service providers should have a formal, well-documented cybersecurity program that consists of policies and procedures designed to protect the infrastructure, information systems, and data from unauthorized access and other malicious acts
 - Risk Assessments: Service providers should design and codify annual risk assessments that help identify, estimate, and prioritize risks to the information systems
 - Third-Party Audits: Service providers should have a third-party auditor assess the service providers' security controls on an annual basis
 - Senior Management and Qualified Personnel: Service providers should clearly define and assign information security roles and responsibilities, with management of the cybersecurity program at the senior executive level and execution of the cybersecurity program by qualified personnel
 - Access Control Procedures: Service providers should have strong access control procedures, including limiting access to authorized users

Cybersecurity – Service Provider Focused Component

- Oversight of Storage Systems: Service providers should ensure that any cloud or third-party-managed storage system used by the service providers to service the plan is subject to proper security reviews and independent security assessments
- Cybersecurity Awareness Training: Service providers should conduct periodic cybersecurity awareness training for all personnel pursuant to a comprehensive program
- System Development Life Cycle: Service providers should implement and manage a secure “system development life cycle” (SDLC) program addressing both in-house-developed applications and externally developed applications, and that includes activities such as penetration testing, code review, and architecture analysis
- Business Resilience Program: Service providers should have an effective business resiliency program that addresses business continuity, disaster recovery, and incident response
- Encryption Standards: Service providers should implement current, prudent standards for the encryption of sensitive nonpublic information both while it is at rest and while it is in transit
- Security Controls: Service providers should implement technical security controls consistent with best security practices
- Response to Incidents: Service providers should respond appropriately to cybersecurity incidents that have occurred, including notifying law enforcement, insurers, and oversight bodies; investigating the incident; taking steps to prevent or mitigate harm; honoring contractual or legal obligations; and fixing problems to prevent recurrence

Cybersecurity – Participant Focused Component

- Online security tips for participants — participants should:
 - Register, establish, and routinely monitor online accounts
 - Use strong and unique passwords
 - Use multifactor authentication
 - Keep personal contact information current
 - Close or delete unused accounts
 - Avoid use of free Wi-Fi for sensitive matters
 - Beware of phishing attacks
 - Use antivirus software and keep apps and software current
 - Know how to report identify theft and cybersecurity incidents

Cybersecurity Takeaways

- Guidance is “sub-regulatory,” meaning that it does not have the force of a law or binding regulation, BUT:
 - Represents the position the DOL would take on audit or enforcement action
 - Potentially will be used by courts or litigants as a benchmark to measure and evaluate fiduciaries’ behavior
- Although targeted at different audiences, all three components of the guidance raise issues and considerations for plan fiduciaries
- Application of guidance to existing service provider relationships is potentially more challenging for plan fiduciaries
- Record and document fiduciary process regarding cybersecurity

DOL Audit Initiatives



Timothy Hauser, the DOL's Deputy Assistant Secretary for National Office Operations, has repeatedly commented on cybersecurity matters. He has been quoted as saying that the DOL will be auditing retirement plans for cybersecurity and that the people responsible for plan administration should be paying attention to whether the systems are secure.

Ali Khawar, the Acting Assistant Secretary for EBSA, has highlighted the DOL's cybersecurity efforts in recent speeches.

DOL Audits start in June 2021!!

ARPA COBRA Subsidy Basics

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ARPA COBRA Subsidy Basics

- Enacted under The American Rescue Plan Act (ARPA)
- Provides a 100% COBRA premiums subsidy for “assistance eligible individuals” (AEIs) from April 1, 2021 through September 30, 2021
- AEI:
 - Reduction in hours
 - Involuntary terminated
 - Not eligible for other group health plan coverage
 - Note “eligible,” not “actually covered” — known unknown for employers and TPAs
- “Premium Payee” gets tax credit

DOL Guidance

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DOL Guidance

- Model Notices
 - Model General Notice
 - Model Notice for Extended Election Period
 - Model Alternative Notice (insured coverage subject to state continuation)
 - Summary of COBRA Premium Assistance Provisions (includes attestation and opt-in)
 - Model Notice of Expiration of Premium Assistance
- Models continue typical DOL paper-based processes and anticipate an actual attestation physically returned to the COBRA administrator
 - This paper-based process, and indeed the attestation itself, contains the seed of compliance difficulties for many COBRA vendors—and payroll audit risks for employers

