EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

EMPLOYEE BENEFITS YEAR-END CHECKLIST

2022 Employee Benefits Year in Review—Planning Ahead for 2023

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 2022

- Many contribution and benefit limits will increase for 2023, so your payroll and recordkeeping systems will need to be updated. A table setting forth the 2022 and 2023 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, 2022 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 2023, you must provide your annual notice in most cases by December 1, 2022 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 IRS has said that the plan must issue a safe harbor notice unless it is using the "Qualified Automatic Contribution Arrangement" design ("QACA").[1] In addition, an employer needs to

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

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 2023 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, 2022 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.
- 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.
  - The IRS has extended the amendment deadlines for the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and SECURE Act amendments. These amendments were originally due at the end of the 2022 plan year for most plans, but will now be due December 31, 2025 for qualified plans and 403(b) plans, with the deadline for governmental plans depending on legislative sessions.[3] More details about these extensions and extensions for other legislation are discussed below.
  - 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.
    - Under the SECURE Act, employers have more flexibility if they opt instead to use a nonelective contribution safe harbor structure. The SECURE Act allows 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

---

[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.

[3] The IRS has not addressed amendments for non-governmental 457(b) plans subject to the required minimum distribution rules. Sponsors of these plans should consult counsel as to whether they need to adopt amendments during the 2022 plan year.

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 is prioritizing updates to reflect the SECURE Act, employers with safe harbor plans should consider being proactive about approving changes before the beginning of the plan year, even if using the nonelective safe harbor.
  - Adding an automatic enrollment feature to a 401(k) or 403(b) plan or making changes to an automatic enrollment feature may also require an amendment before the start of the plan year.
  - Individually designed qualified retirement plans (i.e., plans not using a document template preapproved by the IRS) generally are required to adopt amendments reflecting legal changes by the end of the second calendar year after the legal change appears on the IRS' required amendment list. Qualified retirement plans and 403(b) plans using IRS-preapproved documents must adopt amendments reflecting legal changes by the end of the second calendar year after the calendar year in which the change in qualification requirements is effective with respect to the plan. As noted above, SECURE Act and CARES Act amendments for most plans are now due in 2025 under an IRS extension.
- 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 previously met the benefit statement requirement by providing continual online access to statement information, remember that Department of Labor ("DOL") authorization for this "continuous access" protocol expired January 27, 2022. You should make sure your current statement arrangements comply with the updated regulatory requirements.
- Defined benefit plans sponsored by employers with intranet sites generally are required to make certain information from Form 5500 available on their intranet sites. See the instructions to Form 5500 for details.

- Employers sponsoring medical plans should work with their service providers (insurers if the plan is fully-insured and claims administrators/pharmacy benefits managers if the plan is self-insured) to meet their obligations under the Consolidated Appropriations Act, 2021 to report medical and prescription drug spending to the Centers for Medicare & Medicaid Services. The due date for the report is December 27, 2022. For more information, see our LEGALcurrents at https://hselaw.com/news-and-information/legalcurrents/employer-group-health-plan-prescription-drug-and-medical-reporting-requirement/. 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.
- Most retirement plan participants are required to receive annual "required minimum distributions" after turning age 72[4] and terminating employment with the plan sponsor. (The requirement applies at age 72 regardless of employment status, in the case of a more-than-5% owner.) Time limits also apply to payment to beneficiaries of deceased participants. Each year's payment must be made by December 31st, with the exception of a participant's first required minimum distribution (due April 1st of the year following the year in which the participant attains age 72 or terminates employment, as applicable).
    - 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 newsletter at https://hselaw.com/news-and-information/legalcurrents/2217-finding-and-paying-your-retirement-plan-participant for more information.

---

[4] The relevant age was 70½ rather than 72, for individuals who attained age 70½ prior to January 1, 2020 (*i.e.*, born before July 1, 1949).

- Temporary IRS permission for remote notarization and witnessing of spousal consent (required for certain types of plan distribution and beneficiary designations) is set to expire at the end of 2022. The IRS has indicated that it hopes to complete permanent rules addressing the issue before that happens, but has said it does not anticipate issuing another extension of the temporary relief. Accordingly, plans will need to return to requiring in-person notarization (or, alternatively, in-person witnessing by a plan representative) if the IRS does not issue additional guidance.
- If you completed a plan merger in the 2021 plan year in connection with a business transaction in the 2021 or 2020 plan year and want to submit an IRS determination letter in connection with that merger, you must do so by the end of the plan year after the plan year of the merger (December 31, 2022, for calendar year plans).
- If you expect to have assets remaining in your defined contribution plan's forfeiture account at the end of the year, you should review your options and obligations under the plan document to determine whether you can (and whether you must) make arrangements to use up your forfeiture account this year. The IRS has emphasized that plans generally should not be carrying forfeiture balances over from year to year. As a corollary of this analysis, make sure that your recordkeeper is processing forfeitures in a timely fashion when former employees take distributions or complete five breaks in service, so that the forfeited money can be put to proper use.
- It's important to be sure that lists of plan signatories and fiduciaries, and other documentation enabling access to plan information and funds, are updated to reflect changes in employees and vendors at the time a change takes effect. However, the end of the year is a good time to do a final check and confirm that all your documentation has, in fact, been kept up to date.
- Likewise, the end of the year may be a good time to take a look at your plan demographics and assets and assess the adequacy and cost-effectiveness of your fidelity bonding coverage and fiduciary liability insurance. Consider such factors as the maximum dollar amount of coverage relative to the size of your plans, the identity of the individuals and entities covered, the types of allegations covered, the extent to which coverage is available outside the litigation context (such as in connection with government audits and correction processes), and the alignment of coverage with contract indemnification rights with respect to vendors and employees.

A Look Ahead at 2023

There are some important action items to plan for as 2023 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 2023 or 2024 (depending on a plan's service structure).
  - 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 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. However, a 500-hour computation period does count as a year of vesting service for employees eligible under this rule, and the rule allowing plans to disregard pre-2021 service does not apply to vesting service.

