Newsletter

November 21, 2023

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ATTORNEYS AND COUNSELORS

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

EMPLOYEE BENEFITS YEAR-END CHECKLIST

2023 Employee Benefits Year in Review—Planning Ahead for 2024

For most benefit plans, the end of the calendar year brings a number of communications and compliance deadlines, and it's also a convenient time to revisit the year's significant legal updates. To assist you with your year-end projects, this newsletter provides a summary of some important dates and new developments.

Important Reminders for 2023

- Many contribution and benefit limits will increase for 2024, so your payroll and recordkeeping systems will need to be updated. A table setting forth the 2023 and 2024 IRS limits appears at the end of this newsletter.
- A number of notices are due 30 days before the start of each plan year, and plan administrators often like to provide other required communications at the same time. Most notably:
  - 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, 2023, 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 2024, you must provide your annual notice in most cases by December 1, 2023 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 on 30 days' notice, in order to preserve this ability for you if you need it.
    - The Setting Every Community Up for Retirement Enhancement Act of 2019, commonly called 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, the plan must issue a

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safe harbor notice.[1] In addition, an employer needs to provide notice of its reservation of rights to reduce or eliminate the safe harbor contribution during the year on 30 days' notice, or it 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 2024 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, 2023 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 disclosure.
- The SECURE 2.0 Act allows defined contribution plans to reduce disclosures to individuals who are eligible to participate in the plan but have chosen not to contribute and do not have account balances. To qualify for this special rule, participants must have received the plan's summary plan description and any other initial disclosures, and must receive an annual reminder notice of their right to participate which includes certain information about the plan and the contribution election process.

■ 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.

- 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).
- In particular, 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 gave employers more flexibility if they opt instead to use a nonelective contribution safe harbor structure. The SECURE Act allows the safe harbor structure to be

[1] A technical correction to the SECURE Act eliminated an exception to this rule for Qualified Automatic Contribution Arrangements.

[2] Alternatively, plans using the nonelective safe harbor have 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.

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 nonelective contribution 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 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 will be making 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 following the year the IRS issues the required amendment list containing the change. 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.
  - Thanks to an amendment extension included in the SECURE 2.0 Act passed at the end of 2022, amendments reflecting changes made by the SECURE Act, the SECURE 2.0 Act, and the CARES Act of 2020 are now due by the end of the 2025 plan year. Special deadlines apply to governmental plans.

- 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.)

- Defined benefit plans sponsored by employers with intranet sites (or whose plan administrators maintain plan websites for them) 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.
- If you use a broker or consultant in connection with your group health plan (e.g., a broker to assist you in the selection of insurance products, or a consultant to assist in plan design) and you haven't received a disclosure from them regarding the compensation (direct or indirect) that they receive in connection with their provision of services (e.g., commissions from insurance carriers), you should request such information from the broker or consultant before the next renewal of your agreement with the broker or consultant.
- Group health plan sponsors should ensure that they are in compliance with the Consolidated Appropriations Act, 2021 ("CAA") anti-gag clause attestation requirement, which is due December 31, 2023. The CAA prohibits group health plans and issuers from entering agreements with "gag clauses" which (1) restrict provider specific price or quality of care information/data to referring providers, participants/beneficiaries/enrollees, individuals eligible to become participants/beneficiaries/enrollees, (2) restrict electronic access to de-identified claims and encounter information/data for each participant, beneficiary, or enrollee upon request or (3) restrict sharing the above information/data or directing the above information/data be shared with a business associate. These gag clauses are prohibited in agreements between plans/issuers and providers, networks/associations of providers, third party administrators ("TPAs"), and any other service provider offering access to a network of providers. In August 2021, the Departments of Labor, HHS, and the Treasury (the "Departments") released a FAQ stating that until further guidance was issued, plans and issuers should implement a good faith, reasonable interpretation of the statute. But on February 23, 2023, the Departments issued further guidance imposing an annual requirement for plans and issuers to attest their compliance with the prohibition to the Departments compliance. The first attestation is due no later than December 31, 2023 (and will cover the period from December 27, 2020 through the attestation date). Then, the attestations will be due every December 31. A self-insured plan may enter into a written agreement with its TPA for the TPA to submit the attestation on behalf of the plan, but if the TPA does not submit the certification, the self-insured plan sponsor must submit it. Insurance carriers for fully-insured plans are independently required to submit the attestation, and the Departments have indicated that when the issuer of a fully-insured group health plan submits an attestation on behalf of the plan, the Departments will consider the plan and issuer to have satisfied the attestation submission

requirement. Plan sponsors of fully-insured plans should ensure that the carrier submits the attestation, as the fully-insured plan must submit the attestation if the carrier fails to do so. Instructions for submitting the attestation can be found here.