IRS Guidance

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IRS Guidance

- **Notice 2021-31**

- Issued less than two weeks before model notices were due
- Did not give COBRA administrators/employers an opportunity to pivot in time to issue COBRA notices
- Largely a carryover of guidance issued under the American Recovery and Reinvestment Act of 2009
- Q&A format broken up into sections

IRS Guidance: Notice 2021-31 Highlights

- **Assistance Eligible Individuals (AEIs)**
 - Employers may require individuals to self-certify and attest regarding eligibility status for subsidy including, most importantly, that the Qualified Beneficiary (QB) has no disqualifying group health plan coverage (but proof of eligibility is required for payroll tax purposes)
 - If an individual was eligible for disqualifying group health plan coverage prior to April 1, 2021, and is no longer eligible on or after that date, the employee remains subsidy-eligible
 - Note that any disqualifying group health plan coverage, such as a special enrollment opportunity, that is tolled under the EBSA Disaster Relief guidance results in ineligibility for a COBRA subsidy

IRS Guidance: Notice 2021-31 Highlights

- **AEIs**

- A QB's reduction in hours or involuntary termination that follows another qualifying event, such as a divorce, does not make that QB eligible for the COBRA subsidy (this would apply to dependents; covered employee remains subsidy-eligible)
- The COBRA subsidy is available to individuals who have remained on COBRA due to an extension of COBRA coverage or a second qualifying event such as a disability determination
 - Do employers have to hunt down and provide a notice to individuals who may be eligible for COBRA but did not notify of a disability?
 - IRS and DOL are still reviewing that question

IRS Guidance: Notice 2021-31 Highlights

- **AEIs**

- Retiree coverage offered under a stand-alone retiree plan is disqualifying coverage for the COBRA subsidy
- COBRA subsidy available only to QBs
 - Not available for domestic partners
 - Not available for children of domestic partners unless such children are tax dependents of the covered employees (which generally is not the case)
 - Confirm with the COBRA administrator

IRS Guidance: Notice 2021-31 Highlights

- **Involuntary Termination of Employment**

- Facts-and-circumstances analysis
- Many examples in the Notice
- Key analysis is whether the employer initiated the action to terminate employment
- Generally, does not include retirement
- Includes a resignation as a result of a material change in geographic location
- Includes participation by an employee in a window program under which employees with impending terminations of employment are offered severance arrangements to terminate employment
 - Facts and circumstances important in this analysis — limited to window programs that meet certain requirements

IRS Guidance: Notice 2021-31 Highlights

- **Interaction with EBSA Disaster Relief Notice**
 - ARPA notices/elections are not tolled by the EBSA Disaster Relief guidance
 - If election for COBRA is tolled under the EBSA Disaster Relief guidance, the AEI must within 60 days of receiving the ARPA extended election notice either elect or decline COBRA for the period tolled prior to April 1
 - Effectively eliminates COBRA election tolling for ARPA extended election notice recipients
 - Note that payment of premium prior to April 1 is still tolled

IRS Guidance: Notice 2021-31 Highlights

- **Premium Tax Credit**

- Tax credit is equal to the amount of COBRA premiums paid by the QB
 - Employer-subsidized portion of COBRA premiums not eligible for a tax credit
 - Design pointer: STOP subsidizing COBRA coverage for former employees!
 - Baseline is similarly situated employees
- Examples in the guidance on how to allocate the tax credit if the premium paid by the QB covers individuals who are not assistance-eligible (such as domestic partners)
- Tax credit for Health Reimbursement Arrangement is limited to 102% of the amount actually reimbursed with respect to an AEI

IRS Guidance: Notice 2021-31 Highlights

- **Claiming Premium Tax Credit**

- Claimed by the “premium payee”
 - Multiemployer plan, employer, insurer, certain limited-circumstances PEO
- Claimed on Form 941
- If anticipated credit exceeds the federal employment tax deposits available for reduction, the premium payee may file a Form 7200 to request an advance payment of the credit
- Included in gross income of the premium payee

