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Small Business Retirement Option at Risk in Health Plans Fight

By Lydia Wheeler

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- Labor Department takes broad view of "employer" in small business retirement plan rule
- Same definition was used in an association health plan rule struck down by federal judge

A courtroom fight over a Trump administration rule that expanded health insurance options for small businesses could also wipe out new retirement plan offerings for small businesses.

A recent Labor Department final rule allows more employers to band together to offer 401(k) plans to their workers, but it also includes a definition of "employer" that nearly matches the one a federal district court judge had already tossed out.

The administration is trying through its rule to expand retirement coverage to 38 million people, but litigation over a regulation that allowed small businesses to band together in associations to offer health insurance as a group has many questioning if the agency will achieve its goal.

Judge John Bates, of the U.S. District Court for the District of Columbia, said March 28 that the definition in the association health plan rule stretched beyond the bounds of the Employee Retirement Income Security Act.

The government appealed the ruling to the U.S. Court of Appeals for the District of Columbia Circuit. The case has not yet been scheduled for oral argument, but final briefs are due Aug. 8.

If the rule for association health plans, which the Congressional Budget Office estimates would expand coverage to 400,000 previously uninsured people, is tossed out by the D.C. Circuit, parts of the rule for association retirement plans could be chopped, too, attorneys say.

"I do think it does put the association retirement rule at risk," said Seth Perretta, a principal at Groom Law Group who serves as outside ERISA counsel for the National Association of Professional Employer Organizations.

Patricia Smith, who served as the solicitor of labor during the Obama administration and is now senior counsel at the National Employment Law Project, agrees.

"If they were to hold the association health plan rule's definition was beyond what ERISA permitted and they used a similar definition for part of their rule here, I think that would be directly implicating it," Smith said.

But it's unclear whether a court ruling invalidating one rule would automatically kick out the other or if a separate legal challenge would have to be brought against the association retirement plan rule.

The Labor Department directed Bloomberg Law to the Department of Justice for comment. The DOJ declined to comment.

Deja Vu

ERISA was enacted to protect workers' employer-provided benefits and set minimum standards for plans. It generally bans states from passing laws that further regulate employee retirement or health-care plans that are already covered by the federal law. ERISA has carveouts, however, for what are known as multiple employer welfare arrangements, which typically include association health plans.

The Labor Department for decades has interpreted ERISA narrowly to only allow associations to qualify as an employer if members have a common business interest that's in no way related to offering benefits.

But in its rule for association health plans, the agency relaxed that requirement and allowed virtually any association of disparate employers to qualify if they're located in the same geographic area or are all part of the same trade or business group, like a chamber of commerce.

"I think when the association health plan rule was invalidated by the court, I think there was some thinking it would slow down the final association retirement rule," Perretta said.

Some people thought the department would wait to see how the litigation played out or at least issue a rule that used a different commonality test, he said.

The Labor Department not only used an almost identical definition for "employer," it allowed certain sole proprietors without employees to participate in ERISA-covered multiple employer plans sponsored by associations of employers.

But attorneys say the retirement rule doesn't present the same challenge as the health plan rule.

When New York led a coalition of 12 states and the District of Columbia in challenging the association health plan rule, the states' main argument was that the rule created an end run around the Affordable Care Act and expanded the availability of association health plans that historically have been perpetrators of fraud and abuse.

The ACA requires small employers to offer their employees plans that comply with critical consumer protections and provide essential health benefits, but the rule allows small employers to avoid those requirements by joining a large association.

"In the association retirement plan rule, none of that exists," said Lynn Dudley, senior vice president of global retirement and compensation policy at the American Benefits Council.

But Perretta noted the district court didn't narrow its decision to the ACA. It seemed, he said, to find the definition of employer unreasonable as an interpretation of ERISA generally.

"DOL's interpretation does not 'interpret' ERISA, it rewrites it, obliterating the statute's references to 'employers,' employees 'employed by' those employers, and plans 'established or maintained by an employer … for the purpose of providing for' those employees," Bates wrote.

Bates said ERISA makes clear that a sole proprietor without employees is not an ERISA "employer" directly and cannot create an ERISA plan for himself.

'This Isn't the End'

Attorneys think there's a good chance the appeals court will strike down the rule.

"I think the court will defer to the court before it," said Seth Hanft, a partner at Porter, Wright, Morris & Arthur LLP in Columbus, Ohio, who specializes in employee benefits.

That would be a blow to the administration and its association retirement plan rule, but Hanft said it might push the Labor Department to rework the rule so it could pass muster if challenged.

If the court issues a narrower ruling that invalidates one provision of the association health plan rule but not the others, some of the association retirement plan rule could be saved.

The Trump administration wrote a severability provision into the retirement plan rule that says if any of the provisions in the final rule are found to be invalid, the remaining portions would remain operative and available for qualifying employer groups or associations.

Regardless of what happens with these specific regulations, Hanft said efforts to expand these types of plans are likely because they are seen by many as a cheaper way for small business to offer employee benefits.

"This isn't the end even if the rules are struck down," he said.

The case is New York v. DOL, D.C. Cir., No. 19-05125.

To contact the reporter on this story: Lydia Wheeler in Washington at lwheeler@bloomberglaw.com

To contact the editors responsible for this story: Fawn Johnson at fjohnson@bloomberglaw.com; Brent Bierman at bbierman@bloomberglaw.com

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