- Most retirement plan participants are required to receive annual "required minimum distributions" after turning a specified age[3] and terminating employment with the plan sponsor. (The requirement applies at the specified age 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 the specified age or terminates employment, as applicable).
  - The CARES Act 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.
  - The IRS and the DOL have dedicated resources to enforcing these rules, and require plans to indicate on Form 5500 whether they failed to make required payments. The Department of Labor, in particular, has developed an enforcement program focused on payment timeliness and participant outreach efforts generally. Therefore, in addition to checking in on required minimum distribution compliance, plan fiduciaries should confirm that their plans' cash-out processes for participants with small balances is operating properly, and make sure that the plan has appropriate follow-up protocols for returned mail, bounced e-mails and other indications of invalid addresses for participants and beneficiaries (whether or not currently required to commence payments). See our LEGALcurrents for more information.
- If you completed a plan merger in the 2022 plan year in connection with a business transaction in the 2022 or 2021 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 that begins after the date of the merger (December 31, 2023, for calendar year plans that merged in 2022).
- 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. As discussed at more

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[3] The relevant age is 70½ for individuals who attained age 70½ prior to January 1, 2020 (*i.e.,* born before July 1, 1949), age 72 for individuals who attained age 70½ on or after January 1, 2020 but no later than December 31, 2022, and age 73 for individuals who had not attained age 72 by December 31, 2022. The age will increase to 75 effective in 2033, for participants attaining age 73 after December 31, 2032 (a statutory technical correction is needed with respect to the details of the 2033 transition).

length below, the IRS is working on formalizing the forfeiture usage deadline, and several recent lawsuits have lodged objections to the use of forfeitures to offset contributions rather than to make payment of plan expenses when a plan allows either type of use, so plan sponsors and fiduciaries should take a fresh look at their rights and responsibilities when determining how and when to use their forfeitures.

- 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 contract indemnification rights with respect to vendors and employees.

A Look Ahead at 2024

There are some important action items to plan for as 2024 gets underway:

- The SECURE Act added a requirement for 401(k) plans to allow part-time employees who meet a reduced service threshold to make elective deferrals, and this requirement may begin having a practical impact in 2024.
  - Historically, a 401(k) plan could exclude an employee who had not completed at least 1,000 hours of service in a twelve-month eligibility computation period (i.e., the first 12 months of employment, and thereafter either each twelve-month period beginning on the employment anniversary or each plan year). The SECURE Act requires the plan to allow employees who have not met the 1,000-hour year of service requirement but who have completed at least 500 hours of service in each of three consecutive eligibility computation periods (disregarding service computation periods beginning prior to 2021), and who are at least age 21 upon satisfaction of the service requirement, to make elective deferrals. (The SECURE 2.0 Act will reduce the three consecutive years requirement to two consecutive years, effective for plan years beginning after December 31, 2024.)
    - The new requirement became effective in the 2021 plan year, but plans were allowed to disregard service for computation periods that began prior to January 1, 2021, giving employers time to prepare for the change. As a result, 2024 is the first year that an employee would have three consecutive years of post-2020 service.

    - The employer is not required to make employer contributions for these employees and may disregard them for purposes of coverage and nondiscrimination testing, safe harbor contributions, and top-heavy benefits. If the employer does opt to make employer contributions, a 500-hour computation period will also count as a year of vesting service for employees eligible under this rule. The vesting service rule also now allows plans to exclude service prior to January 1, 2021 from being taken into account under this special rule. A revision made by the SECURE 2.0 Act overrode a previous IRS directive for plans to count that service for vesting purposes even though it was excludable for eligibility purposes.
    - The new rule does not apply to collectively bargained employees or non-resident aliens with no U.S.-source income.

- The IRS has provided for an "administrative transition period" that effectively extends until 2026 the deadline for employers to comply with the SECURE 2.0 Act requirement that employees with prior year FICA wages in excess of $145,000 make catch-up contributions as Roth rather than pre-tax contributions. The IRS has yet to issue guidance to facilitate adoption of other SECURE 2.0 features. However, employers may still be interested in some of the SECURE 2.0 Act changes that become available in 2024. In addition, some SECURE 2.0 provisions taking effect in 2024 are mandatory to at least some extent. Changes effective in 2024 include (see our LEGALcurrents at for more details about these provisions and additional information about the SECURE 2.0 Act):
  - Plan sponsors can increase their plans' cash-out thresholds from $5,000 to $7,000 if they wish to do so. In keeping with pre-existing rules, payees still must be offered a rollover opportunity when applicable, and rollover-eligible payments to participants that exceed $1,000 must be rolled over to an automatic rollover IRA unless the participant provides contrary instructions. Plan sponsors who currently have their cash-out limits set to $5,000, or who use a lower cash-out threshold but are interested in enhancing their cash-out options, should discuss the potential to implement the increased limit with their recordkeepers.
  - The SECURE 2.0 Act permits (but does not require) employers to offer a matching contribution for student loan repayments on the same terms as for elective deferrals. In the absence of IRS guidance, questions remain about how this provision will work, but at least some recordkeepers are prepared to support this new feature. Interested employers should discuss the option with their recordkeepers.
  - 401(k), 403(b) and governmental 457(b) plans may, but need not, offer "pension-linked emergency savings accounts" to allow employees to earmark a small portion of their contributions to their 401(k) plan accounts for accessibility in the event of an emergency. These accounts are entitled to more flexible withdrawal rules and more favorable tax treatment than typical retirement plan withdrawals.

