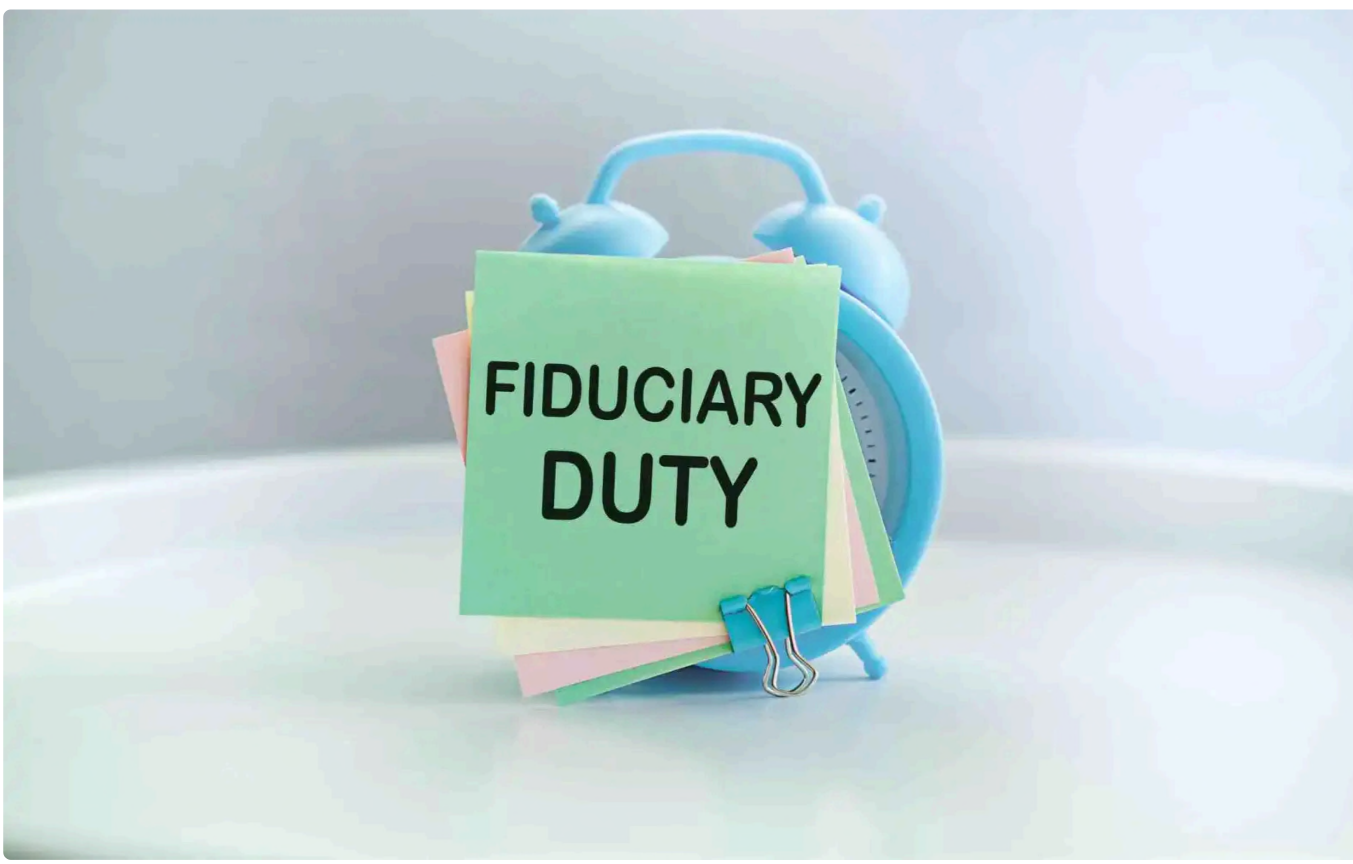
ERISA Attorneys Outline Next Steps, Actions Item After DOL Fiduciary Rule Stays

ERISA attorneys give their predictions for DOL next steps and action items for industry professionals and plan sponsors

by **Amanda Umpierrez** · August 2, 2024 · 5 minute read



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Industry reactions are pouring in as the Department of Labor (DOL) faces a grave setback in implementing its Retirement Security Rule come this fall.

Two legal challenges filed in Texas last week have stalled the fiduciary rule from its September 23 effect, with the second stay having been issued late last Friday night.

Despite initial shock from the industry, the challenges aren't unexpected, nor staggering for advisors already in compliance with the current fiduciary regulation, tells Bonnie Treichel, ERISA attorney and founder of Endeavor Retirement, in an interview with *401(k) Specialist*.

Bonnie Treichel

"For these advisors, they put policies and procedures and appropriate forms—and in some cases tools—in place to comply with the five-part test when it was reinstated and when PTE 2020-02 was finalized," she said. "The change under the new fiduciary rule package only nominally impacted these advisors, so a stay does not change things and honestly is just noise and unnecessary distraction."

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Until both stays are resolved, retirement plan advisors will have to continue following the current fiduciary regulation come September, including the original five-part test and current prohibited transaction exemptions (PTEs) 84-24 and 2020-02, shared Fred Reish, ERISA attorney and partner at Faegre Drinker, in an article on his blog on Thursday.

