



AMERICAN BENEFITS

COUNCIL

TESTIMONY OF

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ON BEHALF OF THE

AMERICAN BENEFITS COUNCIL

FOR THE ERISA ADVISORY COUNCIL

CONSIDERATIONS FOR RECOGNIZING AND ADDRESSING
PARTICIPANTS WITH DIMINISHED CAPACITY

OCTOBER 23, 2020

Good morning. My name is Jan Jacobson and I am senior counsel, retirement policy for the American Benefits Council. The American Benefits Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs.

We really appreciate being invited today to testify with respect to recognizing and addressing participants with diminished capacity. As you know, I, as well as other Council members and staff, have previously testified before you on a wide variety of benefit issues. But the truth is that when participants or beneficiaries appear to have diminished capacity, the most significant issue for plans can be how to deal with typical administrative matters such as investment elections and plan distributions. Plan sponsors certainly do not want a distribution to be made to a participant with diminished capacity who might also be a victim of fraud but need guidance that delaying or putting a hold on such distributions will not result in liability. They may also be concerned they will face state law or discrimination issues. Thus, we are very pleased that the ERISA Advisory Council is holding this hearing and invited a dialogue on the diminished capacity issue.

As a starting point, it is useful to note that the employer-sponsored retirement plan is an enormously important tool for helping people prepare for retirement. Studies have shown that the mere availability of a retirement plan at work significantly increases the likelihood that an individual will be properly prepared for retirement. Employers continue to be the leading impetus in designing programs that achieve demonstrated results in improving savings and enhancing the personal financial security of their employees. We encourage the ERISA Advisory Council to keep these points in mind when making recommendations to the U.S. Department of Labor (DOL).

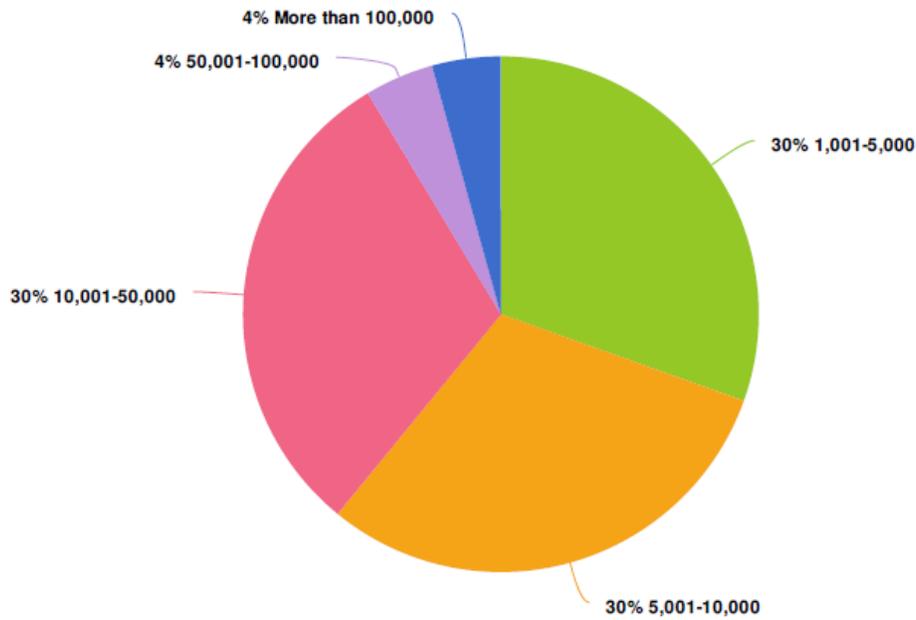
Generally speaking, administrative complexity and cost have to be considered when the government considers taking any action that creates new obligations for those voluntarily providing benefits. Rules should be flexible and foster continued innovation. At the same time, rules need to provide sufficient clarity that they can be relied upon.

