Legal Matters®

Estate Planning
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'Fiduciary rule' voided by judge: What the decision means for you

The fiduciary rule, a regulation that required financial advisers to put their clients' interests ahead of their own, is now dead.

Enacted in 2016 after five years of development in the Department of Labor, the fiduciary rule was slated to go into full effect in 2019. But a federal court of appeals made a decision that voided the rule, finding that the Department of Labor had overstepped its authority.

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Fiduciary basics

In a financial sense, fiduciaries are required to act in their clients' best interest. Advisers must always recommend solutions that are "suitable" to the client. But when weighing such "suitable" options, investment professionals who are not fiduciaries are still free to recommend products that come with higher commissions.

The fiduciary rule required financial professionals to ensure investment advice was accurate and complete, to disclose potential conflicts of interest, to disclose clearly all fees and commissions, and to make investment recommendations that were consistent with a client's goals and risk tolerance.

Registered Investment Advisers are already governed by a fiduciary responsibility. But many brokers, insurance professionals, and others in the financial industry are not. The fiduciary rule would have applied fiduciary-level standards to the wider body of financial professionals.

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Would-be divorcees face year-end tax deadline

If you are planning a divorce, talk to an adviser about how changes in the Tax Cuts and Jobs Act (TCJA) will affect your taxable income.

Under the new law, for divorce agreements executed after Dec. 31, 2018, payers no longer receive a deduction for alimony payments and recipients no longer have to include them in taxable income.

Arguably, if you will be making sizable alimony payments, you have an incentive to finalize your agreement before the end of the year in order to get the tax benefits. If you stand to receive alimony, you may want to delay in order to receive payments tax free.

Eliminating the divorce subsidy

Assuming the payer is in a higher tax bracket and the recipient is in a lower tax bracket, there are tax savings to be generated by passing the tax burden to the person in the lower bracket — assuming you file by year-end 2018.

Reportedly, the House Ways and Means Committee described the alimony deduction as a "divorce subsidy" because a divorced couple might pay less in their combined taxes than a married couple might. Repealing the deduction will add about $7 billion in new tax revenues over 10 years.

Impact on negotiations

The tax implications of an alimony payment should be factored into calculations and negotiations. Talk to your attorneys about each partner's tax bracket and the net tax impact.

Some lawyers suggest that eliminating the tax deduction limits their ability to help clients find common ground by maximizing each party's post-divorce financial situation.

Filing before year-end may provide you and your partner more options in settlement negotiations. Consult a financial professional with experience in divorce tax issues to understand your personal implications.

Check withholdings to avoid costly tax surprise

For most taxpayers, the Tax Cuts and Jobs Act reduced the overall tax burden. However, even though taxpayers will see an overall reduction in their taxes, many of them could still end up with a nasty tax bill at year end.

Following passage of the TCJA, the IRS released updated withholding tables to reflect the new law. As a result, many people saw their paychecks increase. But the withholding tables didn't take into account the wide range of individual circumstances affecting exemptions.

By having your employer withhold taxes from your paycheck, you spread out your tax liability and avoid underpayment penalties. You may have withheld the right amount in the past, but TCJA changes may have altered your situation. The IRS advises that families with complex tax situations may have their income taxes withheld incorrectly and may end up owing more.

Most families should double check

It's generally a good idea to review your withholding annually or when you have a significant life change. But these families should make a particular effort to review their withholdings:

- People living in high-tax states
- Two-income households
- Households with children
- People who itemized deductions in 2017
- Anyone with a large tax bill or large refund in 2017

The loss of certain exemptions may not be offset by the higher standard deduction. Some taxpayers could end up with a larger return than expected while others will be saddled with a challenging tax bill.

The sooner you review, the better

The fix: Use the IRS online withholding calculator to review your withholding. Better yet, sit down with your tax adviser to get a clear understanding of your upcoming liability. With just a few months left in the year, changing your withholding now may not completely correct any discrepancies.

Talking with an adviser can help you figure out if you should be expecting a large tax burden next spring — and give you extra time to save.

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Industry concerns

The problem, for some, was the added expense and liability created by the fiduciary rule. By some accounts, the rule would have made it difficult for advisers to service some small investors while generating sufficient revenue for their work. Others argued that the rule was poorly defined and put even ethical, well-intentioned advisers at risk of facing costly litigation.

