

Legislate[®]

Key Legislative Developments Affecting Your Human Resources US

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Fate of the Fiduciary Rule in Doubt; Update on Health Care Reform and CSRs

Start your engines! The fiduciary rule took off last week, one day after legislation was introduced to eliminate it and the House voted on a comprehensive bill to put the SEC, rather than the DOL, in the driver’s seat. Health care reform efforts remained in focus for lawmakers from both chambers.

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Fiduciary Rule

After a great deal of procedural and process gymnastics, DOL released a final regulation redefining ERISA fiduciary responsibility for providing investment advice and setting forth a conflict of interest rule. Employers were, and continue to be, keenly interested in how the rule applies to the day-to-day administration and operation of employee benefits plans, as well to decisions and activities affecting the assets of such plans.

Applicability Dates

The rule’s effective date was in April 2016, but the rule’s applicability date was delayed. The new fiduciary definition and some limited conditions of the Best Interest Contract Exemption were to be implemented in April 2017, with the remaining requirements in place by January 1, 2018. But calls for a re-evaluation ensued and the April applicability date was further delayed.



On Friday, June 9 at 11:59 PM local time, the provisions of the rule that were scheduled to apply in April 2017 went live. However, the provisions scheduled to be applicable on January 1, 2018 may be sidelined with a further delay – or subject to a restart. Indeed, DOL announced last week that it is seeking [public input](#) on potential further changes to the rule. For additional information on the rule, its procedural history and efforts to derail it, please see [May 24, 2017](#) and [April 6, 2016](#) issues of *FYI Alert* and issues of *Legislate* from [February 13, 2017](#) and [January 9, 2017](#).

SEC vs. DOL

The debate as to whether the SEC or the DOL should take the lead in defining the guardrails for investment and other advice applicable to employer-sponsored retirement savings plans, including 401(k) plans and other defined contribution plans, remains open. Last week the House passed legislation – the Financial CHOICE Act ([H.R. 10](#), Sec. 841) – that includes a provision to send the DOL rule to a pit stop, anoint the SEC as relief driver to take the lead on changing course, and require DOL guidance to be aligned with SEC guidance. The bill jump-started, virtually along party lines, with no support from any Democrat and one Republican voting against it.

Congress vs. Agency

Last week, another round of legislation was introduced to replace the DOL’s fiduciary standard for employer-sponsored retirement savings plans with a new one agreed to by Congress. Rep. Phil Roe, R-Tenn., member of the House Committee on Education and the Workforce, and Rep. Peter Roskam, R-Ill., chairman of the House Ways and Means Subcommittee on Tax Policy, introduced the [Affordable Retirement Advice for Savers Act](#) (H.R. 2823) to repeal the DOL rule and establish a statutory definition of “investment advice” that would, among other things, set standards for providing information about investment options for employer-sponsored defined contribution savings plans, IRAs and HSAs. Sen. Johnny Isakson, R-Ga., member of the Senate Committee on Finance, introduced the [Affordable Retirement Advice Protection Act](#) (S. 1321). It is similar to the House bill in that it would establish a new paradigm for investment advice for DC plans, but it does not expressly repeal the DOL rule nor create a fiduciary duty for IRAs and HSAs.

Employers and plan sponsors are likely to applaud certain provisions in both bills that are designed to foster smart retirement savings decisions by participants. The bills respond to employer concerns that the DOL fiduciary rule creates unwarranted risk of liability and unnecessary hurdles to providing participants and beneficiaries with meaningful distribution guidance, such as recommendations about whether to roll the assets in their plan account to another plan or to an IRA. For additional background on the challenges facing employers under the DOL rule, please see the [June 8, 2016 testimony](#) to the ERISA Advisory Council submitted by Allison Klausner, a Principal at Conduent, on behalf of the American Benefits Council.

Under the bills, if certain guidelines are followed, information provided to participants or beneficiaries on factors to consider in deciding whether to elect to receive a distribution from a plan (or an IRA) and whether to roll it to a plan or an IRA would fall outside the definition of a fiduciary recommendation. Employees of the employer or a third-party service provider could avoid being subject to all the traps of the current DOL fiduciary rule when providing examples of different distribution alternatives, as long as the examples are accompanied by facts and assumptions supporting them.

For the House bill, please refer to this [press release](#), [fact sheet](#) and [summary](#) for additional information. For the Senate bill, please refer to this [press release](#).

Looking Ahead – Health Care Reform

Both chambers are expected to be busy working on health care this week. The Senate parliamentarian will continue reviewing the American Health Care Act ([H.R. 1628](#)), passed by the House on May 4. She will determine whether the bill’s provisions, individually and in the aggregate, comply with the budget reconciliation rules and whether the AHCA is eligible to advance in the Senate with a simple majority vote. Senate lawmakers will endeavor to build consensus on key provisions for a health care reform bill with an eye towards scheduling a vote before the July 4

holiday recess. In the meantime, the House reportedly is planning to vote on other health related legislation, including one bill ([H.R. 2579](#)) sponsored by Rep. Pat Tiberi, R-Ohio, that would permit individuals to use tax credits to purchase “unsubsidized” COBRA health coverage. (For additional information on the bill, please see this House Ways and Means Committee [report](#) and this Joint Committee on Taxation [publication](#).)

In other news, at an HHS budget hearing, Secretary Tom Price was asked about the cost-sharing reduction (CSR) payments under the Affordable Care Act (ACA) and whether the Trump administration would continue to fund them. Although he did not provide a direct answer, the secretary stated that the budget reflects that CSR payments will be made through 2018. (For background on CSR payments and the pending litigation about them, please see our [April 17 Legislate](#).) Additionally, GOP Senator John Thune, R-S.D., hinted that funding for such payments may be reflected in a Senate health care reform proposal.

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