- Separately, defined contribution plans will be permitted to offer qualifying emergency withdrawals free of the 10% penalty tax normally applicable to pre-age 59½ withdrawals. Penalty free withdrawals will also be available within specified parameters to victims of domestic abuse. Plans may rely on the participant's self-certification that the participant qualifies for the applicable withdrawal. Both emergency withdrawals and domestic abuse withdrawals will be eligible for repayment to the issuing plan or an IRA within three years.
- Plans' Roth accounts will be exempt from lifetime required minimum distributions, just as Roth IRAs currently are, beginning with required minimum distributions for the 2024 year (not including required minimum distributions due on April 1, 2024 for individuals whose first required minimum distribution year is 2023). As with Roth IRAs, beneficiaries will need to take required minimum distributions after a participant's death. While plans which require payment to occur earlier than the required minimum distribution rules would demand should be able to retain their existing rules, the statutory change will affect the extent to which a payment is considered a "required minimum distribution" and hence will affect application of the rollover and withholding rules.
- Surviving spouses will be permitted to calculate required minimum distributions under more favorable rules. Again, plans which apply more restrictive beneficiary payment rules should be able to continue to do so, but will need to be mindful of the effect of the statutory change on the rollover and withholding rules.
- SIMPLE plan limits will increase, and employers will have more flexibility to replace SIMPLE IRA plans with a SIMPLE 401(k) or safe harbor 401(k).
- "Top heavy" defined contribution plans will be able to exclude employees who have not yet attained age 21 and completed a year of service from top heavy minimum contributions.

■ 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 2023 calendar year Forms 1095-C must be furnished to employees by March 1, 2024. Forms 1094-C and 1095-C are due to the IRS by February 28, 2024, for employers who do not file electronically, and April 1, 2024, 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.

■ 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 2023 by no later than February 29, 2024. Notifications must be submitted online at the HHS website here.
- 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, 2024.
- If you have an individually designed 403(b) plan and your EIN ends in 4, 5, 6, or 7, you can submit the plan for a determination letter beginning June 1, 2024, and if your EIN ends in 1, 2, or 3, you can submit the plan for a determination letter now. If your EIN ends in 8, 9, or 0, you can submit the plan for a determination letter beginning June 1, 2025. Nevertheless, plan sponsors with individually designed 403(b) plans may want to consider whether moving to an IRS pre-approved plan document would be a better option, since this approach typically is less expensive over the long term.
- If you are making a discretionary match for the 2023 plan year, your plan document may require you to notify your participants when the match is deposited. The IRS required such provisions in

pre-approved plan documents during the last document update cycle. Check your plan document for details.

- Will you need a summary of material modifications to update one or more summary plan descriptions to reflect 2023 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— July 28, 2024, since 2024 is a leap 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. Additionally, auditors also need to review a draft of the Form 5500 before issuing the audit opinion. All of this means that a number of our clients have found that their annual audits require more time. Consider whether you need to adjust your audit timetable for the 2023 plan year audit that will take place in 2024.

Important Developments in 2023

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

SECURE 2.0 Act

The biggest legislative news for 2023 was the SECURE 2.0 Act, passed at the end of 2022. The statute makes numerous changes to the rules governing tax-qualified retirement plans, with provisions addressing topics as diverse as required minimum distributions, contribution limits, access to retirement funds in the event of emergencies, employer tax credits, automatic enrollment, and more. In addition to the highlights discussed above, more details about the SECURE 2.0 Act are available in our LEGALcurrents.

Consolidated Appropriations Act, 2023

The Consolidated Appropriations Act, 2023, passed at the end of 2022 extended the safe harbor allowing high deductible health plans (HDHP) to cover telehealth and other remote care services before the covered individual has satisfied the deductible without causing the individual to lose eligibility for contributions to a health savings account (HSA). The relief was set to expire on December 31, 2022 but was extended to apply to plan years beginning before January 1, 2025.

Litigation Developments

401(k)/403(b) Fee Litigation

Plaintiffs' firms continue to target the recordkeeping fee arrangements and investment options offered under defined contribution plans, with hundreds of lawsuits having been filed in the past few years. Plaintiffs experienced mixed results in 2023, with a number of cases requiring plaintiffs to provide detailed comparators and benchmarking in order to advance past plan fiduciaries' motions to dismiss into the usually time-consuming and expensive process of discovery. However, some courts continue to take a fairly lenient stand on the level of detail that plaintiffs need to provide prior to discovery. Plaintiffs who are able to overcome a motion to dismiss have enhanced leverage to persuade defendants to settle.

