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Are HR employees 'investment advisors' under the DOL's fiduciary rule?

In April 2016, the Department of Labor promulgated final regulations that fundamentally changed the ERISA fiduciary rules governing advisors to retirement income investors. Though the rule is final, the new provisions affecting advisors generally are applicable beginning April 10, 2017.

In the wake of Donald Trump's election victory, some Republican lawmakers have expressed a strong interest in rolling back the so-called "fiduciary rule." But changes, if any, could be far in the future, and the administration of President-elect Trump hasn't articulated its priorities for the Department of Labor.

When the final rule becomes applicable in April 2017, a person who makes a single, isolated suggestion for a fee to a retirement income investor, such as a participant in an employer-sponsored 401(k) plan, on how to invest or whether to roll over plan assets is considered an ERISA fiduciary. Currently, a person becomes a fiduciary on account of giving investment advice for a fee only if the advice was provided on a regular basis pursuant to a mutual understanding that the advice would serve as a primary basis for making investment decisions. The advice must also be individualized based on the particular needs of a retirement income investor.

Under the rule, advice on whether a participant in a 401(k) plan should take a distribution or roll over a distribution to another plan or an IRA could be considered a fiduciary activity. When first proposed, the regulations raised concerns about whether an employee working in a plan sponsor's human resources or finance department could be considered a fiduciary, and perhaps engage in a prohibited transaction merely by talking to a plan participant about the participant's options under a plan.

The final regulations contain an exclusion that permits employees of plan sponsors to communicate with participants without triggering fiduciary status if the following conditions are satisfied:

1. The employee receives no compensation for the advice-related activities above and beyond his or her normal salary; and

2. If the advice is given by an employee to a fellow employee in his or her capacity as a participant in the plan; the job description or responsibilities of the employee giving the advice do not involve providing investment advice; and the advice that is given is not regulated by federal or state securities law or insurance law.

So long as an employee receives no additional compensation for the advice-related activities above and beyond his or her normal salary, an HR employee should be able to explain plan options to participants without incurring ERISA fiduciary liability. And an employee in the HR or finance department should be able to provide reports and recommendations to ERISA fiduciaries, such as performance reports and recommendations regarding the menu of investment options in an employer's 401(k) plan provided to an investment committee, without incurring ERISA fiduciary liability.

On the other hand, an employee whose job description included assisting plan participants in selecting investment options in a self-directed 401(k) plan probably would be considered an ERISA fiduciary.

For more information regarding the new DOL Fiduciary Regulations, contact Trish Winchell.

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