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By Ben Miller and Jacklyn Wille
Deep Dive

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- Individuals, classes could sue advisers, broker-dealers

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A newly finalized rule from the US Labor Department is poised to spur a new crop of suits under federal employee benefits law over alleged fiduciary breaches by defendants who previously weren't held to the strictest standard of care in handling retirement savers' funds.

The highly anticipated rule expands strict fiduciary standards of conduct to cover more advisers who provide recommendations involving retirement savers' assets by replacing an original five-part 1975 test that defined fiduciaries.

Lawsuits focusing on the extent to which an insurance agent, broker-dealer, or another party becomes a fiduciary by giving investment advice for a fee, a matter that hasn't been litigated frequently in federal courts, could emerge from the new fiduciary standard, according to benefits lawyers. One-time advice providers including insurance agents recommending rollovers, as well as broker-dealers and wealth managers, will be covered by the new standard and could be targeted in future such lawsuits, they said.

The rule will "increase the number of potential defendants" and likely also the number of "potentially deep-pocket defendants," said Michael A. Schloss, of counsel with Wagner Law Group and a former Labor Department litigator.

Fiduciaries have some time to get up to speed with the revamped rule and revised prohibited transaction exemptions. The Labor Department's Employee Benefits Security Administration has set an initial effective date for many provisions of Sept. 23 and a full compliance deadline for September 2025.

The DOL's rulemaking is likely to face legal challenges of its own, as well as an attempt in Congress to overturn it before it goes into effect, which could derail potential Employee Retirement Income Security Act litigation.

If and when the rule is fully implemented, the new standards could magnify an ongoing wave of lawsuits, many of which are class actions brought by plan participants, challenging many aspects of retirement plan management.

These cases are often brought against the plan's sponsoring employer and don't typically include claims against a plan's hired investment advisers, but that could change under the new rule, Schloss said.

Typical cases challenging a plan sponsor's management of a plan, rather than one-time rollover advice covered under new the fiduciary standards, seek to bring class action claims regarding high fees, imprudently selected funds, or underperformance.

Plaintiffs As Enforcers

Prospective litigation under the new fiduciary rule could take aim at both ongoing and single instances of advice being provided to retirement savers.

The rule could spark new litigation tied to individual interactions between retirement savers and advisers, although it's less certain that those relationships will prompt class actions, given the specific facts and circumstances of each recommendation.

An adviser providing the same rollover recommendation to a group of retirement savers, for example, would need to closely follow fiduciary standards in each case in order to avoid potential lawsuits.

"I think a good plaintiff's attorney could write a [class action] complaint, particularly in the rollover context," said Heather Mehta, partner at UB Greensfelder. "Even though that's an individual receiving advice from one of these potential new fiduciaries, if you have one plan with tens of thousands of participants that you know has hundreds of people getting rollovers each year, there's a class."

Players in the life insurance industry, which has raised concerns about the rule's potential to limit insurance agents' ability to recommend annuities and collect compensation, could also land on the receiving side of a class action suit down the line.

“You could bring a class on behalf of every individual in any plan who were targeted by an insurance company for their annuity products,” Mehta said. “I think there could be a new wave that’s targeted at these new classes of fiduciaries, because they would have the same rule applicable to them that fees have to be reasonable.”

Benefits lawyers say they see the potential for litigation against any fiduciaries who have been brought under the expanded umbrella of the DOL’s rule.

“As the DOL have very openly and repeatedly said, they don’t have the person power to do a lot of enforcement in the ERISA space, and they depend on private litigation,” said Jerry Schlichter, founding partner at Schlichter Bogard LLP. “So it may take further litigation, just as it did with the 401(k) excessive fee litigation to implement this rule if advisers and people who make these recommendations don’t take on following the rule themselves.”

Schlichter has brought multiple landmark class actions on behalf of retirement savers, suing university 403(b) sponsors and landing deals to settle fiduciary breach claims related to unreasonable plan fees.

Under the new rule, an insurance agent who charges an excessive commission or recommends a product with high fees could also be subject to litigation on the question of whether those fees are reasonable.

“If the rule stays in effect, it will depend largely on whether or not the people who are making these recommendations and giving advice comply with the rule or if they do not,” he said. “If they do, that’s a great thing for American retirees, but if they don’t, they are risking litigation.”

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