- The new requirement became effective in the 2021 plan year, but service for computation periods that began prior to January 1, 2021, can be disregarded for purposes of eligibility (although not for purposes of counting total vesting service under the special vesting rule). Accordingly, employers have some lead time before part-time employees must be allowed to make elective deferrals under this rule. The new rule does not apply to collectively bargained employees or non-resident aliens with no U.S.-source income. Practitioners hope that the IRS will provide some greater clarity on how to administer the vesting rules

- 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 2022 calendar year Forms 1095-C must be furnished to employees by March 2, 2023. Forms 1094-C and 1095-C are due to the IRS by February 28, 2023, for employers who do not file electronically, and March 31, 2023, 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 2022 by no later than March 1, 2023. 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, 2023.
- Will you need a summary of material modifications to update one or more summary plan descriptions to reflect 2022 changes to plan terms, insurers, trustees, or other summary plan description content? Is your summary plan description due for replacement because it is more than five years old (ten years old, if there have been no changes)? For a calendar year plan, updated summary plan descriptions or summaries of material modifications will be due just before the end of July (210 days after the end of the plan year).
- We have noticed an increase in questions and documentation requests from Form 5500 auditors, particularly with respect to late remittances and the correction of operational failures. Additionally, auditors also need to review a draft of the Form 5500 before issuing the audit opinion. Therefore, we recommend working with your Form 5500 auditor to start the audit process as soon as possible, so there will be time to appropriately resolve any issues that may arise.

Important Developments in 2022

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

Inflation Reduction Act

Although a number of high-profile retirement-related legislative proposals remain in the discussion stages, the Inflation Reduction Act of 2022 included several provisions relating to employee benefits.

On the retirement side, two provisions relate to application of the new 15% corporate alternative minimum tax calculation on certain corporations with income in excess of $1 billion. In the wake of lobbying by benefits interest groups, pension contributions remain deductible for purposes of this tax as they are for income tax purposes, and pension plan investment gains and losses likewise remain excluded from the corporation's income if they are excludable for regular income tax purposes. This avoids a situation in which a company is penalized due to plan assets not available for its business uses. On the other hand, the alternative minimum tax does *not* allow for the deduction of ESOP dividends, which are normally an exception to the usual prohibition on corporate deduction of dividends paid.

In terms of health and welfare benefits, the statute includes provisions allowing Medicare and Medicaid to negotiate the price of prescription drugs and requiring payment of an excess pricing rebate to the federal government. Private employer plans and the rest of the commercial market are not covered by these protections, and there is concern that lower pricing for Medicare and Medicaid and the impact of the pricing rebates could drive up prices elsewhere. The Inflation Reduction Act also caps out of pocket prescription costs for Medicare enrollees, and extends subsidies for individuals purchasing coverage through Affordable Care Act exchanges.

Also of relevance to group health plans, the Act allows high-deductible health plans to cover insulin on a pre-deductible basis.

Forthcoming Legislation

A number of benefits-related provisions have been proposed for inclusion in various pieces of pending legislation, but at this point, there is no way to predict whether any of those proposals will be enacted. Likely candidates include:

- Authorization for employers to "match" employees' student loan repayments under 401(k) plans
- A further extension of the deadline to commence payments from qualified plans from age 72 to 75, and other liberalization of required minimum distribution rules
- Additional contribution opportunities for older employees
- Roth matching contributions (currently, only elective contributions can be classified as Roth contributions)
- Expansion of employers' ability to correct plan errors without formal IRS review
- Additional incentives for plans to utilize automatic enrollment
- Increased cash-out limit
- Streamlined hardship withdrawal process
- Simplification of some reporting and disclosure obligations
- Assistance for locating missing participants
- Authorization for plans to offer immaterial incentives for 401(k) contributions (e.g., offering new enrollees a water bottle, or a small-denomination gift card)
- Expanded authority for DOL to enforce group health plan compliance with the Mental Health Parity and Addiction Equity Act of 2008

There has also been some interest in curtailing or prohibiting clauses requiring arbitration of ERISA disputes, a subject that has also been the topic of a number of court decisions (see below).

Litigation Developments

Dobbs v Jackson Women's Health Organization

The biggest benefits-related news from the Supreme Court in 2022 came when the Court issued its decision in *Dobbs v Jackson Women's Health Organization*. As has been widely publicized, *Dobbs* overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) decisions, holding that there is no constitutional right to have an abortion. In the absence of federal legislation, that leaves abortion oversight to the states. Some states have explicitly legalized abortion and taken steps to support abortion access, while others have prohibited the procedure. Texas and Oklahoma have imposed civil penalties, enforceable through litigation, on individuals who assist with the procurement of an illegal abortion.

A number of large employers have announced that their health plans will cover travel costs for individuals unable to obtain an abortion where they live. As explained in our prior LEGALcurrents (https://hselaw.com/news-and-information/legalcurrents/overview-of-legal-issues-in-covering-abortion-related-travel-expenses/) there are several factors an employer should consider in implementing a travel benefit, such as whether to run the benefit through its group health plan or to pay for travel "outside of" the group health plan. As explained in the prior LEGALcurrents, ERISA generally preempts state civil laws that relate to employee benefit plans, so offering the benefit outside of a group health plan loses the advantage of ERISA preemption. Employers should consider, among other things, structuring the benefit to comply with the requirements of the Mental Health Parity and Addiction Equity Act of 2008, and federal nondiscrimination laws, such as the Pregnancy Discrimination Act. An employer can mitigate these legal risks by not making the travel benefit exclusive to abortion benefits, but instead making the travel benefit available to all otherwise covered benefits that are either 1) not legal in the state of residence or, 2) not available in the state of residence or within a specified number of miles from the individual's residence, due to either illegality or lack of a provider.

Employers should also note that ERISA does not preempt state criminal laws of general applicability. Some state legislators have announced plans to introduce state legislation criminalizing payment for abortion travel, and have explicitly threatened plan sponsors and plan administrators that pay for abortion travel. Whether these legislators will enact or could successfully enforce such legislation (particularly against an out-of-state plan sponsor or plan administrator) remains to be seen. We expect numerous and prolonged constitutional law battles over such enforcement actions in the future. In anticipation of the possibility that state law enforcement action may be taken against an employer or plan administrator that pays for abortion travel (or even just abortion services provided legally in another state), employers should review their fiduciary liability and director and officer insurance policies to try to determine whether coverage would be available to defend against such actions.

