

# DOL Cybersecurity Guidance for Retirement Plans Highlights Employer Obligations

*Many plans already comply, but growing litigation means employers and fiduciaries should review protocols*

**JESSICA FOLKER**  
LAW WEEK COLORADO

The U.S. Department of Labor on April 14 issued cybersecurity guidance aimed at protecting retirement accounts. The first-of-its-kind guidance is directed at plan sponsors and fiduciaries subject to the Employee Retirement Income Security Act as well as plan participants.

The guidance came in three separate documents. The first, a list of tips for hiring service providers, is aimed at plan sponsors and fiduciaries. It advises employers to ask about information security standards, practices, policies and audit results.

They should also find out whether a potential service provider has experienced past security breaches, evaluate its track record and check whether the provider has any insurance policies that would cover losses from cybersecurity and identity theft breaches.

The first document also recommends contract provisions and terms that help enhance cybersecurity protection. These include requirements for annual third-party security audits, insurance coverage, provisions on the use and sharing of information and how a service provider should respond in the event of a cybersecurity breach.

The second document on cybersecurity program best practices is directed toward recordkeepers but also contains tips for fiduciaries on hiring service providers. Fiduciaries should look to hire service providers that have a formal cybersecurity program, conduct annual risk assessments, clearly define and assign information security roles and responsibilities, encrypt sensitive data and conduct periodic cybersecurity awareness training.

The final document contains online security tips for plan participants and beneficiaries. It offers familiar advice on how to avoid phishing attacks, create strong passwords and use multi-factor authentication to keep accounts safe.

“I think the bottom line for em-

ployers is this is a great checklist and something that you can easily use to go in and make sure that you’ve vetted your service provider,” said Holland & Hart partner Kevin Selzer.

Fisher Phillips partner Ed Hopkins said that every organization with an ERISA-governed plan should schedule a meeting that includes the chief information security officer or cybersecurity management experts to discuss whether existing cybersecurity protocols already comply with the DOL’s guidance.

“Some of them may find that they’re already checking the box, but they won’t know until they actually meet with their information experts and assess their programs against this new guidance,” Hopkins said.

Hopkins added that while the guidance focuses on cybersecurity protocols, it is important not to ignore the privacy component, and he recommended an organization’s chief privacy officer or privacy counsel also attend.

“There needs to be someone in the room at these types of meetings, in my opinion, that understands privacy laws and how to comply with them,” Hopkins said.

“Because at the end of the day, this guidance is really focusing on not only protecting the information from hackers but also managing it in such a way where no more private information is accessible to hackers than is necessary to run the operation.”

Hopkins said the guidance shouldn’t be viewed as a “significant new legal duty” because organizations were already required to safeguard retirement plan information. “The Department of Labor is just saying, ‘This is what you should have been doing, and here’s what you should do if you’re not doing it,’” he said.

Most large employers are already in compliance, Hopkins said, but he added that smaller operations may be less likely to have robust cybersecurity or privacy information management teams.

“It’s very likely that the smaller

plans don’t have much of the protection that’s talked about and haven’t done many of these best practices to protect themselves,” Selzer said.

In a press release announcing the guidance, the DOL noted that as of 2018, there were 34 million defined benefit plan participants in private pension plans and 106 million defined contribution plan participants with assets totaling more than \$9 trillion.

Hackers have increasingly targeted 401(k) and other retirement ac-

counts in recent years, according to media reports. Employees have sued their employers and recordkeepers for ERISA violations, but many of the cases have settled or are still working their way through the courts.

Last year, a former Estée Lauder employee who had nearly \$100,000 stolen from her 401(k) settled with the company and the plan’s recordkeeper, Aight Solutions. In another high-profile case, a former Abbott

