EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

EMPLOYEE BENEFITS YEAR-END CHECKLIST

2021 Employee Benefits Year in Review—Planning Ahead for 2022

As the world inches closer to a post-pandemic new normal, employee benefit plans and practitioners continue to provide crucial support to employees and retirees facing the special challenges of the COVID-19 pandemic and associated economic turmoil. Plan staff have the added challenge of continuing to meet their day-to-day responsibilities despite the ongoing market and workplace disruptions and a flurry of new legislative and regulatory developments. As another pandemic year approaches its end, benefit plan sponsors and fiduciaries need to monitor upcoming deadlines and make sure they are familiar with 2021's legal developments as well as changes and deadlines on the horizon for 2022. To assist you with your year-end projects, this newsletter provides a summary of some important dates and new developments.

Important Reminders for 2021

- Many contribution and benefit limits will increase for 2022, so your payroll and recordkeeping systems will need to be updated. A table setting forth the 2021 and 2022 IRS limits appears at the end of this newsletter.
- If you have participant-directed investments and utilize a "Qualified Default Investment Alternative" ("QDIA") for "default" investments, you should provide your default investment informational notice by December 1, 2021 if you have a calendar year plan year. Your plan recordkeeper generally will assist you in preparing the notice and coordinating its distribution.
- If you have a "safe harbor" 401(k) or 403(b) plan or want to adopt a safe harbor structure for 2022, you must provide your annual notice in most cases by December 1, 2021 if you have a calendar year plan year. This applies regardless of whether you are using a traditional safe harbor or an automatic enrollment safe harbor. Make sure the notice includes a warning that the employer retains the right to reduce or eliminate safe harbor contributions, in order to preserve this ability for you if you need it.
    - The SECURE Act eliminated the notice requirement for plans providing safe harbor contributions as nonelective contributions (i.e., contributions made to all eligible participants regardless of whether those participants contribute from their own paychecks), rather than as matching contributions. However, if a plan does offer matching contributions in addition to the safe harbor nonelective contribution and wants those matching contributions to qualify for the safe harbor exemption from testing, it must issue a safe harbor notice unless it is using the "Qualified Automatic Contribution

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Arrangement" design.[1] In addition, you need to provide notice of your reservation of rights to reduce or eliminate the safe harbor contribution during the year on 30 days' notice, or you will not be able to reduce or eliminate the contribution in the absence of a substantial business hardship or a qualifying plan termination in connection with a business merger, divestiture, or acquisition event. Accordingly, while the IRS has said that it is working on guidance to eliminate the notice requirement for nonelective contribution safe harbor plans, providing a safe harbor notice with a proper reservation of rights is advisable for 2022 even if you are using the nonelective safe harbor.[2]

- If you have an automatic enrollment 401(k) or 403(b) plan, regardless of whether it is a "safe harbor" plan, you must provide your automatic enrollment annual notice by December 1, 2021 if you have a calendar year plan year.
- Participant-directed defined contribution plans must provide annual notices regarding plan expenses and investments. Plans should be sure they have met that obligation; the deadline will vary depending on the timing the plan has established. Disclosures must be provided no more than 14 months after the previous year's fee disclosure.
- If you want to make any amendments to your qualified retirement plan, you may need to adopt them before the end of the current plan year. Generally, an amendment to a qualified retirement plan that takes effect during a plan year must be adopted before the end of the plan year, unless Congress or the IRS has granted an extension.
  - Plans which offer hardship withdrawals affected by the Bipartisan Budget Act of 2018 or the Treasury Regulations finalized in 2019 must adopt the requisite amendments by December 31, 2021.
  - As a general matter, some amendments must be in place before the desired effective date (for example, if you are changing your contribution structure, an advance amendment may be required).
  - Changing a 401(k) or 403(b) plan to or from a matching contribution "safe harbor" structure usually requires an amendment in advance of the start of the plan year.
    - Under the SECURE Act, employers have more flexibility if they opt instead to use a nonelective contribution safe harbor structure, allowing the safe harbor structure to be added at any point until 30 days before the end of the plan year, or even retroactively during the following year if the employer offers a 4% contribution instead of the usual 3% contribution. The contribution must be made for the entire plan year, regardless of when the safe harbor provisions are added. Employers also have the pre-SECURE Act option of issuing a contingent notice of possible intent to adopt a safe harbor design with a supplemental notice to be provided at least 30 days before the end of the plan year if a safe harbor design is adopted.
    - If the plan also offers matching contributions as to which the employer seeks exemption from the ACP test, the IRS has said that the pre-SECURE Act additional notice and more restrictive

[1] Of course, a QACA must provide participants with an annual automatic enrollment notice, which encompasses much of the same content.

[2] Plans using the nonelective safe harbor retain the ability to notify participants that the safe harbor may be used, without committing in advance, and to provide a follow-up notice at least 30 days before the end of the year if a safe harbor design is adopted.

timing requirements apply to amendments adopting a nonelective safe harbor contribution structure. In addition, IRS guidance still restricts employers' ability to change provisions of safe harbor plans during the year.
    - Ultimately, while the IRS has said it is prioritizing updates to reflect the SECURE Act, employers with safe harbor plans should consider being proactive about approving changes before the beginning of the plan year, even if using the nonelective safe harbor.
  - Adding an automatic enrollment feature to a 401(k) or 403(b) plan
  - or making changes to an automatic enrollment feature may also require an amendment before the start of the plan year.
  - Individually designed qualified retirement plans (i.e., plans not using a document template preapproved by the IRS) generally are required to adopt amendments reflecting legal changes by the end of the second calendar year after the legal change appears on the IRS' required amendment list. Qualified retirement plans and 403(b) plans using IRS-preapproved documents must adopt amendments reflecting legal changes by the end of the second calendar year after the calendar year in which the change in qualification requirements is effective with respect to the plan. Pursuant to special rules, however:
    - Hardship withdrawal amendments are due by the end of 2021.
    - SECURE Act and Coronavirus Aid, Relief and Economic Security Act ("CARES Act") amendments will be due at the end of the 2022 plan year.
- Benefit statements
  - Remember that you must provide benefit statements for your participant-directed plans within 45 days of the end of the quarter, and for non-participant-directed defined contribution plans by the filing date for Form 5500 for the plan year.
  - If you sponsor a defined benefit plan, you must either provide employed participants with an annual notice of the availability of a benefit statement on request, or with an actual benefit statement once every three years. (Bear in mind that the statute does not exempt frozen plans from these requirements.)
  - If you meet the benefit statement requirement by providing continual online access to statement information, remember to provide participants and beneficiaries with an annual notice explaining how they can access their benefit statement information and informing them of their right to a paper copy, free of charge, upon request. Also, bear in mind that Department of Labor authorization for this "continuous access" protocol will expire January 27, 2022, so you will need to have other arrangements in place for your fourth-quarter 2021 statement unless you provide it before the expiration date, and certainly for your first-quarter 2022 statement.
  - A new requirement for defined contribution plans to disclose information about the amount of lifetime income payments available from defined contribution plan account balances will take effect later in 2022, as discussed below.

