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ATTORNEYS AND COUNSELORS

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

EMPLOYEE BENEFITS YEAR-END CHECKLIST

2020 Employee Benefits Year in Review—Planning Ahead for 2021

It seems fair to say that no one will be sorry to see the end of 2020. Employee benefit plans and the vendors and employees who administer those plans have played key roles in COVID-19 response efforts during this challenging year, while also trying to meet their ordinary responsibilities in the face of various obstacles such as remote work, disrupted supply chains, economic recession and more. However, with year-end deadlines approaching, there is no rest for the weary. Especially in the midst of the economic and logistical disruptions that accompanied the pandemic and that still remain facts of life today, it is important for benefit professionals to set aside the time to review their compliance obligations for 2020 and plan ahead for what we all hope will be a better year in 2021. To assist you with your year-end projects, this newsletter provides a summary of some important dates and new developments.

Important Reminders for 2020

- Some contribution and benefit limits will increase for 2021, so your payroll and recordkeeping systems will need to be updated. A table setting forth the 2020 and 2021 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, 2020 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 2021, you must provide your annual notice in most cases by December 1, 2020 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 your plan document includes a nonelective safe harbor provision, it is not clear whether you would be able to reduce or eliminate the safe harbor contribution during the year if you did not issue a notice preserving that right. Pending IRS guidance, providing a safe harbor notice with a proper reservation of rights is advisable even if you are using the nonelective safe harbor.

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- 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, 2020 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.
    - The SECURE Act now gives employers 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.
    - Notwithstanding the SECURE Act, IRS guidance still restricts employers' ability to change provisions of safe harbor plans during the year, and the IRS has yet to update its rules to reflect the SECURE Act. Accordingly, 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.
- 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 in January 2022. Plan administrators relying on it will need to make arrangements during 2021 to be ready to (i) adapt their disclosure protocols to meet one of the alternative rules for electronic disclosure or (ii) provide paper statements.

- Defined benefit plans sponsored by employers with intranet sites generally are required to make certain information from Form 5500 available on the intranet site. See the instructions to Form 5500.
- 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 (age 70½, for those who attained age 70½ before 2020) and terminating employment with the plan sponsor. (The requirement applies at age 72 (age 70½, for those who attained 70½ before 2020) 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 requisite age is attained).
  - For defined contribution plans, the CARES Act waived the requirement for participants and beneficiaries to take required minimum distributions for 2020, and also waived the distribution obligation for participants who normally would have been required to take a first required minimum distribution on April 1, 2020 and who had not taken that payment in 2019. The CARES Act also provided that 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.
  - If you have a defined benefit plan, make sure that your plan has arranged to make all required payments, and has up-to-date addresses for affected participants and beneficiaries. If you have a defined contribution plan, stay in touch with your terminated participants even though payments are not required this year, since at present payments are expected to be required as usual in 2021.
  - 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://www.hselaw.com/news-and-information/legalcurrents/1481-finding-and-paying-your-retirement-plan-participants for more information. See below for more information about new IRS guidance on paying state unclaimed property funds if a payee cannot be located.

- December 30, 2020 will be the last day for coronavirus-related distributions from qualified retirement plans. December is also the last month before individuals who deferred plan loan payments as permitted by the CARES Act need to resume their payments. See our newsletter at https://hselaw.com/news-and-information/legalcurrents/1973-covid-19-cares-act-provisions-and-other-employee-benefits-developments.
- If you submitted a determination letter application to the IRS for a "hybrid" defined benefit plan and reserved the right to supplement your application with additional materials, those materials must be submitted by December 31, 2020. See https://www.irs.gov/retirement-plans/statutory-hybrid-plans-amended-determination-letter-requests for more information.
- If you have an individually designed qualified retirement plan that meets the IRS requirements to apply for a determination letter, bear in mind that the application fee will increase for applications filed after December 31, 2020.
- 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.

A Look Ahead at 2021

There are some important action items to plan for as 2021 gets underway:

- Sponsors of IRS-preapproved defined contribution plans should begin 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. The IRS recently extended the due date for employers to provide individuals with a copy of Form 1095-Cs. Originally, the due date for furnishing 2020 Forms 1095-C to employees was January 31, 2021, but the IRS extended it to March 2, 2021. The IRS did not extend the due date for employers to provide Forms 1094-C and 1095-C to the IRS. Forms are due to the IRS by March 1, 2021, for employers who do not file electronically, and March 31, 2021, 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, 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 2020 by no later than March 1, 2021. 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, 2021.
- Will you need a summary of material modifications to update one or more summary plan descriptions to reflect 2020 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).