IRS Guidance: Notice 2021-31 Highlights

- **Claiming Premium Tax Credit**

- If a QB fails to notify the premium payee of other disqualifying coverage, the premium payee is not required to refund to the IRS any claimed credit for the period after the individuals eligible for COBRA premium assistance ended coverage due to eligibility for other disqualifying coverage
- Any claim for the tax credit must be substantiated by the premium payee
 - Other employer records to substantiate
 - As a practical matter employer records cannot substantiate eligibility for other group health plan coverage (except perhaps Medicare)
 - Importance of DOL opt-in/attestation form

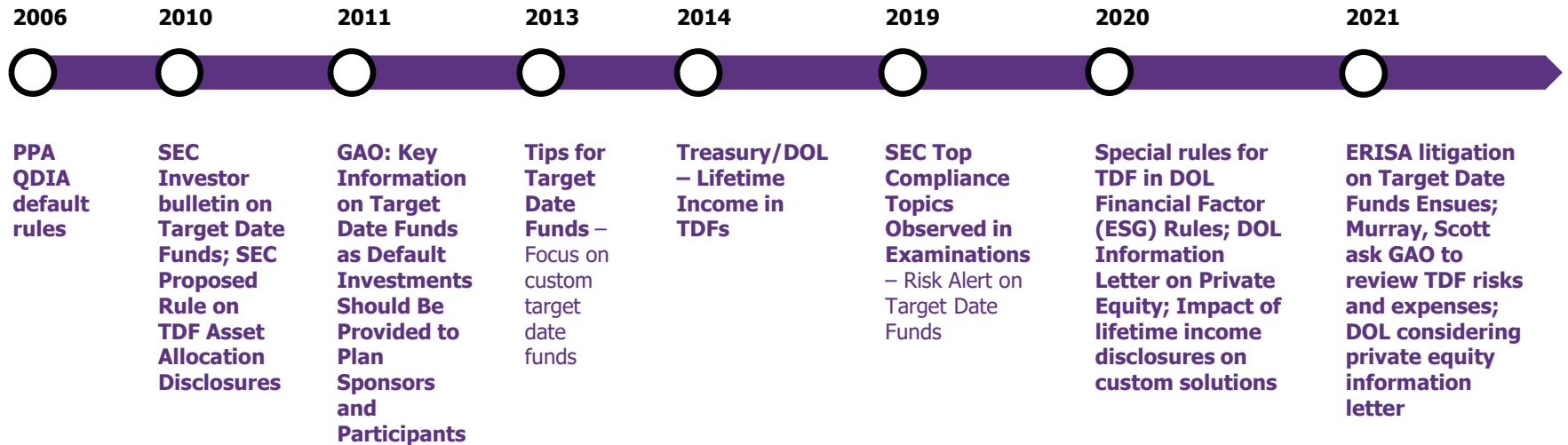
Target Date Funds

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Target Date Funds

- Target date funds (TDFs) are one of the mainstays of defined contribution (DC) plan design and investment line ups.
- Based on the impact of QDIA defaults and fund mapping, they continue their trend as the predominant investment option when chosen as the default investment option.
- New design ideas for target date funds continue to be developed, such as for retirement tier/lifetime income structures.
- At the same time, we continue to see the legal regulatory spotlight on target date funds from an array of sources.

Target Date Fund Timeline Highlights



Murray Scott Letter to the GAO

“

The employer-provided retirement system must effectively serve its participants and retirees, and we are concerned certain aspects of TDFs may be placing them at risk. TDFs are often billed as ‘set it and forget it’ investments, yet expenses and risk allocations vary considerably among funds. The millions of families who trust their financial futures to target-date funds, need to know these programs are working as advertised and providing the retirement security promised.

“

...retirement experts have raised concerns that the performance of TDFs and level of risk exposure can vary widely—even for those close to retirement.

“

Little is known about the extent to which TDFs offered in employer-provided retirement plans include alternative assets and how those TDFs with alternative assets impact participants’ fees and returns.

