

FEBRUARY 2017

NO CHANGE BY TRUMP: FIDUCIARY REGULATIONS STILL EFFECTIVE IN APRIL

On April 8, 2016, the U.S. Department of Labor (DOL) issued final regulations intended to protect the public from certain practices of the financial industry that adversely affect retirement plan investments. The regulations hold financial advisers to a high fiduciary standard when selling products for retirement accounts. Instead of a “buyer beware” marketplace, the DOL has required that financial advisers act in the consumer’s best interest when selling investments for a retirement account. Persons held to the new standards include brokers, consultants and valuation firms that previously had little legal accountability toward retirement accounts.

The final regulations are designed to curb the often undisclosed amounts (such as commissions on insurance) that advisers have been taking on sales of investments to retirement vehicles such as IRAs and 401(k) accounts. By assigning fiduciary responsibility to dealers recommending investments to retail retirement accounts, the regulations seek to prevent excessive charges to the public on investments which are not in their best interests.

Not unexpectedly, the financial industry objected to new rules that upset an old profit model.

The final regulations, as originally published almost a year ago, are operative as of April 10, 2017.

On February 3, 2017 President Trump issued a memorandum directing the Secretary of the DOL to determine whether the new fiduciary regulations impair the public’s access to retirement information and financial advice.

Specifically, the memorandum requires the DOL to assess whether the public is apt to be harmed by any reduction in its access to certain retirement savings offerings, information or advice, and whether the regulations are likely to increase litigation and prices that investors and retirees must pay for retirement services. If so, then the DOL is directed to rescind or revise the rule. If it alters the regulation, the DOL must adhere to the Administrative Procedures Act which is designed to protect the public’s due process rights in rulemaking by providing the public notice and a comment period.

ABOUT THE AUTHOR

Evelyn Haralampu — Partner
Labor, Employment & Employee Benefits
617.345.3351 | eharalampu@burnslev.com

Evelyn advises on employee benefits, ERISA, executive compensation, medical privacy, federal health reform and related tax law. She writes and speaks extensively and has authored “ERISA Liability,” in the MCLE treatise *Massachusetts Employment Law*.

She is a member of the Tax Section of the American Bar Association and has been a contributing member of its subcommittee on Government Submissions. Recently, Evelyn’s article “Supreme Court’s Evolution in Defining Equitable Remedies Under ERISA” was featured in Bloomberg’s *BNA Benefits Practitioners’ Strategy Guide*.

LABOR, EMPLOYMENT & EMPLOYEE BENEFITS PRACTICE

Clients rely on us for advice on all aspects of the employment relationship, from pre-hiring considerations through separations, layoffs and terminations. We counsel employers on strategies for maximizing the effectiveness of their human resource function by avoiding litigation, while navigating the maze of state and federal regulations now governing employers’ actions.

We assist our clients in developing policies and procedures that assure compliance with governing laws and contracts. In addition, we develop and implement effective training programs for managers and staff.

To learn more about our **Labor, Employment & Employee Benefits** practice, visit burnslev.com.

• *continued*

The effective date of the regulation will remain April 10, 2017 unless the DOL follows procedures for delaying that date. The effective date of a final, published regulation cannot be postponed by an executive order or presidential memorandum without the agency's going through a public notice and comment process (*Natural Resources Defense Council, Inc. v. EPA*, 683 F.3d 752 (3d Cir. 1982)). However, under 5 U.S.C. 705, the DOL may postpone an effective date of a regulation pending judicial review. Alternatively, the DOL may unilaterally delay the effective date, without public notice and a comment period, if it finds the notice and public procedure are impracticable, unnecessary or contrary to the public interest (5 U.S.C. §553(b)(3)(B)). Otherwise, the regulations can be delayed, amended or repealed only by new law.

The procedures available for altering or delaying the fiduciary regulation are not easily or quickly implemented. The passage of a new law can take months. It is unlikely that the DOL would find it impracticable, unnecessary or contrary to the public interest to notify or have the public comment on any change or delay in the regulations. It is not certain that the DOL needs to suspend the effective date of the regulations pending current litigation, but it might do so.

For now, given the proximity of the date, the public should assume that the final regulations will take effect, as scheduled, on April 10, 2017. President Trump's memorandum to the DOL has not changed this result.

This communication provides general information and does not constitute legal advice. Attorney Advertising. Prior results do not guarantee a similar outcome.
© 2017 Burns & Levinson LLP. All rights reserved.

ABOUT BURNS & LEVINSON:

Burns & Levinson is a Boston-based, full service law firm with more than 125 attorneys in Massachusetts and Rhode Island. The firm has grown steadily and strategically throughout the years, and has become a premier law firm with regional, national and international clientele. Core areas of practice are Business Law, Business Litigation, Intellectual Property, Private Client Legal Services and Real Estate.

For more information, visit burnslev.com.