- Defined benefit plans sponsored by employers with intranet sites generally are required to make certain information from Form 5500 available on their intranet sites. See the instructions to Form 5500 for details.
- Make sure that you or your insurer or other service provider have provided all notices required under your group health plan this year, which may include the Women's Health and Cancer Rights Act notice, the Children's Health Insurance Program notice, notice of availability of the Health Insurance Portability and Accountability Act ("HIPAA") privacy notice, and/or the Medicare Part D notice, and that you or your insurer provide required Summary of Benefits and Coverage documents during your open enrollment period.
- Most retirement plan participants are required to receive annual "required minimum distributions" after turning age 72 and terminating employment with the plan sponsor. (The requirement applies at age 72 regardless of employment status, in the case of a more-than-5% owner.) Time limits also apply to payment to beneficiaries of deceased participants. Each year's payment must be made by December 31st with the exception of a participant's first required minimum distribution (due April 1st of the year following the year in which the participant attains age 72 or terminates employment, as applicable).
    - CARES Act special rules:
        - For defined contribution plans, the CARES Act waived the requirement for participants and beneficiaries to take required minimum distributions for 2020, including the payment that would normally have been required on April 1, 2021 for those who had turned age 72 or terminated employment in 2020.[3] However, payments must be made as usual for 2021, including the 2021 payment due to individuals who turned 72 or terminated employment in 2020 and had their April 1, 2021 payment waived.
        - The CARES Act also provided that defined contribution plans can disregard 2020 when calculating the five-year deadline that applies for payment to be completed to certain non-spousal beneficiaries of deceased participants.
        - No changes were made to the required minimum distribution rules applicable to defined benefit plans.
        - More details are available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/1973-covid-19-cares-act-provisions-and-other-employee-benefits-developments.
    - The IRS and the Department of Labor have increased the resources dedicated to enforcing these rules, and require plans to indicate on Form 5500 whether they failed to make required payments. See our newsletter at https://hselaw.com/news-and-information/legalcurrents/2217-finding-and-paying-your-retirement-plan-participant for more information.
- If you have discovered a compliance failure in connection with a retirement plan that you would like to submit to the IRS via the Voluntary Correction Program on an anonymous basis, you must do so by the end of 2021. Anonymous filings will no longer be permitted after that date, although the IRS will offer

[3] Participants who had attained age 70½ prior to 2020 and terminated employment in 2020 are subject to the required minimum distribution rules even if not yet 72, but were entitled to the CARES Act waiver for the 2020 payment.

an anonymous consultation process. (See our newsletter at https://hselaw.com/news-and-information/legalcurrents/2446-irs-issues-new-rules-for-retirement-plan-corrections for more information about the 2021 changes to the IRS' Employee Plans Compliance Resolution System, including the Voluntary Correction Program.) The decision to submit a failure anonymously rather than on an identified basis involves a number of factors, and should be made only after consultation with counsel.

- If you completed a plan merger in the 2020 plan year in connection with a business transaction in the 2020 or 2019 plan year and want to submit an IRS determination letter in connection with that merger, you must do so by the end of the plan year after the plan year of the merger (December 31, 2021, for calendar year plans).
- If you expect to have assets remaining in your defined contribution plan's forfeiture account at the end of the year, you should review your options and obligations under the plan document to determine whether you can (and whether you must) make arrangements to use up your forfeiture account this year. The IRS has emphasized that plans generally should not be carrying forfeiture balances over from year to year. As a corollary of this analysis, make sure that your recordkeeper is processing forfeitures in a timely fashion when former employees take distributions or complete five breaks in service, so that the forfeited money can be put to proper use.
- It's important to be sure that lists of plan signatories and fiduciaries, and other documentation enabling access to plan information and funds, are updated to reflect changes in employees and vendors at the time a change takes effect. However, the end of the year is a good time to do a final check and confirm that all your documentation has, in fact, been kept up to date.
- Likewise, the end of the year may be a good time to take a look at your plan demographics and assets and assess the adequacy and cost-effectiveness of your fidelity bonding coverage and fiduciary liability insurance. Consider such factors as the maximum dollar amount of coverage relative to the size of your plans, the identity of the individuals and entities covered, the types of allegations covered, the extent to which coverage is available outside the litigation context (such as in connection with government audits and correction processes), and the alignment of coverage with contact indemnification rights with respect to vendors and employees. (See our newsletter at https://www.hselaw.com/news-and-information/legalcurrents/2556-fifth-circuit-opinion-shines-light-on-potential-holes-in-plan-sponsors-fiduciary-liability-coverage for more information.)

A Look Ahead at 2022

There are some important action items to plan for as 2022 gets underway:

- Sponsors of IRS-preapproved defined contribution plans should have heard or should soon be hearing from their document vendors about adoption of the next version of the document. The window to adopt these documents currently is scheduled to end July 31, 2022.
- Under the Patient Protection and Affordable Care Act, larger employers can face a "shared responsibility" (a.k.a. "pay or play") penalty if they fail to offer full-time employees affordable medical coverage. Larger employers are also subject to an information reporting requirement that requires them to track employees' hours of service as well as information about their offers of coverage to their

full-time employees during the year. Unless the IRS grants an extension (as it has done in past years), the 2021 calendar year Forms 1095-C must be furnished to employees by January 31, 2022. Forms 1094-C and 1095-C are due to the IRS by February 28, 2022, for employers who do not file electronically, and March 31, 2022, for employers who do file electronically. Note that some states (e.g., New Jersey and Rhode Island) as well as the District of Columbia have reporting requirements similar to the federal requirements. Employers subject to these state requirements should monitor state-specific reporting deadlines, as they will not necessarily align with the extended federal deadline. Finally, note that over the summer, the IRS released draft Forms 1094-Cs and 1095-Cs for 2021, but final forms have not been released as of the date of this publication.

- If required, an employer with a self-insured medical plan may need to make a second request for a taxpayer identification number ("TIN") (i.e., a Social Security Number) for employees who have not provided a requested TIN. As noted above, under the Affordable Care Act, larger employers are subject to information reporting requirements regarding employee full-time status and offers of coverage. The IRS Forms used for this purpose require that TINs be included on the Form. Employers with self-insured medical plans are responsible for collecting (or attempting to collect) TINs for employees and their family members who enroll in the employer's medical coverage. The IRS proposed regulations that provide a waiver from penalties if the employer is unable to obtain necessary TINs but has taken "reasonable steps" to collect such TINs, which consists of making a solicitation within the following timeframes:
  - upon enrollment;
  - within 75 days after the date of the initial solicitation; and
  - by December 31st of the year following the year in which the individual applied for coverage or added an individual to existing coverage.

  If an employee does not provide a TIN for a covered spouse or dependent, the employer may use that individual's date of birth on Form 1095-C in lieu of a TIN.

- The Health Information Technology for Economic and Clinical Health Act (the "HITECH Act") requires group health plans to notify the Department of Health and Human Services ("HHS") of all breaches of unsecured protected health information. A group health plan must notify HHS within 60 days of discovering a breach affecting 500 or more individuals. For breaches involving fewer than 500 individuals, HITECH requires a group health plan to keep a log or other documentation of such breaches that occur within a calendar year and to notify HHS of such breaches within 60 days of the close of the calendar year. This means that group health plans must notify HHS of all breaches affecting fewer than 500 individuals that occurred in 2021 by no later than March 1, 2022. Notifications must be submitted online at http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/brinstruction.html.
- Medicare Part D online disclosure to the Centers for Medicare & Medicaid Services ("CMS") for group health plans offering prescription drug coverage to individuals eligible for Medicare Part D is due by March 1, 2022.