Courts have also differed on the nature of the allegations that plaintiffs must make when asserting that a service provider or investment relationship violates the "prohibited transaction" rules. A recent case in the Ninth Circuit involving AT&T has attracted concern that plaintiffs will too easily be able to raise prohibited transaction claims. The plaintiffs asserted that Fidelity did not provide AT&T with the compensation disclosures necessary for the relationship to qualify for exemption from the prohibited transaction rules and that the fiduciaries did not properly consider whether Fidelity's total compensation was reasonable as required by the prohibited transaction rules. The Ninth Circuit determined that the reasonableness of the compensation could not be decided without additional factual findings from the district court, and reversed the district court's dismissal of the plaintiffs' claims. In reaching its decision, the Ninth Circuit rejected holdings from the Third and Seventh Circuits as having interpreted the scope of ERISA's prohibited transaction rules too narrowly. Those decisions had denied the need to apply the prohibited transaction analysis to arm's-length arrangements providing for basic plan services such as those being provided by Fidelity. A Second Circuit case against Cornell University attempted a middle path, requiring plaintiffs to allege as an initial matter that services were unnecessary or that total compensation was unreasonable (and thus to allege that arrangement falls outside the statutory prohibited transaction exemption for necessary services provided in exchange for reasonable compensation), while acknowledging that the burden to demonstrate the necessity of services and the reasonableness of compensation ultimately remains on the defendants in keeping with the normal rules for establishing an affirmative defense.

In one piece of good news, many of the series of lawsuits brought by Miller Shah LLP that had accused plan fiduciaries of imprudence for selecting target date funds operated by BlackRock have been dismissed.[4] BlackRock itself is not a defendant, but the plaintiffs' complaints alleged that BlackRock's target date funds drastically underperformed and that plan fiduciaries were imprudent when they selected and retained these funds. The funds themselves are low-cost index funds, exactly the type of funds plaintiffs have repeatedly alleged that fiduciaries of plans with high-cost actively managed funds

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[4] The one case so far in which a motion to dismiss was denied involves Genworth Financial, Inc. In that case, plaintiffs had been granted early access to discovery, and were able to make specific allegations regarding the manner in which the defendant fiduciaries made investment decisions.

should have selected, and have been highly rated by Morningstar. A number of employer advocacy groups have criticized the data relied on by plaintiffs, noting that it involves limited time periods and funds with different management styles. So far, courts largely appear to agree with these critiques.

Forfeitures

The law firm of Hayes Pawlenko LLP has sued several large employers with respect to their usage of forfeitures to reduce employer contributions rather than to pay plan expenses for the benefit of plan participants. In these lawsuits, the plaintiffs' own complaint indicates that the plan allows either use, but the plaintiffs assert that the company and its employees on the fiduciary committee breached their fiduciary obligations to the plan by always opting to reduce employer contributions rather than applying some of the forfeitures to pay expenses.

The premise of the lawsuits ignores the long-established distinction between an employer's role as "settlor" (i.e., sponsor) of the plan, in which capacity it can act in its own corporate interests, and the role of plan fiduciaries. Since many plans are written to identify the employer as a fiduciary as well as the sponsor, an employer often plays both roles, but an employer exercising its "settlor" authority is not subject to fiduciary duties in doing so. Caselaw and Department of Labor guidance make it clear that decisions about the design of plan features, such as the contribution formula, are "settlor" decisions not subject to fiduciary duties. Since the employer has the right to amend the plan to eliminate or reduce contributions, decisions about permissibly using available forfeitures to fund those contributions also seem like "settlor" decisions. Indeed, the Department of Labor has acknowledged in a recent Advisory Opinion issued to Citigroup that, "Plan sponsor decisions on plan document provisions governing whether and under what circumstances the sponsor will pay fees and expenses that could otherwise appropriately be paid by the Plan are settlor decisions not subject to ERISA fiduciary standards." Foregoing the right to apply forfeitures to contributions produces the same result as an employer decision to pay plan expenses. However, it remains to be seen how courts will respond to these lawsuits.

Employers may want to exercise their settlor authority to amend their plans to clarify that the employer has the right, as sponsor of the plan, to apply forfeitures first to reduce contributions, with the plan fiduciaries then having the responsibility to ensure any forfeitures not used for contributions are properly applied to plan expenses within IRS-mandated timeframes. Employers should also consider clarifying their reliance on their settlor rather than fiduciary authority in documentation allocating forfeitures to contributions.

Employers and fiduciaries alike should also be sure they are using forfeitures in ways permitted by the plan document. The Department of Labor recently obtained a settlement in a case in which an employer had applied forfeitures against contribution obligations, but the plan provisions only permitted forfeitures to be used to pay plan expenses.

Actuarial Equivalent Pension Litigation

After a few relatively quiet years, a number of new lawsuits challenging the actuarial assumptions used to calculate optional forms of payment from pension plans have been filed. Aside from a $59 million settlement by Raytheon, these cases so far have not proven lucrative for plaintiffs.[5] However, the cases remain largely in the early stages, and at least one law firm is optimistic enough to have filed several new actions in recent months.