Important Developments in 2020

Even in the midst of a global pandemic, there have been a number of legal developments important to benefit plan sponsors and administrators. While some of those developments relate specifically to pandemic response efforts and others were fueled at least in part by the economic and logistical disruptions generated by the pandemic, others were more general in scope. This segment of the newsletter summarizes the items we have found to be most relevant to our clients.

COVID-19 Guidance

For details about many of the special legislative and regulatory actions in connection with the COVID-19 pandemic, including the Coronavirus Aid, Relief and Economic Security Act ("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 a number of high-profile ERISA decisions during the past year.

- *Intel Corp. Investment Policy Committee v. Sulyma*: The Court ruled that the three-year statute of limitations on a claim challenging allegedly imprudent plan investments does not begin to run until a plaintiff had "actual knowledge" of the breach. In the absence of "actual knowledge" to activate the three-year deadline, a plaintiff can file suit within six years after the last act or omission that constituted the alleged breach. The Court explained that "to have 'actual knowledge' of a piece of information, one must in fact be aware of it" and stated that "the plaintiff's knowledge must be more than 'potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal.'" Accordingly, a fiduciary alleging that a claim was brought more than three years after a plaintiff had "actual knowledge" of the alleged breach will need to prove that the plaintiff was indeed aware of the complained-of acts or omissions. Depending on developments in future caselaw, contractual statutes of limitations may become more important in the wake of this decision. More information is available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2038-the-supreme-court-s-sulyma-decision-and-the-statute-of-limitations-for-claims-against-erisa-fiduciaries.

- *Thole v. U.S. Bank, N.A.*: The Court held that a plaintiff who is a participant in a defined benefit plan does not have constitutional authority (known as "standing") to sue over allegedly imprudent plan investments that caused losses to the plan if the plaintiff's own benefits are not actually in jeopardy. The Court explained that, "Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to lose this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit." See our newsletter at https://hselaw.com/news-and-information/legalcurrents/2039-supreme-court-rejects-defined-benefit-plan-participants-right-to-sue-for-fiduciary-breaches for details.
- *IBM v. Jander*: The Court agreed to review the Second Circuit's decision that plan participants could pursue a claim that IBM plan fiduciaries acted imprudently by not disclosing the known overvaluation of a business, when IBM was trying to sell that business and, as a result, was aware that its overvaluation would at some point inevitably become public knowledge. However, the Court ended up not deciding the central question of whether the plaintiffs had failed to show that a reasonable fiduciary would not have expected such a disclosure to do "more harm than good," as required by past Supreme Court rulings in employer "stock drop" cases. Instead, the Court picked up arguments made by the defendants, the Department of Labor and the SEC that requiring such a disclosure under ERISA would create an inappropriate potential conflict with the complex regulatory regime established under securities laws. Since those arguments had not previously been properly raised, the Court remanded the case to the Second Circuit for consideration of that defense. The Second Circuit subsequently held that the defendants' new arguments had been forfeited when they were not raised in the original appeal, and again declined to dismiss the case.

The Supreme Court's ERISA activity will continue in late 2020 and 2021. The Court will soon hold oral arguments in a case challenging the constitutionality of the Affordable Care Act. The Court recently heard oral arguments in a case alleging that ERISA preempts states' abilities to regulate pharmacy benefit managers. The Court has also asked the Solicitor General to weigh in on whether it should review a case on the question of how much informational support plaintiffs must provide for claims asserting that a defined contribution plan paid excessive fees, the second time of late that the Court has indicated interest in this issue.

Significant Employee Benefits Litigation

Not surprisingly in a year that featured significant economic disruption, 2020 also was a busy year for employee benefits law in the lower courts.

