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By Austin R. Ramsey
Aug. 19, 2022, 12:31 PM

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Bloomberg Law News 2022-08-22T07:27:21110346327-04:00
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Advisory opinions the US Labor Department uses to answer employers' legal questions can undergo judicial review, according to a federal appeals court decision this week that also made the department's most recent memo unenforceable.

The department suffered the double blow in a US Court of Appeals for the Fifth Circuit decision that remanded review of a data-for-insurance scheme back to the US District Court for the Northern District of Texas.

The ruling on advisory opinions paves the way for companies to sue the Labor Department if they disagree with its subregulatory conclusions and could force regulators to shy away from opinionated guidance for fear of a litigious rebuttal. DOL's Employee Benefits Security Administration usually only opines on an issue once, so industry practitioners widely consider the guidance precedent-setting.

"A lot of people in practice are guided by the advisory opinions that other people have gotten," said Roberta Casper Watson, a partner at the Wagner Law Group PC in Tampa, Fla. "The court is definitely saying it's subject to judicial review."

Labor Department advisory opinions have already waned in recent years. The latest opinion (Advisory Op. No. 2020-01A) struck down by the Fifth Circuit Aug. 17 was one of only five issued by the Trump administration, compared with 28 under former President Barack Obama. President Joe Biden's Labor Department so far hasn't issued any advisory opinions.

The ruling nixed only one Labor Department advisory opinion, but future and existing memos could feasibly undergo legal challenges within the Fifth Circuit's jurisdiction, which covers Louisiana, Mississippi, and Texas. It's unclear how the ruling may impact other executive agencies that issue fact-based opinions.

The Labor Department deferred all questions pertaining to the Fifth Circuit decision to the Justice Department. Justice Department officials declined to comment Friday.

'Final Agency Action'

The Fifth Circuit decision rejected DOL's assertions that an advisory opinion doesn't constitute "final agency action" and therefore isn't open to review procedures under the Administrative Procedure Act (Pub.L. 79–404).

EBSA argued that advisory opinions are just that—opinions based on a hypothetical set of facts. They don't bear the same finality as formal regulatory action.

"An action is either final or not, and the mere fact that the agency could—or actually does—reverse course in the future does not change that fact," the court ruled. "Were it otherwise, no agency action would be final because an agency could always revisit it. And that can't be right."

The appeals court said the advisory opinion at issue here was arbitrary and capricious because the agency failed to align it with other memos published in 1999 and 2006, as well as a regulation (RIN 1210-A85) the agency issued in 2018 expanding the definition of employers in association health plans to include self-employed workers.

A US district court judge struck down that Trump-era regulation in 2019, calling it an "end-run" around the Affordable Care Act (Pub.L. 111-148). That ruling, which put thousands of workers' benefits at risk, remains a thorn in the Biden administration's side as it reviews the case on appeal.

Show Your Work

The Fifth Circuit told the lower court to check its work on determining whether the novel workplace benefit qualifies as a single-employer health plan under the Employee Retirement Income Security Act of 1974 (Pub.L. 93-406).

Under that benefit, Data Marketing Partnership LP and LP Management Services LLC offer participants health insurance in exchange for internet usage data that they market and sell.

But the appeals panel didn't show its own work, Watson said.

"We don't know what the court will do once it has the full district-court analysis," she said. "They didn't leave any hints about what side they're on, and I'm really curious whether the Fifth Circuit really thinks you ought to not do this and they just want the DOL to follow the rules or whether they really think this is allowed and the DOL was wrong."

Qualifying under ERISA means plans aren't subjected to ACA protections such as coverage for pre-existing conditions and essential health benefits. It also allows companies like Data Marketing Partnership to avoid state health insurance regulations and subvert the ACA's goal to keep health-care costs affordable by grouping healthy and sick people together.

If the district court comes to the same conclusion and the Fifth Circuit agrees, Watson said, it could greenlight more companies to try to sneak around the Obama-era law by offering workplace plans that dodge minimum ACA protections.

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