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Rewards Policy Insider
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In this Issue:

Upcoming Compliance Reminders for Calendar Year Employee Benefit Plans

November 2025

1st: ACA Marketplace Open Enrollment for 2026 Begins

December 2025

31st: Gag Clause Attestation Due

Note: This is meant to be a reminder of certain upcoming compliance deadlines for employee benefit plans operating on a calendar year basis. It is not an exhaustive list of compliance obligations. Specific plans may be subject to different obligations and deadlines depending upon a variety of factors, including the plan type, plan year, and whether or not the plan is subject to ERISA, among other things.

11th Circuit Court of Appeals Rules Health Plan Can Exclude Coverage for Gender Reassignment Surgery

The 11th Circuit Court of Appeals, has ruled that a group health plan's specific coverage exclusion for gender-affirming surgery does not violate Title VII of the Civil Rights Act of 1964. The decision is at odds with what other federal courts have ruled in similar cases, thus adding to uncertainty for employers and health plans.

Background and 11th Circuit's Ruling

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."

A federal district court held the plan's exclusion was sex-based discrimination that violated Title VII, which generally prohibits employment-related discrimination based on race, color, religion, or sex, among other things. A 3-judge panel from the 11th Circuit Court of Appeals agreed. Since only transgender participants would seek gender-affirming surgery, the panel reasoned, the plan's denial of coverage was based on transgender status.

Because the Supreme Court has previously held that discrimination based on transgender status is discrimination based on sex, the 3-judge panel agreed that the plan's exclusion violated Title VII.

However, the full 11th Circuit Court of Appeal decided to review the 3-judge panel's decision and narrowed the case down to a single issue: whether the employer's health insurance policy—which covers medically necessary treatments for certain diagnoses but excludes coverage for gender reassignment surgery—violates Title VII. The full 11th Circuit ruled it does not, because the exclusion is applied uniformly without regard to the individual's sex or gender identify.

Outlook

This is an increasingly complex issue, as more and more courts review challenges to these types of coverage exclusions under a variety of legal theories. The 11th Circuit's decision is a significant development because it breaks from what had arguably been an emerging trend favoring participants in these cases. Of course, other courts of appeal might reach different conclusions, and the Supreme Court might eventually have the final say.

In the meantime, employers and health plans that exclude coverage for gender reassignment surgery might consider reviewing their plans against relevant case law to determine their risk of litigation or other enforcement action.

FTC Drops Appeal of Cases Preventing Enforcement of Non-compete Ban, But Signals it Will Continue to "Aggressively" Challenge "Unlawful" Non-compete Agreements

On September 5, the Federal Trade Commission (FTC) announced it had withdrawn its appeals of two cases that blocked enforcement of final regulations that would have banned almost all post-employment non-compete agreements. However, the FTC has also signaled it will continue to use its authority to challenge "unlawful" non-compete agreements.

Background

On April 23, 2024, the FTC announced that it was finalizing the rule it proposed in January 2023 to impose a blanket ban on non-compete agreements. Under the 2024 final rule, a non-compete agreement was defined as a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from seeking or accepting work with a different employer after concluding prior employment or operating a business after

concluding prior employment. Non-compete agreements are common in, for example, the financial services, tech, and medical industries.

The rule, which was scheduled to take effect on September 4, 2024, would have (1) prohibited employers from entering into new non-compete agreements with most workers, including paid and unpaid employees, independent contractors, and volunteers; and (2) immediately nullified nearly all existing non-compete agreements (subject to certain exceptions for existing agreements with certain senior executives), regardless of whether they were already in existence prior to the final rule's approval by the FTC.

At least three legal challenges to the 2024 final rule were filed before its scheduled effective date. In two of those cases, federal district courts issued injunctions preventing the FTC from enforcing the rule before it ever took effect. The FTC appealed both rulings, but announced on September 5 that it was dropping those appeals. Current FTC Chairman Andrew Ferguson said in a statement the illegality of the 2024 final rule was "patently obvious. "

What's Next?