- As discussed below, lifetime income disclosures will need to be provided to defined contribution plan participants with at least one plan benefit statement a year. For participant-directed plans subject to the requirement to issue quarterly statements, the first illustration will be due with the second-quarter statement for 2022 (to be published within the first 45 days of the third quarter of 2022). Non-participant-directed defined contribution plans must include the disclosure with their annual statement for the first plan year ending on or after September 19, 2021.
- Will you need a summary of material modifications to update one or more summary plan descriptions to reflect 2021 changes to plan terms, insurers, trustees, or other summary plan description content? Is your summary plan description due for replacement because it is more than five years old (ten years old, if there have been no changes)? For a calendar year plan, updated summary plan descriptions or summaries of material modifications will be due just before the end of July (210 days after the end of the plan year).
- We have noticed an increase in questions and documentation requests from Form 5500 auditors, particularly with respect to late remittances and the correction of operational failures. Therefore, we recommend working with your Form 5500 auditor to start the audit process as soon as possible so there will be time to appropriately resolve any such issues that may arise.

Important Developments in 2021

Despite (and in some cases, because of) the ongoing challenges from the pandemic, there have been a number of legal developments important to benefit plan sponsors and administrators. This segment of the newsletter summarizes the items we have found to be most relevant to our clients.

New Legislation

American Rescue Plan Act and Infrastructure Investment and Jobs Act Pension Funding Provisions

The American Rescue Plan Act ("ARPA") contained various employee benefits provisions targeted towards COVID-19 relief, as described at more length in our newsletter at https://hselaw.com/news-and-information/legalcurrents/1973-covid-19-cares-act-provisions-and-other-employee-benefits-developments. However, a number of its changes to pension funding rules go beyond the COVID-linked economic downturn.

ARPA's multiemployer plan provisions adjust a number of multiemployer plan funding requirements to give plans more time to absorb liabilities and improve funding status. ARPA also allows plans to "freeze" their status for a year with respect to designations of "green zone," "endangered," "critical," or "critical and declining" status for the first or second plan year beginning on or after March 1, 2020 (as elected by the plan) based on their status for the prior year, and adjusts certain requirements normally applicable as a result of critical or endangered status designations. In addition, the statute creates a special financial assistance program for troubled multiemployer plans. The IRS provided guidance on ARPA's multiemployer plan funding relief in Notice 2021-57 (https://www.irs.gov/pub/irs-drop/n-21-57.pdf).

ARPA also includes funding changes for single-employer defined benefit plans. In addition to certain special rules specific to community newspapers, ARPA's generally applicable pension funding provisions extend single-employer plans' pension liability amortization period from seven to fifteen years (with this extension accompanied by a "fresh start" that disregards prior year shortfalls and recalculates the plan's funding status), and extend and enhance interest rate smoothing. Employers have flexibility about when to implement these changes. An employer can implement the amortization period and "fresh start" changes retroactively to the 2019 plan year or delay implementation to a later year through 2022. The interest rate changes take effect for the 2020 plan year but an employer can elect not to have the changes apply for years before 2022 (and can elect that delay for all purposes or only for purposes of benefit restrictions under Section 436 of the Internal Revenue Code).

The Infrastructure Investment and Jobs Act extends ARPA's interest rate smoothing (delaying the beginning of the phase-out from 2026 to 2031) and increases the number of years over which employers must pay for pension liabilities from seven to 15.

Consolidated Appropriations Act, 2021

This statute also contained a number of COVID-19 provisions, as well as some non-COVID-19 benefit provisions. On the COVID-19 front, the statute provided for special rules for determining whether a retirement plan had experienced a "partial termination" (requiring full vesting of affected participants) in 2020 or 2021. More information is available in our COVID-19 newsletter at https://hselaw.com/news-and-information/legalcurrents/1973-covid-19-cares-act-provisions-and-other-employee-benefits-developments under "Partial Termination Concerns."

The statute also retroactively authorized "coronavirus-related distributions" from money purchase pension plans. In the non-COVID-19 category, the statute authorized "qualified disaster distributions" and plan loan relief for non-COVID-19 disasters.

Forthcoming Legislation

A number of benefits-related provisions have been proposed for inclusion in the "Build Back Better Act" or as separate legislation, but at this point, there is no way to predict whether any of those proposals will be enacted.

COVID-19 Guidance

For details about many of the special legislative and regulatory actions in connection with the COVID-19 pandemic, including this year's ARPA and 2020's CARES Act, see our newsletter at https://hselaw.com/news-and-information/legalcurrents/1973-covid-19-cares-act-provisions-and-other-employee-benefits-developments.

Supreme Court Cases

The Supreme Court issued two significant health care decisions in 2021. In *California v. Texas*, the Court for the third time upheld the constitutionality of the Affordable Care Act, often referred to as Obamacare. The decision brought the final remaining challenge to the permissibility of the law to an end, giving employers and insurers greater certainty about their obligations and the likely shape of the health care marketplace.

However, the details of implementing ACA's various requirements remain subject to ongoing regulatory developments, and health care delivery and insurance structures remain the topic of policy debates.

The Supreme Court also issued a ruling addressing states' ability to regulate pharmacy benefit managers, or "PBMs." PBMs enter into pricing agreements with various pharmaceutical suppliers and sellers, asserting that their economies of scale can lower drug prices for health plans. However, a number of PBM industry practices, such as the payments made to PBMs to be included in their networks, have attracted criticism and prompted some states to actively regulate PBMs. PBMs asserted that the Employee Retirement Income Security Act of 1974 ("ERISA") preempted state regulation when it came to rules that would affect ERISA-governed plans. In *Rutledge v. Pharmaceutical Care Management Association*, the Supreme Court rejected the PBMs' argument and held that states could regulate their conduct and fees. This case may have an impact on employer sponsored plans, as it may prompt PBMs to attempt to modify pricing guarantee provisions in PBM agreements.

The upcoming Supreme Court term will also feature at least one case of intense interest to retirement plan sponsors. The Court has agreed to consider *Hughes v. Northwestern University (previously Divane v. Northwestern University)*. Practitioners hope that the Court will clarify how much support plaintiffs need to provide when they file a complaint alleging that an employer's defined contribution plan charged excessive fees and/or featured underperforming investment options relative to alternative fee arrangements and funds that could have been selected instead.

The Court has also agreed to consider a case relating to federal requirements for coverage of end-stage kidney disease. The plaintiff in *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita, Inc*. asserts that the health plan provider structured its reimbursement rates for dialysis to incentivize people to switch to Medicare coverage, in violation of the Medicare Secondary Payer requirements.

Other Significant Employee Benefits Litigation

2021 was a busy year for employee benefits law disputes in the lower courts.

Challenges to Defined Contribution Plan Fees and Performance

As noted above, the Supreme Court has agreed to consider a dispute involving the degree of detail that plaintiffs must provide in order to bring a valid claim asserting that an employer's plan charged excessive fees and/or featured underperforming investment options. With over 100 employers' plans having been the subject of this type of lawsuit in the last couple of years, this case will be closely watched. In the meantime, however, employers and plan fiduciaries should continue to pay close attention to plan fees and investment performance, as well as to the optics of their plan arrangements. In particular, fiduciaries should be diligent about:

- Benchmarking investment fees and performance
- Benchmarking administration fees and other expenses
- Reviewing fee and investment information provided on Form 5500, since plaintiffs' attorneys mine those filings for data

- Avoiding conflicts of interest and situations that may create an appearance of conflict
- Considering ways to demonstrate prudent fiduciary oversight to participants via plan communications, and being sure to make all required disclosures
- Being thoughtful about offering "actively managed" and generally more expensive investment options, and reviewing their performance regularly in relation to their costs
- Being aware of how participants' personal information may be used by recordkeepers and other service providers

The recent victory by AT&T in *Alas v. AT&T Servs., Inc.* demonstrates the value of extensive, well-documented due diligence. In addition, fiduciary liability insurers concerned about rapidly increasing exposure in this area are pressing their customers to provide details about their fee oversight practices. As a result, fiduciaries should be aware that their ability (or inability) to demonstrate well-documented due diligence may have an impact on the availability and cost of insurance coverage.

