



U.S. Department of Justice

Civil Division

Washington, DC 20530

February 15, 2017

Via Electronic Filing

The Honorable Susan Richard Nelson
United States District Court
774 Federal Building
316 N. Robert Street
St. Paul, MN 55101

Re: *Thrivent Financial for Lutherans v. Edward C. Hugler, Acting Secretary of Labor*¹ and U.S. Department of Labor, Court File No. 0:16-cv-03289-SRN-HB

Dear Judge Nelson:

We represent Defendants in the above-referenced action. We write to request a stay of proceedings and the continuance of the currently scheduled March 3, 2017 summary judgment hearing in this action. If a hearing is necessary on this request, we propose that it occur on March 3, 2017 in lieu of the previously scheduled hearing.

This Court has broad discretion to control its docket, including granting a stay of proceedings. *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990); Local Rule 6.1 (providing for continuances on a showing of good cause). Under the circumstances here, a stay of proceedings would make sense for the Court and the parties.

This suit concerns one condition of an administrative exemption issued by the Department of Labor (“Department”) that is not scheduled to become applicable to Plaintiff and the rest of the financial services industry until January 1, 2018. This exemption was promulgated in connection with the Fiduciary Duty Rule. *See* Defs.’ Mem. in Supp. of Cross-Mot. for Summ. J. at 12-17, ECF No. 24. On February 3, 2017, the President issued a memorandum to the Secretary of Labor, directing the Secretary to “examine the Fiduciary Duty Rule” and to “prepare an updated economic and legal analysis” of the Rule in regard to three enumerated considerations, among other things. *See* Memorandum on Fiduciary Duty Rule for the Secretary of Labor (February 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017). The memorandum further directed that if the Secretary “make[s] an affirmative determination as to any one of the [enumerated] considerations,” or for any other reason after appropriate review, he “shall publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law.” *Id.*

¹ On January 20, 2017, Edward C. Hugler became Acting Secretary of Labor. Therefore, pursuant to Fed. R. Civ. P. 25(d), Mr. Hugler is substituted for Thomas E. Perez as a defendant.

The Department is carefully reviewing the issues raised in the President's Memorandum of February 3, with the immediate goal of deciding the best course of action to implement it. On February 9, 2017, the Department sent a proposed rule, "Definition of the Term "Fiduciary" – Delay of Applicability Date" to the Office of Management and Budget for interagency review in preparation for publication in the Federal Register. See List of Regulatory Actions Currently Under Review, <https://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>.

In light of the potential for change to the rulemaking, there is good cause to continue the March 3, 2017 summary judgment hearing and stay proceedings pending the outcome of the Department's review. See, e.g., *VData, LLC v. Aetna, Inc.*, No. 06-1701, 2006 WL 3392889, at *4 (D. Minn. Nov. 21, 2006) (staying litigation pending reexamination proceedings in Patent and Trademark Office where, among other considerations, stay "would [not] unduly prejudice or present a clear tactical disadvantage to the non-moving party" and could "simplify the issues in question"). It would serve judicial efficiency not to rule on a matter that may no longer be at issue depending on the outcome of the administrative review. Moreover, as part of the Department's review process, Plaintiff may be afforded another opportunity to seek an administrative change to the provision to which it objects. And the Department could act to revise or rescind the challenged provision. Finally, Plaintiff would not be unduly prejudiced by a stay because the provision it challenges will not be applicable for more than nine months in any event. See Pls.' Mem. at 13, ECF No. 16 (acknowledging that contract requirement goes into effect January 1, 2018). Accordingly, there is time for this additional administrative process to run its course.

In sum, Defendants respectfully request that the Court stay the proceedings in this action pending the results of the review directed by the President. Defendants propose that an initial joint status report be due on May 15, 2017 to update the Court on the Department's actions and address whether a continued stay is warranted. We are prepared to file a formal motion to this effect in short order if the Court prefers.

In addition, Defendants request that any hearing on our stay request, if necessary, occur on March 3, 2017, in lieu of the summary judgment argument currently scheduled for that date. We have no objection to the Court deciding the stay request without a hearing. We understand that Plaintiff is opposed to a stay of proceedings and may request that this issue be addressed simultaneously with summary judgment hearing scheduled for March 3, 2017. However, it would best serve judicial efficiency and the interests of the Defendants to resolve the stay motion before addressing the merits.

Sincerely,

/s/ Galen N. Thorp

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