

DOL's Push To Curb 401(k) Suits Could Face Court Challenges

By **Kellie Mejdrich**

Law360 (March 31, 2026, 8:55 PM EDT) -- The U.S. Department of Labor's recent proposal to give retirement plan fiduciaries legal cover to select a broader range of investments aims to reduce ERISA litigation, but attorneys on both sides of the bar say they expect the rule to face legal challenges if finalized as proposed.

The proposed rule — which was **first unveiled** Monday by the DOL's Employee Benefits Security Administration and **published in the Federal Register** on Tuesday — would establish a safe harbor to shield retirement plan fiduciaries from Employee Retirement Income Security Act litigation.

That safe harbor, which is conditioned on following the agency's process, would protect against allegations that plan fiduciaries breached ERISA's fiduciary duty of prudence with regard to their selection of an investment fund, including investments that incorporate alternative assets.

"Underneath it all, it really is designed to reduce litigation, and gives a whole bunch of steps that are designed to basically say, if you've done these process steps, you're in a good position for litigation," said David Levine, a principal at Groom Law Group Chtd. who represents employers and plan sponsors.

"A Real Breakthrough"

While not exhaustive, the DOL's proposal says that the agency's investment selection process emphasizes six factors: performance, fees, liquidity, valuation, performance benchmark and complexity.

The proposed rule came as a welcome development to some attorneys because of persistent class action litigation challenging employer plan sponsors' investment fund choices, and a recent spike in suits alleging that underperforming target-date investment funds violated ERISA.

Levine highlighted how reducing benefit plan litigation was a stated goal of President Donald Trump's **executive order from August** that focused on alternative asset investing and called for regulations from the DOL.

Levine also pointed out language in the proposed rule's investment selection scenarios as another way the DOL's regulations might serve as a defense against ERISA fee litigation, including a specific example walking through considerations involved with adding lifetime income benefits to a plan that involved higher fees.

"Historically, ... lawsuits have often said, '[a fund is] not the cheapest, it's not the cheapest.' And this makes it clear — it's not about being the cheapest from the department's view. So I think that's a real positive," Levine said.

Attorneys also highlighted how the safe harbor was constructed to be "asset neutral," with the DOL repeatedly stating in the proposal that the agency doesn't believe any given investment is good or bad for a plan but rather is subject to ERISA's requirement that fiduciaries follow a prudent process.

The DOL's proposal also adds language to ERISA regulations to explicitly state that "there is no per se rule respecting investment in alternative assets generally or the inclusion of private market

investments," including with regard to funds that include direct or indirect interests in things like private equity, digital assets and real estate.

The DOL said in the preamble to its proposed rule that by staying asset neutral, the safe harbor would expand the number of investments in plan menus by giving legal protection to plan fiduciaries.

Karen Brandon, a shareholder at Ogletree Deakins Nash Smoak & Stewart PC and an employer-side ERISA attorney, took note of the asset-neutral language in the proposal, and said the construction could help the DOL fend off legal challenges to its regulations.

"I do think it was wise to not focus on the type of investment ... and just go back to the process of ... how do you make a reasonable investment decision?" Brandon said.

Richard Shea, senior counsel at Covington & Burling LLP and former chair of the firm's employee benefits and executive compensation practice, said the safe harbor would give fiduciaries "a single test for all investments."

"I think it's a real breakthrough technically, to [the DOL] providing more practical, granular advice to plan fiduciaries and to the courts," Shea said.

"Turning ERISA on Its Head"

While defense-side practitioners praised different aspects of the liability shield envisioned by the DOL in the context of fund selection, the same construct raised skepticism from plaintiff-side practitioners, including J.J. Conway of J.J. Conway Law, a longtime ERISA practitioner and plaintiff-side attorney.

"I mean, the fees in private alternative investments ... it's like, you know, Mount Everest level," Conway said. "These are really high fees."

Conway said he was also skeptical about the timing of the release, given **recent strain** in the private credit market.

"You've got this situation right now where this is all being rolled out while the private credit market is in total turmoil — just absolute, total turmoil," Conway said. "So a lot of it just, it doesn't seem to make a lot of sense at the present time, doesn't seem all that well-thought-out."

Brandon, the employer-side practitioner with Ogletree, pointed out that agency interpretations of laws don't get the same deference they used to from courts, in the wake of the U.S. Supreme Court's 2024 decision in **Loper Bright Enterprises v. Raimondo** 📌. That decision upended the so-called Chevron doctrine handing deference to federal agencies to interpret statutes.


"I know that the DOL hopes that the courts will give deference to this rule, but that's a little shakier these days, since we don't have Chevron deference anymore," Brandon said.

And the recent history of the DOL's attempts to deal with fiduciary status strongly implies that courts will have their say.

Texas courts **in July 2024 invalidated** fiduciary investment advice regulations from the DOL under former President Joe Biden's administration, concluding that an attempt to expand ERISA's reach to cover more rollovers out of an employee retirement plan went beyond the agency's authority. This March, the DOL also **adjusted its fiduciary investment advice regulations** to reflect Texas courts entering final judgments in those disputes and ordering the DOL's regulations vacated.

Biden's regulations, which were finalized in April 2024, aimed to replace a 2016 final rule on ERISA fiduciary duties when providing investment advice for a fee that the Fifth Circuit **overturned in 2018**. The Fifth Circuit's action forced fiduciaries to revert to a 1975 five-part test, although the DOL eventually finalized updates to related prohibited transaction exemptions in 2020.

"Similar to fiduciary rules that have been promulgated by the Department of Labor, I think [the proposed safe harbor regulations] will be subject to a similar challenge," said plaintiff-side attorney Carl Engstrom, co-founder and partner at Engstrom Lee LLC.

Engstrom was also highly critical of the proposal and questioned how a safe harbor complied with ERISA. He also suggested the rule might conflict with the Supreme Court's 2014 decision in [Fifth Third Bancorp v. Dudenhoeffer](#) , in which the justices held there was no special presumption of prudence for employee stock ownership plan fiduciaries.

"It strikes me as likely turning ERISA on its head, by turning it into just a compliance checklist that you need to follow to escape liability," Engstrom said.

Andrew Oringer, partner and general counsel at The Wagner Law Group and an employer-side ERISA attorney, said he also expects legal challenges to the rule. He said a lawsuit could come from interest groups or potentially individual investors who argue the policy change puts retirement plan participants at risk.

A challenge to the rule could also occur if retirement plan fiduciaries bring up the DOL's regulation as a defense in litigation, such as a proposed class action against an employer, and the plaintiffs then argue the regulation is invalid, he said.

"I think there are multiple avenues on which this regulation could be challenged," Oringer said.

--Editing by Abbie Sarfo and Nick Petruncio.