The Council was unsure how big a problem diminished capacity might be for our members and so, in connection with my testimony, the Council conducted an informal survey of its members with questions related to diminished capacity. I want to thank members of the ERISA Advisory Council for your help in drafting the questions we asked. I will briefly report on the results of that informal survey.

A total of 37 members responded to our brief survey and, of that number, 33 (or almost 90 percent) were plan sponsors. (Please note that not all 37 respondents answered all survey questions.) Responding employers also tended toward larger employers with 69 percent from employers with more than 5,000 employees and one company with more than 100,000 employees (Figure 1).

Figure 1

How many full-time employees does your organization have?



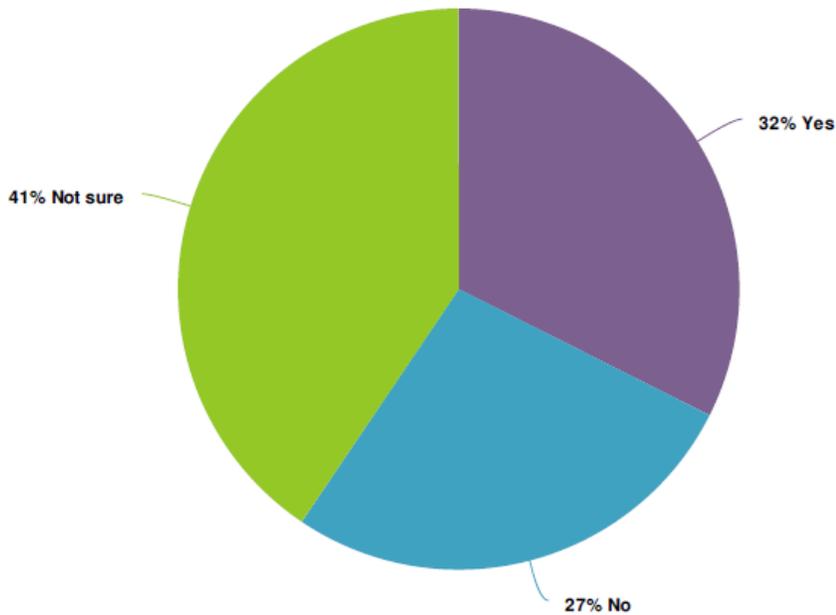
Value	Percent	Responses
1,001-5,000	30.4%	7
5,001-10,000	30.4%	7
10,001-50,000	30.4%	7
50,001-100,000	4.3%	1
More than 100,000	4.3%	1

Totals: 23

Interestingly, while 32 percent had encountered participants exhibiting signs of diminished capacity and another 41 percent were not sure if they had encountered such participants (Figure 2), 61 percent did not have set policies, guidelines or procedures for interacting and handling participants who exhibit diminished capacity (Figure 3).

Figure 2

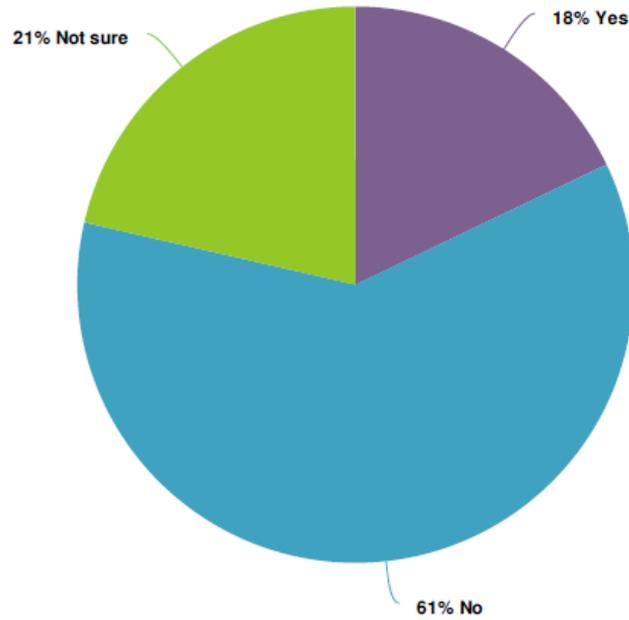
Do you encounter participants exhibiting what may be considered "diminished capacity?"



