Washington Update:
Fiduciary Rule Changes, Again

Regular readers will remember that we wrote in last quarter's newsletter about the final fiduciary rule, released by the Department of Labor (DOL) in April of this year. The rule finalized a new definition of who qualifies as an investment advice fiduciary and what those individuals must do in order to receive a fee for providing that advice. Shortly after publication of that article, the United States District Court for the Eastern District of Texas issued an order staying the fiduciary rule and blocking the DOL from implementing and enforcing the rule.[1] A similar ruling came down the following day in the Northern District of Texas.[2] The only constant is change…right?

What does this mean? The final fiduciary rule — as discussed in our article last quarter — will *not* go into effect on September 23rd as provided in DOL's final regulation.

So, where does this leave us? This will almost assuredly be appealed to the Fifth Circuit Court of Appeals and, depending on that outcome, potentially to the United States Supreme Court. In the meantime, plan sponsors should continue to follow the fiduciary rules in effect before this final rule and may consider continuing to implement changes that would have been required.

The good news for plan sponsors is that they do not need to change their current procedures to meet a new standard. More specifically, plan sponsors do *not* need to implement compliance procedures related to individuals that provide the expanded list of services that would have been considered fiduciary investment advice. The final rule generally would have expanded this to include not only "traditional" types of investment advice (such as recommending particular securities or investment strategies) but also investment advice for things like the advisability of rollovers, the investment of plan assets after a distribution, and the selection of other persons to provide investment advice or management services.

While we wait for a resolution in the courts, plan sponsors would be well-served to take stock of current fiduciary practices. Have any procedures been changed in anticipation of the final rule's effective date that should now be amended again? The procedures that would have been required by the final rule may still eventually be required, therefore some plan sponsors may wish to consider moving forward with implementation of some or all those procedures, even if they are only a best practice in the interim. The fiduciary rule is complex, and plan sponsors should continue to ensure continued compliance with ERISA.

1. *Federation of Americans for Consumer Choice, Inc., et. al. v. United States Department of Labor,* E.D. Tex., No. 6:24-cv-163-JDK, 7/25/24.
2. *American Council of Life Insurers v. United States Department of Labor,* N.D. Tex., No. 4:24-cv-00482, 7/26/24.

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Best Practices: Year-End Notice Round-Up

It's hard to believe, but summer is coming to an end. As we move into the fall, now is a great time to ensure plan sponsor clients are ready for year-end requirements. As a quick reference, included below are some common year-end notices for retirement plans and important things for you to consider:

401(k) and 403(b) Safe Harbor Notice: For plans relying on the safe harbor rules (traditional or qualified automatic contribution arrangement (QACA)), this notice should be distributed to participants 30-90 days before the beginning of each plan year. This means that calendar-year safe harbor plans should generally distribute their notice no later than December 1. Keep in mind that computer generated notices may not always properly include special write-in provisions and addenda, so these should be carefully reviewed before sending. Although SECURE 1.0 did eliminate the notice requirement for plans that use nonelective contributions to satisfy the safe harbor, you may wish to continue providing safe harbor notices in order to have the flexibility to reduce or suspend safe harbor contributions during the plan year.

Automatic Contribution Arrangement (ACA) Notice: Plans that include automatic contribution arrangements, including eligible automatic contribution arrangements (EACAs), also may have a notice requirement, even if they do not use safe harbor provisions. This notice should go out to participants 30-90 days before the beginning of each plan year. This means that calendar-year plans should generally distribute the notice no later than December 1.

Qualified Default Investment Arrangement (QDIA) Notice: For plans that wish to obtain the fiduciary relief applicable to QDIAs, a notice must be distributed to participants 30-90 days before the beginning of each plan year (noticing a general trend yet?) — for calendar year plans, by December 1. It is common to send this notice with the safe harbor or ACA notice, but the recordkeeper may or may not do so automatically, so sponsors should confirm who is responsible for distribution.

Annual Participant Fee Disclosures: This is an "annual" notice detailing the fees that may be charged to the plan that must go out every 14 months. Plan sponsors often distribute this with any applicable year-end notices as well. Like the QDIA notice, it is important for clients to be clear on whose responsibility it is to distribute the notice.

Summary Annual Report (SAR): ERISA-covered defined contribution plans must provide the SAR to participants within nine months of the end of the plan year or two months after the Form 5500 filing deadline. For calendar year plans, this generally means the SAR is due September 30th if the Form 5500 deadline was not extended—or generally December 15th if (and depending on how) the Form 5500 deadline was extended.

Plan sponsors should carefully review all notices to ensure they accurately reflect the plan's terms and operations. It also is a good time to carefully review year-end considerations, including forfeiture allocations, RMD's, and ensure that discretionary operational changes made during the year are timely included in plan amendments. One final note — though many plan sponsors are not yet amending for SECURE 2.0, now is a great time to coordinate with your TPA partner to keep a thorough record of operational changes made to comply with SECURE 2.0 during the year for future such amendments.

Hot Topic:
New Flexibility in Employee Benefits Plans — IRS Private Letter Ruling 202434006

The IRS has issued guidance via Private Letter Ruling 202434006, which highlights significant flexibility for employers in structuring its benefit plans. The ruling paves the way for employers to offer tailored benefits packages that cater to individual employee preferences, fostering a more customized and supportive work environment.

Key Takeaways:

1. Customizable Employer Contributions:

Employers can now provide employees the option to allocate a discretionary contribution (up to a set limit) across multiple benefits programs, including:

– 401(k) Plans
– Retiree Health Reimbursement Arrangements (HRA)
– Health Savings Accounts (HSA)
– Educational Assistance Programs (including student loan repayment)

2. Irrevocable Annual Elections:

Under the program, employees would make an annual irrevocable election on how they wish to allocate the employer contribution, providing flexibility without impacting the tax-favored status of these benefits and allowing employees the ability to change their election as their personal needs change.

3. Non-Taxable Benefit Flexibility:

This ruling confirms that the election doesn't compromise the tax-advantaged status of the selected programs, and the amounts would not be treated as a 401(k) deferral (but rather would be treated as an employer contribution).

4. Tailoring to Individual Needs:

The ability to direct contributions across multiple benefit programs allows employers to offer a benefits package that better meets the individual needs of employees, whether they prioritize retirement savings, healthcare, or educational assistance.

This ruling provides a strategic opportunity for employers to enhance their benefits packages, offering more personalized and meaningful support to employees while maintaining compliance with IRS regulations.