New DOL Fiduciary Rule Faces Another Delay

The department is grappling with two fiduciary-related lawsuits and other regulatory priorities.

By Melanie Waddell | September 27, 2022

The Department of Labor's new fiduciary rule is facing another delay, and likely won't be sent to the Office of Management and Budget for review until the first quarter, according to retirement industry experts.

The reveal of Labor's new rule to define who's a fiduciary "will probably slip to the first quarter next year," Phyllis Borzi, former head of Labor's Employee Benefits Security Administration, told ThinkAdvisor Monday in an email. This is partly "because of how many other regulatory projects they are working on and in part because they may want to see what happens in the courts with the two lawsuits that have been filed" against Labor.

Brad Campbell, also a former head of EBSA who's a now a partner at Faegre Drinker in Washington, agreed in another email that it's likely Labor's new rule will not be published in December as it has "not yet been sent to OMB for review."

The normal OMB review takes up to 90 days, "but rarely less than two months for significant rules," Campbell said. "To be published in December, the proposals would likely need to be sent to OMB in September or early October."

Campbell, however, said it's hard to discern whether the "apparent delay is due to the ongoing litigation or to broader political considerations."

Labor said in its regulatory flexibility agenda (https://www.thinkadvisor.com/2022/06/22/new-dol-fiduciary-rule-pushed-to-december/), released in early June, that the reveal of its new fiduciary rule would come in December.

However, dates set out in reg flex agendas are traditionally placeholders, and may not reflect the actual date that a fiduciary plan would be released.

Fiduciary Lawsuits

There are currently two pending lawsuits against Labor regarding fiduciary advice.

One was filed on Feb. 2 (https://www.thinkadvisor.com/2022/02/03/annuity-group-sues-dol-over-fiduciary-rule/) by the Federation of Americans for Consumer Choice in the U.S. District Court for the Northern District of Texas.

This district, Borzi said, is "the go-to court for all the forum-shopping financial services and business suits against the DOL and other cabinet agencies."

The lawsuit challenges the Trump-era Labor Prohibited Transaction Exemption, or PTE, 2020-02, Improving Investment Advice for Workers & Retirees, which establishes more stringent rollover rules and became effective on Feb. 16.

Advisory firms are now required to provide "retirement investors" with the specific reasons why a rollover or transfer of their retirement money is in the best interest of the retirement investor. The rollover requirements went into effect July 1 (https://www.thinkadvisor.com/2022/06/27/new-dol-rollover-rules-kick-in-friday-are-you-ready/).

The Federation alleges that "Labor has 'resurrected and repackaged' the substance of its vacated 2016 rule in direct violation of the 5th Circuit decision" by allowing PTE 2020-02 to take effect, Borzi said.

The Federation's case "asks the court to vacate PTE 2020-02 in its entirety and enjoin DOL from implementing or enforcing it in any manner."

On Sept. 7, Labor asked the court to dismiss the FACC suit "for lack of standing, alleging the plaintiffs have failed to demonstrate actual injury-in-fact, especially since insurance agents are not forced to use PTE 2020-02 to receive conflicted compensation, since the long-standing PTE 84-24 which allows for insurance agent commissions is still available," Borzi explained.

The other suit, filed Feb. 9 by the American Securities Association (//www.napa-net.org/sites/napa-net.org/files/ASA%20v%20DOL.pdf) in the U.S. District Court for the Middle District of Florida, Tampa Division, alleges that Labor violated the Administrative Procedure Act "when it issued its FAQs on PTE 2020-02 without public notice and comment," Borzi said.

The suit "challenges the FAQs generally, but with specific focus on FAQ 7 and FAQ 11," Borzi pointed out.

"Both of these questions focus on the specifics of establishing a fiduciary relationship in a rollover context and the documentation needed to support the notion that a rollover recommendation is in the client's best interest," Borzi continued. "The complaint alleges that the FAQs are legislative in nature (which require notice and comment) rather than interpretive (which do not require that process)."

Labor "has not yet filed an answer to the complaint or a motion to dismiss, but that is expected any day now," she added.

In the Preamble to PTE 2020-02, Campbell added, Labor "rescinded its prior interpretation (that most rollover recommendations are not ERISA fiduciary advice) and replaced it with new guidance reaching the opposite conclusion. The challenge in the litigation is to the interpretive guidance, not to the underlying rule."

The court, Campbell continued, "could rule on the guidance even as DOL is moving separately to replace the 1975 regulation" under its new fiduciary rule.

ERISA attorney Fred Reish, partner at Faegre Drinker, adds: "It can be argued that the lawsuits are an incentive for the DOL to move forward on a new [fiduciary] regulation. If the lawsuits are successful, and the DOL's expanded fiduciary interpretation [under PTE 2020-02] is set aside, we would revert to the old status, meaning that a rollover recommendation is not fiduciary advice. I think that would be untenable from the DOL's perspective."

Regarding PTE 2020-02 itself, Campbell adds, with its anticipated new fiduciary rule, Labor "seems likely to retain the current structure in significant part, but they may add some additional conditions."

With any new fiduciary rule, Borzi said, Labor has said "it was going to issue a new rule amending the five-part test … perhaps making some adjustments to PTE 2020-02, and reexamining some of the existing PTEs, such as 84-24. But nothing has been proposed yet."

"I personally don't think that either of these lawsuits are strong enough or offer enough proof on the merits to survive motions to dismiss but one never knows what a court would do, particularly that Texas court," Borzi said.