Hughes v. Northwestern University

Fiduciaries continue to face litigation relating to defined contribution plan recordkeeping costs and investment quality. Over 200 lawsuits of this type have been filed in the past couple of years, and have generated over $150 million in settlements. In recent years, plaintiffs' attention has expanded from the very large plans that were targets in the initial wave of excessive fee lawsuits a decade or more ago, and litigation targets now include mid-sized and even relatively small plans. And while smaller plans tend to generate smaller settlements simply by virtue of having fewer assets and participants to generate fees or investment losses, defendants who can persuade a court to grant a motion to dismiss the case for failure to state a claim typically can resolve their cases for smaller settlement payments and at less expense than those whose cases move to later stages of litigation.[5]

When determining whether plaintiffs have alleged adequate facts to demonstrate that their claims deserved to proceed to discovery, different courts have expressed different expectations of what plaintiffs need to show. Accordingly, when the Supreme Court agreed to review the Seventh Circuit's dismissal of claims challenging the recordkeeping and investment arrangements of Northwestern University's plans, practitioners hoped for definitive guidance from the Court about the specificity of supporting facts required in order for plaintiffs to craft a complaint capable of surviving a motion to dismiss.

However, the Court's decision in *Hughes v. Northwestern University* did not provide broadly applicable guidance on this point. Although the Supreme Court overruled the Seventh Circuit's early dismissal of claims alleging that Northwestern University's plan fiduciaries allowed the university's plans to pay excessive recordkeeping fees and selected poorly performing, overpriced investments, it did so on narrow grounds. Specifically, the Court rejected the Seventh Circuit's rationale that plaintiffs' access to other plan investments that did not charge the objectionable fees prevented plaintiffs from bringing a lawsuit with respect to the investments that did charge the fees. The Court sent the case back for the Seventh Circuit to reconsider whether the plaintiffs' claims were adequate.

The Supreme Court's rejection of the premise that acceptable investments could excuse flaws in other investments was not surprising. That doctrine had never found substantial support outside the Seventh Circuit. Likewise, the Supreme Court's statement that, "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" was not controversial.[6] However, the decision itself spawned debate as to whether it would ultimately favor plaintiffs or defendants.

Initial speculation from practitioners anticipated that the decision would help more plaintiffs past the motion to dismiss, in light of courts' inability to make factual findings at that early stage of litigation, while the Supreme Court's emphasis on trade-offs and reasonable judgment would prove helpful to defendants seeking summary judgment on more fully developed factual records or victory at trial. Early trends in district court decisions bore out defendants' concerns that courts would view plaintiffs' complaints leniently at the motion-to-dismiss stage. Meanwhile, defendants remained optimistic that the Court's acknowledgement of the need for complex judgment calls would incline lower courts to defer to fiduciaries

[5] According to Bloomberg's statistics, cases which survive a motion to dismiss settle for approximately $1,000,000 more than those which do not. Jaclyn Wille, "Suits over 401(k) Fees Nab $150 million in Accords Big and Small," Bloomberg Benefits & Executive Compensation, August 23, 2022.

[6] Our newsletter at https://hselaw.com/news-and-information/legalcurrents/supreme-court-reaffirms-need-for-individualized-analysis-of-breach-of-fiduciary-duty-claims/ has more details about the *Hughes* case.

who could demonstrate a thoughtful process in making those decisions when those fiduciaries requested summary judgment later in the litigation process.

However, recent appellate decisions have been more favorable to defendants. The Seventh Circuit has not yet issued a decision in the remanded *Hughes* case, but recently dismissed similar claims against Oshkosh. The Seventh Circuit observed that the Supreme Court's *Hughes* opinion had rested on the Court's objection to the Seventh Circuit's willingness to overlook problematic investments simply because acceptable investments were also present, and had not criticized other aspects of the holding requiring plaintiffs to provide a high degree of specificity to survive dismissal. The Sixth Circuit likewise held that plaintiffs must provide details as to why the less expensive plans and investment funds they cited as comparators were in fact appropriate comparators. Most recently, the Eighth Circuit ruled that plaintiffs in a lawsuit involving MidAmerican Energy Co.'s plan had failed in some cases to provide adequate details to support the adequacy of the proffered comparative statistics, and in others had proffered comparators that were not sufficiently similar.

Thus, the Sixth, Seventh, and Eighth Circuit cases provide a counterweight to the pro-plaintiff trend that had been noticeable in the immediate aftermath of *Hughes*. District courts are taking notice, with a number of recent cases (some from courts within these circuits and some from elsewhere) faulting plaintiffs' complaints for not providing sufficient comparative data. While the Ninth Circuit took a more lenient view of the standard of evidence required in reinstating claims against Salesforce and Trader Joe's soon after *Hughes* was decided, another 401(k) fees case involving AT&T is now pending in the Ninth Circuit. This case will allow that Circuit to react to the appellate decisions since its earlier holding. At oral arguments, the court appeared open to plaintiffs' concerns regarding allegedly incomplete fee disclosures, but indicated concern that plaintiffs had not provided expert testimony to support their claims of excessive baseline recordkeeping fees.

In any event, however, fiduciaries should be aware that more and more insurers are concerned about litigation of this type, and are addressing the increasing risk not only by raising premiums, but by inquiring into their insureds' operations. Insurance renewal paperwork increasingly is asking fiduciaries to explain how vendors are selected, how often the plan conducts requests for proposals or other benchmarking, whether the fiduciaries have certain types of fee or service arrangements and/or certain types of funds that have been repeated targets for plaintiffs' attorneys, whether they have adopted protective provisions such as contractual statutes of limitations, and so forth.

Other Significant Employee Benefits Litigation

BlackRock Life Path Fund Litigation

Given the massive expansion of defined contribution plan fee/investment litigation and the concerns of fiduciary liability insurers, fiduciaries now have even more incentive to become familiar with and follow the ever-evolving best practices in vendor and investment selection. However, plaintiffs' firms unfortunately have not demonstrated consistency in selecting their targets. For example, some fiduciaries have been criticized for their decisions to include potentially less liquid and more expensive stable value funds rather than money market funds, while others have been criticized for the reverse decision.