It remains to be seen whether any courts will, in the end, determine that the actuarial provisions in question violate legal requirements, or what kind of relief they might grant if they do reach such a conclusion. Given the complications involved in changing actuarial assumptions without imposing impermissible benefit reductions on participants, employers who are concerned about a plan's design should review their options with their actuaries and counsel before taking action.

Arbitration of ERISA Claims

Courts in 2023 largely sided with plaintiffs' challenges to the enforceability of arbitration clauses as a way of preventing class action claims alleging breach of fiduciary duty. Some decisions turned on the specifics of the arbitration clause in question, but a number of courts have expressed the view that an arbitration clause barring access to the federal courts and/or plan-wide relief prevents plaintiffs from "effective vindication" of their rights under ERISA, and hence is unenforceable. However, a district court judge in Kentucky recently ruled that plaintiffs are not prevented from asserting statutory rights simply because they must arbitrate their dispute, and a Ninth Circuit case a number of years ago had also upheld the application of an arbitration clause to ERISA statutory claims.

Practitioners are hoping that the Supreme Court will resolve the issue in the near future, but the Supreme Court has turned away a couple of cases that would have allowed it to weigh in on the topic.

American Airlines ESG Case

Over the past several years, there has been a great deal of political and media attention to investment programs that incorporate review of "environmental, social, and governance" ("ESG") factors and the role of "diversity, equity and inclusion" ("DEI") initiatives in the financial industry in particular and the business world in general. Proponents argue for the economic merits of these efforts as well as their social value. Opponents deride them as "woke capitalism" and assert that they are economically disadvantageous and in fact outright illegal in some cases— namely, with respect to certain DEI employment initiatives that allegedly involve reverse discrimination, or ESG efforts that allegedly sacrifice investment returns for ESG goals. The Department of Labor has made efforts to clarify the regulatory standard for ESG-oriented decisions by ERISA plans, and its most recent regulations have been upheld against a court challenge (see "ESG Investing" in "Department of Labor News" below).

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[5] Rockwell Automation reached a much more modest $900,000 settlement ($270,000 of which would go towards attorneys' fees), and the settlement amount for U.S. Bancorp has not yet been disclosed.

One opponent of ESG investing has sued American Airlines, alleging that the company impermissibly used its 401(k) plans to further its corporate ESG goals. The lawsuit is problematic for several reasons, including a lack of data to support the lawsuit's claims of poor investment performance by certain funds that it categorizes as "ESG" investments and/or as utilizing impermissibly-ESG-oriented proxy voting guidelines. In addition, a number of the funds were available only through the plan's brokerage account. In the first place, retirement plan industry practitioners generally agree that the plan fiduciaries would not be responsible for screening the brokerage account's offerings (which included both ESG-branded funds and anti-ESG-branded funds) for the use or non-use of ESG factors. Furthermore, the plaintiff in the lawsuit had not even opened a brokerage account and hence likely lacks legal standing to object to its offerings. At present, American Airlines' motion to dismiss is pending.

Behavioral Health Coverage Cases

Continuing a trend from the past several years, 2023 saw a number of lawsuits filed against group health plans, their employer sponsors and claims administrators related to coverage of behavioral health treatment. Claims frequently involve residential therapy treatment of adolescents provided by out-of-network providers who have been paid significantly less than their billed charges. The plaintiffs frequently allege breach of fiduciary duty and failure to follow the coverage standards set forth in the benefit plan. With the increased Department of Labor focus on compliance with the Mental Health Parity and Addiction Equity Act, in particular the requirement for group health plans to prepare a comparative analysis of a plan's nonquantitative treatment limitations, employers with self-insured medical plans should work with their claims administrators to ensure that plan documents/summary plan descriptions accurately reflect the processes and procedures followed by the claims administrator with respect to mental health and substance use disorder treatment.

Department of Labor News

Fiduciary Conflict of Interest Regulations

Following the Fifth Circuit's invalidation of an Obama-era regulatory effort by the Department of Labor to expand the definition of "fiduciary" under ERISA to cover a broader range of conduct (including provision of advice regarding distributions and rollovers from retirement plans), the Department largely reinstated the original regulatory provisions regarding the scope of fiduciary status. However, the Department attempted to reverse its previous position (expressed in non-regulatory guidance) that a financial professional providing advice with respect to a plan distribution or rollover is not a "fiduciary" by reason of offering that advice if the financial professional does not already have or anticipate an ongoing relationship with the plan. The Department's new view, as reflected in the preamble to a prohibited transaction exemption allowing such advice to be given under specified circumstances and an accompanying online FAQ, was that if the financial professional anticipated a relationship with the plan participant after the payment was received from the plan, that was sufficient to bring the distribution advice within the regulatory requirement that investment advice be offered on a "regular basis" even though the plan in such a scenario would have no further

involvement. A Florida court agreed that the interpretation reflected in the FAQ exceeded the Department's authority and was contrary to the reinstated regulatory definition, and a magistrate judge has recommended that a Texas judge overseeing a similar lawsuit reject the Department's new interpretation of its regulatory language as well.

