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Fifth Circuit Rules that DOL Advisory Opinion Is Subject to Judicial Review and Invalidates DOL Advisory Opinion on Health Insurance

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On August 17, 2022, the U.S. Court of Appeals for the Fifth Circuit held that a Department of Labor ("DOL") advisory opinion, which found that an insurance plan was not governed by ERISA, was unenforceable under the Administrative Procedure Act ("APA"). In doing so, the court ruled that the DOL advisory opinion constituted a "final agency action" subject to judicial review. The case is *Data Marketing Partnership, LP v. Department of Labor*, No. 20-11179, 2022 WL 3440652, __F. 4th __ (5th Cir. 2022).

By way of background, in 2018, Management Services, LLC ("Management Services"), the general partner of Data Marketing Partnership, LP ("Data Marketing"), applied for a DOL advisory opinion seeking a finding from the DOL that the health insurance plan it envisioned providing for limited partnerships was governed by ERISA as an "employee welfare benefit plan." Absent such a finding by the DOL, the insurance plan would be governed by more restrictive state insurance mandates that limit rights of subrogation and reimbursement.

The following year, not having received the opinion, Management Services filed suit in the District Court for the Northern District of Texas, seeking a declaratory judgment that ERISA would apply and an injunction prohibiting the DOL from issuing an opinion to the contrary. Thereafter, the DOL issued an advisory opinion finding that ERISA would not govern the insurance plan because the limited partners were not sufficiently connected to the business to be employees for purposes of ERISA. The plaintiffs then amended their complaint to challenge the opinion under the APA. The DOL argued that the advisory opinion was not subject to judicial review under the APA because the DOL reserves its rights to later change its position, and thus the advisory opinion is not a "final agency action for which there is no other adequate remedy in a court." The district court, siding with Management Services, held the advisory opinion unenforceable and permanently enjoined the DOL from not recognizing the ERISA-status of the plan.

On appeal, the Fifth Circuit reviewed two main issues: (i) whether the advisory opinion was subject to judicial review as a "final agency action," as defined in the APA; and (ii) if yes, whether the opinion was "arbitrary and capricious." The court held in the affirmative on both counts and remanded. On the finality of the advisory opinion, the Fifth Circuit explained that for the advisory opinion to be considered final it must consummate the DOL's decision making process and be an action from which legal consequences will flow. The Fifth Circuit found both here since the advisory opinion determined the status of insurance plan and it was "not subject to further Agency review." The Fifth Circuit also rejected the DOL's argument that the advisory opinion cannot be final since the agency can "change its positions or its reasons for the decision after more fact finding" because whether or not the DOL reverses course in the future did not change the fact that the advisory opinion was final when issued.

As to the second issue, the Fifth Circuit reasoned that the advisory opinion was arbitrary and capricious because it relied on a definition of "working owner" that was "materially different" from the one applied in prior guidance. The Fifth Circuit held that the DOL's failure to explain its departure from the prior definition resulted in the kind of "unexplained inconsistency" that is the "hallmark" of arbitrary and capricious agency action.

The Fifth Circuit, having resolved the two main issues presented, affirmed the vacatur of the advisory opinion and remanded for further proceedings on whether the limited partnerships were employees of the general partner and whether the injunction permanently restraining the DOL from refusing to recognize the ERISA-status of the plan is an appropriate remedy.

Practical Implications

DOL advisory opinions are perceived as reliable representations of the agency's interpretation of ERISA and often respond to technical questions not directly addressed in the DOL's formal rules. If a court can set aside an advisory opinion, plan sponsors may think twice before relying on such guidance in designing and implementing key elements of their plans. Even the recipient of a favorable opinion may question its worth. While it is too soon to know whether the Fifth Circuit's decision is an anomaly or a harbinger of greater judicial oversight of advisory opinions, employer plan sponsors, especially those in the Fifth Circuit, will want to pay close attention to future developments in this area.

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