

DOL Removes 2008 Safe Harbor on Selecting 401(k) Plan Annuity Providers; Statutory Safe Harbor Remains

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Direct Final Rule: Selection of Annuity Providers—Safe Harbor for Individual Account Plans, 90 Fed. Reg. 28007 (July 1, 2025)

Available at <https://www.govinfo.gov/content/pkg/FR-2025-07-01/pdf/2025-11615.pdf>

The DOL has taken action to remove from the Code of Federal Regulations a safe harbor on selecting annuity providers for 401(k) plans and other individual account plans that offer annuity distribution options. Under the regulations, issued in 2008, a fiduciary that adheres to a specified process of information gathering and analysis will be considered to have acted prudently in selecting an annuity provider. More recently, the SECURE Act added ERISA § 404(e), providing standards under which a fiduciary's selection of an insurer for a "guaranteed retirement income contract" (essentially, an annuity contract) will be deemed to have been prudent. While many of the standards are similar, there are some differences. For example, under the statutory safe harbor, fiduciaries may rely on the insurer's representation of its compliance with state laws regarding financial capability. According to the DOL, this makes the statutory safe harbor more streamlined and less costly than the regulatory safe harbor, rendering the latter unnecessary, inefficient, and a potential trap for the unwary.

The action is a "direct final rule" that will take effect on September 2, 2025, unless the DOL receives "significant adverse comments" on the removal by July 31. If significant adverse comments are received, the DOL will issue an additional notification either withdrawing the removal or issuing a new rule addressing the comments. The removal is prospective and does not affect decisions made prior to its effective date.

EBIA Comment: While relatively few 401(k) plans typically offer annuity distribution options, fiduciaries for those that do should look to ERISA § 404(e) for guidance on prudently selecting annuity providers. Keep in mind that this is a safe harbor; fiduciaries who do not follow these guidelines may nevertheless be able to demonstrate that they engaged in a prudent selection process. For more information, see EBIA's 401(k) Plans manual at Section XXIV.G.3 ("Selecting Annuity Providers").

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