Multiemployer Plan Withdrawal Liability Challenges

When an employer withdraws (i.e., ceases to contribute to) a multiemployer plan or experiences a sufficient decline in contributions that it is considered to have triggered a "partial withdrawal," it becomes liable for payments necessary to cover the costs of "unfunded vested benefits" attributable to its employees. A number of plans use a set of actuarial assumptions developed by the consulting firm Segal to calculate these "withdrawal liability" payments. The "Segal Blend" combines assumptions used by the Pension Benefit Guaranty Corporation ("PBGC") for terminated pension plans with the assumptions the relevant plan normally uses. Inclusion of the PBGC's assumptions results in higher withdrawal liability assessments, since terminated plans that will have no additional investment earnings between the date of termination and the date of benefit payment, and hence must receive contributions sufficient to fund payments without the advantage of investment growth.

Although numerous employers have challenged the use of the Segal Blend, there had not been a definitive ruling on its permissibility. In *Sofco Erectors Inc. v. Trustees of the Ohio Operating Engineers Pension Fund*, the Sixth Circuit held that use of the Segal Blend violated the requirement that the assumptions reflect "the actuary's best estimate of anticipated experience under the plan," explaining that "An actuary using the Segal Blend is factoring in an interest rate used for plans that essentially go out of business, even though these plans are neither going out of business nor required to purchase annuities to cover the departing employer's share of vested benefits." With this decision, it is anticipated that employers may be more inclined to challenge withdrawal liability calculations by plans using the Segal Blend.

In any event, an employer facing a withdrawal liability assessment should discuss its options with its counsel and actuary, and should bear in mind that challenging an assessment requires strict adherence to legal deadlines and the relevant plan's withdrawal liability procedures.

Actuarial Equivalent Pension Litigation

Lawsuits challenging the actuarial assumptions used to calculate early retirement reductions and/or optional forms of payment from pension plans have been filed by participants in plans sponsored by U.S.

Bancorp, PepsiCo (dismissed in 2020), Metropolitan Life Insurance, American Airlines (settled with agreement that each side would pay its own costs), Anheuser-Busch, Rockwell Automation, Huntington Ingalls, Partners Healthcare, Raytheon, UPS (dismissed in 2020), AT&T (dismissed but refiled with new plaintiffs), CITGO, and Luxottica. Aside from the recently filed lawsuits against CITGO and Luxottica, new lawsuits of this type appear to be largely on pause for now. We have yet to see significant developments in most of the cases that remain pending, with the exception of Raytheon's decision to settle the case against it for $59 million.

Stock Drop Claims

IBM agreed to settle claims relating to the drop in its stock price associated with an allegedly overvalued business unit for $4.75 million, after losing its bid to have the case dismissed. Fortunately for employers, the Second Circuit's denial of IBM's motion to dismiss remains an outlier, and was dependent heavily on the unusual facts of the case.

In the vast majority of cases, plaintiffs' stock drop claims have been dismissed in the early stages of litigation, with courts concluding that plaintiffs have failed to demonstrate that the plan fiduciaries could have issued disclosures or taken some other actions that would not have undoubtedly caused "more harm than good." The Supreme Court declined to revisit this standard of review, rejecting a request for *certiorari* by plaintiffs attempting to sue Wells Fargo over the decline in its stock price linked to its scandals in recent years.

Nonetheless, employers whose plans include company stock continue to face potentially significant litigation risks in the event of a stock drop or, ironically, a stock price increase from which some or all plan participants were prevented from benefiting due to forced sales or (alleged) concealment of information. Even if they are likely to prevail in the end, the expense of defending the claim in the early stages can be considerable, and victory still is not guaranteed. Plan fiduciaries need to be sure they understand their responsibilities and potential exposure, and that they are sensitive to the interplay between ERISA and the obligation to comply with securities laws.

In addition, fiduciaries of privately held employee stock ownership plans considering a purchase or sale of company stock should bear in mind that the extent to which they can qualify for the protection offered to public companies under current Supreme Court precedent remains unsettled. Investment in private company stock generally involves more potential for volatility, more difficulties with valuation, less liquidity and investment control for participants, and more potential for self-dealing than investment in publicly traded stock, further enhancing the risk profile for private stock investments. The Department of Labor and private plaintiffs alike have obtained victories and settlements relating to a variety of ESOP transactions in 2021 and recent years.

ERISA Claims Process

A number of courts have also ruled on procedural aspects of ERISA claims, and have come to some strikingly different results. Practitioners hope that the Supreme Court may provide definitive guidance on some of these issues in the not too distant future, but in the meantime, the ability of a number of common defensive strategies to facilitate a successful motion to dismiss plaintiffs' claims may depend on where a lawsuit is brought.

Exhaustion

Section 503 of ERISA requires all plans to maintain procedures for processing claims for benefits. Those procedures must meet requirements established by Department of Labor regulations. Courts have long required a plaintiff claiming entitlement to a benefit to exhaust these administrative remedies before filing suit (i.e., the plaintiff must first file an internal claim with the plan, and pursue the plan's appeal process if the claim is denied), absent a clear showing that attempting to do so would be futile. However, there has been a long-standing disagreement among the different federal courts of appeals as to whether other types of ERISA claims, such as claims for breach of fiduciary duty, must also be filed internally with the plan before the claim can be brought to court. Some courts require it, some do not, and some have yet to establish a rule. In light of the uncertainty in the law, many plans now contain language requiring claimants to file an internal claim and exhaust their appeals before pursuing litigation of any type, seeking to impose the exhaustion requirement as a matter of contract.

While not all courts have agreed, the ability to do this is consistent with the Supreme Court's acceptance of the view that plan sponsors can alter the "normal" claims review rules by contract, reflected in the Court's decision in *Heimeshoff v. Hartford Life & Accident Inc. Co.* to uphold a plan sponsor's right to shorten the deadline for filing suit via a contractual statute of limitations. This approach is also consistent with appellate courts' recent acknowledgment of the enforceability of arbitration clauses and long-standing acceptance (despite Department of Labor opposition) of forum selection clauses. Furthermore, requiring the use of internal remedies is also consistent with the principles underlying the exhaustion requirement. Specifically, the plan administrator has access to information about the actions sparking the plaintiffs' complaint, and must share that information when relevant to the claims and appeals process. The claims and appeals process gives the plan administrator a cost-effective opportunity to explain the merits of its process to plaintiffs, and in the event it is persuaded that a problem exists, to take remedial action without the expense of a lawsuit. Plaintiffs bringing breach of fiduciary duty claims often assert that they need discovery to assess and demonstrate the merits of their claims, but filing a lawsuit imposes a heavy financial burden on both sides that could be avoided by requiring plaintiffs to utilize the internal claims process first.

Arbitration of ERISA Claims

Both the Second Circuit and the Seventh Circuit weighed in this year on the permissibility of arbitration clauses for ERISA plans. In *Smith v. Board of Directors of Triad Manufacturing*, the Seventh Circuit joined the Ninth Circuit in asserting that arbitration clauses are enforceable when properly drafted and when participants have been properly informed and have given the requisite consent. The Seventh Circuit also confirmed that, in keeping with Supreme Court precedent, an arbitration clause in an ERISA plan can bar class action arbitration. However, the court found that the clause at issue in the particular case before it was too restrictive, saying that it denied participants access to a statutorily protected remedy when it limited the relief available in arbitration to losses suffered by the individual participant's own account. The plaintiffs in this case had sought replacement of the trustee, and the court held that they had a right to seek this remedy and could pursue it in court.