Rules under the proposed Retirement Security Rule will not be effective until courts have "decided the validity of the regulation and exemptions," and until appeals by the Department of Labor are exhausted, he wrote.

Two stays in two days

The first challenge was issued on July 25, when U.S. District Judge Jeremy Kernodle of the U.S. District Court for the Eastern District of Texas, issued a preliminary injunction after the Federation of Americans for Consumer Choice (FACC) requested so in a separate lawsuit last May.

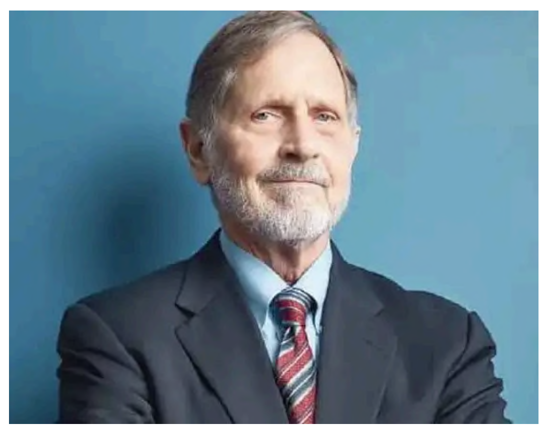
In his ruling, Judge Kernodle said the Retirement Security Rule had incorporated several of the same issues that killed the 2016 rule several years ago. In that instance, the Fifth Circuit vacated the rule in 2018 because it "conflict[ed] with the plain text of [ERISA]," was "inconsistent with the entirety of ERISA's 'fiduciary' definition," and unreasonably treated numerous financial services providers "in tandem with ERISA employer-sponsored plan fiduciaries," Kernodle stated.

The second stay, issued by the Federal District Court for the Northern District of Texas, blocks the DOL's fiduciary rule from taking effect until the court rules on a past lawsuit brought on by the American Council of Life Insurers and eight other insurance organizations, including the National Association of Insurance and Financial Advisors (NAIFA), the Insured Retirement Institute (IRI), and the National Association for Fixed Annuities (NAFA), among others. The suit, filed on May 24, accused the fiduciary rule of being "contrary to law," "arbitrary and capricious," and "ultimately unconstitutional," and also compared it to the DOL's 2016 fiduciary regulation.

"We are grateful to the court for its decision to issue a stay halting the September 23, 2024, effective date of the U.S. Department of Labor's [DOL] fiduciary-only regulation, the DOL's latest attempt to vastly expand its statutory authority by imposing fiduciary status on almost every financial professional who sells retirement products," NAFA wrote in a statement following an announcement of the stay.

Next steps for the DOL

While the Department of Labor previously stated it would be prepared to face challenges against its rule, it's unclear whether the agency will appeal the stays. Even if they do, the potential of subsequent success is slim, predicted Reish.


Fred Reish

Instead, the DOL may choose to do a hearing of the merits, Reish wrote, even if it's uncertain whether or not it will lead to a win for them. "Since the courts have already indicated that the plaintiffs [primarily from the insurance industry] are likely to succeed in the desire to overturn the DOL rules, and since the judges believe that they are bound by the 5th Circuit Court of Appeals *Chamber of Commerce* decision in 2018 [which overturned the Obama era fiduciary rules], it seems almost certain that the judges will vacate the regulation and exemptions," he wrote.

In this scenario, the DOL could appeal to the Fifth Circuit Court of Appeals, where a three-judge panel will hear and rule in favor of or against the regulation, he noted. Ultimately, whoever loses could request an "en banc review" where all judges of the Fifth Circuit review the case, or even request it be heard by the Supreme Court of the United States.

In all, it could take up to three years or longer before a final ruling is established, unless Republicans win in the general election come November and decide to drop any additional appeals, Reish noted.

Until then, its insurance professionals, and the clients they service, that will be playing the waiting game, adds Treichel. "The impact of the stays is to those individuals in the insurance world that were going to become ERISA fiduciaries for the first time," she said. "Arguably the most impacted parties then are the investors these individuals serve that aren't provided service as an ERISA fiduciary."

Industry action items

While experts recommend advisors continue complying with existing regulation, the stays create a bout of uncertainty and confusion for employers, both of which can result in litigation, told Marcia Wagner, an ERISA attorney and founder of the Wagner Law Group, to *401(k) Specialist*.

Such lawsuits could become a catalyst for future regulation. "That is dangerous. You don't want things decided presumptive in litigation," Wagner cautioned. "For a huge industry to be making standards pursuant to litigation alone and not with regulatory initiatives, I think could end up in a situation that is sub-optimal."

Marcia Wagner

Wagner advises for industry professionals, along with their clients, to play defense for now. Being proactive by ensuring compensation is reasonable and updating benchmarking practices could minimize chances of future litigation.

Some employers may choose to outsource independent advice to diminish fiduciary liability. For instance, Wealthramp, an SEC-registered investment adviser, matches plan participants with pre-screened advisors who can offer personalized guidance, Wagner stated.