Value	Percent	Responses
Yes	32.4%	12
No	27.0%	10
Not sure	40.5%	15
		Totals: 37

Figure 3

Does your organization have set policies, guidelines or procedures for interacting and handling employees/participants exhibiting "diminished capacity?"

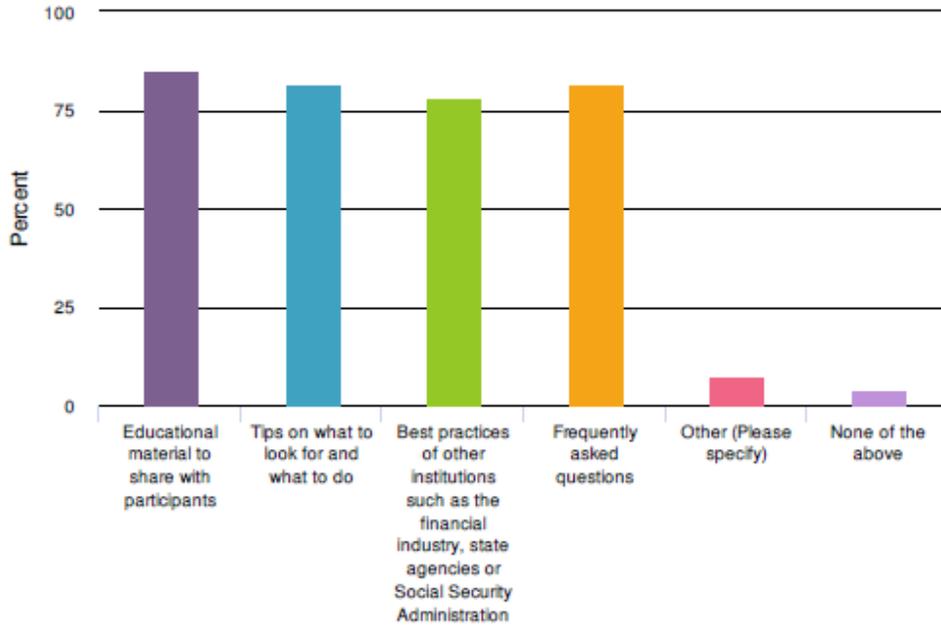


Value	Percent	Responses
Yes	17.9%	5
No	60.7%	17
Not sure	21.4%	6
Totals: 28		

Although we did not ask this question, I suspect in some cases the lack of policies, guidelines and procedures is due to the lack of any kind of guidance on what they should be doing. When asked what kind of guidance from the DOL would be helpful, with the option of selecting multiple answers, more than 75 percent thought it would be helpful to have the DOL provide (1) educational material to share with participants, (2) tips on what to look for and what to do, (3) best practices of other institutions such as the financial industry, state agencies or Social Security Administration, and (4) frequently asked questions. In fact, more than 80 percent thought (1), (2) and (4) would be helpful (Figure 4).

Figure 4

If the DOL published information about the best practices or considerations organizations should identify when dealing with issues of "diminished capacity," which of the following formats would be helpful to you? (Please select all that apply.)