In the meantime, the Department has been working on a new set of regulations that would require safeguards against conflicted rollover advice and close other perceived gaps in the existing regulatory structure. Proposed regulations and amended prohibited transaction exemptions were issued on October 31, 2023. The proposed regulations would make a person a fiduciary with respect to a transaction if that person provides investment advice or an investment recommendation to a retirement investor (a plan, plan fiduciary, plan participant, or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary) for a fee or other compensation (whether paid directly or indirectly) and the person:

- Has discretionary control or authority with respect to purchasing or selling securities or other investment property,
- "Makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest," or
- Represents or acknowledges fiduciary status with respect to the recommendation.

The proposed regulations will bar enforcement of disclaimers that are contrary to other materials or representations provided by a putative fiduciary, or to other interactions between the parties.

Cryptocurrency and Brokerage Windows

In 2022, the Department of Labor issued a Compliance Assistance Release ("CAR") warning plan fiduciaries who make cryptocurrency and similar digital investments available to participants in participant-directed plans to "expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks" associated with such investments. While the CAR did not forbid plans to invest in cryptocurrency or other digital investments, and did not prohibit them from allowing participants to do so, it expressed strong skepticism regarding the ability of these types of investments to satisfy ERISA's prudence requirements. The Department cited concerns about valuation, volatility, the potential for fraud, the potential for loss of assets due to the loss of a password, and other risks.

A brokerage provider known as ForUsAll sued the Department, alleging that the CAR had a chilling effect on potential customers. The court dismissed the case, finding that ForUsAll hadn't demonstrated that vacating the CAR would renew customers' interest in ForUsAll's cryptocurrency investment platform. The court noted that benefit plan fiduciaries would still be aware of the Department's

skeptical view of cryptocurrency investment offerings' ability to satisfy ERISA's prudence standards for participant investment offerings.

The recent implosion of cryptocurrency values and the failure of the FTX exchange have dampened enthusiasm for cryptocurrency investments, and the failure of ForUsAll's lawsuit has not garnered much attention from plan fiduciaries. However, concerns remain regarding language in the CAR indicating that the Department would not take a more lenient view of fiduciaries who made cryptocurrency investments available through a brokerage account rather than through the plan's regular investment menu. These comments run counter to the widespread view that ERISA does not require fiduciaries to oversee brokerage accounts, given the impracticality of exercising any sort of control over the thousands of offerings typically available through these accounts.

In a filing with the court in the ForUsAll case, the Department rejected concerns that the CAR required monitoring of brokerage account investments, but also refused to concede that brokerage accounts are a "duty-free zone." In a subsequent filing, the Department clarified that it had not yet taken a "definitive position" regarding the application of fiduciary duties to brokerage accounts, and the Department has not issued any subsequent guidance on the topic. The court agreed that the CAR does not change fiduciaries' duties ("whatever those duties are") with respect to brokerage windows.

ESG Investing

The Trump Administration had issued regulations intended to establish procedural obstacles to the use of "environmental, social, and governance" ("ESG") factors in plans' investment decisions. The Biden Administration's Department of Labor suspended enforcement of those regulations, and subsequently replaced them with regulations that reverted to the Department's previously expressed position that ESG factors can and should be considered when economically relevant, and otherwise may (but need not) be used as "tie-breakers" when more than one investment would be economically appropriate. More information is available in our LEGALcurrents.

Opponents of "ESG" investing and so-called "woke capitalism" challenged the regulations in two lawsuits filed in Texas and Wisconsin. The Texas judge, despite being known for adhering to conservative viewpoints and for having struck down a number of Biden initiatives, upheld the regulations as within the Department's authority and consistent with past precedent. That decision has been appealed to the Fifth Circuit. A decision has not yet been issued in the Wisconsin case.

As noted earlier in this newsletter, ESG investing and "diversity, equity and inclusion" ("DEI") initiatives remain politically fraught topics. Plan fiduciaries should take care to ensure that all decisions made with respect to plan operations and investments are made in the best interests of the plan, and that their documentation records their analysis of the economic grounds for each decision. Decisions about investments and service providers must be economically prudent, with ESG, DEI or similar considerations being taken into account only when economically relevant in their own right, or as "tie-breakers" when the economic standards for prudent investment or vendor selection (as applicable) have been met.