Challenges to Defined Contribution Plan Fees and Performance

Over 80 cases in this genre have been filed in 2020, dwarfing the number of filings in recent years. Large for-profit companies, major universities, and sizeable healthcare systems remain the favored targets, and financial companies with affiliated funds in their 401(k) plans are particularly vulnerable if those funds underperform or appear overpriced. However, smaller companies' plans are not immune. Plan fiduciaries should pay particular attention to the following:

- 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
- 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

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, Metropolitan Life Insurance, American Airlines, Anheuser-Busch, Rockwell Automation, Huntington Ingalls, Partners Healthcare, Raytheon, UPS, and AT&T. While new lawsuits of this type appear to be largely on pause for now, the cases filed in 2018 and 2019 continue to move through the courts.

American Airlines was the first company to reach a settlement, which consisted of an agreement that both sides would pay their own costs. The case against PepsiCo was dismissed, with the court holding that the particular statutory provision cited by the plaintiffs was only applicable to normal retirement benefits and not to the benefits at issue for the plaintiffs, who all retired before that age. The case against UPS was dismissed due to the plaintiffs' failure to exhaust the internal claims procedure first. The case against AT&T was also dismissed, but the dismissal was based on the factual circumstances of the initial plaintiffs, and new plaintiffs have since filed claims.

Cases against Huntington Ingalls, Raytheon, Partners Healthcare, Rockwell Automation, US Bancorp, and Anheuser-Busch have been cleared to move forward past initial efforts to dismiss the claims, but there have been no definitive rulings yet. The magistrate judge in the Huntington Ingalls case expressed skepticism of plaintiffs' ability to prevail at trial, but ruled that they had enough evidence to proceed, and the district court judge agreed.

While plan sponsors of defined benefit plans should continue to monitor these cases and may want to discuss their potential vulnerability with their actuaries and counsel, changing the factors a plan uses for actuarial equivalence calculations is difficult. New factors generally cannot result in a less favorable calculation than the old factors, so replacing interest rates or mortality tables typically means years of dual calculations to determine whether the old factors or the new ones are more favorable at the time a particular calculation is performed. Accordingly, most plan sponsors likely will decide against making changes at this point, with plaintiffs yet to obtain any victory on the merits of their claims.

Stock Drop Claims

The Second Circuit's decision allowing the plaintiffs' "stock drop" case to proceed in *IBM v. Jander* remains an outlier, even in the Second Circuit, with most stock drop cases meeting early dismissals. The *Jander* holding depended heavily on the facts of the case, with plaintiffs successfully asserting that the anticipated sale of an allegedly overvalued business unit meant a market revelation of the overvaluation was inevitable and that earlier disclosure of the overvaluation would therefore not have undoubtedly caused "more harm than good."

However, despite the uphill fight to survive dismissal, plaintiffs continue to file stock drop claims, and some (such as the case against Johnson & Johnson with respect to asbestos in its baby powder) remain pending. Accordingly, 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. 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.

Department of Labor News

Electronic Disclosure

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 regulations do not apply to welfare plans.

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.

A summary of both the new regulations and the pre-existing regulatory safe harbor, along with information about the transition rules applicable to interim guidance issued by the DOL for certain types of notices, 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.

Lifetime Income Illustration

As required by the SECURE Act, the Department of Labor has provided a set of safe harbor assumptions and guidelines for supplying participants in defined contribution plans with examples of what their account balances will 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. 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). 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.

"ESG" Investing

The Department of Labor has intensified its efforts to discourage ERISA plan fiduciaries from using plan investments to further "environmental, social and governance" ("ESG") goals. Although evidence indicates that few plans engage in investments or proxy voting activities with a specific ESG focus, investment professionals have increasingly publicized the manner in which ESG factors play a role in the economics of a business and hence in the economic analysis of whether their benefit plan clients should make or retain an investment or vote in particular ways. The availability of ESG-themed investment products has also increased. In response, the Department of Labor issued final regulations restating the long-standing prohibition on sacrificing a plan's economic best interests for other factors when making investment decisions, and imposing specific analytical standards and, in some situations, enhanced documentation requirements on the use of investments involving strategies intended to further "non-pecuniary" goals.