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<p>Colorado Division of Insurance Synopsis of Annual Statement for Year 2020</p> <p><b>BITCO NATIONAL INSURANCE COMPANY</b> 3700 Market Square Circle Davenport, IA 52807 NAIC Number: 20109</p> <p>Assets ..... \$258,816,020 Liabilities ..... \$155,137,060 Capital and Surplus/ Policyholder Surplus ..... \$103,678,960</p> <p>DIVISION OF INSURANCE CERTIFICATE OF AUTHORITY TO WHOM IT MAY CONCERN: This is to certify that the <b>BITCO NATIONAL INSURANCE COMPANY</b>, organized under the laws of <b>Illinois</b>, subject to its Articles of Incorporation or other fundamental organizational documents and in consideration of its compliance with the laws of Colorado, is hereby licensed to transact business as a <b>Property and Casualty</b> insurance company, as provided by the Insurance Laws of Colorado, as amended, so long as the insurer continues to conform to the authority granted by its Certificate and its corporate articles, or its Certificate is otherwise revoked, canceled or suspended.</p> <p>IN WITNESS WHEREOF, I have hereunto set my hand at the City and County of Denver this first day of March 2021.</p> <p><b>Michael Conway</b> Commissioner of Insurance</p> <p>First Publication: April 26, 2021 Last Publication: May 17, 2021 Published in Law Week Colorado 378/20109</p>	<p>Colorado Division of Insurance Synopsis of Annual Statement for Year 2020</p> <p><b>SURETY LIFE INSURANCE COMPANY</b> 310 NE Mulberry Lee's Summit, MO 64086 NAIC Number: 69310</p> <p>Assets ..... \$29,220,972 Liabilities ..... \$1,995,426 Capital and Surplus/ Policyholder Surplus ..... \$24,725,545</p> <p>DIVISION OF INSURANCE CERTIFICATE OF AUTHORITY TO WHOM IT MAY CONCERN: This is to certify that the <b>SURETY LIFE INSURANCE COMPANY</b>, organized under the laws of <b>Nebraska</b>, subject to its Articles of Incorporation or other fundamental organizational documents and in consideration of its compliance with the laws of Colorado, is hereby licensed to transact business as a <b>Life</b> insurance company, as provided by the Insurance Laws of Colorado, as amended, so long as the insurer continues to conform to the authority granted by its Certificate and its corporate articles, or its Certificate is otherwise revoked, canceled or suspended.</p> <p>IN WITNESS WHEREOF, I have hereunto set my hand at the City and County of Denver this first day of March 2021.</p> <p><b>Michael Conway</b> Commissioner of Insurance</p> <p>First Publication: April 26, 2021 Last Publication: May 17, 2021 Published in Law Week Colorado 380/69310</p>

# Surveys Suggest Virtual ADR Could Be Here to Stay

*Denver mediator finds nearly 70% of clients would participate remotely after the pandemic — as long as the other side does, too*

**JESSICA FOLKER**  
LAW WEEK COLORADO

About two-thirds of attorneys say they are willing to continue using videoconferencing for mediations and arbitrations after the pandemic is over, according to recent surveys.

Denver-based mediator and former judge Robbie Barr of BarrADR sent surveys in March to 100 of her clients to gauge their sentiment about remote ADR and returning to in-person mediation and arbitration. Of the 60 attorneys who responded, most of them based in Colorado, 69.5% said they would likely continue using video platforms for ADR even after the state reduces physical distancing requirements.

Barr handles mediation and ar-

bitration in cases ranging from civil rights and environmental law to commercial transactions and probate matters. She is quick to note that she is not a statistician or professional pollster, and the respondents were limited to her own clients. But her results mirror those of a national survey conducted in September by the National Academy of Distinguished Neutrals, which found that 65.6% of litigators would likely consider Zoom or other video platforms for some mediations or arbitrations after the pandemic.

Of the NADN respondents, 22.2% said they would be unlikely to consider video ADR and 12.1% said they were undecided, while just over 10% of Barr's respondents answered "unlikely" and about 20% were undecided.

Among litigators who say they plan to continue online ADR in the future, NADN found that 22% would like to attend three-quarters or more of their arbitrations and mediations online. Just over half said they would prefer to attend between 50% and 74% of arbitrations and mediations online.

The results suggest attorneys have quickly become comfortable with technology they had barely touched a year before.

According to NADN, only 2% of litigators had ever attended a video arbitration or mediation before March 2020. Six months later, 95% of litigators were primarily attending meetings online.

While attorneys said they are willing to participate in video ADR

in the future, Barr's clients indicated they are equally willing to resume meeting in person. As of late March, about 68% of her respondents said they felt "comfortable" about returning to in-person mediations and arbitrations, while the rest said they were "uneasy."

"I was a little surprised that as many were willing to return now," Barr said. Asked what they would need to feel comfortable meeting in person, several attorneys said it would depend on vaccination rates or the vaccination status of the participants, while others said it would depend on their clients' preferences or the ADR specialist's conference room facilities.

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Let us know of any attorneys with any interesting non-legal hobbies at  
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