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DOL Fiduciary Rule Compliance Tips

Although the U.S. Department of Labor Fiduciary Conflict of Interest Rule was finalized roughly six months ago, many plan sponsors and plan fiduciaries have not fully analyzed how the new rule will impact their plans and service provider relationships. Our prior alert, “DOL Fiduciary Rule Explained,” addressed the major aspects of the rule.

Certain implications of this rule may be surprising. For example, plan service providers that previously did not have fiduciary status may be forced to comply with this new rule, **or** alternatively, to change their level or type of services to continue avoiding that status (and its accompanying requirements). For this reason, among others, plan sponsors and plan fiduciaries should proactively vet the services and fees associated with any arrangement, any modifications to the same, and any other impacts the rule may have to avoid unwelcome surprises upon the effectiveness of the rule.

Some concrete steps that we recommend include the following:

1. Collecting and reviewing all plan service provider agreements that may be impacted by this rule, e.g., recordkeeping agreements (especially those that cover investment education or explicitly or implicitly permit the provision of rollover advice), plan and participant-level investment advisory agreements, and any other agreements that may impact plan and participant decisions on investments and distributions/rollovers
 - A close review of the provisions concerning fiduciary status, agent status, and services provided under any of these agreements is advisable.
 - Amendments to these agreements may be necessary and/or advisable to reflect any changes in services that the rule may prompt (e.g., provision of recommendations).

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2. Contacting the plan's record keeper and other service providers to ascertain what they are doing in response to the rule. We suggest a few specific inquiries: Does the record keeper or service provider intend to acknowledge its status as a fiduciary under the revised rule?
 - If the record keeper or service provider does not acknowledge fiduciary status, upon what exception or exceptions is it relying?
 - Will an amendment to the applicable agreement be required based on the new rule?
 - How will the participant experience change? Will all investment education tools and materials offered by the record keeper or service provider remain the same?
 - How will the participant call center services change? Will different or more or fewer services be offered?
 - Will costs change? Which ones, and by how much?
 - How will (or should) the forms and procedures concerning the processing of distribution inquiries and forms (including rollover advice) be modified?

NOTE: Any modifications to the services and/or fees will require consideration by the responsible fiduciaries as to whether the modified arrangement will meet or continue to meet, as applicable, the "reasonable contract" exemption under ERISA Section 408(b)(2).
3. Reviewing investment education materials for continuing compliance with the exception for non-fiduciary investment education, rather than fiduciary investment advice. If investment education materials will now be deemed investment advice, determine whether that is acceptable.
4. Revisiting which employees, if any, may be involved in activities designed to inform employees about plans, plan participation, plan investments, distribution options, retirement planning, and similar subjects.
 - Meetings amongst the HR, payroll, accounting, and/or benefits teams may be necessary to ascertain who may meet these criteria.
 - If in-house employees do or may give advice, do they receive any fees or compensation for giving the advice, and is any licensure or registration required under federal or state securities or insurance laws for the provision of such advice?

Because many benefit professionals and service providers believe the new rule does not or may not apply to them, we advise plan sponsors and plan fiduciaries to proactively determine what impact, if any, the rule will have on the plans and participants they are charged with overseeing, rather than waiting to be approached by service providers about needed changes shortly before the rule's various effective dates or, worse yet, after a particular provision of the rule is applicable.

Related People



Carrie Byrnes

Partner

cebyrnes@michaelbest.com

T 312.596.5838

Jorge Leon

Partner

jmleon@michaelbest.com

T 312.596.5831

Mark Lotito

Senior Counsel

malotito@michaelbest.com

T 414.223.2507

Kirk Pelikan

Partner

kapelikan@michaelbest.com

T 414.223.2529