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Department of Labor's Recently Finalized Fiduciary Rule Already Faces A Barrage of Challenges

Shortly after the Department of Labor ("DOL") finalized its controversial rule amending the definition of an investment advice fiduciary, two separate lawsuits were filed challenging the regulation. In addition to these legal challenges, a group of Members of Congress have also introduced resolutions to invalidate the rule. As of now, the rule is scheduled to go into effect on September 23, 2024.

Final Fiduciary Rule

On April 23, 2024, DOL released the final version of its regulation determining the circumstances under which a person is considered a fiduciary under ERISA by reason of providing investment advice. The regulation, commonly referred to as the "fiduciary rule," modifies an existing regulation first published in 1975 that created a five-part test to determine fiduciary status. (A full summary of the final fiduciary rule is available in Rewards Policy Insider 2024-10.)

The 2024 fiduciary rule is not the first time DOL has attempted to update the 1975 regulation. Most notably, in 2016, DOL amended the regulation to significantly expand who is considered a fiduciary under ERISA, which caused significant concerns within the retirement services industry. The 2016 fiduciary rule was challenged in court shortly after it was finalized, and in 2018, the Fifth Circuit Court of Appeals struck down the rule and restored the original, more narrowly tailored five-party fiduciary test.

Lawsuits

Like in 2016, industry groups almost immediately challenged the 2024 fiduciary rule, and thus far, two lawsuits have been filed. In the first case, *Federation of Americans for Consumer Choice v. DOL*, the plaintiffs seek to have the upcoming effective date of the rule paused and for the judge to grant a preliminary injunction to prevent the rule from going into effect pending a final outcome in the case. One key argument in the case, which was filed in the U.S. District Court for the Eastern District of Texas, is that the 2024 rule is so similar to the 2016 rule that it violates the Fifth Circuit's 2018 decision invalidating that rule.

The second case, *American Council of Life Insurers v. DOL*, was filed in the U.S. District Court for the Northern District of Texas by a group of insurance trade associations. The plaintiffs make very similar arguments as in the first case and are also asking the court to invalidate the fiduciary rule. Notably, the plaintiffs ask that the court provide preliminary relief – namely, a pause of the rule's September 2024 effective date – by the end of July. As these lawsuits are still in the very early states, DOL has yet to respond in either case.

Congressional Challenge

The fiduciary rule is also facing pushback by Members of Congress. On May 15, 2024, resolutions were introduced in both the House of Representatives and the Senate to invalidate the rule pursuant to the Congressional Review Act (CRA). The CRA allows Congress to overturn federal agency rules if certain procedures are followed, such as the introduction of a joint resolution disapproving of the rule. While the resolutions are a clear sign that some within Congress are vehemently opposed to the fiduciary rule, it is unlikely that these legislative efforts will result in the fiduciary rule being overturned. Even if the

resolutions are approved by both the House and Senate, President Biden is sure to veto them.

RPI will continue to provide updates on this developing story.

Two Federal Courts Rule Health Plans Improperly Excluded Coverage for Gender Affirming Treatment

In separate cases, the 4th and 11th Circuit Courts of Appeal have found that attempts by public-sector group health plans to exclude coverage for gender transition surgery and other forms of gender-affirming care are prohibited by certain federal laws and the 14th Amendment's equal protection clause.

Case Summaries

The 4th Circuit opinion covered two consolidated cases: one involved the group health plan for a state's employees, and the other involved a different state's Medicaid program. In both cases, the plans specifically excluded coverage for certain types of gender-affirming care, even if the same treatments would be covered if sought for other purposes – e.g., breast cancer. The 4th Circuit ruled that these coverage exclusions represent state discrimination based on gender identify, which is prohibited by the 14th Amendment's equal protection guarantee. The 4th Circuit also concluded that the state Medicaid program's exclusion violated Medicaid and Section 1557 of the Affordable Care Act, which prohibits health plans receiving federal financial assistance from discriminating based on sex and certain other protected categories.

