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United States | Human Capital | 10 March 2023

Rewards Policy Insider
2023-05

In this Issue:

District Court Strikes Down DOL Guidance on Fiduciary Rollover Recommendations

A federal judge partially invalidated guidance issued by the Department of Labor ("DOL") in the form of FAQs addressing the agency's interpretation of a "fiduciary" in the context of giving advice on rollovers from a plan to an IRA. While this is not the final word on this issue – the case does not have precedential value and may be appealed – this is an important development in the ongoing saga over who counts as an ERISA fiduciary.

Background

In 1975, DOL issued regulations containing a five-part test to use in determining who is an ERISA fiduciary in the context of giving investment advice. One prong of the test requires that the advisor makes investment recommendations to the plan on a "regular basis." DOL revised this regulation in 2016 and significantly broadened its interpretation of fiduciary, including to cover advisors who make recommendations to roll over assets from a retirement plan to an IRA. Two years later, the Fifth Circuit Court of Appeals struck down the 2016 rule and reinstated the five-part test, determining that the 2016 rule did away with the "regular basis" prong and therefore improperly defined fiduciaries to include virtually all financial professionals who do business with ERISA plans and IRA holders, not just those with a relationship of trust and confidence with a client.

In 2020, DOL published Prohibited Transaction Exemption ("PTE") 2020-02, which covered fiduciary investment advice to retirement investors. In April 2021, DOL issued a set of FAQs addressing questions related to PTE 2020-02. In FAQ 7, DOL stated that the "regular basis" prong could be satisfied for a recommendation to roll plan assets to an IRA, even when it is the first instance of advice. Therefore, an advisor could be considered a fiduciary even with a very limited – possibly even first-time – interaction with a plan participant. This concerned many advisors, who would be subject to ERISA fiduciary duties in these circumstances. In FAQ 15, DOL stated that financial institutions must take very specific actions to document the reasons that any recommendation to roll over assets is in the best interest of the investor. PTE 2020-02 required documentation in these instances, but it did not go as far as the FAQ.

In February 2022, the American Securities Organization ("ASA") filed a lawsuit in the District Court for the Middle District of Florida challenging FAQs 7 and 15. The ASA argued that through the FAQs, DOL impermissibly expanded the circumstances in which an investment advisor is subject to fiduciary duties in violation of the Administrative Procedures Act ("APA"), which generally requires federal agencies to follow certain processes when engaging in rulemaking.

Takeaways from the Case

On February 13, 2023, the court struck down FAQ 7 because the court concluded it violated the APA by conflicting with DOL's existing regulations containing the five-part test with respect to the "regular basis" prong. The court concluded that the "regular basis" prong should be applied to advice to a plan, not just to a plan participant. The result is that it will be difficult for DOL to treat rollover advice to ERISA plan participants as fiduciary investment advice. The court did not, however, strike down FAQ 15, noting that it does not contradict or go beyond PTE 2020-02.

Outlook

This decision has no precedential value because it is a district court case. However, this case does represent a setback for DOL regarding its broad interpretation of who falls within the scope of "fiduciary." Given the likelihood of an appeal, in the meantime, it may make sense for advisors to continue to follow PTE 2020-02 with respect to rollover advice to ERISA plan participants.

DOL also faces a second challenge to its guidance associated with PTE 2020-02, brought in a Texas district court. A decision has not yet been rendered in that case.

DOL Issues Guidance on Applying FLSA and FMLA to Telework

The Department of Labor's Wage and Hour Division has issued a field assistance bulletin ("FAB 2023-01") to provide guidance on applying certain aspects of the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) to telework arrangements. Among other things, the guidance clarifies an employer's obligations to give nursing mothers who are teleworking time and a place to pump breastmilk.

Counting Hours Worked by Teleworkers

The Fair Labor Standards Act (FLSA) generally requires employers to pay nonexempt employees for all hours worked, including certain break times. This same rule applies regardless of where work is being performed – i.e., in an office, a factory, at home, or some other remote location – as long as the employer knows or has reason to know work is being performed.

What about breaks? Do the same rules apply to teleworkers as to people working at the employer's facility? They do, according to FAB 2023-01.

Pursuant to the FLSA, breaks of 20 minutes or less must be counted as hours worked.

Longer breaks – such as meal breaks of 30 minutes or more – do not count as hours worked, but only if the employee is completely relieved from duty and is effectively able to use the time for their own purposes.

FAB 2023-01 illustrates this rule in the telework context with the following example:

> Employee C teleworks from home and has an arrangement with their employer where Employee C works from 9:00 a.m. to 4:00 p.m., takes a three-hour break from 4:00 p.m. to 7:00 p.m., and returns to work at 7:00 p.m. and works until 8:00 p.m. Employee C is free to do whatever Employee C chooses during this three-hour break, including staying at home to make dinner and do laundry, for example. Under these circumstances, because Employee C is relieved from duty and is able to

> effectively use the period between 4:00 p.m. and 7:00 p.m. for their own purposes, that time is not work time under the FLSA.