Questions raised include:

- How are TDFs marketed and advertised? Are participants sufficiently aware of the cost and asset allocation variation among TDFs?
- Is there a material difference in the performance of off-the-shelf versus custom TDFs?
- To what extent do TDFs include alternative assets, such as hedge funds or private equity? What information is typically available to participants and plan sponsors about the risks and benefits of asset allocations in TDFs? How do plan sponsors select and oversee TDFs to ensure these funds have a suitable risk level for participants?
- What steps has the DOL taken to ensure that ... sponsors provide appropriate information and education about these funds to plan participants?
- What are possible legislative or regulatory options that would not only bolster the protection of plan participants, who are nearing retirement or are retired, but also achieve the intended goals of TDFs?

So, What's a Fiduciary to Do?



Step up TDF compliance reviews/mock audits

Review governance and procedures

Conduct risk management review

Review compliance against multiple lenses – DOL, SEC, broader topics

ESG and the ERISA Fiduciary

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“ESG”

Environmental, Social, and (Corporate) Governance factors and considerations

E

Environmental

Climate Change

Biodiversity

Natural Resources

Carbon Emission

Energy Use

Water Use

Hazardous Waste

Air and Water Pollution

S

Social

Health and Safety

Labor Standards

Product Liability

Privacy and Data Security

Employee Opportunity

Diversity and Inclusion

Working Conditions

Compensation and Benefits

Internal Pay Equity

Child and Forced Labor

Corporate Giving and Philanthropy

Supplier Practices

G

Governance

Diversity and Inclusion

Transparency

Board Independence

Ownership and Ethics

Executive Compensation

Shareholder Rights

Enterprise Risk Management

Audit Oversight

Disclosure and Reporting

Privacy and Cybersecurity

Relationship Between ERISA's Fiduciary Duties and ESG

ERISA's duty of prudence

Requires fiduciaries to act with prudence and diligence.

ERISA's duty of loyalty

"A fiduciary shall discharge his or her duties . . . solely in the interest of the participants and for the exclusive purpose of (i) providing benefits to participants; and (ii) defraying reasonable expenses."

The key issue is how ESG fits within these duties.

DOL view: A "fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals."

The interpretation of this standard goes back and forth.

The DOL has issued interpretative guidance over the last 20 to 25 years that can feel like watching a ping-pong match.

Trump Era: Reexamination of ESG and Proxy Voting

“Financial Factors in Selecting Plan Investments” (the “Financial Factors Rule”), aka the ESG rule.

- The crux of the Financial Factors Rule is to mandate that fiduciaries may consider only pecuniary factors when making investment decisions, subject to a few exceptions.
- For this purpose, “pecuniary” means a factor that the fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons and the plan’s objectives and funding policy.

Proxy Voting Rule (officially titled “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights”)

- Sets policies and procedures to satisfy the safe harbor.
 - Only vote when the vote is prudently determined to be substantially related to the issuer’s business or expected to have a material effect on the value of the investment.
 - Don’t vote when the plan’s holding in a single issuer relative to a plan’s total investment assets is below a quantitative threshold.
 - All subject to a “prudence override.”

Along with the two regulations, the DOL has been conducting enforcement examinations on the use of ESG factors and proxy voting.

The Biden Administration

01

In a somewhat expected development, in early March the DOL issued an enforcement statement announcing that it will not enforce either of the above two new rules.

02

On May 20, President Biden issued an Executive Order (EO) titled "**Executive Order on Climate-Related Financial Risk.**"

Section 4 of the EO directs the DOL to consider proposing, by September 2021, a new rule (for notice and comment) that would suspend, revise, or rescind the ESG rule and proxy voting rule that were finalized in January 2021.

More broadly, it directs the DOL to "identify any actions that can be taken" under ERISA "to protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk."

Congressional Developments

- Senators Patty Murray (D-WA) and Tina Smith (D-MN) along with Suzan DelBene (D-WA) introduced legislation in the Senate and House aimed at providing legal certainty to workplace retirement plans that choose to consider ESG factors in their investment decisions or offer ESG investment options.
- Specifically, the “**Financial Factors in Selecting Retirement Plan Investment Act**” (S. 1762) amends ERISA to specifically allow plans to consider ESG factors when they are expected to have an impact on investment outcomes, as long as fiduciary obligations are met.

What to Do Next?

