

---

ADVERTISEMENT

---

# What's Next for the Fiduciary Rule? Tom Clark at the NAPA DC Fly-In Forum

BY JOHN SULLIVAN JULY 31, 2024

---

## LITIGATION

"If Republicans win in November, this is dead in the water, and they will stop the appeals process," Wagner Law Group's Tom Clark said of the latest iteration of the Department of Labor's (DOL) fiduciary rule. "If the Democrats win, I expect any appeals filed before January will continue."

Clark's comments came during a Tuesday afternoon session with American Retirement Association Chief Legal Officer Allison Wielobob at the NAPA D.C. Fly-In Forum in Washington. It focused on litigation surrounding the rule, officially called the "Retirement Security Rule," and its prospects for implementation.

---

ADVERTISEMENT

---

## Most Popular

What's Happening with the 2025 Social Security COLA Estimate(s)?

---

How Much Could 401(k) Contribution Limits Rise in 2025?

---

Here They Are—The 2024 NAPA Top D.C. Wholesalers!

---

What Optional SECURE 2.0 Provisions Are Plan Sponsors Most Likely to Adopt?

---

Creative Planning, 'Crazy' Bets, and the Need for 401(k) Education

---

Advertisement

## Recent Headlines

Case of the Week: Missing Top-Hat Plan Statement

---

Aptly titled “Looming Litigation: Discussing Ongoing Fiduciary Rule Litigation,” it was particularly timely given last week’s rulings in two separate Texas federal courts, in which stays in the rule’s effective date were granted to plaintiffs who sued the DOL.

“The courts made it really easy,” Clark told the Fly-In delegates. “The previous script we had for you all was about guessing what the court would do, and then it turned around and did it. So, that was really helpful.”

Plaintiffs in the **two latest cases** included an insurance trade group for independent marketing organizations (IMO) and the American Council of Life Insurers (ACLI).

“If you’re asking yourself how a court that governs Texas decides what happens in any other state, federal courts are allowed to issue stays for everyone, not just the people who live in that geographic region,” he explained. “The Chamber of Commerce decision by the Fifth Circuit Court of Appeals all those years ago invalidated the old fiduciary rule in toto and said it’s dead nationwide. The latest Texas argument said the DOL didn’t overcome that decision, so the new rule is also bad for the same reasons as the last.”

Wielobob emphasized that the DOL tried to respect the Fifth Circuit’s decision when drafting the Retirement Security Rule. Yet, both Texas courts ruled it was “violative” of the same rule vacated six years ago.

She then asked Clark to summarize the DOL’s position when drafting the latest rule.

“They cited the words ‘trust’ and ‘confidence’ 80 times in the preamble,” he said. “They got rid of the best interest contract exemption. They got rid of, allegedly, the private right of action breach that was built into that whole process. They felt they did a better job narrowing down what they were trying to accomplish in regulating rollovers. Money is going to vehicles that don’t have fiduciary duties explicitly applied to them, and the DOL was nervous about that. They feel people are being hurt and want to address that, and they feel the five-part test doesn’t cover it.”

The courts disagreed and issued stays on the rule’s September 23rd effective date. So, what happens now, and what does it mean for advisors and their clients?

“As far as what you should be doing as an advisor right now, keep doing what you put in place after the five-part test was reinstated and PTE 2020-02 was adopted,” Clark concluded. “If you’re doing rollovers and are willing to be a fiduciary in giving advice, stick with your disclosure forms and policies and procedures. If you paid an ERISA lawyer like me to draft a waiver that a participant can sign saying, ‘I made this decision on my own, and I understand you, the advisor, are not making a recommendation about the rollover,’ those, arguably, are still good and will still hold up as long as you really are not the primary basis for their decision to rollover.”



---

Drug Costs Fuel Latest ERISA  
Fiduciary Breach Suit

---

What’s Next for the Fiduciary Rule?  
Tom Clark at the NAPA DC Fly-In  
Forum

---

Talking Points: The 401(k) Match  
‘Catch’

---

How SECURE 1.0 and 2.0 Impacted  
Retirement Security Projections

## NAPA's 401(k) Rollover Specialist (k)RS Credential



Sign up for The Daily

Subscribe to the [NAPA Net Daily](#).

## Recent Comments

[There's fifty years of legislation,  
litigation, \(good & 'not so good'\)...](#)

---