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5 ERISA Cases To Watch In 2024's Second Half

By **Kellie Mejdrich**

Law360 (June 21, 2024, 1:38 PM EDT) -- The U.S. Department of Labor will be playing defense in the second half of 2024, battling injunction bids in Texas seeking to halt the agency's recently finalized retirement security regulations, as well as fighting to uphold a DOL rule tackling social and environmental factors in retirement plan investment decisions.

Here are five Employee Retirement Income Security Act cases that attorneys say will be on their radar.

Two Fiduciary Rule Challenges

Benefits attorneys are closely watching two challenges to the DOL's recently finalized rule expanding who's considered a fiduciary under ERISA, which are proceeding in adjacent Texas court districts and seek to limit the agency's broader power to enforce federal retirement security laws.

Both suits are led by insurance industry interests against the DOL, with the **first-filed suit from May 2** proceeding in Texas Eastern District Court led by a Texas-based nonprofit trade group called the Federation of Americans for Consumer Choice Inc. Other plaintiffs in that suit include insurance agency TX Titan Group LLC and insurance marketing organization ProVision Brokerage LLC, along with individual licensed insurance agents.

Another suit **was filed** May 24 led by the American Council of Life Insurers, along with other insurance trade groups including the Insured Retirement Institute and the National Association of Insurance and Financial Advisors, in Texas Northern District Court.

Both suits alleged that the DOL's implementation process for the final rule and amendments to ERISA prohibited transaction exemptions violated the Administrative Procedure Act and that the regulatory package purported to expand the DOL's authority beyond ERISA. Challengers in both cases cite what they say was a rushed process to implement the new rule and exemption amendments. The U.S. **Chamber of Commerce filed an amicus brief** in support of efforts in the first-filed case at the end of May.

Both cases seek a preliminary injunction against the regulations, and the **DOL filed an opposition brief** June 14 in the first-filed case. A response brief from the DOL is due June 28 on an injunction motion in the second-filed case led by the American Council of Life Insurers.

The **DOL's regulations finalized April 23** that are subject to the two suits sweep in a broad array of new retirement investment advice situations, including one-time rollover solicitations out of an employee benefit plan and many annuity recommendations affecting the insurance industry. In the introduction to its regulations, the DOL extensively addressed criticisms from the Fifth Circuit regarding its previous rule that attempted to expand the fiduciary definition under ERISA finalized in 2016, which the appellate court **vacated as beyond the agency's authority** in 2018.

Andrew Oringer, a partner and general counsel at the Wagner Law Group, said he's watching the two challenges to the fiduciary rule. He said the DOL's final product from April was "not as broad as the 2016 rule," but cautioned that it was "by no means obvious that this rulemaking will survive."

"The Department of Labor [is] very much trying to craft a rule that allows it to reach rollover solicitations, and other advice that they think should be within the scope of being fiduciary advice, in a way that the rule would survive," Oringer said.

As for what he's watching as the cases progress, Oringer said he'll be paying close attention to how challengers in the two cases compare the DOL's regulations from April with what the Fifth Circuit invalidated in 2018.

"One reason to be careful about overshooting the mark on the extent of sameness, is that you potentially give the other side the ability to highlight distinctions," Oringer said. "And so I do think that the arguments here have to be carefully crafted, and presumably, will be made in a way that is intended not to be overbroad."

The first-filed case is Federation of Americans for Consumer Choice Inc. et al. v. U.S. Department of Labor et al., case number 6:24-cv-00163, in the U.S. District Court for the Eastern District of Texas.

The second-filed case is American Council of Life Insurers et al. v. U.S. Department of Labor et al., case number 4:24-cv-00482, in the U.S. District Court for the Northern District of Texas.

ESG Rule Challenge At 5th Circ.

Attorneys are also keeping tabs on a Fifth Circuit appeal from more than two dozen Republican states seeking to invalidate a **DOL rule from 2022** that allows retirement advisers to consider so-called environmental, social and governance, or ESG, factors when choosing investments, since the ruling could change ERISA investment selection policy.

The appeal comes from 26 states with Republican attorneys general, led by Utah AG Sean Reyes, along with individual defendants, energy companies and an energy trade group. They appealed after U.S. District Judge Matthew J. Kacsmaryk **granted the DOL summary judgment** in the case in September.

Judge Kacsmaryk found that the DOL's rule was properly implemented under the APA and that it didn't violate ERISA. The 2022 policy was issued by the DOL's Employee Benefits Security Administration and explains how managers of ERISA-regulated retirement plans can factor ESG issues into their decision-making process but makes clear they don't have to do so.

Judge Kacsmaryk said under the test established by the U.S. Supreme Court in the landmark Chevron USA Inc. v. Natural Resources Defense Council Inc. , the court should defer to the DOL's interpretation of ERISA on the ESG rule.

In particular, Judge Kacsmaryk upheld the so-called tiebreaker test in the DOL rule, which ERISA plan managers can refer to when two investments otherwise would equally serve a plan's economic interests. Judge Kacsmaryk said the rule met the first step under Chevron deference "because ERISA does not contemplate the possibility of a 'tie' between two financially equivalent investment options." The second step under Chevron was also met, Judge Kacsmaryk said, because previous rules also supported the DOL's interpretation.