At issue in the 11th Circuit case was a group health plan sponsored by a local government for its employees. An employee was diagnosed with gender dysphoria, and her doctors determined vaginoplasty surgery was medically necessary for her treatment. However, the health plan denied the claim based on the plan's exclusion of "[d]rugs for sex change surgery" and "[s]ervices and supplies for a sex change and/or the reversal of a sex change."

Because the 11th Circuit Court of Appeals concluded that only transgender participants would seek gender-affirming surgery, it ruled the plan's denial of coverage was based on transgender status. Since the Supreme Court has previously held that discrimination based on transgender status is discrimination based on sex, the court concluded that the plan's exclusion violated Title VII of the Civil Rights Act of 1964. Title VII generally prohibits employment-related discrimination based on race, color, religion, or sex, among other things.

Key Takeaways

Although these cases have precedential value only within the jurisdictions of the 4th (MD, VA, WVA, NC, and SC) and 11th circuits, (AL, FL, and GA) respectively, it is possible that courts in other circuits will be persuaded by their reasoning as these types of challenges relating to gender-affirming care exclusions make their way through the federal courts.

Also noteworthy is the range of laws under which these challenges are being brought. Collectively, these cases considered challenges under the Affordable Care Act, the Civil Rights Act, Medicaid, and the 14th Amendment to the Constitution. Not every employer and group health plan is subject to all of these laws, but most employers and group health plans would be subject to at least one of them. As a result, employers and group health plans that continue to exclude coverage gender-affirming surgery and treatment may be vulnerable to this type of lawsuit.

Louisiana Enacts Law Classifying Abortion Medications as Controlled Substances

In the newest frontier of states' attempts to regulate abortion, Louisiana passed a first-in-the-nation law making the commonly used abortion medications mifepristone and misoprostol "controlled substances" under state law, which makes the possession of such medication without a prescription a crime.

Louisiana Law

On May 23, 2024, the Governor of Louisiana signed into law Senate Bill 276, which classifies mifepristone and misoprostol as Schedule IV drugs under state law. Both drugs are widely used to induce early-stage abortions, and mifepristone was approved by the Food and Drug Administration (FDA) over 20 years ago. It is estimated that medication abortions now account for almost two-thirds of all abortions nationwide.

Louisiana already has one of the strictest abortion laws in the nation. Abortion is banned in nearly all circumstances, unless to protect the pregnant individual's health.

Under state law, possession of Schedule IV drugs without a prescription is illegal and is punishable by a prison sentence of between one to ten years and a possible fine of up to $5,000. The law puts the two abortion medications in the same category as drugs that are known to pose addiction or dependency risks, such as Ambien, Valium, and Xanax. In effect, the new law increases the risks for Louisiana residents to obtain mifepristone and misoprostol from out of state or to order the medications online without a prescription.

The newly enacted law specifies that a pregnant woman who possesses the medications for her own consumption is not in violation of the law. But others who help obtain the drugs illegally could face prosecution.

The state Attorney General has made public remarks clarifying that the legislation does not prohibit the drugs from being prescribed in Louisiana for legal, non-abortion reasons. However, it also limits the ability of Louisiana doctors to prescribe the drugs, and requires that all such prescriptions be logged and tracked in a state database.

Update on Lawsuit Challenging FDA Approval of Mifepristone

Separately, the Supreme Court on June 13, 2024 unanimously rejected a challenge to FDA's 2000 approval of mifepristone. In *FDA v. Alliance for Hippocratic Medicine*, the plaintiffs argued that FDA exceeded its authority in approving the drug by failing to follow the proper procedures for drug approvals. The Supreme Court ruled the challenge must be dismissed because the plaintiffs lack standing to sue.

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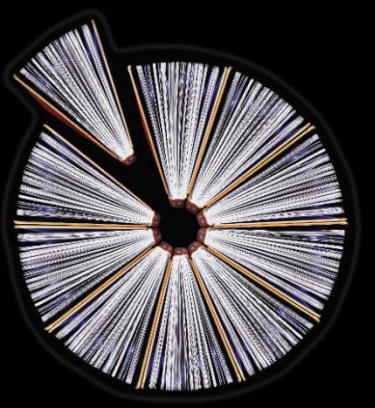

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