In that regard, however, the Department of Labor recently issued an Advisory Opinion regarding Citigroup's proposal to underwrite the cost of diverse managers selected by the fiduciaries of its benefit plans. The program as described in the Advisory Opinion would be limited to managers who were (i) identified as diverse by an independent third-party's database and (ii) had passed a robust economic screening. In other words, Citigroup would pay a portion of the fees charged by a diverse manager that was qualified to serve its benefit plans and hence could be selected without violating ERISA's prudence rules, reducing the cost that would otherwise be paid by the plan and allowing the manager to be more price-competitive. The Department determined that since Citigroup is paying the fees from its corporate assets, the proposal did not violate ERISA's prohibited transaction rules. The Department also concluded that any positive publicity garnered by Citigroup as a result of its efforts would be an incidental benefit, and not a prohibited use of the plans for Citigroup's benefit. The Department emphasized, however, that the plan fiduciaries could not take such benefits to Citigroup into account when actually selecting managers.

Employee Ownership Initiative

The Department is in the process of rolling out support for employee ownership of businesses, in keeping with a mandate included in the SECURE 2.0 Act. As part of that initiative, the Department has established a new Division of Employee Ownership, and has promised to begin work on finalizing rules regarding valuation of the stock of closely held employers in connection with purchases and sales of their stock by an employee benefit plan (typically an employee stock ownership plan).

However, the Department continues to take enforcement action with respect to employee stock ownership plan transactions that it believes are problematic.

Internal Revenue Service News

SECURE Act/SECURE 2.0 Act Guidance

The IRS has yet to issue guidance on a number of SECURE Act provisions, and has not yet finalized the required minimum distribution regulations that it had proposed updating in the wake of SECURE Act changes to the required minimum distribution rules. Likewise, the IRS has issued only a few pieces of guidance regarding the SECURE 2.0 Act. The IRS has said that a "grab bag" notice containing guidance on a number of provisions is slated to be issued before the end of 2023, but that guidance on most major provisions remains in the works.

However, some preliminary guidance has been issued, including the following:

- As noted above, in recognition of the need for guidance on a number of important questions, the IRS has announced an "administrative transition period" during which the SECURE 2.0 Act requirement that employees with prior year FICA wages in excess of $145,000 make catch-up contributions as Roth rather than pre-tax contributions will not be enforced, effectively extending the compliance deadline until 2026.

- The IRS has issued updates to some provisions of its Employee Plans Compliance Resolution System to reflect the requirements of the SECURE 2.0 Act. However, the IRS has yet to address one of the key features of the SECURE 2.0 Act with respect to correction of plan administrative errors—specifically, the correction of overpayments. As explained at more length in our SECURE 2.0 LEGALcurrents, the SECURE 2.0 Act makes it easier for plans to opt to forego collection of inadvertent overpayments if they wish to do so, by removing the IRS' requirement that employers reimburse the plan for overpayments that are not collected from participants and protecting the validity of rollovers of excessive payments in many cases. Conversely, the Act imposes restrictions on plans' ability to recover overpayments even if they wish to do so, unless a recipient is considered "culpable" with respect to the overpayment. Plan fiduciaries are hoping that the IRS will provide more details about the collection rules, particularly in the common situation in which payments continue for a period of time after a payee's death before the plan is informed of the death by a member of the payee's family or discovers it through a death search.
- The IRS issued Notice 2023-54 to provide transition relief for plans and IRAs, and for recipients of distributions from plans and IRAs, with respect to implementation of the required beginning date changes made by SECURE 2.0 during the first seven months of 2023. The Notice acknowledges that plans and IRAs may have misreported distributions as required minimum distributions when they were not and denied rollover opportunities accordingly due to the need for time to update systems to reflect the new rules. The transition relief waives noncompliance penalties for plans and IRAs with respect to distributions between January 1, 2023 and July 31, 2023 to participants/IRA owners turning 72 in 2023 (and their surviving spouses) which were mistakenly treated as required minimum distributions rather than as subject to the rollover and withholding rules applicable to eligible rollover distributions. Recipients of these mischaracterized distributions were given an extended deadline of September 30, 2023 to complete rollovers. In addition, the IRS provided an extension of transition relief for distributions to beneficiaries of participants and IRA owners who had died after their required beginning date that had not complied with the IRS' interpretation of the ten-year deadline applicable to most non-spousal defined contribution plan beneficiaries under the SECURE Act. The Notice also states that the IRS' pending revisions to the required minimum distribution regulations will not be effective prior to 2024.

Virtual Notarization of Spousal Consent

Under most plans, federal law requires married participants to obtain spousal consent for non-spousal beneficiary designations. Defined benefit plans and money purchase pension plans, as well as other types of plans that provide for annuity payments as the normal form of benefit, also must require spousal consent in order for a married participant to receive payment in a form other than a lifetime annuity assuring a spouse of a 50% survivor benefit. Plans which offer optional annuities must require

spousal consent if a participant elects a life annuity that does not provide the requisite spousal survivor benefit. Spousal consent must be signed by the spouse and notarized.

Prior to the COVID-19 pandemic, both the spouse and notary had to be physically present in the same place. During the pandemic, the IRS issued temporary authorization for remote notarization subject to adherence to certain safeguards. The IRS has now proposed regulations that would permanently permit remote notarization if specified conditions are satisfied, and has said that plans can rely on the proposed regulations until final regulations are issued.