The final regulations were released October 30, 2020, after an unusually brief 30-day comment period, and despite overwhelmingly negative reaction from the financial industry, plan sponsors, and benefits professionals. The financial industry challenged the Department's assertion that ESG investing normally is not economically beneficial, and many commentators objected to the costs, administrative burdens, and litigation risks they believed likely to be generated by the new rules, noting the absence of any indication that plans are engaged in problematic prioritization of ESG concerns over participants' economic benefit. In response, the Department modified the regulation to remove specific references to environmental, social, and governance factors from the regulatory text, reduced some of the documentation requirements, and made some other adjustments and clarifications. However, the preamble makes clear the Department's continued hostility to ESG investing, and its skepticism that such investments can be made without sacrificing a plan's economic interests. Given the truncated comment period and strong opposition from the regulated community, it is expected that the regulations will be challenged in court.

Another set of proposed regulations disavowed existing proxy voting guidance that indicated a general expectation that a plan would exercise shareholder rights unless doing so was cost-prohibitive. The proposed regulations instead weight the analysis *against* voting by calling on fiduciaries to provide a rationale for why voting would *not* be cost-prohibitive. While reaction to these rules was also strongly negative, the Department is expected to finalize them as well.

More information about the proposed regulations is available in our newsletter at https://hselaw.com/news-and-information/legalcurrents/2068-irs-and-department-of-labor-release-new-retirement-plan-guidance. A summary of the final investment regulation is available at https://www.hselaw.com/news-and-information/legalcurrents/2114-department-of-labor-finalizes-regulations-on-erisa-plan-investments-in-esg-socially-conscious-funds.

Private Equity Funds and Defined Contribution Plans

In an Information Letter dated June 3, 2020, the Department of Labor discussed the considerations pertinent to including private equity opportunities as part of a mixed-asset investment account or vehicle offered to participants in a defined contribution plan. The letter confirmed that fiduciaries can opt to include private equity holdings within a managed "white label" custom fund or collective investment trust that holds a variety of asset classes in furtherance of a target date, target risk or "balanced" fund, but noted the complexities and potential risks inherent in including these assets on a defined contribution platform. While some categorized the letter as facilitating (for better or worse) the use of private equity investments by defined contribution plans, the letter actually took a very cautious tone and highlighted the difficulties posed by such investments. More 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.

Registration for Pooled Multiple Employer Plans

In keeping with the SECURE Act, the Department of Labor issued proposed regulations that will govern registration by providers of "pooled" retirement plans for multiple unrelated employers.

IRS News

The bulk of the IRS' benefits-related activity this year focused on COVID-19 considerations, such as the CARES Act's loan and distribution provisions and the use of virtual rather than in-person notarization for spousal consent to certain retirement plan payments. However, the IRS did issue some more routine guidance as well.

SECURE Act

The IRS has yet to issue extensive guidance about the many changes made by the SECURE Act, but in Notice 2020-68 (available at https://www.irs.gov/pub/irs-drop/n-20-68.pdf), the IRS provided preliminary insights into its views on some of these changes. The information on qualified birth and adoption distributions is likely to be of the most interest to employers and recordkeepers, but the IRS also 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), a discussion of post-age-70½ IRA contributions, guidance on certain tax credits, and a discussion of some other topics. 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.

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.

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 issued proposed regulations (new Section 1.402(c)-3 of the Treasury Regulations) explaining how to administer loan offset rollovers generally and this extended rollover deadline in particular. Most notably, the IRS stated that the default must occur within 12 months of the severance from employment to be considered attributable to that termination. The IRS also clarified that a participant who files a timely tax return without seeking an extension and prior to completing a loan rollover can subsequently make the rollover and file an amended return by the extended deadline.

New Special Tax Notice

The IRS has issued an updated "special tax notice," required to be distributed for all rollover-eligible distributions under Section 402(f) of the Internal Revenue Code. The new notice accommodates the SECURE Act's increase of the age for mandatory commencement of distributions from 70½ to 72, the availability of SECURE Act qualified birth/adoption distributions, the associated exemption from the 10% penalty tax, and the special tax and rollover rules applicable to various statutes associated with natural disasters and the COVID-19 pandemic, such as the coronavirus-related distributions available under the CARES Act. Plan administrators should update their plans' distribution forms to include the new version of the notice.

Reporting, Withholding, and Rollover Rules for Payments to State Unclaimed Property Funds

The IRS permits a qualified retirement plan to pay a participant or beneficiary's benefits to a state unclaimed property fund if the proper payee cannot be located when payment is due. Revenue Ruling 2020-24 now confirms that normal tax withholding and reporting rules apply to these payments. Revenue Procedure 2020-46 allows a payee whose rollover-eligible distribution is paid to an unclaimed property fund to claim an exception to the normal 60-day deadline for rollovers.