The Second Circuit's *Cooper v. Ruane Cunniff & Goldfarb* case, involving claims against an investment adviser who allegedly mismanaged a retirement plan, was another holding in which the actual outcome was very much specific to the particular facts. The court concluded that the arbitration clause, by its terms, did not apply to the plaintiffs' claims. However, the majority opinion also suggested concern that clauses barring class actions and other representative actions in arbitration could run afoul of Second Circuit precedent requiring that breach of fiduciary duty claims be brought on behalf of the plan and that such cases include safeguards to ensure any recovery goes to the plan. While these comments were not part of the decision and hence are not binding for future cases, they do sound a note of caution for employers and fiduciaries in the Second Circuit.

And indeed, in November, a court in the Southern District of New York cited both *Cooper* and *Triad* in denying a motion to compel arbitration in *Cedeno v. Argent Trust Company*. The *Cedeno* court took note of the Second Circuit's discussion in *Cooper* about the need to bring breach of fiduciary actions in a representative capacity, and agreed with *Triad's* conclusion that arbitration could not bar a plaintiff from pursuing a plan-wide remedy. The court drew a distinction between barring arbitration on a class action or representative basis, something specifically allowed by the Supreme Court, and barring a particular remedy (in this case, plan-wide financial recovery). The court explained that the Federal Arbitration Act allows the parties to an arbitration clause to specify the manner of arbitration, but does not give them similar discretion to ban remedies. Accordingly, the court held that ERISA's clear authorization of a plan-wide remedy prevailed over the Federal Arbitration Act's requirement of deference to arbitration agreements.

On a more encouraging note for proponents of individual arbitration, the employer whose plan was also at issue in the *Cooper* case had successfully forced claims against it into arbitration in reliance on the clause that the Second Circuit found lacking. In what is nonetheless a cautionary tale, that employer faced numerous individual arbitration actions, and a number of plaintiffs obtained arbitration awards in connection with the asserted breaches of fiduciary duty associated with the plan's investment strategy. The employer then sought to force claims of this type back into federal court, in reliance on the Second Circuit's comments questioning the individual arbitrability of breach of fiduciary duty claims of this sort. However, the district court in the Eighth Circuit in which some of the successful plaintiffs sought to have their arbitration award confirmed not only objected to the employer's reversal of position, but expressed skepticism regarding the validity of the Second Circuit's reservations. The court cited various cases holding that ERISA fiduciary breach claims could be arbitrated, including the earlier precedent from this case.

Practitioners anticipate that the Supreme Court (which has generally favored arbitration) may accept a case in the not too distant future which will allow it to resolve the permissibility of ERISA arbitration clauses, particularly if a circuit split develops.

Contractual Statute of Limitations

In its 2013 *Heimeshoff v. Hartford Life & Accident Inc. Co.* decision, the Supreme Court held that a contractual limitations period in a plan will govern unless it is "unreasonably short" or unless "a 'controlling statute' prevents the limitations provision from taking effect." *Heimeshoff* involved a claim for benefits, which is a type of legal action as to which ERISA does not specify a claim deadline. In light of ERISA's silence, courts impose deadlines based on analogous state-law statutes of limitations. In contrast, Section 413 of ERISA specifies the deadline for filing a breach of fiduciary claim. As a result of this difference, courts have disagreed on whether a contractual statute of limitations can apply to a claim for breach of fiduciary duty. While some recent district court decisions have determined that Section 413 of ERISA controls, it is not clear why Section 413 should be any more invincible than the numerous other state and federal statutes that can be varied by contract. In support of this view, the Sixth Circuit noted in 2018's *Hewitt v. W. & S. Fin. Grp. Flexible Benefits Plan* decision that Section 413 "is not a "controlling statute to the contrary" because it "provide[s] only *a default rule* that permits parties to choose a shorter limitations period" as opposed to a rule that makes it unlawful to set a shorter limitations period." At present, however, the state of the law in this area remains unsettled in most circuits.

Department of Labor News

Missing Participants

The Department of Labor, along with the IRS, has focused a great deal of enforcement activity and public awareness outreach on plans' efforts (or lack thereof) to locate and pay individuals entitled to benefits in a timely fashion. As part of its ongoing efforts to improve compliance in this area, in January 2021, the Department issued Compliance Assistance Release 2021-01 (https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/compliance-assistance-release-2021-01.pdf), laying out expectations for missing participant reviews conducted under its Terminated Vested Project for defined benefit pension plans. At the same time, the Department released a list of "best practices" (https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans.pdf) to provide general guidance to plan fiduciaries for ongoing[4] retirement plans. Plan fiduciaries should review these documents and make sure their processes are in line with the Department's expectations, or that they have documented their rationale for determining that one or more recommendations are not appropriate to their plan's circumstances. See our newsletter at https://hselaw.com/news-and-information/legalcurrents/2217-finding-and-paying-your-retirement-plan-participant for more information.

Cybersecurity

On April 14, 2021, the Department of Labor issued new cybersecurity recommendations for benefit plans governed by ERISA. The guidance, available at https://www.dol.gov/agencies/ebsa/key-topics/retirement-benefits/cybersecurity and discussed in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2269-department-of-labor-issues-cybersecurity-recommendations-for-benefit-plans, covers data security, anti-fraud and business continuity/disaster recovery concerns, and consists of a list of topics for retirement plan fiduciaries to discuss with potential vendors, an outline of cybersecurity

[4] For terminated defined benefit plans, the PBGC maintains a mandatory program for missing participants' benefits, and now offers a program for terminated defined contribution plans as well. The Department has also issued guidance allowing for automatic rollovers of missing participants' account balances from terminated plans.

best practices for plan vendors, and a list of recommendations for plan participants seeking to keep their account information secure.

The Department of Labor has already begun inquiring about alignment with its recommended best practices as part of plan audits. Data security is also a topic of great public concern. Security breaches can give rise to liability for plans and their fiduciaries, as witnessed by a December 2020 lawsuit filed in connection with a data security breach by the American Federation of Radio and Television Artists (AFTRA) Retirement Fund. In addition, the past couple of years have seen several high-profile cases seeing recovery from recordkeepers or employers in connection with cybertheft of plan benefits.

Plan fiduciaries should pay careful attention to the Department's suggestions and work with their IT professionals and counsel to be sure their contracts and systems comply with legal requirements and adhere to industry standards. In that regard, plan fiduciaries should take state as well as federal data protection and privacy laws into account. The scope of ERISA preemption of state law in this area remains unclear, and some state laws are specifically left applicable when more protective, as is the case with respect to health information.

If you are interested in more information about data privacy requirements generally, see the newsletter prepared by our Privacy and Data Security Group at https://www.hselaw.com/news-and-information/legalcurrents/2512-be-cyber-smart-plan-for-new-privacy-requirements-in-2022.

Electronic Disclosure

In 2020, The Department of Labor finalized regulations that create an additional "safe harbor" for plan administrators and employers seeking to distribute official retirement plan communications via electronic media rather than on paper. The new rules allow a retirement plan to distribute materials electronically, absent an affirmative request for paper, so long as the plan has valid electronic contact information for the recipient and complies with certain notice requirements and other safeguards. This new option is available in addition to the pre-existing regulatory safe harbor (available to both retirement and welfare plans), which generally allows electronic communication with employees who regularly use the employer's electronic information system in the course of performing their duties and with other recipients who consent to receive communications in that fashion. The new regulations are particularly helpful for employers with a large proportion of their workforces holding non-desk jobs, such as companies with manufacturing, warehouse, retail, and restaurant businesses. During 2021, many recordkeepers have been working on programming and protocol enhancements, as well as making efforts to collect the participant e-contact information necessary to implement the new rules.

