

Compensation and Benefits Insights

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Farewell to the Fiduciary Rule? The Fifth Circuit Vacates the Fiduciary Rule

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On March 15, 2018, the Fifth Circuit Court of Appeals, in [Chamber of Commerce v. U.S. Department of Labor](#), vacated the Department of Labor’s (the “DOL’s”) fiduciary rule (the “Fiduciary Rule”) in a 2-1 decision. The Fiduciary Rule, which expansively reinterprets the term “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and includes amendments to six existing exemptions and two new exemptions to the prohibited transaction provisions in both ERISA and the Internal Revenue Code of 1986, as amended (the “Code”), generally went into effect on June 9, 2017 (with some provisions not coming into effect until July 1, 2019). Following the Fifth Circuit’s opinion, the DOL was reported to have announced that it will not enforce the Fiduciary Rule “pending further review.”

Background

As we reported [here](#), the Fiduciary Rule expands the category of advisers who are fiduciaries with respect to ERISA plans and individual retirement accounts (“IRAs”), and establishes two new prohibited transaction exemptions intended to allow service providers that become investment advice fiduciaries under the new rule to continue receiving compensation. Under the “best interest contract” or “BIC” exemption, an adviser that gives investment advice concerning an IRA or a non-ERISA plan must enter into a written contract with the advice recipient under which the recipient may sue the financial institution for failure to meet the fiduciary requirements.

Fifth Circuit Decision

The Fifth Circuit analyzed whether the definition of an “investment advice fiduciary” under the Fiduciary Rule comports with Titles I and II of ERISA and is

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.

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“reasonable” and in accordance with the Administrative Procedures Act (the “APA”). Finding the answers to both of these questions to be “no,” and going on to find that the BIC exemption is inconsistent with Titles I and II of ERISA, invalid under the APA and inconsistent with federal law in creating implied private rights of action and prohibiting certain waivers of arbitration rights, the Fifth Circuit vacated the Fiduciary Rule *in toto*. The Fifth Circuit stated that while the DOL made no argument concerning severability of the provisions making up the Fiduciary Rule (apart from the illegal arbitration waiver), in any event the regulatory package is “plainly not amenable to severance.”

The Fifth Circuit reasoned that the Fiduciary Rule conflicts with the text of ERISA’s “investment advice fiduciary” provision, under which fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client. In addition, the Court stated that the BIC exemption inappropriately extends ERISA Title I’s statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although ERISA Title II, which governs IRA plans, includes no such requirements. Moreover, the Court found that the BIC exemption creates private rights of action for IRA owners, which is not permitted under Title II of ERISA.

Insights

The Fifth Circuit’s decision is scheduled to take effect on May 7, 2018, although this effective date could be “stayed” (i.e., delayed) pending the outcome of subsequent legal proceedings in the event the DOL decides to request a rehearing by the full Fifth Circuit or appeal the decision to the U.S. Supreme Court. We will continue to monitor developments for you. In the meantime, King & Spalding would be happy to assist you with any questions you have about the Fiduciary Rule.

April and May 2018 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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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 generally 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.

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Deadline	Item	Action	Affected Plans
April 1	Age 70 ½ Distribution Requirements	Deadline for plan administrator to distribute prior year's required minimum distribution for any terminated employee who reached age 70 ½ or older during the prior year.	Qualified Retirement Plans*
April 15	Excess Deferrals	Deadline for plan to distribute prior year's deferrals in excess of Internal Revenue Code (IRC) §402(g) annual dollar limit and related earnings.	401(k) Plans
April 16 (105 days after the end of the plan year)	PBGC 4010 Filing	Deadline for contributing sponsors (and each controlled group member) to file PBGC Form 4010 if: 1) Any single-employer plan in the contributing sponsor's controlled group had a prior year AFTAP of less than 80%; 2) Any single-employer plan in the contributing sponsor's controlled group fails to make a required installment or other required payments to a plan, and as a result, a lien is imposed pursuant to ERISA section 303(k)(1) or IRC section 430(k)(1); or 3) The IRS has granted funding waivers of more than \$1 million to any single-employer plan in the contributing sponsor's controlled group and any portion of such waiver is still outstanding.	Defined Benefit Plans

* Qualified Retirement Plans include all defined benefit and defined contribution plans that are intended to satisfy Internal Revenue Code §401(a).

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Deadline	Item	Action	Affected Plans
April 30 (no later than 120 days after the end of the plan year)	Annual Funding Notice	Deadline for the plan administrator to provide a plan funding notice to the PBGC, to each plan participant and beneficiary and to each employer that has an obligation to contribute under the plan.	Defined Benefit Plans
May 15 (within 45 days after the close of the first quarter of plan year)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the first quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans that allow participants to direct investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the first 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.	
May 15 (the 15 th day of the 5 th 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. A 3-month extension may be obtained by filing a Form 8868, which must be filed by this date.	Qualified Retirement Plans Voluntary Employee Beneficiary Associations