Most recently, a series of cases brought by Miller Shah LLP has taken aim at target date funds operated by BlackRock, the world's largest asset manager. BlackRock itself is not a defendant, but the lawsuits allege 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 should have selected, and have been highly rated by Morningstar. Employer-oriented benefits interest groups, including the ERISA Industry Committee and the American Benefits Council, have filed amicus briefs in some of these lawsuits, and expect to file more. The briefs assert that allowing plaintiffs' claims to move forward "will subject every plan that does not select the #1 fund in each asset category to costly litigation, a catastrophic outcome for both the court system and the private retirement system." The U.S. Chamber of Commerce has also weighed in against the lawsuits.

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 against a number of large plans. Some of those cases have now been dismissed or settled. Aside from a $59 million settlement by Raytheon, these cases so far have not proven lucrative for plaintiffs, but the cases remain largely in the early stages. The pace of filings has slowed dramatically following an initial flurry in 2018 and 2019, but some new cases were filed in 2022.

The cases have yet to produce definitive results that might provide a solid foundation for other employers to consider whether action is needed. The trial court in the Partners Healthcare case issued summary judgment for the employer, determining that ERISA did not require that actuarial assumptions be reasonable and taking note of the difficulties employers face if they want to change actuarial assumptions without impermissibly decreasing benefits. The Partners Healthcare case settled before appeal, however, and other lower courts have disagreed with its holding that reasonableness is not required, so the issue remains unsettled.

Given the complications involved in changing actuarial assumptions without imposing any impermissible benefit reductions on participants, employers who are concerned about a plan's design should review their options with counsel before taking action.

Employer Stock Claims

Plaintiffs continue to face an uphill fight when seeking relief for losses relating to reductions in the stock price of publicly traded employers offering employer stock as an investment option in participant-directed 401(k) plans. The now-settled *IBM v. Jander* case remains the only recent case allowing plaintiffs in a case of this type to proceed past the motion to dismiss. The recent Seventh Circuit decision in *Burke v. The Boeing Company*, dismissing ERISA breach of fiduciary claims relating to the losses suffered by Boeing stock in the wake of the 737 MAX crashes, offers further comfort to employers.

Defense practitioners have taken particular note of the weight given by the court to the presence of an independent fiduciary overseeing the company stock fund. However, the court offered some indications that the decision might have gone the same way even without an independent fiduciary. The court noted the high bar set by the Supreme Court's *Fifth Third Bancorp v. Dudenhoeffer* decision requiring plaintiffs to articulate a reasonable protective action that plan fiduciaries could have taken without violating securities laws and to show "that a prudent fiduciary in the defendant's position could not have concluded" that the alternative action "would do more harm than good." The *Boeing* decision's language also could be applied in situations involving employee-fiduciaries not party to inside information. Accordingly, while the opinion's discussion of the rules for independent fiduciaries is helpful and its focus on the presence of an independent fiduciary may prove trend-setting, the decision is reassuring in general for employers with publicly traded employer stock in their 401(k) plans, even in the absence of an independent fiduciary.

In most cases, appointment of an independent fiduciary for employer stock oversight is permissible but not mandatory. Ultimately, there are a number of factors companies and employee-fiduciaries normally consider in deciding whether an independent fiduciary is desirable for a particular company/plan. These may include the company's health, the availability of non-insider employees with the requisite financial sophistication to act as plan fiduciaries, the corporate culture, the willingness to accept the loss of control associated with retention of an independent fiduciary, cost, and other concerns.

For those fiduciaries interested in hiring an independent fiduciary, the *Boeing* case removes one potential stumbling block to obtaining protection against liability by doing so. Specifically, the case rejects the plaintiffs' assertion that there was a "non-delegable duty to disclose" problematic information about the company. This is also, of course, reassuring to companies that utilize non-insider employee-fiduciaries and hope in that manner to avoid conflicts between insider trading rules and ERISA.[7] In reaching this decision, the court noted that both the SEC and the DOL had rejected a special disclosure duty.

The court also rejected plaintiffs' objections to the decision to appoint an independent fiduciary having been made with the intent of limiting the liability risks associated with offering employer stock. ""Limiting plan sponsor risk" is a practical and prudent objective for ESOP sponsors and corporate insiders. The appointment of an independent fiduciary does not completely release appointing fiduciaries of *all* responsibility. But where company insiders who manage ESOPs are willing to give up control to avoid potential conflicts between duties under ERISA and their duties under corporation and federal securities laws, we see no legal obstacles. Quite the opposite. We see important benefits associated with the practice of corporate insiders appointing independent fiduciaries to make the choices about investments, particularly in employer stock."

In contrast, some areas of employer stock litigation raise more risk for defendants. Cases remain pending regarding the obligations of employers whose plans include stock of predecessor or otherwise formerly affiliated companies that no longer have a relationship to the plan. These plans' fiduciaries face risk if they fail to force the divestment of such stock and it subsequently suffers sizeable losses, and likewise may be at risk if they require divestment and the stock price later increases. Fiduciaries of plans in this situation should consult counsel regarding their options and the advantages and disadvantages of various

[7] Ironically, the plaintiffs themselves conceded they would not have asserted that the plan committee had a disclosure duty if it were made up solely of non-insider employees. The court expressed skepticism that such a committee could realistically manage an $11 billion stake in Boeing, although in fact companies large enough to have an adequate pool of financially sophisticated employees below the executive ranks do create non-insider investment committees with multi-billion-dollar responsibilities. In any event, the court observed that appointing an independent fiduciary accomplished the same result.

approaches. Those fiduciaries may wish to consider retaining an independent fiduciary to oversee the stock fund (or the timing of divestment of the fund, if desired).

Likewise, private companies with ESOPs remain vulnerable to allegations that stock was purchased at an inflated price if the company's value subsequently declines, and conversely to challenges by participants who sold stock shortly before a major increase in value or a buy-out transaction resulting in a higher price. In the latter case, employers and fiduciaries are particularly at risk in connection with transactions in which an ESOP or participant was forced or pressured to participate, or which were known by fiduciaries but not disclosed by those fiduciaries despite those fiduciaries' also knowing that participants were selling stock in ignorance.

Arbitration of ERISA Claims

Appellate courts recently have issued conflicting decisions as to whether plan participants can be forced to arbitrate claims of breach of fiduciary duty. Some cases have turned on the details of the terms of arbitration clauses and whether those clauses were properly communicated, with courts willing to enforce those clauses when the clauses were applicable by their terms and the circumstances were not otherwise problematic. However, other courts have expressed concern that ERISA may not allow for mandatory arbitration of breach of fiduciary duty claims brought on behalf of a plan.

