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2020's Biggest Benefits Regulations: Midyear Report

By **Emily Brill**

Law360 (July 2, 2020, 6:26 PM EDT) -- The U.S. Department of Labor's employee benefits arm spent the month of June removing barriers to profit for asset managers, investment advisers and the private equity industry, while attempting to limit ethical investments in 401(k) and pension plans.

Some experts see the Employee Benefit Security Administration's high-impact month as an outgrowth of the Trump administration's election-year philosophy: "a desire to shove as much through at the end of the term as they can," including more brazen policies, said Barbara Roper, director of investor protection for the Consumer Federation of America.

"There's a 'stick a thumb in the eye of the liberals' attitude about some of the stuff they're doing," Roper said.

Here, Law360 recaps the three biggest benefits policies the DOL released in the first half of 2020, which all arrived in June.

Replacing the Fiduciary Rule

Two years ago, the Fifth Circuit struck down Obama-era regulations aimed at banning retirement advisers from simply recommending the investments that earned them the most commission.

The 2016 regulations held more advisers to a fiduciary standard, a level of responsibility judges often call "the highest standard under the law," requiring advisers to place investors' interests above their own.

The regulations, known as the fiduciary rule, also required advisers to agree to act in their clients' best interests and disclose their conflicts of interest if they wanted to earn a commission.

The fiduciary rule was a lightning rod, generating praise from consumer protection advocates and immediate pushback from powerful big-business interests. The U.S. Chamber of Commerce fought the rule in a lawsuit argued by Eugene Scalia, the future Labor Secretary who was then earning millions as a partner at the BigLaw firm Gibson Dunn & Crutcher LLP.

Scalia won the suit on the Chamber's behalf, ushering in the demise of the fiduciary rule in 2018. On June 29, the Scalia-run DOL replaced the rule with a new one that he helped craft.

The new rule brings back an old, more lenient test for determining if an adviser is a fiduciary, likely exempting far more advisers from that role. Those who do still take on fiduciary status, meanwhile, can follow an easier path to earn commission than the one laid out by the 2016 rule, with less strings attached.

Sanford Heisler Sharp LLP partner Charles Field, who co-chairs the plaintiffs firm's financial services litigation practice, said the rule makes it easier for advisers to profit at investors' expense, imposing "very little responsibility on the financial services industry [while offering little] recourse for persons trying to save for retirement."

"Already, the financial services industry takes a healthy slice from workers' retirement savings," Field said. "This DOL rule will ensure that trend continues, making saving for retirement even more elusive than it already is."

BigLaw attorneys said the rule will have "a dramatic impact on the asset management industry," as Joshua Lichtenstein, a partner at Ropes & Gray LLP, put it.

Liechtenstein said the rule, though less impactful than another recent regulation on ethical investments, is "very significant and likely to be the source of a lot of drama around process, potential court challenges, and day-counting toward potential reversal by a new administration."

One element of the rule — the reinstatement of the more lenient fiduciary test — went into effect immediately and without a public comment period, which could open up the possibility of an Administrative Procedure Act lawsuit.

The other key element, which allows advisers to earn commissions, was released on an accelerated track, with the DOL accepting comments for just 30 days rather than 60.

Ethical Investments

On June 24, the Trump administration attempted to end a back-and-forth on whether socially conscious investments belong in retirement plans, a debate that has occupied Democratic and Republican regimes for more than a decade.

Since the DOL first issued guidance about ethical investments after Bill Clinton took office, presidential administrations have engaged in **"**something of a pingpong match**,"** either promoting or discouraging this type of investing by employee retirement plans.

The Trump administration took its place in the line of Republican regimes warning against socially conscious investing in 2018. Now, it's attempting to enshrine its position as administrative law, which would be much more difficult to undo by a Democratic DOL.

The proposed regulations come at a time when ethical investing is more popular than ever, having become a $12 trillion industry that is on track to nearly triple in size by 2025, according to a Deloitte Center for Financial Services study.

Asset managers call this strategy "ESG investing" — considering a company's environmental and social impact and its corporate governance before purchasing its stock. Attorneys warn that the DOL's attempt

to curb this practice could violate the Employee Retirement Income Security Act while leading to more litigation, because it heightens the fiduciary risk of ESG investing.

"The proposal is a direct pushback on the growing popularity of ESG funds including as 401(k) investment vehicles, and its reach into the fiduciary decision-making process is difficult to reconcile with ERISA's heavy deference to that process," said Amanda Amert, a partner at Willkie Farr & Gallagher LLP. "It also opens the door to litigation about the scope and breadth of the duty of loyalty."

Private Equity in 401(k) Plans

Experts say the private equity industry has been scratching at 401(k) plans' door for years, looking for a new pot of money to dip into as companies abandon pension plans, which traditionally invest heavily in private equity.

"A major market for the private equity industry has been traditional pension plans, and they see that world shrinking," said the Consumer Federation's Roper. "At the same time, there's been a dramatic growth in the private equity field. They need to find new people to sell to."

On June 3, the DOL opened that door, clarifying that it's legal for 401(k) plans to invest in private equity. The guidance marked the first time the agency addressed this issue, ending a silence that plan managers had long interpreted as a "no" on private equity in 401(k)s, said Brian Netter, a partner at Mayer Brown LLP.

BigLaw attorneys generally welcomed the development, though Netter said the DOL's guidance "leaves open too many questions to be treated as a green light." Paul Hastings LLP partner Eric Keller and Groom Law Group principal Kevin Walsh said 401(k) plans should be allowed to join pension plans in investing in private equity. (Groom Law Group requested the guidance from the DOL on behalf of private equity clients.)

Roper was more skeptical, saying private equity investments could carry great risks for retirement savers. She said it's difficult to value these investments and there's no proof for the claim that private equity funds would make savers more money than mutual funds.

She also dismissed the DOL's celebration of private equity in retirement plans as a win for "investor choice."

"This is all about giving private equity a new market, not improving the investment options for retirement savers," Roper said. "The idea of putting these funds into people's retirement accounts is more radical than is being acknowledged."

--Editing by Aaron Pelc.

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