The legal challenge comes after President Joe Biden rejected a congressional effort to repeal the rule led by Republicans **using his first veto as president** in March 2023. Political fireworks in Congress over the rule, which Republicans said would encourage considerations of ESG by ERISA plan fiduciaries, played out despite the fact that Judge Kacsmaryk said there was "little in substance" different between the DOL's ESG policy former President Donald Trump finalized in 2020 to Biden's rule from 2022.

Ameena Majid, a partner at Seyfarth Shaw LLP who works in the firm's employee benefits and executive compensation department and co-founded the firm's impact and sustainability practice, said she's keeping a close watch on the case.

"It's another arena where the political divide around ESG is playing out in the private employer space," Majid said, adding that she's watching in particular for how the appellate court rules on the tiebreaker test.

Majid said disputes in court over the rule come at the same time that the financial marketplace is adapting to ESG, which "remains a malleable, amorphous term." She said any potential changes to

the rules that deter consideration of ESG factors could also put investment committees in a tough spot.

"They may very well look, and are likely looking at, how a company is addressing relevant ESG topics with respect to the value of the company," Majid said, referring to investment managers.

The case is Utah v. Su, case number 23-11097, in the U.S. Court of Appeals for the Fifth Circuit.

Oklahoma Wants Justices' Input On PBM Law

Attorneys are also monitoring a petition from Oklahoma to the U.S. Supreme Court seeking to upend a Tenth Circuit ruling from August that found parts of the state's law regulating pharmacy benefit managers were federally preempted.

Oklahoma's insurance commissioner, Glen Mulready, filed a **petition for writ of certiorari in May** in the suit from the Pharmaceutical Care Management Association. Oklahoma asked the justices to reverse a Tenth Circuit panel's **Aug. 15 decision that partially invalidated** the state's Patient's Right to Pharmacy Choice Act because it found portions of the law were preempted by ERISA and Medicare Part D.

Numerous states filed in support of Oklahoma's effort in **an amicus brief filed** this month. A number of pharmacy groups have **also filed in support** of the state's petition.

Oklahoma argues that the Supreme Court's 2020 decision Rutledge v. PCMA, which upheld an Arkansas law regulating PBMs challenged by the same industry group, should have directed the Tenth Circuit to uphold the state's law as not preempted. The state and its supporters argue that by ruling parts of the Oklahoma law were federally preempted, the Tenth Circuit split with the Eighth Circuit, which found most of a similar North Dakota law was **not preempted in 2021**.

Ryan Temme, principal at Groom Law Group who advises health insurers and plan sponsors, said he's keeping an eye on the petition because "if the Supreme Court takes up this case, there are serious implications for the extent to which ERISA preemption protects self-funded plans from state regulation of issues fundamental to the structure of plans' benefit designs."

"Since the court decided Rutledge, we have seen states take increasingly aggressive approaches to regulating PBMs, particularly with respect to the PBM's self-insured, ERISA-covered business," Temme added.

"Unlike the Arkansas law at issue in Rutledge, which was squarely focused on the amount that PBMs paid pharmacies, and thus only indirectly impacted plans, the Oklahoma provider network requirements in Mulready clearly impact plan design," Temme added.

The case is Mulready et al. v. Pharmaceutical Care Management Association, case number 23-1213, in the U.S. Supreme Court.

J&J Excessive Health Fee Suit

A case proceeding in New Jersey district court from a Johnson & Johnson employee alleging her health plan paid excessive fees has drawn attention among employer-side benefits attorneys, given the potential for the new type of pleading to catch on.

Because employers are already facing a recent wave of new excessive fee litigation involving 401(k) retirement plans, attorneys say a new type of ERISA class action alleging excessive fees on the health plan side has begun to raise alarm bells.

In the J&J case, current employee Ann Lewandowski **first alleged in February** that her employer's failure to demand better prices for prescription drugs from its pharmacy benefit manager, Express Scripts, breached fiduciary duties under ERISA. Express Scripts, which is a company that acts as an intermediary between insurance companies, pharmacies and drugmakers, is not named as a defendant in the suit.

Lewandowski's complaint also names the company's pension and benefits committee as well as individual employees overseeing prescription drug benefits and alleges they should have more prudently managed program costs. The suit also alleges that participants weren't furnished proper information on the cost of prescription drugs.

Joanne Roskey, a member of Miller & Chevalier Chtd. who spent over a decade working for the DOL in its Office of the Solicitor and as chief of EBSA's health investigations division, said she's keeping tabs on the proposed class action. She described the suit as part of a broader trend of employers facing more ERISA claims over excessive fees involving health benefits.

"There's a lot of other cases that are similar to this," Roskey said.

Roskey said the J&J filing "got a lot of attention because it's J&J, and it was a big case. But, you know, there are other employers that are getting sued," she added, pointing out an excessive fee case involving MetLife's health insurance premiums that's **currently before the Third Circuit** as one example.

Roskey said that "you also now see the employers, potentially as a result of this new liability risk that the J&J-type cases are creating, they're suing their" third-party administrators of health plans, she said.

"Both employers and TPAs are seeing a lot more potential liability exposure, because this scrutiny over fees and costs is causing an increase in the types of litigation that we're seeing," Roskey added.

Johnson & Johnson moved to **dismiss the case in April** and a response brief from the proposed class led by Lewandowski is due June 28.

The case is Lewandowski v. Johnson & Johnson et al., case number 3:24-cv-00671, in the U.S. District Court for the District of New Jersey.

--Editing by Neil Cohen and Roy LeBlanc.