Arbitration is of particular value to defendants, since the Supreme Court has upheld the right of contracting parties to bar class action arbitration. Most challenges to defined contribution plan recordkeeping and investment arrangements are brought as class actions, with plaintiffs' attorneys claiming a share of the settlement as compensation if the case settles, and hoping for a share of any award in the event of victory at trial. Concededly, such anti-class-action clauses have backfired on defendants in some cases in which a plaintiff's attorney concluded that the case could feasibly be brought as multiple individual arbitrations that would require the defendants to incur the expense and risk of multiple proceedings. However, for the most part, class actions are the most economical way to pursue the most potentially lucrative types of claims, making arbitration with an anti-class-action rule a desirable deterrent for many plan sponsors.

Practitioners are hoping that the Supreme Court will resolve the issue in the near future, and the Court has indicated potential interest in a request for certiorari by Cintas that presents this issue.

DuPont Early Retirement Notification

DuPont recently settled a case relating to its handling of individuals who qualified for unreduced early retirement benefits. The plaintiffs complained that they were not notified of their right to retire without reduction for early commencement, and as a result waited until a later date and effectively lost out on benefits they could have obtained. Employers whose pension plans include subsidized early retirement benefits should make sure participants are informed of applicable early retirement rights, and should consider instituting an outreach schedule for individuals who are not eligible for payment upon termination of employment but who later age into eligibility. As noted above, the DOL has an enforcement program focused on the adequacy of plans' distribution commencement outreach.

Internal Revenue Service News

SECURE/CARES Act Extensions

As described previously, the IRS has issued an extension for amendments reflecting the provisions of the SECURE Act, along with the accompanying Bipartisan American Miners' Act of 2019 ("Miners Act"), and the CARES Act, all of which were originally due by the end of the 2022 plan year. Notice 2022-33 extended the deadline only for SECURE Act and Miners Act amendments and amendments relating to the required minimum distribution suspension provisions of the CARES Act. Notice 2022-45 made the extension available for provisions of the CARES Act relating to coronavirus-related distributions and plan loan relief, as well as with respect to qualified disaster distributions permitted by plans under the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Amendments for qualified plans, 403(b) plans and IRAs will now be due December 31, 2025. Governmental plans have separate deadlines. The IRS has not addressed amendment rules for non-governmental 457(b) plans affected by the required minimum distribution changes, so those plans should consult counsel about their obligations.

Despite the extension of the amendment deadline, plans are still required to implement any mandatory changes required by the new laws, and can choose to implement any permissible provisions. The plan sponsor must ensure that the eventual amendments accurately reflect plan operations. Accordingly, plan sponsors must retain documentation of how and when changes were made in plan operations. More information is available from our LEGALcurrents about the SECURE Act (https://hselaw.com/news-and-information/legalcurrents/secure-act-implications-for-qualified-retirement-plans/) CARES Act relief https://hselaw.com/news-and-information/legalcurrents/covid-19-cares-act-provisions-and-other-employee-benefits-developments/, and the amendment extensions (https://hselaw.com/news-and-information/legalcurrents/irs-extends-additional-amendment-deadlines/).

RMD Regulations

The SECURE Act made extensive changes to the required minimum distribution rules for defined contribution plans, and extended the age for commencement of required minimum distributions from age 70½ to age 72. In February 2022, the IRS proposed new regulations for required minimum distributions, reflecting the statutory changes. The IRS also proposed regulations updating the rollover rules to reflect various changes made over the years since those regulations were originally issued.

The IRS anticipates issuing final regulations, which will take effect no earlier than January 1, 2023. In the meantime, the IRS has issued limited transition relief related to rules changes applicable to beneficiaries of participants and IRA owners who die after the required beginning date, as well as successor beneficiaries of "eligible designated beneficiaries" who were entitled to a longer payout period but who then die. Since many of these beneficiaries did not realize that the IRS would expect them to continue taking annual payments until the new ten-year total-payout deadline created by the SECURE Act prior to the IRS' issuance of proposed regulations in February 2022, the IRS has waived penalties for failing to take these payments in 2021 and 2022.

Other IRS News

- The IRS has been piloting an audit program that gives plans selected for audit a 90-day advance notice period during which the plan sponsor can review plan operations, identify any compliance failures, and work with the IRS to disclose and correct any issues. For plans in the pilot program, the IRS agent determines whether an audit is warranted based on the plan sponsor's response and correction efforts.

The IRS has indicated that the initial results have been positive, with two-thirds of the plans contacted as part of the program responding. A third of those plans saw their cases closed almost immediately, and half of the remaining respondents are in the process of submitting documentation, with the other half under audit. That significantly reduces the number of plans undergoing audits, saving time and money for both the plan sponsors who avoided audit and the IRS. While the IRS will need to review final data before making a decision on whether the program should be permanent, a senior IRS official has said that the initial numbers bode well for a favorable decision in that regard.

- Notice 2022-6 updates the rules for determining when a series of payments qualifies as a "series of substantially equal periodic payments" for purposes of exemption from the 10% excise tax on payments from plans and IRAs prior to age 59½.
- The IRS issued updated pension mortality tables in Notice 2022-22. The IRS has also issued proposed regulations that would make changes to the mortality tables used for most pension funding calculations and the calculation of pension lump sums under Section 417(e) of the Internal Revenue Code. Depending on whether and when the regulations are finalized, they may supersede Notice 2022-22 for most plans' funding calculations.
- Individuals who need to make federal tax withholding elections with respect to periodic payments and certain nonperiodic distributions from annuity contracts, IRAs and qualified plans traditionally have used IRS Form W-4P. The IRS has revised Form W-4P for periodic distributions, and created a new form W-4R for nonperiodic distributions and eligible rollover distributions. The new versions may be used for 2022 reporting and must be used starting with January 2023 reporting. The IRS has posted information on its website regarding the adaptation of these forms for electronic and telephone use, and it intends to issue additional guidance.
- The IRS has also issued draft instructions for redesigned Forms 1099-R and 5498 for 2023.
- The IRS has established rules for individually designed 403(b) plans seeking determination letters that are similar to those applicable to individually designed qualified plans, and made some additional minor changes to the determination letter program. As with qualified plans, a Section 403(b) plan will be able to request an initial qualification letter, a letter upon termination, and a letter in connection with certain mergers. The right for a Section 403(b) plan to seek an initial determination letter will be made available as follows:

If the EIN of the Plan Sponsor ends in:	A determination letter application may be submitted beginning on:
1, 2, or 3	June 1, 2023
4, 5, 6 or 7	June 1, 2024
8, 9, or 0	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 that typically is less expensive.