Some advisers planned to increase their fees to cover the new expenses and make up for the loss in commissions. Others intended to increase the minimal investable assets someone needed in order to become a client.

Vetting your advisers

The fiduciary rule is now dead, but its legacy lives on.

In part, the fiduciary rule helped bring adviser responsibilities and compensation models to the forefront of discussion. Such conversations have helped individual investors realize there are advisers who serve as fiduciaries and others who do not. The fiduciary rule also opened broader conversations regarding fees and business models.

Many advisers who are not fiduciaries operate on a commission basis. There are plenty of ethical advisers, and commissions are not necessarily a bad thing. Investors should feel empowered to ask the tough questions such as, "What fees am I paying? Are they appropriate? How do these fees affect my retirement plan? Are there lower cost options available to me, outside your services?"

Ask your adviser if he or she is a fiduciary, and if not, why not. You may find that your adviser is doing a good job for you, even without the strict fiduciary parameters.

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Consider how much financial advice you want and if the associated fees are worth it to you. Just the fact that an adviser you're working with is a fiduciary doesn't mean that adviser is the best fit for you.

What's next?

Some firms have already made significant investments to adhere to the fiduciary rule and they're going forward with those plans, even though they don't have to. This means they may be channeling more of their clients' money into fee-based accounts rather than commission-based products.

In the meantime, the Securities and Exchange Commission is working on an alternate rule that would call for a standard of conduct that exceeds "suitable" yet falls short of "fiduciary" requirements. Legislation has been enacted, or is pending, in several states to impose best-interest or other standards on financial institutions and their personnel.

Survey: Family drama causes estate issues

Families face a variety of estate planning challenges, and family drama may be chief among them. In fact, 44 percent of planning professionals say family conflict is the biggest threat to estate planning this year, followed by tax reform (25 percent) and market volatility (12 percent), according to a survey by TD Wealth.

Though conflict may make planning a challenge, a careful estate plan can reduce future family feuds. Take these steps to minimize tension after you're gone:

- Use an experienced estate planner to ensure you have the proper planning documents in place to outline your intentions and appoint a fiduciary.
- Hold frank conversations so everyone knows what to expect in the event of your death. Fewer surprises mean less discord.
- If you are giving unequal gifts, tell your heirs why and document your rationale in an estate planning letter.

Also, tax law changes in the Tax Cuts and Jobs Act could significantly impact your estate plans. For the sake of your legacy and future family harmony, families need to engage in cross-generational dialogue and financial planning.

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Including frequent flyer miles in estate plans

When celebrity chef and author Anthony Bourdain died, his will contained a directive leaving his frequent flyer miles to his estranged wife to “dispose of in accordance to what she believes to be his wishes.”

Bourdain’s frequent flyer account was almost assuredly large. He built the latter half of his career as a globe trotter, traveling the world sharing meals and exotic food experiences. Though most people probably don’t have as many frequent flyer miles as Bourdain, many do have hundreds of thousands of them.

Each airline has different rules and regulations on the transfer of miles after death. Many airlines, such as Delta, have clear policies indicating frequent flyer miles are not transferable upon death. However, some of those same policies go on to stipulate that the airline may transfer miles to certain authorized persons at their discretion.

The American Airlines policy, for example, states: “Neither accrued mileage, nor award tickets, nor status, nor upgrades are transferable by the member … upon death … However, American Airlines, in its sole discretion, may credit accrued mileage to persons specifically identified in court approved divorce decrees and wills upon receipt of documentation satisfactory to American Airlines and upon payment of any applicable fees.”

In other words, if you include a clause in your will bequeathing your frequent flyer miles, the airline may or may not honor it.

Improve the odds of transfer

Talk with your estate planning professional for help deciphering airline policies and taking the necessary steps to transfer your miles. To help ensure your miles will transfer, include a provision in your will that makes your wishes clear. That will provide important documentation if the airline requests proof of your intent.

You will also want to provide your account number and login information to your executor along with written instructions about who can access your account.

Your airline miles may be a way to leave a legacy to someone after your death. Of course, frequent flyer policies may change at any time. You might be better off using or donating your miles now, while you can, rather than risk losing them after you die.

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