However, in conjunction with the issuance of the new rules, the Department announced that it would discontinue simplified e-disclosure rules that it had made available for certain types of communications, effective after January 27, 2022. Most notably, plan administrators will no longer be able to rely on Field Assistance Bulletin 2006-03's special rule allowing a plan to make benefit statements available on a website and simply provide an annual notice with instructions on how to access the electronic statement or obtain a free paper copy. Instead, they must provide benefit statements using one of the other approaches.[5]

A summary of both the 2020 regulations and the pre-existing regulatory safe harbor, along with information about the expiration of the simplified rules in January 2022, is available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2024-electronic-delivery-rules-for-benefit-plan-communications-2. The newsletter also provides a summary of the IRS' rules for electronic disclosure.

Fiduciary Regulation

The Trump Administration opted not to contest the Fifth Circuit's invalidation of the Obama Administration's efforts to extend the scope of ERISA fiduciary obligations to define more types of interactions between financial professionals and individuals as "investment advice" subject to ERISA's fiduciary standard of conduct and the "prohibited transaction" rules under ERISA and the Internal Revenue Code. Instead, the Department of Labor under Trump largely reinstated the pre-Obama definition of what constitutes "investment advice" that is provided on a "regular basis" for a fee and hence gives rise to fiduciary status.

The Department also issued a new class exemption from the prohibited transaction rules to allow qualifying financial professionals to receive compensation as a result of providing fiduciary advice, including rollover recommendations, if certain conditions are met. The exemption requires the advice to be in the "best interests" of retirement plan investors, receipt of no more than reasonable compensation, an absence of misleading statements, an acknowledgment of fiduciary status, compliance with disclosure and conflict-mitigation requirements, and annual compliance reviews. In October 2021, the Department announced that it would extend the December 20, 2021 deadline for companies to come into compliance with the new rules, giving advisers until June 31, 2022, to compile price comparison data when advising clients to roll their assets into individual retirement accounts and extending the deadline for participant disclosures until January 31, 2022.

A number of consumer advocates feel that the new rules still allow for too many situations in which a consumer will wrongly believe a financial professional is required to act in the consumer's best interest rather than recommending the course of action most remunerative to the professional. The Biden Administration has indicated that it intends to revisit the topic for a third time and try again to strengthen consumer protections. In the meantime, however, the new regulations and prohibited transaction class exemption are now in effect.

In that regard, financial professionals who work with individual participants should take note that the Department did reverse one significant pre-Obama policy in favor of a new approach more protective of participants. Specifically, the Department rejected its earlier view that a financial professional without a prior relationship to a plan was not acting as a fiduciary when advising a plan participant to take a distribution from a plan and roll it over to an IRA or other vehicle with respect to which the financial

[5] While use of the safe harbors is not required, the penalties for failing to provide benefit statements are substantial. Accordingly, an administrator that wants to provide electronic statements should follow the Department's rules.

professional would receive compensation for ongoing sales or services. The new regulations take the view that if the financial professional anticipates the existence of an ongoing relationship after the rollover, the rollover recommendation is considered part of a program of advice that will be provided on a "regular basis" and hence the financial professional cannot claim an exemption from fiduciary status. Financial professionals should be sure they are operating in accordance with ERISA's fiduciary requirements and the Department's prohibited transaction exemptions. Plan fiduciaries should make sure that the plan's vendors who offer distribution counseling, investment advice or other potentially fiduciary services have made any updates necessary to bring their protocols into line with the new regulations and associated class exemption, or that their arrangements qualify for another type of exemption (such as the exemptions for "level fee" arrangements or advice arising from computer models).

On a related note, the Department has long acknowledged a distinction between participant-specific recommendations, which constitute advice, and general informational disclosures, such as discussions about the risk and return characteristics of commonly recognized asset classes and the general merits of maintaining a diversified portfolio. Many employers and recordkeepers offer investment education programs that are designed to familiarize employees with general concepts, and are not intended to provide personalized assistance. However, the regulatory preamble and comments by some Department officials have raised concerns that the Department may, on at least some topics, take a broad view of when conversations between employer representatives and participants about the plan constitute "advice" (with the associated potential for fiduciary liability), rather than general "education" without fiduciary implications. Employers and recordkeepers should review the Department's guidance on "advice" versus "education," make sure that they understand which categories their programs are in, and take steps to communicate the intended categorization clearly to employees.

Lifetime Income Illustration

As required by the SECURE Act, in September 2020, the Department of Labor provided a set of safe harbor assumptions and guidelines for supplying participants in defined contribution plans with examples of how much their account balances can be expected to generate in the form of lifetime income. These lifetime income disclosures will need to be provided with at least one plan benefit statement a year. For participant-directed plans subject to the requirement to issue quarterly statements, the first illustration will be due with the second-quarter statement for 2022 (to be published within the first 45 days of the third quarter of 2022). Non-participant-directed defined contribution plans must include the disclosure with their annual statement for the first plan year ending on or after September 19, 2021. Some additional details are available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2068-irs-and-department-of-labor-release-new-retirement-plan-guidance.

At the time it issued the interim final rule, the Department had announced plans to review the comments it received and issue a superseding final rule in 2021. However, it has yet to do so. Accordingly, recordkeepers are moving forward to program the disclosures using the parameters established by the interim final rule, despite considerable negative reaction to a number of the Department's specified assumptions.

"ESG" Investing

Shortly before the presidential election in 2020, the Trump Administration's Department of Labor had intensified its efforts to discourage ERISA plan fiduciaries from using plan investments to further "environmental, social and governance" ("ESG") goals by issuing regulations that imposed heightened procedural and documentation requirements on investments based on "non-pecuniary" factors. The regulations received an overwhelmingly negative reaction from the benefits community due to the extra burdens and potential litigation risks they created. Commentators highlighted the lack of any evidence of widespread problematic investing or voting behavior by benefit plans and noted the desire of many plan participants to have quality ESG investment options available. The regulations were also heavily criticized by the financial industry, which challenged the Department's underlying premise that ESG investing normally is not economically beneficial.

The Biden Administration issued a non-enforcement policy for both sets of Trump-era regulations, and issued a new set of proposed regulations in October 2021. The proposed regulations adhere to the Department of Labor's long-established position that "a fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote goals unrelated to the plan and its participants and beneficiaries." However, the proposal removes various requirements and restrictions that the Trump regulations had imposed on decisions and actions based at least in part on "non-pecuniary" factors. In addition, the Department's preamble and the proposed regulations expressly acknowledge the potential economic impact of factors that also have ESG implications.

The proposed regulations also address proxy voting responsibilities, once again largely returning to the pre-Trump expectation that "In general, fiduciaries should take their rights as shareholders seriously, and conscientiously exercise those rights to protect the interests of plan participants." As under the pre-Trump guidance, plan fiduciaries with proxy voting responsibilities are expected to act prudently and in the plan's economic best interests. The Department has also proposed removing "safe harbors" under the prior regulations that it felt might deter fiduciaries from voting when appropriate, and generalized documentation and oversight requirements.

Congress may consider legislation intended to make it easier for plan fiduciaries to accommodate interest in ESG strategies. In the meantime, however, plan fiduciaries should adhere to the long-standing principle that benefit plans must be managed in the financial best interests of plan participants, and that these financial interests cannot be subordinated to other goals. Fiduciaries should discuss the risks and rules with counsel before making decisions based on ESG factors, unless the ESG factors are considered only as part of a bona fide economic analysis.