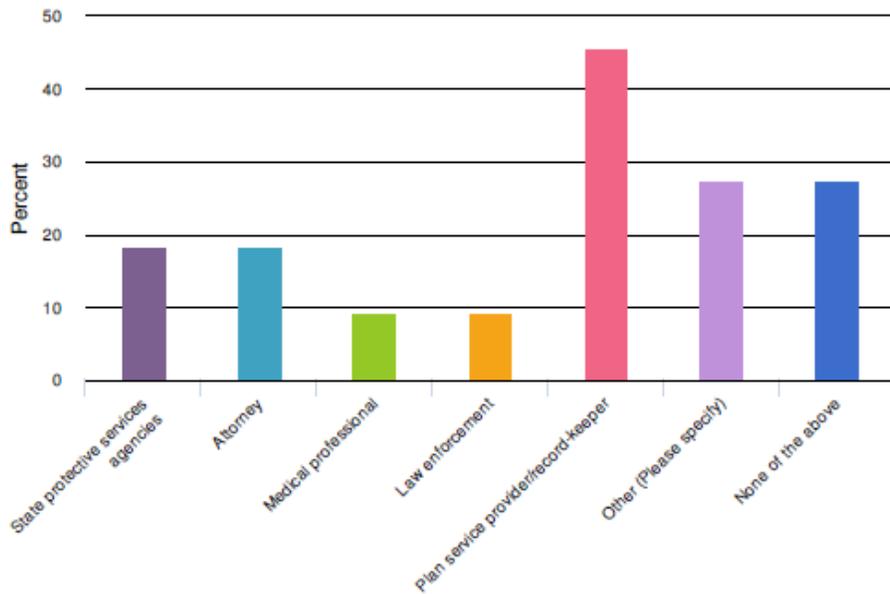
Value	Percent	Responses
Educational material to share with participants	85.2%	23
Tips on what to look for and what to do	81.5%	22
Best practices of other institutions such as the financial industry, state agencies or Social Security Administration	77.8%	21
Frequently asked questions	81.5%	22
Other (Please specify)	7.4%	2
None of the above	3.7%	1

Other (Please specify)	Count
record keeper / plan sponsor not held responsible	1
the level of oversight that should be required - power of attorney, guardianship, etc.	1
Totals	2

We also asked those employers who had indicated they have encountered participants exhibiting what may be considered diminished capacity to indicate what external organizations or professionals they have delegated interactions with the individuals exhibiting diminished capacity. Again, we allowed them to select from a list and they could select multiple answers. The biggest percentage, selected by 45.5 percent of respondents, was their outside service provider or recordkeeper but a few selected state or city protective service agencies or attorneys. Another mentioned powers of attorney (Figure 5).

Figure 5

You indicated that you encounter participants exhibiting what may be considered "diminished capacity." Please indicate the following external organizations or professionals to which you delegate interactions with individuals exhibiting "diminished capacity." (Please select all that apply.)



Value	Percent	Responses
State protective services agencies	18.2%	2
Attorney	18.2%	2
Medical professional	9.1%	1
Law enforcement	9.1%	1
Plan service provider/record-keeper	45.5%	5
Other (Please specify)	27.3%	3
None of the above	27.3%	3

It is interesting to note that many plan sponsors selected delegating to the outside service provider or recordkeeper when you would think that the plan sponsor would have had more interaction with the participant and, therefore, more opportunity to observe the signs of diminished capacity. However, it may be that many of these participants are former employees but that is a question we did not ask.

Before concluding, I would like to reiterate a very critical point. While guidance on best practices and considerations organizations should identify when dealing with issues of diminished capacity would be helpful for plan sponsors, administrative complexity and costs must be taken into consideration before implementing any new requirements that may be difficult to meet while expanding potential liability. It is important to remember that the employer-sponsored retirement plan system is voluntary and increasing potential costs and liabilities could have the unintended consequence of discouraging employers from implementing and maintaining plans, especially small employers.

I would like to conclude by noting that the Council agrees with our co-panelist and member company Fidelity that it would be helpful for DOL to issue guidance including best practices relating to (1) identifying and taking steps to address participants that exhibit signs of diminished capacity or financial exploitation, (2) supporting the use of trusted contacts and powers of attorney and (3) educational training opportunities. As previously mentioned, it is also important for DOL to provide liability relief, such as for a subsequent drop in value, for putting reasonable restrictions on participant plan accounts temporarily preventing the distribution of assets where participants exhibit signs of diminished capacity or financial exploitation. The relevant guidance should not put plan fiduciaries between a rock and a hard place where any action they take can result in additional liability.

Thank you again for providing the opportunity for me to present the Council's testimony from the perspective of plan sponsors. I welcome any questions you may have.