REGULATORY Update

QUARTERLY UPDATE, APRIL 2018

DOL Conflict of Interest Rule Vacated—What Happened, and What Comes Next?

In the latest in a seemingly endless string of twists and turns, the Fifth Circuit Court of Appeals issued a decision on March 15, 2018, to vacate the Department of Labor's (DOL) Conflict of Interest Rule. The decision, if it becomes final, will eradicate the regulation, which had been scheduled for full implementation on July 1, 2019, and revert to the DOL's former definition of fiduciary advice.

In essence, the court's decision rested on the premise that the DOL did not have the authority to redefine the definition of fiduciary investment advice under ERISA and overstepped its boundaries in so doing. The decision also encompassed rejecting the rule's exemptions, including the Best Interest Contract (BIC) exemption.

What happens now?

It is important to note that the Fifth Circuit's judgment *does not* take immediate effect. Below are several scenarios that could still play out:

- Within 45 days of the judgment (i.e., by the end of April 2018), the DOL could decide to ask the Fifth Circuit's judges to rehear the case. If it does not, the ruling would take effect on May 7, 2018.
- The DOL could ask the U.S. Supreme Court to intervene. If it does that, the Fifth Circuit's ruling could be stayed until the higher court arrives at a decision.
- The DOL could decide not to request a rehearing, effectively letting the rule die. In this scenario, the "old" fiduciary advice definition, which included its prohibited transaction exemptions, would become effective. In the meantime, the DOL could continue to review its original rule, with the ultimate aim of amending it.
- Other regulatory bodies could show an interest in proposing a reformed standard of fiduciary care—as the U.S. Securities and Exchange Commission and the Financial Industry Regulatory Authority have done in the past—and charge forward with such efforts.

What retirement plan sponsors should know

Those who have been following the years-long trials and tribulations of the DOL rule can be forgiven for feeling overwhelmed and confused. Because many financial institutions and service providers have taken comprehensive measures to meet the conditions for implementing the rule, retirement plan sponsors may have been asked to repaper service agreements or sign additional forms or contracts in order to comply with the rule's requirements.

Regardless of the rule's fate, retirement plan sponsors must be mindful that, as fiduciaries themselves, they have an obligation always to act in the best interests of their employees. This obligation includes understanding which parties are providing services to their retirement plan and employees, knowing how much compensation is paid to the providers in exchange for their services, and determining whether the compensation paid is reasonable. Whatever happens, plan sponsors should remain diligent about monitoring providers' compensation and services while ensuring that the services suit their employees' needs.

Lawmakers Seek to Address Workplace Retirement Plans

Recently, lawmakers introduced several bills that aim to make it easier for Americans to save through a workplace retirement plan. Let's look at some key provisions of each bill and how their implementation could affect employers and retirement savers.

Last December, Congressman Richard Neal of Massachusetts introduced the Automatic Retirement Plan Act of 2017. This bill would require most employers—excluding businesses with fewer than 10 employees, those in business for fewer than three years, and governmental and church organizations—to offer their employees either a 401(k) or 403(b) retirement plan. Employees would be enrolled in the plan automatically, unless they explicitly choose to opt out, at a 6-percent deferral rate, with that rate automatically escalating 1 percent annually until a 10-percent deferral rate has been reached. The bill would also provide greater flexibility for small employers to use multiple employer plans (MEPs). Considered attractive options for managing plan costs, MEPs are 401(k)s maintained by two or more unrelated employers that maintain a common interest.

Also last December, Congressman Neal introduced the Retirement Plan Simplification and Enhancement Act of 2017, which seeks to eliminate the 10-percent automatic-increase deferral cap now imposed on employees who are automatically enrolled in their workplace retirement plans. In addition, the bill looks to exempt IRA and plan accounts with balances below $250,000 from required minimum distributions.

In March 2018, Senate Finance Committee Chairman Orrin Hatch of Utah and Senator Ron Wyden of Oregon reintroduced the Retirement Enhancement Savings Act of 2018. Originally proposed in 2016, the bill would offer easier and more attractive ways for employers to offer workplace retirement plans. One provision, called a pooled employer plan or PEP, would allow two or more unrelated employers to pool monies in an open plan and leverage the aggregated assets to decrease costs and offer institutional-quality options and services to workers. Also featured in the bill is a more generous start-up tax credit (up to $500) for employers who establish a workplace retirement plan and a provision that would allow seniors older than age 70½ to make tax-free contributions to their IRAs.

Although these bills would need to clear hurdles before coming to fruition, their proposals demonstrate that lawmakers recognize the need to lower the retirement savings bar for American workers and business owners.

We Can Help

Our firm is ready to provide you with the ideas, guidance, and foresight to position your firm for success. If you would like to review the impact of recent DOL rule or legislative happenings, we're here to assist you.

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