Department of Labor News

Department Weighs in on Certain Types of Investments

Benefit plans governed by ERISA are permitted to invest in almost any type of asset. As a general matter, ERISA only requires that investments be prudent and that a plan's portfolio be appropriately diversified. If a plan permits a participant to select the investments for the participant's own account, the plan needs to meet certain standards with respect to disclosures, investment election processes, and the nature of the investment array, and most participant-directed plans restrict participants to liquid, diversified mutual funds and similar investment vehicles (such as daily valued collective investment funds). However, large, professionally managed pension plans often invest in a wide range of assets, including private funds and non-public securities, and some participant-directed plans (particularly those of small companies with a financially sophisticated workforce) offer participants access to private company securities and other more esoteric assets, either directly or via a pooled fund. Historically, the DOL has not ruled on the permissibility of particular investments or even of particular asset classes, simply restating ERISA's general standard of prudence when asked about specific investment proposals. However, the DOL recently broke with this practice with respect to two asset classes that have received increasing attention.

Cryptocurrency

In March 2022, the DOL released a cautionary memo warning defined contribution plan fiduciaries about letting participants invest in cryptocurrencies, and expressing skepticism about the prospect that such an investment option would satisfy ERISA's prudence standards. The memo cited cryptocurrency's security risks, volatility, regulatory uncertainty, lack of transparency, and valuation complexity among factors warranting the level of concern necessary to result in the issuance of the warning memo. The DOL indicated that it would be launching an investigative program aimed at plans offering "participant investments in cryptocurrencies and related products." The guidance is available at https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.pdf.

Interestingly, the memo suggests that the DOL is not planning to take a more lenient view with respect to cryptocurrency-themed investments that are made available as part of a self-directed brokerage account, a plan feature that typically gives participants access to thousands of mutual funds and in the case of some plans also allows investment in individual securities. A minority of plans offering self-directed brokerage accounts even permit alternative investments, such as private equity funds. While courts and practitioners generally accept that plan fiduciaries have a responsibility to select quality investment options for a plan's "core" array, oversee the performance of the "core" funds, and take action in the event a "core" fund ceases to be a prudent choice, monitoring the quality of thousands of funds (let alone individual securities) would be impossible.

Accordingly, the retirement industry does not consider investment choices available through a self-directed brokerage account to be subject to fiduciary scrutiny, although fiduciaries are required to act prudently when deciding whether to make a self-directed brokerage account available and agreeing to the broker's terms and conditions. In 2012, the DOL had indicated an intention to require fiduciary oversight of self-directed brokerage account options in some circumstances, and quickly withdrew the Field Assistance

Bulletin outlining its desired approach in the face of intense opposition. A revised Field Assistance Bulletin simply observed that in connection with brokerage windows, fiduciaries "are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement."

With this background in mind, it remains to be seen how the DOL might proceed with respect to any effort to impose obstacles on cryptocurrencies offered only through a self-directed brokerage account. The DOL itself, in a filing with the court in a pending case challenging its authority to issue the memorandum outside the regulatory process, rejected concerns that the memorandum required monitoring of brokerage account investments, while also refusing to concede that brokerage accounts are a "duty-free zone." In a subsequent filing, the DOL clarified that it had not yet taken a "definitive position" regarding the application of fiduciary duties to brokerage accounts.

In the pending litigation, a 401(k) cryptocurrency provider called ForUsAll has asserted that the DOL must follow a formal rule-making process and allow stakeholders to comment before it can establish a policy that has demonstrated a significant chilling effect on employers' willingness to consider making cryptocurrency funds available under participant-directed plans. ForUsAll has a cryptocurrency platform currently in operation. Fidelity Investments has also challenged the DOL, indicating that it intends to press forward with making a cryptocurrency investment platform available to its clients and has some clients already taking advantage of this opportunity, despite the DOL's expressed skepticism.

It remains to be seen how many plans' fiduciaries will be willing to face the risk of increased regulatory scrutiny and potential enforcement action and make cryptocurrency available. Fiduciaries who feel that their plans' demographics are likely to support a conclusion that their participants have adequate sophistication and knowledge to make informed investment decisions about cryptocurrency are, of course, the likeliest to be willing to do so. It is also worth noting that while retirement practitioners were reporting increasing demand from participants for 401(k) access to cryptocurrency, the massive decline in the cryptocurrency and non-fungible token markets that occurred shortly after the DOL's memo may have dampened enthusiasm and led to a greater understanding of the risks that raised the DOL's concerns.

Private Equity

In 2020, the DOL issued an Information Letter affirming that a plan fiduciary selecting investment options for a participant-directed defined contribution plan would not necessarily violate ERISA's standard of conduct solely because the fiduciary offered participants the opportunity to invest in a professionally managed fund that included private equity holdings, provided certain conditions were met. The Information Letter listed a number of considerations that fiduciaries should take into account before deciding that a private equity fund was prudent and appropriate, and was limited to the offering of a professionally managed investment fund, rather than direct investment in private equity. The Information Letter noted that direct investment in private equity would pose legal and logistical issues for a participant-directed plan. In December 2021, the DOL supplemented the original Information Letter. The supplemental Information Letter added emphasis to the aspects of the 2020 Information Letter that had focused on the risks of private equity, and noted a recent Risk Alert from the SEC regarding compliance concerns about private equity managers. The supplemental Information Letter also acknowledged that the original Information Letter's summary of the advantages of private equity offerings reflected the views of the private equity industry, and described countervailing concerns that the DOL had concluded should have been presented along with the private equity industry's views. Finally, the supplemental Information Letter expressed concern about the likelihood that fiduciaries of most participant-directed plans would have the sophistication needed to properly assess and oversee private equity investments. The DOL explained that the original Information Letter was intended more for fiduciaries who also oversee a large defined benefit plan with private equity holdings, and thus have the requisite experience.