- On the one hand, for those plans that were under a current DOL investigation related to ESG usage, the DOL has largely ended its current enforcement effort in this area (although not fully).
- The Biden DOL will prepare a new set of regulatory interpretations in these two areas.
 - However, it may be some time until the DOL proposes such new guidance.
- But there is also some uncertainty because a nonenforcement policy does not remove either rule.
 - As a result, one remaining risk is that a private litigant could still bring an ERISA action for noncompliance with either rule since a nonenforcement policy leaves each rule intact.
 - Also, there is continuing concern about uncertainty when there is a new administration.

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



Biography



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Julie provides effective and practical solutions to clients' complex ERISA issues. She proficiently steers plan sponsors and investment managers through ERISA's fiduciary and prohibited transaction rules, and negotiates virtually every type of investment-related agreement with employee benefit plans. Julie uses exceptional communication and interpersonal skills to advise clients on a wide range of ERISA topics, including effective fiduciary governance, risk management, the creation of "white label" investment options, and the application of environmental, social, and governance (ESG) factors in plan investment decisionmaking.

Biography



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Biography



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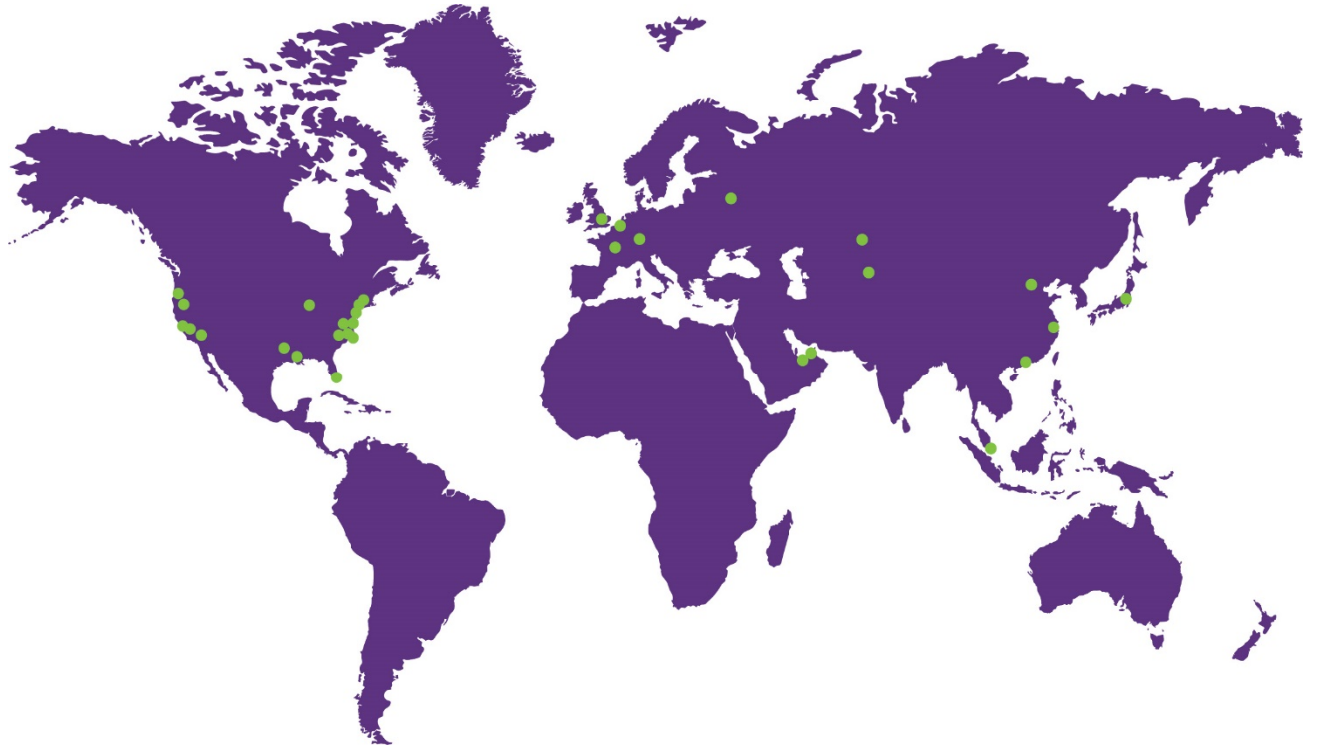
Sage counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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