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From the Employment, Labor & Benefits Practice Group

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Special Client Alert

How Did President Trump Change the DOL's Fiduciary Rule?

President Trump has directed the Secretary of Labor to re-examine the Department of Labor's final so-called "Fiduciary Rule" to determine whether it "may adversely affect the ability of Americans to gain access to retirement information and financial advice," and to prepare a new cost-benefit analysis of the Fiduciary Rule that focuses on potential adverse impacts on investors, retirees, and the retirement services industry. If (as anticipated) the results of this analysis indicate adverse impacts, President Trump has ordered the Department of Labor to "publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law."

What does this mean for employers who sponsor 401(k) plans? The short answer is that plan sponsors remain liable as fiduciaries for the prudent selection and ongoing monitoring of 401(k) plan investment options. Noting in President Trump's order changes these fiduciary responsibilities, which are statutory in nature, were reaffirmed by the United States Supreme Court in *Tibble v. Edison International*, and were not changed by the Fiduciary Rule.

The Fiduciary Rule, which took six years to finalize under the federal Administrative Procedures Act (APA), requires investment professionals who charge commissions to put their clients' "best interests" first when giving advice on retirement investments to plan fiduciaries and to an individual participant-retiree who is rolling a plan account balance to an IRA. The purpose of the Fiduciary Rule is to prevent investment advisers from steering plans and individual clients toward investments with higher commissions and fees that ultimately would reduce accumulated retirement savings.

The Rule itself became final in April of 2016, with implementation for employers set to begin in April of 2017 and full compliance required by the financial services industry by January 1, 2018. For employers who use the assistance of an investment advisor to select 401(k) plan investment options, the Rule requires that the plan's named fiduciary must execute a "best interests contract" (BIC) with the plan's investment advisor that satisfies the warranties and disclosures set forth in the Rule. Once the Fiduciary Rule became final in April of 2016, the financial services industry vigorously challenged its legality in the federal courts. Federal district courts in the District of Columbia and Kansas have already upheld the Fiduciary Rule, while other lawsuits are pending.

Under the procedures for federal agency rulemaking set forth in the APA, because the Fiduciary Rule became *final* in June of 2016 the Department of Labor must initiate a *new* rulemaking process to change the Rule. President Trump's order on Friday, February 3, 2017, directed the Secretary of Labor to take the first procedural step required to initiate a new proposed rule that would most likely modify or change the existing Fiduciary Rule. These anticipated changes are likely to modify or eliminate the requirement that plan sponsors must execute BICs with their plan investment advisors. Importantly, any change to the Fiduciary Rule is unlikely to impact the plan sponsor's statutory fiduciary responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA) to prudently select and monitor the investment offered as investment options for a 401(k) plan.

These statutory duties were the basis of the United States Supreme Court's much publicized 2015 decision in *Tibble v. Edison International*. *Tibble* held that plan fiduciaries have a *continuing duty* to monitor plan investments and to remove imprudent ones, particularly

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mutual funds that charge excessive fees. According to *Tibble*, ERISA's statute of limitations will not necessarily bar a plaintiff's challenge to investment decisions that were made many years ago. For example, in *Tibble* the claimed breach of fiduciary duty dated back to 1999 when the mutual funds at issue were originally selected by the members of the plan's 401(k) investment committee. Nothing in the Fiduciary Rule changes the core fiduciary responsibilities of employers who select investments for their 401(k) plans.

If the Fiduciary Rule is modified or eliminated, how will employers who sponsor 401(k) plans be impacted? Without the Fiduciary Rule, 401(k) plan investment advisers would continue to operate under the status quo's lesser "suitability" standard when making investment option recommendations to plan fiduciaries. The 401(k) plan's investment fiduciaries, however, must operate under ERISA's higher statutory standard, which requires that the fiduciaries must act for the "exclusive purpose of providing benefits" to the plan's participants and "defraying the reasonable expenses of administering the plan." Certainly, the investment advisor's suitability standard and ERISA's exclusive purpose standard for 401(k) plan fiduciaries may, as applied to a particular set of plan investment menu recommendations, both be satisfied. However, the burden of proving (and prudently documenting) that the higher ERISA standard has been satisfied falls on the 401(k) plan's fiduciaries. In terms of managing the risk of fiduciary litigation, it is critical to recognize that any change or even the elimination of the Fiduciary Rule would not impact the types of breach of fiduciary duty claims that have dominated the benefits news since the Supreme Court rendered its decision in *Tibble*. These claims, which are brought by private attorneys on behalf of 401(k) plan participants, are based on ERISA's statutory requirements for plan fiduciaries.

The Labor Employment and Benefits attorneys of Koley Jessen are closely monitoring proposed legislation and related regulatory developments. As events unfold, we would welcome the opportunity to work with your 401(k) plan fiduciaries to provide fiduciary training and assist with developing robust procedures for documenting investment decisions. Additional information about our Fiduciary Training Program is attached. For questions or additional information, please contact Adam Cockerill at (402) 343-3808 or adam.cockerill@koleyjessen.com or Colleen Medill at (402) 343-3832 or colleen.medill@koleyjessen.com.

Attorneys in the Employment, Labor and Benefits Practice Group

Margaret C. Hershiser, Chair
402.343.3711
margaret.hershiser@koleyjessen.com

Richard D. Vroman
402.343.3810
richard.vroman@koleyjessen.com

David A. Yudelson
402.343.3800
david.yudelson@koleyjessen.com

Ryan J. Sevcik
402.343.3859
ryan.sevcik@koleyjessen.com

Nathan T. Burkman
402.343.3807
nathan.burkman@koleyjessen.com

Adam L. Cockerill
402.343.3808
adam.cockerill@koleyjessen.com

Colleen E. Medill (Of Counsel)
402.343.3832
colleen.medill@koleyjessen.com

Stephanie A. Grattan
402.343.3786
stephanie.grattan@koleyjessen.com

Nicholas F. Lesiak
402.343.3875
nicholas.lesiak@koleyjessen.com

John C. Dunn
402.343.3797
john.dunn@koleyjessen.com

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