"ESG" Investing

In 2020, the Trump Administration proposed rules intended to discourage (i) investment decisions based on "environmental, social and governance" (ESG") principles and (ii) exercise of proxy voting and similar rights by plan fiduciaries. The proposed regulations sparked strong opposition, as did the compressed timeline from issuance of proposed regulations to finalization of the rules. In response to the industry outcry, the DOL removed references to ESG factors from the final rules, focusing instead on emphasizing the need to rely on economic factors when making decisions (and thereby leaving room for ESG factors when those factors have an economic impact that a prudent investment professional would take into account), and softened some other aspects of the rules. However, the rules remained unpopular, and the Biden Administration announced a non-enforcement policy. Subsequently, Biden's DOL issued a new set of proposed regulations, reversing course by discussing ways in which ESG factors can be economically important and indicating that prudent fiduciaries should take those factors into account accordingly. Final regulations are expected to be released very soon.

Despite the back and forth, ERISA's statutory requirements provide an unalterable baseline. Namely, fiduciaries must act prudently and for the exclusive purpose of providing plan benefits and covering reasonable plan expenses. Thus, fiduciaries cannot use plan assets to further other purposes at the plan's expense. However, the new proposed regulations give fiduciaries more protection when those fiduciaries consider ESG factors with economic importance as part of their economic analysis, a practice that has become standard in the industry. The proposed regulations also make it easier for plans to continue using a "tie-breaker" analysis to allow ESG factors to tip the scale when an ESG and non-ESG choice would both be appropriate, rejecting the procedural obstacles the Trump regulations would have imposed on fiduciaries attempting to use ESG factors in this way. More information is available in our newsletter at https://www.hselaw.com/news-and-information/legalcurrents/2532-new-proposed-regulations-and-use-of-esg-factors-in-erisa-plans-investment-selection-and-proxy-voting-processes.

The ESG controversy is not confined to ERISA plans, of course. There has been a lot of news coverage of recent efforts by Republican-led states to remove state pension assets and other state financial transactions from firms known to follow an ESG-friendly philosophy, and particularly those firms that focus on sustainable environmental practices and attempt to limit exposure to fossil fuel companies and other businesses considered dangerous for the environment. BlackRock, which has articulated a sustainable-investing philosophy, has been a major target, and has objected to the characterization of its investment practices by the Republican-led states. Other states have pushed back, insisting that managers support their sustainable-investing philosophies. For example, New York has objected to the reassurances BlackRock offered Texas and Florida regarding ongoing commitments to traditional energy suppliers, noting the need for active support by state money managers for the state to achieve its carbon-neutrality goals.

Conflicts of Interest and Prohibited Transactions

ERISA and the Internal Revenue Code both prohibit plans from engaging in transactions with "parties in interest" (or "disqualified persons," in the Code's version of the rule). Generally, parties in interest/disqualified persons include the plan sponsor and its affiliates, plan fiduciaries and their affiliates, unions associated with the plan and its participants, service providers to the plan, and various employees, officers, directors, owners, and other affiliates of the foregoing. However, since the "prohibited transaction" rules would, if enforced without exception, render it impossible for plans to operate, the statutes allow for certain types of transactions to occur in defined circumstances, and allow the DOL to grant additional exemptions. The past couple of decades have seen a political tug of war between the financial industry and those concerned with keeping services available to plans and their participants, on the one hand, and others who believe the current rules allow vendors too much leeway to take advantage of plans and their participants while pretending to act in their interest. With that background in mind, Biden's DOL has reversed course on various past practices in an effort to enhance protections for plans and participants. Some advocacy groups favor the changes, while others worry that the changes will limit plans' flexibility.

- The DOL has proposed changes to the "qualified professional asset manager" ("QPAM") exemption that allows investment firms meeting specified criteria to invest clients' assets without the need to screen for most types of potential conflicts. The new version of the exemption is designed to make it significantly more difficult for financial firms convicted of criminal offenses to qualify as QPAMs, in contrast to a history of fairly liberal waivers for financial firms which had divisions or affiliates involved in foreign financial crimes. The exemption revisions would also heighten the financial standards QPAM firms would need to meet in terms of assets under management and owners' equity and make some additional changes. The exemption would allow a one-year "wind-down period" for plans' relationships with organizations that lose QPAM status.
- The DOL has proposed more restrictive rules for applying for private exemptions from the prohibited transaction rules. For example, the new protocol would require a higher degree of financial independence for independent fiduciaries overseeing exempted transactions and would impose a heightened presumption that exempted conduct must be in the "best interests of the plan."

Proposed Expansion of Voluntary Fiduciary Correction Program

The Department has proposed changes that will expand the list of situations covered by its Voluntary Fiduciary Correction Program, and streamline the process of using the Program.

Pension Benefit Guaranty Corporation Proposes Regulations on Multiemployer Plan Withdrawal Liability

When an employer ceases to participate in a multiemployer plan, it often is required to make a contribution (as a lump sum or over a specified period of time) calculated based on the "unfunded vested benefits" attributable to that employer's current and former employees who participated in the plan. This requirement is designed to ensure that employers who cease contributing to a plan do not leave the remaining employers financially responsible for funding future benefit payments for employees of the withdrawing employer.

While ERISA sets forth various requirements for the calculation and payment of withdrawal liability, it does not specify which assumptions regarding rate of return on plan assets, mortality, or other actuarial considerations ought to be used for the calculation. A number of plans have a policy of using more conservative assumptions than those they use for other purposes, resulting in increased withdrawal liability. Employers have challenged these policies in court, and recently achieved two appellate victories. In September 2021's *Sofco Erectors Inc. v. Trustees of the Ohio Operating Engineers Pension Fund*, the Sixth Circuit held that use of the "Segal Blend," which calculates an interest rate based on a mixture of conservative PBGC plan termination assumptions and the relevant plan's assumptions used for purposes of calculating its ongoing funding status, violated the requirement that the assumptions reflect "the actuary's best estimate of anticipated experience under the plan." In July 2022, the D.C. Circuit dealt another blow to plans' flexibility in this area, ruling in *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Co.* that the plan could not calculate withdrawal liability using a 2.75% rate of return when it assumed a 7.5% rate of return for other purposes.