Pension Mortality Tables

The IRS has issued regulations (including both proposed and final provisions) addressing the mortality tables used by pension plans when calculating minimum funding contributions.

Forfeiture Proposed Regulations

The IRS has proposed regulations that would formalize its position that forfeitures in defined contribution plans typically must be used up in a timely fashion. The new regulations would set a deadline for defined contribution forfeiture usage of 12 months after the end of the year of forfeiture, with a transition period available for forfeiture balances in existence when the regulations are finalized. The new regulations would require both defined benefit plans and defined contributions plans to contain some additional details regarding forfeiture usage, and would update the regulatory language for defined benefit plans to reflect the current minimum funding rules.

In light of the recent flurry of lawsuits alleging that plan fiduciaries who applied forfeitures to contributions in lieu of expenses breached their fiduciary duties, it is particularly noteworthy that the IRS' preamble to the proposed regulations comments that, "Although nothing in the proposed regulations would preclude a plan document from specifying only one use for forfeitures, the plan may fail operationally if forfeitures in a given year exceed the amount that may be used for that one purpose."

Pension Benefit Guaranty Corporation Finalizes Regulations on Valuations, Lump Sums and Payment Forms for Terminated Plans

The PBGC finalized regulations regarding lump sum payments from terminated pension plans, as well as regulations regarding terminated plan valuations and payment forms. Among other things, the new regulations accommodate the legislative increase in the cash-out limit, provide for the payment of benefits owed to estates in a lump sum, and provide for the use of fair market value when allocating assets to participants' benefits and when assessing employer liability for underfunding.

Cybersecurity and Anti-Fraud Measures

Protection of participant data and prevention of fraudulent access to plan benefits remain key concerns for employers and plan vendors alike. The breach earlier this year in connection with the MOVEit file-sharing tool affected a number of major financial institutions, including entities with plan recordkeeping businesses, and has spawned a number of lawsuits.

Plan fiduciaries should be sure that both their in-house systems and those of their vendors maintain appropriate safeguards, and should be familiar with the contractual protections applicable to each vendor relationship. At a minimum, the fiduciaries should confirm that a plan's arrangements align with the best practices cited by the DOL, absent good reasons why a given practice is not appropriate for a particular plan. More information is available in our cybersecurity LEGALcurrents.

In particular, plan fiduciaries should be aware that the Department expects plans to maintain written cybersecurity procedures. These procedures should address both how the plan will protect against potential cyberattacks, and how the plan will respond in the event of a successful cyberattack. Further, the Department has indicated that plan fiduciaries should maintain adequate cybersecurity insurance dedicated specifically to the plan. It is important that plan fiduciaries review this cybersecurity insurance to ensure it is comprehensive in scope, and that they are aware of any privacy and security practices that the policy requires the plan to follow in order to obtain coverage.

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.

Employee Benefits Year-End Checklist: Updated Internal Revenue Code and Other Statutory Limits

	2024	2023
IRA Contribution Limit	$7,000	$6,500
IRA Catch-Up Contributions	$1,000	$1,000
Joint Return	$123,000	$116,000
Single or Head of Household	$77,000	$73,000
SEP Minimum Compensation	$750	$750
SEP Maximum Contribution	$69,000	$66,000
SEP Maximum Compensation	$345,000	$330,000
SIMPLE Maximum Contributions	$16,000	$15,500
Catch-up Contributions	$3,500	$3,500
Annual Compensation	$345,000	$330,000
Elective Deferrals	$23,000	$22,500
Catch-up Contributions	$7,500	$7,500
Defined Contribution Limits	$69,000	$66,000
ESOP Limits	$1,380,000 $275,000	$1,330,000 $265,000
HCE Threshold	$155,000	$150,000
Defined Benefit Limits	$275,000	$265,000

	2024	2023
Key Employee	$220,000	$215,000
457 Elective Deferrals	$23,000	$22,500
Control Employee (board member or officer)	$135,000	$130,000
Control Employee (compensation-based)	$275,000	$265,000
Taxable Wage Base	$168,600	$160,200
Health Care FSA Salary Reduction Maximum	$3,200	$3,050
Individual Out-pocket Maximum Limit under the Affordable Care Act	$9,450	$9,100
Family Out-pocket Maximum Limit under the Affordable Care Act	$18,900	$18,200
High Deductible Health Plan and Health Savings Account ("HSA") Limits		
Min. Individual Deductible	$1,600	$1,500
Min. Family Deductible	$3,200	$3,000
Individual Out-pocket Maximum Limit	$8,050	$7,500
Family Out-pocket Maximum Limit	$16,100	$15,000
Individual HSA Contribution Limit	$4,150	$3,850
Family HSA Contribution Limit	$8,300	$7,750
HSA "Catch-up" Contribution Limit	$1,000	$1,000

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