ERISA audits, either conducted by a law firm, accounting firm, or consulting firm, could also minimize risk for plan sponsor clients, Wagner added. Such an audit ensures plans are compliant with the Department of Labor and the Pension Benefit Guaranty Corporation (PBGC), and will review whether the workplace plan is legal, tax-qualified, if it has a fee policy statement and an investment policy statement (IPS), if the plan committee meets quarterly, if there is a charter for the organization, if the plan sponsor has sent out all requisite notices, and any reportable events, among other items, listed Wagner.

By incorporating an audit, plan vendors and employers could also protect themselves in the case they one day face litigation.

“If it’s done by professionals, then a lot of stuff can be uncovered,” she said. “And if nothing is uncovered, you get a clean bill of health, and I think this would be exhibit A in a lawsuit as defense to get a summary judgement or a motion to dismiss.”

DEPARTMENT OF LABOR (DOL) DOL FIDUCIARY RULE

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Amanda Umpierrez is the Managing Editor of 401(k) Specialist magazine. She is a financial services reporter with over six years of experience and a passion for telling stories and reporting news. Amanda received her degree in journalism and government and politics at St. John's University. She is originally from Queens, New York, but now resides in Denver, Colorado with her partner. In her free time, Amanda enjoys running, cooking, and watching the latest drama show.

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Bipartisan Bill to Allow CITs in 403(b)s Introduced in Senate

Legislation with wide-ranging support a companion to legislation already passed in the House

by **Brian Anderson, Editor-in-Chief** · August 1, 2024 · 3 minute read

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A bipartisan group of four Senators introduced a bill today that would allow 403(b) plans to include collective investment trusts (CITs) as part of their investment menu options.

Senators Katie Britt (R-AL), Raphael Warnock (D-GA), Dr. Bill Cassidy (R-LA), and Gary Peters (D-MI) introduced S. 4917, the *Retirement Fairness for Charities and Educational Institutions Act*, to enhance investment options for 403(b) retirement plans.

Similar to a 401(k), 403(b) plans are offered to employees of non-profit organizations, like public universities, hospitals, churches, and charities.

The bill would expand retirement savings opportunities for non-profit employees by allowing 403(b) plan participants to invest in collective investment trusts (CITs), tax-exempt investment vehicles that provide a diversified, pooled investment option—similar to a mutual fund. Under current law, unlike 401(k) plans, 403(b) plan sponsors are not able to use this stable, lower-cost investment option in their plan. This legislation would create parity between 403(b) and 401(k) retirement savings plans, benefitting over 15 million employees at hospitals, universities, charities, and other non-profit organizations.

"Americans serving in the non-profit sector should have the ability to access retirement resources that fit their needs," Sen. Britt said. "Through the Retirement Fairness for Charities and Educational Institutions Act, Americans in the non-profit sector would be able to access the same investment options available to those in the private sector. It levels the playing field so that more hardworking Americans can access retirement sooner."

The bill has widespread support, including from the American Retirement Association and the Investment Company Institute.

"This is an important next step in the American Retirement Association's effort to enact this legislation that will

"ICI hopes the Senate will join the House and swiftly pass this legislation so public give 15 million 403(b) plan participants throughout the country access to the same lower-cost CIT investments that are available to 401(k) plan participants," ARA CEO Brian Graff said in an article posted on the NAPA website.

"ICI thanks Senators Britt, Warnock, Peters, and Cassidy for their bipartisan leadership on this important legislation," said ICI President and CEO Eric J. Pan in a statement released today. "These professionally managed products help millions of Americans secure their financial future. ICI hopes the Senate will join the House and swiftly pass this legislation so public sector and nonprofit employees participating in 403(b) plans can benefit from the same retirement saving products offered in 401(k)s."

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ICI President and CEO Eric J. Pan

Additional supporters of the legislation include the American Heart Association, American Council of Life Insurers, Habitat for Humanity, National Council of Nonprofits, Council on Foundations, Lutheran Services of America, United Way, and Securities Industry and Financial Markets Association.

The bill follows an amendment that was passed in the House of Representatives in March 2024 in an overwhelmingly bipartisan vote of 301-125, sponsored by Reps. Frank Lucas (R-OK), Bill Foster (D-IL), and Josh Gottheimer (D-NJ).

CITs were supposed to be allowed in 403(b) plans by way of 2022 SECURE 2.0 legislation, but that specific provision somehow didn't make it into the wide-ranging retirement reform law. A SECURE 2.0 “fix” that would allow 403(b)s to invest in CITs was officially introduced in the House in May 2023 in the form of “The Retirement Fairness for Charities and Educational Institutions Act of 2023.”

The full text of the bill can be viewed HERE.

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AUTHOR

Brian Anderson, Editor-in-Chief

Veteran financial services industry journalist Brian Anderson joined 401(k) Specialist as Managing Editor in January 2019. He has led editorial content for a variety of well-known properties including Insurance Forums, Life Insurance Selling, National Underwriter Life & Health, and Senior Market Advisor. He has always maintained a focus on providing readers with timely, useful information intended to help them build their business.

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