

# Should Employers Be Grieving the Impending Death of the DOL's Fiduciary Rule?

## Labor & Employment Law Update

on May 31, 2018

Every employer offering a 401(k) plan is faced with decisions about what investment options to make available to participants. Investment options carry different risks as well as different costs. In designing available investment options, most plan sponsors rely on a third-party advisor. Industry estimates indicate that approximately 90% of these financial advisors are brokers, i.e., commissioned-based sales consultants.

Third-party financial advisors may or may not maintain fiduciary status in regards to the 401(k) plan (this depends on the specific terms of each individual plan). Where an advisor does not maintain fiduciary status, an employer is ultimately the party responsible for selection and monitoring of available investment options.

The final rule, issued back on April 8, 2016, increased the level of responsibility for every third-party advisor to a 401(k) plan from a weaker "suitability" standard to a "best interests" standard, meaning they must only offer advice in the best interests of plan participants and beneficiaries and must disclose any potential conflicts of interest. Understandably this is an incredibly difficult standard for a broker/financial advisor to meet and the financial industry has protested the rule vigorously. In March of 2018, the Fifth Circuit Court of Appeals vacated the Department of Labor (DOL) rule and the DOL has indicated they won't be challenging that decision. On May 7, 2018, the DOL went a step further and issued Field Assistance Bulletin No. 2018-02 announcing a temporary non-enforcement policy.

Should employers be grieving the death of the fiduciary rule? Perhaps, but not necessarily. Ultimately no one will work for free and third-party advisors are no different. If broker/financial advisors can't collect adequate compensation through commissions, they will likely change their fee structure to charge more direct service fees. At the end of the day, the costs to the plan and its participants would arguably be equivalent. That said, employers relying on third-parties for financial advice in designing and maintaining their plans need to keep this in mind. Blind trust is not an option when there is an inherent conflict of interest

due to commission-based compensation. Employers are fiduciaries regardless of the death of the DOL's fiduciary rule and need to be diligent in ensuring they understand their plan and are protecting the participants.

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