It is worth noting that at present, the Department of Labor's stated view is that payment of plan benefits to unclaimed property funds generally is not appropriate while a plan continues to operate, although the Department has conceded that use of these funds may be necessary if a plan is terminating. The Department has been encouraged to reconsider the disfavored status of plan payments to unclaimed property funds. In the meantime, plan fiduciaries should proceed with caution if interested in making payment of plan benefits to these funds from an ongoing plan. Fiduciaries should also remember that use of an unclaimed property fund is permissible only after a diligent effort to locate the payee, regardless of whether a plan is continuing or terminating.

Tax Withholding Rules for Pension Payments

New Treasury Regulations reflect the Tax Cuts and Jobs Act of 2017's grant of discretion to the Department of the Treasury to set a default rate of withholding for periodic pension and annuity payments and certain other deferred income when the payee has not specified a withholding rate. Before that law, the default rate had been set by statute as the rate applicable for a taxpayer who is married and claiming three exemptions.

PBGC Lump Sum Interest Rates

The Pension Benefit Guaranty Corporation ("PBGC") has discontinued publishing its own monthly interest rate for calculating small lump cash-out payments for terminated defined benefit plans. It will instead use the "applicable interest rate" under Section 417 of the Internal Revenue Code, generated by the IRS. However, some pension plans use the PBGC rate for benefit calculations, generally to protect plan participants by retaining this rate for lump sum actuarial equivalence when it produces a more generous result than the rates more recently prescribed by statute. To accommodate these plans, the PBGC provided a chart that these plans can use to calculate what the rate would have been. Details are available at https://www.govinfo.gov/content/pkg/FR-2020-09-09/pdf/2020-19610.pdf.

Cybersecurity

Ensuring that plan sponsors and vendors maintain appropriate data security has been an increasing focus for plan fiduciaries, and litigation in this area demonstrates the importance of proper safeguards and oversight.

In recent months, there have been a handful of lawsuits relating to fraudulent access to retirement benefits. In Bartnett v. Abbott Labs, a participant in Abbott Labs' 401(k) plan sued Abbott and its recordkeeper (Alight) to recover $245,000 stolen from her 401(k) account. Her complaint alleged that an Alight employee did not make adequate efforts to verify the payee's identity when the payment was requested, asserting that a security question procedure was not followed, that the call center employee even provided Ms. Bartnett's address, and that Alight did not notify her before the withdrawal was processed. The court dismissed the claim against Abbott, finding that Ms. Bartnett had not adequately alleged that Abbott was a fiduciary. However, the court rejected Alight's assertion that it likewise was a not a fiduciary, since it performed only "ministerial" functions and lacked fiduciary discretion, and has allowed the case against Alight to proceed. A similar case against Estee Lauder that also involved Alight as recordkeeper settled earlier this year, and another case was filed against a law firm and its recordkeeper and custodian when cybercriminals used fraudulent e-mails to access more than $400,000 from a participant's account.

At present, there are no particular cybersecurity or data protection requirements for retirement plans, although health plans are subject to specific requirements regarding the safeguarding of protected health information and reporting of breaches. The Department of Labor has said that it is in the final stages of preparing cybersecurity guidance for plan fiduciaries. In the meantime, retirement plan fiduciaries should follow generally applicable best practices when selecting vendors, systems and software, preparing contracts, performing security audits, and so forth. In keeping with ERISA's general requirement of prudent fiduciary behavior, fiduciaries of all types of plans should take appropriate steps to safeguard participants' data and plan assets.

The COVID-19 pandemic has also demonstrated the importance of considering the other side of the coin—namely, that fiduciaries need to be sure that vendors have appropriate disaster and emergency response and recovery capabilities and should obtain prudent contractual commitments in that regard.

Data Privacy Concerns

The extent to which plan vendors can use plan participant information for marketing, data mining, and other purposes remains a focus of debate and litigation. While plaintiffs still have not experienced success with these claims in court, restrictions on recordkeeper data use have been included in settlements. Of course, participants may benefit from recordkeepers' use of their data to facilitate more personalized service and education, and employers may appreciate access to information on plan, industry and national statistics, and trends obtained from the recordkeeper's client data base. Employers and fiduciaries should be familiar with their recordkeepers' practices, and should decide what level of data use is acceptable.

