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General Comment

The Labor Department is on the right track here, but the regulations need to go further when it comes to companies that offer 401(k) plans. There shouldn't be any exceptions for Human Resources employees or so-called "investment education." The stuff about "ministerial functions," which is as old as the five-part test, needs to be reexamined. The prohibited transaction exemptions should also ban fiduciaries from receiving higher pay and bonuses simply because they're good sales people.

You hear all these companies claiming they're concerned about employees' lack of retirement savings. Companies all say they want to be able to provide more "investment education" to their employees. Supposedly, if workers just had more "investment education" they would understand more about saving for retirement and make better choices, or whatever. But these companies don't want to do anything that will make them ERISA fiduciaries or require them to make real investments in their workforce since that would mean lower shareholder profits and smaller executive pay packages. Companies are content putting the blame on employees for not saving enough. If these companies offer more "investment education" and nothing changes, they will double down on blaming the workers.

American workers don't need more "investment education." They need higher pay that will allow them to actually save more for retirement, as well as investment advice that is in their best interest. If companies really care about ensuring retirement security for their employees, a time tested solution already exists: defined benefit plans. The fact that private companies have dumped their pension plans and gone with 401(k) arrangements shows employer's aren't actually serious about lifetime income for workers.

Even if companies don't bring back pension plans, more companies could contribute to employees' 401(k) accounts when employees don't. However, Bloomberg is reporting that companies aren't moving in that direction, despite more flexibility in the new SECURE 2.0 law for things like matching contributions on student loan payments and emergency savings accounts. It's "too complicated" or "too risky," or whatever. Companies also take advantage of stingy vesting schedules and require workers to be employed at the end of year to receive a match, all to penalize employees who take better jobs elsewhere.

The higher paid workers are doing just fine because they earn enough to put plenty aside for retirement. But the majority of hardworking Americans barely earn enough to cover their monthly expenses. No amount of investment education or advice will change this situation for the better. It's not that workers don't want to save or are too ignorant about retirement matters, they simply can't make ends meet as it is. And it's only going to get worse as more companies leverage so-called AI to replace portions of their human workers with machines that have no such retirement savings needs.

Obviously, the Labor Department's regulation proposal isn't going to solve problems with poorly designed retirement plans. America's retirement system isn't making the grade (https://www.usatoday.com/story/money/personalfinance/2023/10/17/us-retirement-ranks-average-compared-globally-study/71216903007/) and Congress apparently won't consider the types of broader reforms we need to strengthen it. You hate to see it. But in giving companies' HR employees an exception from being fiduciaries, the Labor Department is playing into the false narrative these companies have been propagating.

The Labor Department's implication that no relationship of trust or confidence exists between employers and their employees is misguided. If employers aren't willing to take meaningful steps to ensure workers' retirement readiness, like reinvigorating old-school pension plans or increasing salaries and employer contributions to 401(k)s, companies claiming to provide "investment education" should be held to a fiduciary standard. That way, when it becomes clear that companies' efforts in this arena are nothing more than empty words, they won't be able to blame their workers for falling short. Companies and their vendors shouldn't be able to hide behind buzzwords like "investment education" or "ministerial functions" to avoid responsibility for not preparing hardworking Americans for retirement. If a recommendation to take a withdrawal from a plan is advice, a recommendation to contribute (or contribute a certain amount or percentage) should also be advice because employees often can't withdraw their contributions if they need them without penalties.

This time, when the so-called "financial advisers" and their lobbyists sue the Labor Department over the regulation, don't take the L in the appeals court without asking

SCOTUS to take the case.

Best wishes and happy new year to all our civil servants.