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DOL Rescinds Advisory Opinion on Racial Equity Asset Manager Program

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As the United States federal government undergoes a tangible political shift, a wide net of executive branch policy changes are reinterpreting federal law, not the least of which is fiduciary responsibility under ERISA. A recent example of this is Department of Labor (DOL) Advisory Opinion 2025-01A, which serves as a reminder to plan fiduciaries that they need to remain apprised of the continued and varied impacts of shifting political landscapes on interpretation and enforcement of their responsibilities.

Incumbent in ERISA's fiduciary responsibilities is the *exclusive benefit rule,* requiring that Plan fiduciaries act solely in the interest of participants and beneficiaries. (ERISA section 404(a)(1)(A).) In line with the exclusive benefit rule, ERISA's prohibited transaction rules prohibit plan fiduciaries from dealing with the assets of the plan for their own interest or account. (ERISA section 406(b).) The exclusive benefit rule and related prohibited transaction rules have long been a topic of executive branch interpretation, with presidential administrations issuing varied regulatory and sub-regulatory guidance to establish policy positions for enforcement of law. On July 21, 2025, the DOL issued its first Advisory Opinion under the Trump administration, Advisory Opinion 2025-01A (https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2025-01a) (the "2025 Opinion"), rescinding Advisory Opinion 2023-01A (https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2023-01a) (the "2023 Opinion"), impacting interpretation of the exclusive benefit rule and its bearing on ERISA's prohibited transaction rules.

The 2023 Opinion addressed the application of ERISA's fiduciary responsibilities to consideration of a plan sponsor's Racial Equity Asset Manager Program (Racial Equity Program) in making investment decisions. The Racial Equity Program was implemented by the plan sponsor to promote utilization of diverse investment managers (i.e., those 50 percent or more minority or women owned) through a financial incentive whereby the plan sponsor would cover a portion of fees paid to such investment managers. This effectively lowered participant and plan expenses for investing in diversely managed funds. The 2023 Opinion tackled two important questions head-on:

- Would the retirement plan fiduciary investment committee be deemed to have violated ERISA's exclusive benefit rule by reason of taking the sponsor's fee payment commitment into account in decisions regarding the selection of or allocation of investment assets to a diverse manager?
- Would the retirement plan fiduciary investment committee be deemed to have engaged in a self-dealing prohibited transaction by taking the sponsor's promotion of diverse managers into account in decisions regarding the selection of or allocation of investment assets to a diverse manager?

In the 2023 Opinion, the DOL found that the retirement plan fiduciary investment committee would not violate the exclusive benefit rule or be deemed to have engaged in a self-dealing prohibited transaction, because the plan sponsor's fee commitment would be an appropriate financial factor for the committee to evaluate when selecting investment managers. This finding served as the first time the DOL opined on the fiduciary implications in considering a corporate policy program in retirement plan investments and provided a blueprint for other companies to establish similar programs.

Fast forward to less than two years later, on July 21, 2025, the DOL issued the 2025 Opinion, stating that the 2023 Opinion was based on the false assumption that the Racial Equity Program was lawful. The 2025 Opinion argued that the Racial Equity Program violates civil rights laws that prohibit discrimination based on race and ordered the plan sponsor to "end all illegal activity within its Racial Equity Program and any other initiative, plan, program, or scheme it operates under the banner of diversity equity and inclusion." Following this position, the DOL repealed the 2023 Opinion in its entirety without any further insight into administration's interpretation of the exclusive benefit or prohibited transaction rules with respect to the selection of investment managers.

From a practical perspective, the rescission of the 2023 Opinion highlights a need for any plan fiduciaries who relied on the 2023 Opinion to make investment management decisions to review such decisions to determine whether they were made pursuant to a program that may be deemed by the new administration to violate civil rights laws. Given that the 2025 Opinion cites Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit Based Opportunity*, plan fiduciaries should assess the potential implications on other major focus areas of the new administration, including environmental, social, and governance initiatives that may have been taken into account by plan fiduciaries in making investment decisions.

Equally, if not more importantly, the 2025 Opinion highlights how quickly and significantly fiduciary responsibility policy can change based on ancillary factors. These changes happen most rapidly where interpretation of law has been established through sub-regulatory guidance, which can be issued, modified, and repealed without a robust regulated process. With a large body of sub-regulatory guidance establishing interpretation and policy under ERISA, additional and impactful changes are likely to arise as the new administration continues broad policy development and implementation. This is especially true given the Supreme Court's reversal of the *Chevron* deference doctrine in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which gives courts more authority in interpreting statutes and less deference to agency expertise. (The *Chevron* deference doctrine was established in the 1984 Supreme Court ruling in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, and required courts to defer to federal agencies' reasonable interpretations of ambiguous federal statutes.)

If you have questions about the impact of the 2025 Advisory Opinion and/or ERISA fiduciary duties, please contact us.