More information is available in our newsletter at https://www.hselaw.com/news-and-information/legalcurrents/2532-new-proposed-regulations-and-use-of-esg-factors-in-erisa-plans-investment-selection-and-proxy-voting-processes.

Revocation of Prohibition of Non-Binding Guidance

The Trump Administration had prohibited the issuance of informal, non-binding agency guidance. Since practitioners rely heavily on informal publications from the Department (as well as from the IRS and PBGC) to navigate ERISA's complex provisions in the ever-evolving field of employee benefits, this prohibition was greeted with concern. The Department has now revoked the prohibition, allowing practitioners to continue to use Field Assistance Bulletins, Advisory Opinions, website articles, and other informal publications to construct reasonable, good-faith interpretations of ERISA's rules.

IRS News

Anticipated Increase in Enforcement Activity

The IRS' Tax-Exempt and Government Entities division, which includes its Employee Plans department, has indicated that it intends to increase hiring, with "most" new hires to be assigned to enforcement activity. For more information about TE/GE's plans and compliance priorities, see Publication 5313 at https://www.irs.gov/pub/irs-pdf/p5313.pdf and TE/GE/s Compliance Program and Priorities page at https://www.irs.gov/government-entities/tax-exempt-government-entities-compliance-program-and-priorities.

SECURE Act

The IRS has yet to issue extensive guidance about the many changes made by the SECURE Act, although it had originally indicated that regulatory proposals would be forthcoming in September. Recordkeepers and fiduciaries are eagerly waiting for guidance on implementing the SECURE Act's complex rules for required minimum distributions to non-spousal beneficiaries as the year-end required minimum distribution deadline approaches.

In the meantime, the IRS provided preliminary guidance on some SECURE Act provisions in 2020. In Notice 2020-68 (available at https://www.irs.gov/pub/irs-drop/n-20-68.pdf), the IRS discussed qualified birth and adoption distributions and provided some comments on the new rules for 401(k) plan participation by long-term, part-time employees (with those comments focused largely on the special vesting service rules applicable to them), commented on post-age-70½ IRA contributions, gave guidance on certain tax credits, and covered a handful of additional topics, including in-service distributions from pension plans under the Bipartisan American Miners Act. More information is available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2068-irs-and-department-of-labor-release-new-retirement-plan-guidance. In Notice 2020-86, the IRS provided preliminary guidance on the SECURE Act's changes to the 401(k)/403(b) safe harbor rules, but it has said further changes will be forthcoming. In Revenue Ruling 2020-23 and Notice 2020-80, the IRS issued guidance enabling the termination of Section 403(b) custodial accounts.

A general overview of the SECURE Act is available at https://hselaw.com/news-and-information/legalcurrents/1774-secure-act-implication-for-qualified-retirement-plans.

Improvements to the Employee Plans Compliance Resolution System

The IRS maintains the Employee Plans Compliance Resolution System ("EPCRS"), which allows employers to correct most errors in plan documentation and operations for qualified retirement plans and 403(b) plans, as well as offering correction options for SEPs and SIMPLEs. The IRS periodically updates the rules for EPCRS corrections, and has now issued its most recently updated rules in Revenue Procedure 2021-30 (https://www.irs.gov/pub/irs-drop/rp-21-30.pdf).

Along with some routine administrative updates and minor revisions, the new Revenue Procedure contains a number of enhancements to the program that are intended to make it more flexible, efficient, and cost-effective. Most notably, the new guidance expands the ability to retroactively amend plans to reflect improved benefits and features, if certain conditions are met, extends the deadline for self-correction of "significant" errors, reinstates until the end of 2023 the previously expired provision allowing an employer that satisfies certain requirements to correct the failure to properly deduct elective deferrals for plans with automatic enrollment features without the need to make a plan contribution to reflect the value of the lost tax deferral opportunity for the missed elective contribution, and reduces or eliminates employers' exposure to liability in the event of inadvertent benefit overpayments by well-funded pension plans.

The IRS also made some other changes, including revising the exemption for *de minimis* corrective allocations, and eliminating the ability to file a Voluntary Correction Program application anonymously as discussed earlier in this newsletter.

More details are available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2446-irs-issues-new-rules-for-retirement-plan-corrections.

IRS Guidance on Rehiring Retirees and In-Service Pensions

The IRS issued two "Frequently Asked Questions" intended to assist employers struggling with workforce shortages and interested in retaining or rehiring retirement-eligible employees. In the first FAQ, the IRS reaffirmed the requirement that a termination from employment be "bona fide" if a terminated employee wants to commence receiving a pension not available for in-service commencement. The IRS explained, "Treasury regulations generally require a qualified pension plan to be maintained primarily to provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement or attainment of normal retirement age. See Treas. Reg. § 1.401(a)-1(b)(1)(i). Accordingly, a plan that does not permit in-service distributions may commence benefit distributions to an individual only when the individual has a bona fide retirement. Although the determination of whether an individual's retirement under a plan is bona fide is based on a facts and circumstances analysis (in the absence of plan terms specifying the conditions under which a retirement will be considered bona fide), a rehire due to unforeseen circumstances that do not reflect any prearrangement to rehire the individual will not cause the individual's prior retirement to no longer be considered a bona fide retirement under the plan."

The IRS also reminded employers that a pension plan can permit in-service pensions to commence as early as age 59½. However, an employer interested in adding an in-service commencement feature should discuss the logistics of doing so with its recordkeeper and actuary. Depending on the design and demographics of the plan, adding an in-service commencement feature can complicate benefit calculations and/or impact funding obligations.

The FAQs are available at https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers.

Streamlining of Retirement Plan Amendment Rules

As discussed above, the IRS has updated its rules regarding the deadline to amend Section 403(b) plans and qualified plans using IRS-pre-approved documents to reflect legal changes. The deadline now aligns more closely with the deadline established for qualified plans not using IRS-pre-approved documents ("individually designed" documents). Individually designed plans must be amended by the end of the second calendar year after the year in which the change is published in the IRS' "required amendment list." IRS pre-approved documents must now be updated by the end of the second calendar year after the year in which the change became effective.

Loan Rollovers

The Tax Cuts and Jobs Act of 2017 allowed a participant who defaulted on a plan loan due to severance from employment or plan termination to roll the defaulted amount over by the deadline (including extensions) for the participant's tax return for the year the loan amount was deducted from the participant's account balance, rather than requiring the rollover to be completed within the usual 60 days. The IRS has now finalized its regulations facilitating these rollovers. The final regulations retained the rule that the default must occur within 12 months of the severance from employment to be considered attributable to that termination.

Required Minimum Distribution Life Expectancies

The IRS issued updated life expectancy tables at the end of 2020, which will take effect in 2022.

Issue Snapshots

The IRS has published several "issue snapshots," which provide an overview of various retirement plan topics, including hardship withdrawals, special rules for contribution limits if an employee of a tax-exempt organization or government entity participates in both an employer 403(b) plan and a qualified plan associated with a business controlled by the employee, deemed distribution of participant loans, and defined benefit plan terminations. The snapshots are available at https://www.irs.gov/retirement-plans/ep-issue-snapshots.

Deadline Extensions

Under the Infrastructure Investment and Jobs Act, certain retirement-related IRS filing deadlines (individual tax filing deadlines, certain plan contribution deadlines, the deadline for distributing excess IRA contributions, the deadline for recharacterizing IRA contributions, and the deadline for completing 60-day rollovers) will automatically be extended for 60 days in the event of certain federally declared disasters.

This will be more efficient than the previous system that required the IRS to issue disaster-specific extensions. The IRS will still have discretionary authority to extend other deadlines.