Benefit plan vendors and fiduciaries should also keep track of evolving privacy-related requirements. Entities that do business in California (which can include entities outside California with business ties to the state) should pay particular attention to the California Consumer Privacy Act ("CCPA"), which took effect in 2020. (For clients with European operations, it is worth noting that the CCPA differs greatly from the EU's General Data Protection Regulation ("GDPR"), so entities doing business in California with established GDPR programs will still have significant work to do in relation to CCPA.) Recently, California voters passed Proposition 24, which means that the CCPA will be amended to be the California Privacy Rights Act ("CPRA") creating new consumer rights and obligations for businesses. However, CPRA is not effective until January 1, 2023 and also provides that all current provisions of CCPA remain in effect until then. Currently, under the CCPA, employees who are considered California residents are "consumers" covered by the law and all entities processing employee data, whether in paper or electronic form, are subject to CCPA's restrictions and obligations. Employment-related data (as defined by the law), including benefits data, can qualify for exemption from the full rigors of compliance until January 1, 2022, but certain obligations still apply, and organizations should not be caught flat footed as the employment-data exemption expires as of the end of 2021.

Employers may be able to assert that ERISA preempts any CCPA compliance obligations in connection with benefit plan data. After all, the retention of plan records is a core function of benefit plan operation, regulated by ERISA. Federal law imposes detailed privacy requirements on employee health plan data, and arguably Congress' decision not to do likewise for retirement plans and other types of welfare plans should not be overridden on a state-by-state basis. However, at this point, a successful preemption defense cannot be guaranteed, and employers who choose to rely on ERISA preemption rather than to comply with the CCPA accordingly will be running some risk.

More information about the CCPA is available at https://www.hselaw.com/news-and-information/legalcurrents/1641-california-legislation-changes-the-data-privacy-game.

State IRA Programs

An increasing 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. However, the Department of Labor has sided with an association challenging California's program, arguing that the enrollment mandate is preempted by ERISA.

In the absence of an appellate ruling in the California case, 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

While 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, worker protections remain an area of regulatory focus and activism and 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. In particular, bear in mind that Puerto Rico has different rules and different amendment deadlines for special COVID-19 plan distributions than the rules established under the CARES Act for U.S. plans.

As always, please feel free to contact a member of the Employee Benefits & Executive Compensation group at 585.232.6500, 716.853.1616, or visit www.hselaw.com for more information about the items discussed in this newsletter, or for assistance in other matters.

Updated Internal Revenue Code and Other Statutory Limits

	2021	2020
IRA Contribution Limit	$6,000	$6,000
IRA Catch-Up Contributions	$1,000	$1,000
Joint Return	$105,000	$104,000
Single or Head of Household	$66,000	$65,000
SEP Minimum Compensation	$650	$600
SEP Maximum Contribution	$58,000	$57,000
SEP Maximum Compensation	$290,000	$285,000
SIMPLE Maximum Contributions	$13,500	$13,500
Catch-up Contributions	$3,000	$3,000
Annual Compensation	$290,000	$285,000
Elective Deferrals	$19,500	$19,500
Catch-up Contributions	$6,500	$6,500
Defined Contribution Limits	$58,000	$57,000
ESOP Limits	$1,165,000 $230,000	$1,150,000 $230,000
HCE Threshold	$130,000	$130,000
Defined Benefit Limits	$230,000	$230,000
Key Employee	$185,000	$185,000
457 Elective Deferrals	$19,500	$19,500
Control Employee (board member or officer)	$115,000	$115,000
Control Employee (compensation-based)	$235,000	$230,000
Taxable Wage Base	$142,800	$137,000
Health Care FSA Salary Reduction Maximum	$2,750	$2,750
Individual Out-pocket Maximum Limit under the Affordable Care Act	$8,550	$8,150
Family Out-pocket Maximum Limit under the Affordable Care Act	$17,100	$16,300
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	$7,000	$6,900
Family Out-pocket Maximum Limit	$14,000	$13,800
Individual HSA Contribution Limit	$3,600	$3,550
Family HSA Contribution Limit	$7,200	$7,100