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The Death of the Fiduciary Rule: the Fifth Circuit Vacates the Fiduciary Rule

Author, *Tabitha Crosier*, New York, +1 212 556 2215, tcrosier@kslaw.com

On June 21, 2018, the United States Court of Appeals for the Fifth Circuit officially vacated the Department of Labor's (the "DOL's") Fiduciary Rule *in toto*. This follows the Fifth Circuit's 2-1 decision on March 15, 2018 vacating the Fiduciary Rule after finding that it is "unreasonable," as we reported here. The mandate had been expected since May 7 when the DOL indicated that it would not challenge the Fifth Circuit's decision. This is despite the fact that three states and the AARP attempted to intervene in the case in order to defend the rule, which the Fifth Circuit rejected.

The 2016 Fiduciary Rule expanded the category of advisers who were considered fiduciaries with respect to plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and individual retirement accounts ("IRAs"). The Fiduciary Rule generally required that financial services advisers act in the best interests of their clients by applying a higher standard than the rule that previously applied to investment advisers. It also established prohibited transaction exemptions ("PTEs"), including the "best interest contract" or "BIC" exemption, in order to allow service providers who became investment advice fiduciaries under the new rule to continue receiving compensation. Since President Trump took office, the Fiduciary Rule has been the focus of significant attention and several court cases challenging its validity were filed.

Even though the Fifth Circuit's recent mandate was not a surprise, there is no clear guidance for what rules apply now. Since the Fiduciary Rule was officially vacated, it appears that the requirements of the pre-Fiduciary Rule "five-part test" devised by the DOL in 1975 must now be followed for purposes of determining who is a fiduciary. As for next steps for financial institutions that relied on the BIC exemption, the options available to them seem to be to either withdraw from fiduciary status or to rely on the Field Assistance Bulletin 2018-02 (the "FAB"). In the FAB issued on May 7, 2018, the DOL took the position that investment

Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan "stock drop" cases and other breach-of-fiduciary-duty class actions.

Contact

Kenneth A. Raskin
Chair of the Employee Benefits & Executive Compensation Practice
New York
+1 212 556 2162
kraskin@kslaw.com

advisers can continue to follow its prior advice in the rule entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule -- Retirement Investment Advice," where the DOL stated that it "would not pursue claims against fiduciaries who were working in good faith to comply with the fiduciary rule and applicable provisions of the PTEs, or treat those fiduciaries as being in violation of the fiduciary rule and PTEs."

We will continue to monitor the developments in this area as they occur and will keep you apprised of market practices that form now that the Fiduciary Rule is no longer applicable. In the meantime, King & Spalding would be happy to assist you with any questions you have about the Fiduciary Rule.

Northwestern University 403(b) Excessive Fee Case Dismissed

Author, *Donna Edwards*, Atlanta, +1 404 572 2701, dedwards@kslaw.com

On May 25, 2018, the U.S. District Court for the Northern District of Illinois, in a strongly-worded decision, dismissed, with prejudice, an excessive fee case brought under the Employee Retirement Income Security Act of 1974 ("ERISA") against fiduciaries of two Internal Revenue Code of 1986 Section 403(b) plans sponsored by Northwestern University. The case, styled Divane et al v. Northwestern University et al, could provide comfort to other retirement plan fiduciaries facing similar claims.

The plans involved in the case allowed participants to choose among various investment options chosen by the plan fiduciaries. The plaintiffs in the case, who were participants in the plans, objected to, among other things, the fees charged by the investment options available under the plans and the mix of those investment options. In particular, the investment options included mutual funds which covered their expenses by charging fees in the form of "expense ratios," which is a fee arrangement under which the fund retains a percentage of fund assets as fees each year. The plaintiffs argued that some of those expense ratios were too high. In addition, the plaintiffs objected to the use of "revenue sharing" by some of those mutual funds. Under a "revenue sharing" arrangement, a plan pays its recordkeeper fees by having the mutual fund that collects the expense ratio share part of the expense ratio with the recordkeeper. Moreover, the plaintiffs complained that certain of the mutual funds offered under the plans charged "retail" fees, as opposed to traditionally lower "institutional" fees.

The plaintiffs asserted a number of counts for breach of ERISA fiduciary duty in connection with these complaints, and the defendant plan fiduciaries moved to dismiss every count. The court sided with the plan fiduciaries and dismissed all of the plaintiff's counts with prejudice. The court noted that no participant was required to invest in any particular investment option, so the participants could have avoided the perceived problems with the mutual funds. In addition, the court pointed out that the plans' participants had investment options under the plans with low expense ratios. For example, the court noted that some of the mutual fund options in the plans had expense ratios as low as .05%, .06%, and .1%, which the court stated were low "as a matter of law." The court also explained that the Seventh Circuit Court of Appeals, which has jurisdiction over the court, has already said that it does not violate ERISA to use a revenue sharing arrangement to pay for plan expenses.

Commentators have observed that there are a number of similar cases pending against the fiduciaries of plans maintained by colleges and universities. This case might serve as a useful guide to other courts in how to handle such litigation.

King & Spalding would be happy to assist you with any questions you have about this case or plan expenses in general.

July and August 2018 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

Author, *Tabitha Crosier*, New York, +1 212 556 2215, tcrosier@kslaw.com

Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
July 29 (no later than 210 days after the end of the plan year in which the change was effective)[1]	Summary of Material Modifications	Deadline for plan administrator to distribute summary of material modifications reflecting any changes to the summary plan description (SPD) arising from any plan amendments adopted during prior year (unless a revised SPD is distributed that contains the modification).	Retirement Plans Health & Welfare Plans
July 31 (the last day of the 7th month following the	DOL Form 5500	Deadline for plan administrator to file Form 5500 (Annual Return/Report of Employee Benefit Plan) for prior year. This deadline is extended 2 ½ months if the plan administrator files Form 5558.	Retirement Plans Health and Welfare Plans

[1] Note: Disclosure of a modification to a group health plan that is a "material reduction in covered services or benefits under the plan" must be made no later than 60 days after the date of the adoption of the modification. Also, a material modification to a group health plan that is not reflected in the most recently provided "summary of benefits coverage" or "SBC" must be provided in a summary of material modifications at least 60 days before the modification becomes effective.

Deadline	Item	Action	Affected Plans
plan year)	IRS Form 8955-SSA	Deadline for plan administrator to file Form 8955-SSA (Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits). This deadline is extended by 2 ½ months if the plan administrator files a Form 5558.	Retirement Plans
July 31	Patient Centered Outcomes Research Institute (PCORI) Fee	Deadline for self-insured health plans to pay a fee for 2017 plan year using IRS Form 720. Note that the fee is not tax deductible. Insurers are responsible for paying the fee on behalf of insured plans.	Self-Insured Group Health Plans (including retiree plans)
August 14 (within 45 days after the close of the second quarter of plan year)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the second quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the second quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	

Deadline	Item	Action	Affected Plans
August 15 (the 15th day of the 8th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a 3-month extension by filing a Form 8868.	Qualified Retirement Plans Voluntary Employee Beneficiary Associations