State IRA Programs

While the pace has slowed in recent years, a number of states have rolled out programs that require employers that do not offer a retirement plan to automatically enroll employees to make payroll deduction contributions to state-run IRA programs. The Obama Administration had originally supported these efforts. In contrast, the Trump Department of Labor sided with an association challenging California's program, arguing that the enrollment mandate is preempted by ERISA. The Ninth Circuit ruled earlier this year that the California program was not preempted. The taxpayer advocacy group challenging the California law has asked the Supreme Court to review the case, but the Court has yet to indicate whether it will do so.

New York approved legislation in 2021 that revised what was to be a voluntary state-run IRA program (the New York Secure Choice Savings Program) for employers without retirement plans into an obligatory program that requires covered employers (i.e., private sector and non-profit employers operating for at least two years with at least 10 in-state employees employed throughout the prior calendar year and who do not offer another retirement plan) to enroll employees into the state's program automatically if the employees do not opt out. Employers must have their payroll deposit program in place within nine months after the program opens. Employers cannot terminate existing plans to qualify for the state program instead.

Employers should be aware of the programs in effect or pending in the states in which they have employees, and of the extent to which some or all of their workforces may be affected. For example, a business that operates a retirement plan but excludes one of its subsidiaries from participation may need to comply with a state IRA mandate with respect to the excluded subsidiary. In addition, some programs require employers to file a certification or other information relating to a claimed exemption from the state's program.

Worker Classification

The Trump Administration had issued a regulation intended to provide greater certainty to "gig worker" industries. The rule was expected to facilitate their practice of classifying workers as contractors rather than employers. However, the Biden Administration revoked that rule, and currently is working on new guidance.

Likewise, Californians voted to exempt app-based ride-hailing and delivery systems from California's new law making it harder for workers to be classified as independent contractors rather than as employees for state law purposes, but a California court ruled in August that the ballot measure had violated the state constitution.

Ultimately, worker protections remain an area of regulatory focus and activism. Legal requirements are likely to continue to evolve. Businesses need to evaluate the implications of an "employee" or "independent contractor" classification for federally governed benefits offered by ERISA plans, as well as for state law mandates (such as disability coverage and family leave). If federal and state classification standards differ, a worker's rights may be different under different benefit programs depending on whether ERISA or state law governs.

Puerto Rico

Employers that maintain retirement plans for employees in Puerto Rico must satisfy the requirements of Puerto Rico's tax laws, even if the plan also satisfies U.S. Internal Revenue Code requirements. If you have a retirement plan covering employees in Puerto Rico, regardless of whether it is a Puerto Rico only plan or a "dual qualified" plan that also covers U.S. employees, consult Puerto Rico counsel about your obligations.

Continued Extension of Benefit Plan Deadlines Due to COVID-19

In February of 2021, the Department of Labor issued additional guidance related to the "tolling" of certain plan and participant deadlines that were extended in light of the COVID-19 pandemic. The February 2021 guidance expands upon the ERISA and Internal Revenue Code provisions on which the April 2020 guidance was based that specify that the maximum period to be disregarded in applying deadlines is one year from the start of the "Outbreak Period" (defined in the guidance), to provide clarity after the Outbreak Period exceeded one year in length. As of the date of this newsletter, the Outbreak Period is still ongoing. The deadline extensions apply to COBRA elections, premium payments, special enrollment periods, and claims procedure deadlines for all plans, including retirement plans.

The notice (Disaster Relief Notice 2021-01 - see on the DOL website here) provides, in essence, that each individual has his or her own up-to-one-year delay of the deadline that would otherwise apply to a specified action to be taken by the individual. As stated in the notice, the applicable period is disregarded until the earlier of (a) one year from the date the individual was first eligible for relief for purposes of that deadline, or (b) 60 days after the announced end of the National Emergency (in other words, the end of the Outbreak Period as originally defined).

- For more information on the updated guidance, including examples of the applicable deadline extensions, see our LEGALcurrents covering the guidance here: https://www.hselaw.com/news-and-information/legalcurrents/2215-u-s-department-of-labor-finally-issues-guidance-regarding-extending-benefit-plan-deadlines
- See our original LEGALcurrents covering the 2020 deadline extension rules here: https://www.hselaw.com/news-and-information/legalcurrents/1942-dol-and-treasury-announce-extensions-of-benefit-plan-deadlines.

Group Health Plan Provisions of the Consolidated Appropriations Act, 2021

The Consolidated Appropriations Act of 2021 ("CAA"), signed into law by former President Trump in December of 2020, contains a number of provisions detailing large-scale changes for group health plans.

As discussed in our newsletter, available here: https://www.hselaw.com/news-and-information/legalcurrents/2249-agency-guidance-on-mental-health-parity-and-addiction-equity-act-requires-employer-attention, the CAA included provisions amending the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") to require employers (including both self-insured and insured plans) to perform and document a comparative analysis of the design and application of non-quantitative treatment limitations ("NQTL") under their group health plan and to provide the analysis to the Agencies, as well as participants and beneficiaries, upon request. This provision took effect on February 10, 2021. On April 2, 2021, the Department of Health and Human Services and the Department of the Treasury jointly released guidance in the form of an FAQ available here: https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-45.pdf explaining the requirements imposed under the CAA.

Other major provisions of the CAA impacting group health plans will take effect January 1, 2022. This includes the "No Surprises Act" which places limits on the ability of out-of-network providers to balance bill participants and beneficiaries under certain circumstances. Be on the lookout for a separate newsletter devoted to the No Surprises Act and other group health provisions of the CAA.

As always, please feel free to contact a member of the Employee Benefits & Executive Compensation group at 585.232.6500, 716.853.1316, or visit www.hselaw.com or more information about the items discussed in this newsletter, or for assistance in other matters.

Updated Internal Revenue Code and Other Statutory Limits

	2022	2021
IRA Contribution Limit	$6,000	$6,000
IRA Catch-Up Contributions	$1,000	$1,000
Joint Return	$109,000	$105,000
Single or Head of Household	$68,000	$66,000
SEP Minimum Compensation	$650	$650
SEP Maximum Contribution	$61,000	$58,000
SEP Maximum Compensation	$305,000	$290,000
SIMPLE Maximum Contributions	$14,000	$13,500
Catch-up Contributions	$3,000	$3,000
Annual Compensation	$305,000	$290,000
Elective Deferrals	$20,500	$19,500
Catch-up Contributions	$6,500	$6,500
Defined Contribution Limits	$61,000	$58,000
ESOP Limits	$1,230,000 $245,000	$1,165,000 $230,000
HCE Threshold	$135,000	$130,000
Defined Benefit Limits	$245,000	$230,000
Key Employee	$200,000	$185,000
457 Elective Deferrals	$20,500	$19,500
Control Employee (board member or officer)	$120,000	$115,000
Control Employee (compensation-based)	$245,000	$235,000
Taxable Wage Base	$147,000	$142,800
Health Care FSA Salary Reduction Maximum	$2,850	$2,750
Individual Out-pocket Maximum Limit under the Affordable Care Act	$8,700	$8,550
Family Out-pocket Maximum Limit under the Affordable Care Act	$17,400	$17,100
High Deductible Health Plan and Health Savings Account ("HSA") Limits		
Min. Individual Deductible	$1,400	$1,400
Min. Family Deductible	$2,800	$2,800
Individual Out-pocket Maximum Limit	$7,050	$7,000
Family Out-pocket Maximum Limit	$14,100	$14,000
Individual HSA Contribution Limit	$3,650	$3,600
Family HSA Contribution Limit	$7,300	$7,200
HSA "Catch-up" Contribution Limit	$1,000	$1,000