Retirement News Highlights

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25 states sue to stop Labor Department's ESG rule

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A group of 25 states is seeking to halt the Department of Labor's new ESG rule from taking effect.

Republican attorneys general from the 25 states, co-led by Ken Paxton of Texas and Sean D. Reyes of Utah, filed a **lawsuit** Thursday in U.S. District Court in Amarillo, Texas, arguing that the Labor Department's rule undermines key protections for retirement savers, oversteps the department's authority under the Employment Retirement Income Security Act, and is arbitrary and capricious.

The Labor Department in November finalized its rule — **Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights** — after unveiling the proposal in October 2021.

The rule, which will go into effect Jan. 30, allows ERISA fiduciaries to consider environmental, social and governance factors. It also maintains the department's position that fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.

Moreover, the rule is a reversal of two rules promulgated late in the Trump administration that said retirement plan fiduciaries could not invest in "non-pecuniary" vehicles that sacrifice investment returns or take on additional risk and outlined a process a fiduciary must undertake when making decisions about casting a proxy vote.

The states' lawsuit said the Labor Department exceeded its authority in issuing the new rule. "DOL goes not adequately justify its decision to permit fiduciaries to consider non-pecuniary factors when making investment decisions or exercising shareholder rights," the lawsuit stated. "By formally injecting ESG concepts into the ERISA prudent duty regulations, DOL has ventured into territory that Congress explicitly rejected when it drafted ERISA."

Also, the "sheer magnitude of the assets that the 2022 Investment Duties Rule would affect — over half of the GDP of the entire United States — suggests that courts should hesitate before finding that DOL has authority to regulate in this area for nonfinancial purposes," the states argued.

The lawsuit also lists as plaintiffs Liberty Energy Inc., a publicly traded energy company; Liberty Oilfield Services LLC, a subsidiary of Liberty; and Western Energy Alliance, a non-profit trade association that "represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West."

As a plan sponsor, Liberty Services, the lawsuit argued, will be forced to "expend additional time and resources monitoring and reviewing recommendations from its investment advisers, without the benefit of record keeping requirements or clearer fiduciary duty regulations, to ensure they are focusing explicitly on pecuniary considerations and not collateral ESG factors."

A Labor Department spokesman directed comment requests to the Department of Justice; the Justice Department did not immediately respond. But Lisa M. Gomez, assistant secretary of labor for the Employee Benefits Security Administration, said in a call with reporters in November that the Trump-era ESG rule had a "chilling effect on the integration of ESG factors into the investment selection and asset management process."

The final rule set to take effect Jan. 30 is **seen as more neutral** because, unlike the October 2021 proposal, it does not include examples of specific ESG factors that fiduciaries could consider and removed language that a prudent fiduciary process "may often require" the consideration of ESG factors.

The states are seeking a preliminary injunction, and "permanent relief in the form of a declaration that the ESG Rule violates the APA (Administrative Procedures Act) and ERISA and is arbitrary and capricious." Further, the court "should hold unlawful and set aside the 2022 Investment Duties Rule, and DOL should be enjoined from implementing or enforcing the 2022 Rule in any manner."

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