

# DOL Court Loss Casts Shadow On Fiduciary Rulemaking

By **Kellie Mejdrich**

Law360 (February 17, 2023, 7:56 PM EST) -- A Florida federal judge's recent decision invalidating the U.S. Department of Labor's guidance on retirement plan rollovers doesn't bode well for the agency's efforts to craft and enforce formal regulations defining who qualifies as a fiduciary under federal benefits law, experts say.

The DOL's Employee Benefits Security Administration has placed revisiting the fiduciary definition on its latest regulatory agenda and has publicly confirmed work on a proposed rule is a top agency priority. The agency said in its fall 2022 regulatory agenda, which was made public in **January**, that it had planned to issue new rules in December. The DOL said a new proposed rule would spell out when someone advising employee benefit plans and IRAs on investments for a fee falls under the Employee Retirement Income Security Act's strict conduct standards.

"Many protections, duties, and liabilities in ERISA hinge on fiduciary status; therefore, the determination of who is a fiduciary is of central importance," the DOL said in its fall agenda.

But the recent Florida federal court **decision**, combined with a previous New York federal court decision tossing an ERISA class action challenging a retirement manager's rollover advice from **late 2022**, are raising questions about the DOL's prospects for putting together a rule extending ERISA's fiduciary requirements to the rollover context. That comes on top of the Fifth Circuit invalidating an earlier version of the DOL's fiduciary rule in **2018** as exceeding the agency's authority, necessitating a **2020** replacement, which the invalidated guidance had addressed.

"Certainly the fact that this is the second time a federal court has struck down either their regulation itself, or their interpretation of a regulation, should constrain the DOL's next potential rulemaking to ensure that it's in line with the fiduciary definition under the statute, under ERISA," said John Schuch, partner at Dechert LLP.

Schuch said that without clarity on how the case would affect the DOL's fiduciary conduct standards rulemaking on rollovers, "it leaves financial institutions in limbo and uncertainty ... there's no clear regulatory guidance one way or the other right now."

In knocking down a portion of EBSA's FAQ document from **April 2021**, Judge Virginia M. Hernandez Covington **found** the agency had overreached in trying to capture rollover transactions outside the scope of ERISA, amounting to an arbitrary and capricious interpretation of current law in violation of the Administrative Procedure Act.

Specifically, Judge Covington rejected EBSA's interpretation of how one prong of a five-part test used to determine whether investment advice is subject to fiduciary conduct standards under ERISA, known as the regular basis prong, applied to rolling money out of a retirement plan and into an IRA.

EBSA's guidance expanded on a final regulation from 2020 in the form of a **prohibited transaction exemption**, which established a way for retirement plan managers to give investment advice for a fee without violating federal benefits laws.

With EBSA's interpretation knocked out describing how the five-part test's regular basis prong applies to rollovers into an IRA out of an employee benefit plan, some clients handling ERISA plan assets that have developed policies to comply with the guidance are "digesting what it means for their

particular business models," Dechert's Schuch said.

"Unfortunately it means our clients — at least financial institutions — are in limbo and uncertainty, because right now there is not clear regulatory guidance," Schuch said, referring to the rollover context.

Charles Field, partner and chair of the financial services litigation practice at plaintiff-side firm Sanford Heisler Sharp LLP, doubted that EBSA could somehow regain oversight of rollovers that the Florida court invalidated through rulemaking.

"They could try, but they're probably going to wind up, again, having it invalidated," Field said. "Until they amend the statute to define what investment advice is, I don't think the DOL is going to be able to get there."

Joanne Roskey, a member of Miller & Chevalier Chtd. who previously spent more than a decade working for the DOL in the Office of the Solicitor and as a former chief of the division of health investigations at EBSA, said the Florida court decision and other rulings show how "the courts are questioning whether this is the regulatory authority that should be overseeing those types of transactions."

For example, some industry groups argue that the U.S. Securities and Exchange Commission, with its **Best Interest regulation** or Reg BI, which applies to broker-dealers giving advice to retail customers, provides adequate oversight.

Field said rollovers are within the SEC's jurisdiction and that the securities regulator "should be regulating this."

"The only reason that the DOL is getting involved is because I think they perceive the SEC as not doing an adequate job in protecting people who are trying to roll over and out of a 401(k)," Field said.

Looking ahead, attorneys have eyes on both the DOL's regulatory action and a possible appeal of the district court's decision.

The DOL didn't respond to a request for comment on the ruling or for information about an appeal or future regulatory action.

Miller & Chevalier's Roskey said she thinks there are "some interesting legal questions that are embedded in that decision that I'm sure will be under consideration by the parties when they consider an appeal."

"I thought there was a lot of mixing of concepts between the standing arguments and the merits arguments," Roskey said. "And I think that'll be an area that's ripe for attorneys involved to assess the legal merits of the court's decision, both on standing and on some of the APA issues."

Employee benefits and executive compensation attorney Andrew Oringer, general counsel and partner at the Wagner Law Group, said "it remains to be seen just how much financial institutions will rely on this development for truly, fundamentally, changing their compliance efforts," particularly with the decision not yet finalized.

"But again, now two courts have resoundingly rejected the Department of Labor's reinterpretation of its own rules," Oringer said.

--Editing by Amy Rowe.