Even though the 2024 final rule will not take effect, the FTC has signaled that it is not closing the door on the possibility of issuing new regulations relating to non-compete agreements. Additionally, it is making it clear that it will continue to challenge non-compete agreements on a case-by-case basis.

On September 4, the FTC issued a request for public comments "to better understand the scope, prevalence, and effects of employer non-compete agreements, as well as to gather information to inform possible future enforcement actions." According to the FTC, "Members of the public, including current and former employees restricted by non-compete agreements, and employers facing hiring difficulties due to a rival's non-compete agreements, are encouraged to share information about the use of non-compete agreements." Comments are due by November 3.

Regarding enforcement, on September 4 the FTC announced it was taking action against a company that required almost all employees to sign a non-compete agreement that would prohibit them from working in the same industry for 1 year after leaving the company. The FTC's position is that the non-compete agreement in this case is too restrictive because it limits "job mobility and the ability to negotiate better wages and benefits."

Then on September 10, the FTC announced it had sent letters to "several large healthcare employers and staffing firms urging them to conduct a comprehensive review of their employment agreements—including any non-competes or other restrictive agreements—to ensure they are appropriately tailored and comply with the law."

Department of Labor Gives Stamp of Approval to Lifetime Income Program's Compliance with QDIA Regulations

The Department of Labor ("DOL") released guidance confirming that a company's lifetime income strategy program that includes a guaranteed lifetime withdrawal benefit ("GLWB") backed by insurers through a variable annuity contract complies with existing law.

Background

Under ERISA, a plan participant is treated as exercising control over their account's assets, which, unless the participant makes a specific investment election, are invested by the plan in default investment options in accordance with DOL's qualified default investment alternative ("QDIA") regulations. QDIAs limit a plan sponsor's fiduciary liability if certain requirements are met. The QDIA regulations provide five categories of investments that are considered QDIAs, including target date funds ("TDFs"); balanced funds; and investment management services such as managed accounts.

When the QDIA regulations were first proposed, some stakeholders sought clarification on whether the use of variable annuity contracts within QDIAs would affect an investment's status as a QDIA. The final regulations provide some clarification, stating that a product or portfolio that is offered through a variable annuity or similar contract will not, on its own, affect its status as a QDIA in the context of TDFs or balanced funds; however, the regulations are silent on managed accounts in this context.

Key Takeaways from DOL Guidance

In September, DOL issued Advisory Opinion 2025-04A. Advisory opinions are issued to individuals or organizations for the purpose of interpreting ERISA as it applies to a specific set of facts. Only the party requesting the opinion may rely on it, but advisory opinions are generally seen as a sign of DOL's thinking on a particular matter.

The advisory opinion addresses a company's lifetime income strategy program that includes a GLWB backed by insurers through a variable annuity contract. Generally, a GLWB allows individuals to take guaranteed annual withdrawals from annuities during retirement. The program is offered to certain defined contribution plans as a QDIA that is intended to fall within the "investment management service" category, described above. The program offers guaranteed lifetime income to participants through the funding of a separate portfolio offered through a variable annuity contract. Participant funds are gradually allocated to the separate portfolio, and an insurer then provides a guaranteed lifetime income stream to participants on an annual basis during their retirement.

The advisory opinion concludes that the company's program can qualify as a QDIA even though it is offered through a variable annuity contract with a GLWB component. DOL also notes that the QDIA regulations should not be read to preclude the use of lifetime income strategies in an investment management service.

While this advisory opinion primarily serves to confirm existing law, it also provides some clarity regarding the language in the QDIA regulations that discuss the offering of variable annuities or similar contracts or features.

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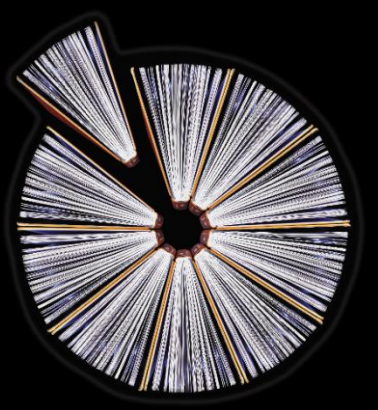

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