Note that the example does not specify if the arrangement was in writing, or if it was just an informal agreement between the employer and employee. However, that should not matter so long as the employee is relieved from duty and can effectively use that time for their own purposes.

Break Time and Privacy for Pumping Milk

The FLSA also requires employers to provide reasonable break time for nursing mothers to express milk during the 1-year period following the child's birth. It also requires employers to provide these employees a private place – other than a bathroom – for this purpose. These rules likewise apply when employees are teleworking from home or another location, according to FAB 2023-01.

In the telework context, ensuring employees have a private space to express milk entails "ensuring that an employee is free from observation by any employer provided or required video system, including a computer camera, security camera, or web conferencing platform, when they are expressing breast milk regardless of the location they are working from."

The FLSA does not require employers to compensate employees for breaks needed to express milk. However, if the employee is not completely relieved of duties during that time, then they must be compensated. For example, if an employee listens to a conference call while expressing milk, she must be compensated for that time.

Telework and FMLA Eligibility

One condition of FMLA eligibility is that an otherwise eligible employee be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. The employee's home is not a worksite for FMLA purposes.

According to FAB 2023-01, "When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made." FAB 2023-01 illustrates this rule with the following example:

> Employee B works in data processing for an advertising company headquartered in a large city and teleworks from her home more than 75 miles away. Many of the employees in Employee B's department telework from different cities and states. All teleworking employees are assigned projects for data analysis from the manager who works at the company headquarters. Employee B's worksite, for FMLA eligibility determination, is the company's headquarters. The company's headquarters is also, under the FMLA, the worksite for the data processors in Employee B's department who telework from different cities and states but report to and receive assignments from their manager at headquarters. There are 300 total employees who work at or within 75 miles of the company's headquarters. Thus, the employee is considered to be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite even though she herself does not work within 75 miles of the company headquarters.

The full text of FAB 2023-01 is available here.

Employee with Serious Chronic Health Condition Can Use FMLA to Work Reduced Daily Schedule, According to DOL

An employer sought guidance from DOL because employees with a serious chronic health condition who typically work a 12-hour shift were asking to use incremental Family and Medical Leave Act leave in order to limit their workday to 8 hours. The employer suggested the better path might be to treat the employees' requests as one for a reasonable accommodation under the Americans with Disabilities Act.

Background

In general, the Family and Medical Leave Act (FMLA) entitles eligible employees to up to 12 weeks of unpaid job-protected leave in a 12-month period for qualifying family and medical reasons, including the employee's serious health condition. A serious health condition is a condition that "makes the employee unable to perform the functions" of the employee's position. During FMLA leave, group health insurance coverage must continue under the same terms and conditions as if the employee had not taken leave.

FMLA leave can be taken in increments of weeks, days, hours, or even less.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against an employee with a disability in regard to the terms and conditions of employment. For employees with a disability under the ADA, employers must make reasonable accommodations unless doing so would cause undue hardship to the employer.

The concepts of "disability" under the ADA and "serious health condition" under the FMLA are different and must be analyzed separately. However, leave provided as an accommodation under the ADA may also be FMLA-protected leave. In cases like that, one statute does not trump the other. Instead, the employee maintains their rights under both the FMLA and the ADA.

Incremental FMLA Leave Can Be "Indefinite"

According to DOL, so long as an employee continues to be eligible for FMLA and has a qualifying reason, they may use FMLA leave for an indefinite period of time. In this specific situation, if an employee would normally work 12 hours a day but is unable to do so because of an FMLA-qualifying reason, the employee may use FMLA leave for the other 4 hours. These 4 hours count as FMLA leave and thus count against the employee's 12 weeks of FMLA leave entitlement. If the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely.

DOL also weighs in on how much FMLA leave an employee is entitled to. The statutory standard is 12 weeks during a 12-month period, which translates to 480 hours for someone who normally works 40 hours per week. However, if someone typically works 12 hours per day (60 hours per week), then their FMLA entitlement is 720 hours during a 12-month period.

If the employee does exhaust their FMLA leave entitlement, they are entitled to be reinstated to the same or an equivalent position, with equivalent pay and benefits, to what they had before the FMLA leave started. Furthermore, depending on the specific circumstances, they may have rights under the ADA.

The full text of the opinion letter is available here.

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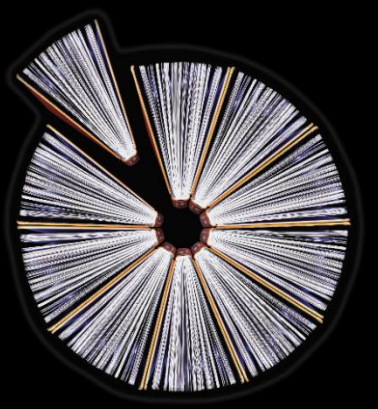

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