In light of this controversy, the PBGC has proposed regulations that would allow plans to use:

- The interest rate used for ERISA minimum funding purposes
- Settlement interest rates prescribed by the PBGC under Section 4044 of ERISA, as if the plan were terminating by a mass withdrawal of all employers
- An interest assumption between the rates described in the preceding bullet points

Accordingly, the proposed regulations would allow plans to continue the practice of using more conservative assumptions to calculate withdrawal liability. Other actuarial assumptions would have to be "reasonable." The proposed regulations are likely to spark strong opposition from employers, and the PBGC has specifically indicated that it is open to setting tighter parameters on the permissible range of interest rates, so significant changes are possible prior to finalization of any rules.

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

Employee/Independent Contactor Status

The question of when a worker is an independent contractor and when a worker is an employee entitled to state and federal protections such as employer payroll taxes, unemployment insurance, state disability benefits, and so forth remains a vexing one as the "gig worker" economy continues to be a major force. Another potential source of dispute arises from the practice of hiring workers through staffing agencies, since it may not be clear whether a given worker is an employee of the agency or of the employer receiving the worker's services.

For most benefit plan purposes, the key standard for making an "employee" determination remains the standard established by the IRS for determining if an individual is a "common law" employee. Since the application of this standard often requires some judgment rather than producing a definitive result, benefit plan sponsors should be sure their plans have language stating that the employer's payroll classification governs, even if an individual the employer had been paying as an independent contractor or had considered an employee of a staffing agency is later reclassified by a court or other governmental authority as an employee of the employer. That way, a reclassified worker will not be entitled to retroactive benefits.

However, even if the plans have protective language, an employer should take every precaution to classify individuals correctly in the first place. Other liabilities, such as retroactive responsibility for payroll taxes, minimum wage and overtime, FMLA benefits, state law benefits and so forth, can be significant, and the employer may find itself faced with penalties or fines due to worker misclassification. In making its classification decision, as well, the employer must pay attention to the various different reasons it might be deciding whether an individual is an employee or not, and be sure it knows which legal standard applies to which set of obligations. For example, California has a specific state law regarding employee status that businesses who have workers in California need to understand and apply to covered California workers for the required purposes, even if the workers may not be employees for purposes of benefit plans or federal protections. In addition, the DOL recently proposed a new rule addressing employment status for purposes of the Fair Labor Standard Act, which governs minimum wage and overtime protections. As a result, a given worker may be entitled to be treated as an "employee" for some purposes even if not for others.

Cybersecurity and Anti-Fraud Measures

Protection of participant data and prevention of fraudulent access to plan benefits remain high-profile issues for employers and plan vendors alike. 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 newsletter (https://hselaw.com/news-and-information/legalcurrents/department-of-labor-issues-cybersecurity-recommendations-for-benefit-plans/).

State IRA Programs

While the pace has slowed in recent years, a number of states have rolled out programs that require employers that do not offer a retirement plan to automatically enroll employees to make payroll deduction contributions to state-run IRA programs.

New York approved legislation in 2022 that revised what was to be a voluntary state-run IRA program (the New York Secure Choice Savings Program) for employers without retirement plans into an obligatory program that requires covered employers (i.e., private sector and non-profit employers operating for at least two years with at least 10 in-state employees employed throughout the prior calendar year and who do not offer another retirement plan) to enroll employees into the state's program automatically if the employees do not opt out. Employers must have their payroll deposit program in place within nine months after the program opens. Employers cannot terminate existing plans to qualify for the state program instead.

Hawaii recently approved a voluntary program in which individuals who are not eligible for an employer's retirement plan must be allowed to have the employer direct a portion of their paychecks into IRAs. Hawaii's statute is unusual since it covers individuals not covered by a retirement plan, even if the employer has a plan covering other employees, rather than exempting employers with retirement plans entirely.

Puerto Rico

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

Continued Extension of Benefit Plan Deadlines Due to COVID-19

In February of 2021, the DOL issued additional guidance related to the "tolling" of certain plan and participant deadlines that were extended for up to one year in light of the COVID-19 pandemic during the "Outbreak Period," defined as 60 days after the end of the COVID-19 National Emergency declaration initially declared by President Trump and which was effective March 1, 2020. This National Emergency is still in effect as of the writing of this newsletter. The deadline extensions apply to COBRA elections, premium payments, special enrollment periods, and claims procedure deadlines for all plans, including retirement plans.

The DOL's Disaster Relief Notice 2021-01 (available on the DOL website at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01) provides, in essence, that each individual has his or her own up-to-one-year delay of the deadline that would otherwise apply to a specified action to be taken by the individual. As stated in the Notice, the applicable period is disregarded until the earlier of (a) one year from the date the individual was first eligible for relief for purposes of that deadline, or (b) 60 days after the announced end of the National Emergency (in other words, the end of the Outbreak Period as originally defined).

- For more information on the 2021 guidance, including examples of the applicable deadline extensions, see our LEGALcurrents covering the guidance here: https://www.hselaw.com/news-and-information/legalcurrents/2215-u-s-department-of-labor-finally-issues-guidance-regarding-extending-benefit-plan-deadlines
- See our original LEGALcurrents covering the 2020 deadline extension rules here: https://www.hselaw.com/news-and-information/legalcurrents/1942-dol-and-treasury-announce-extensions-of-benefit-plan-deadlines.

Note also that separate from the National Emergency declaration, there is the "Public Health Emergency" declaration. During the period of the Public Health Emergency, which began on January 31, 2020, group health plans and issuers are required to cover certain COVID-19 tests and related services with no cost-sharing. In addition, as of January 15, 2022 and ending as of the end of the Public Health Emergency, group health plans and issuers must cover over-the-counter COVID-19 tests. As of the date of this newsletter, the Public Health Emergency is still ongoing, having been extended for another 90 days on October 13, 2022.

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

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

	2023	2022
IRA Contribution Limit	$6,500	$6,000
IRA Catch-Up Contributions	$1,000	$1,000
Joint Return	$116,000	$109,000
Single or Head of Household	$73,000	$68,000
SEP Minimum Compensation	$750	$650
SEP Maximum Contribution	$66,000	$61,000
SEP Maximum Compensation	$330,000	$305,000
SIMPLE Maximum Contributions	$15,500	$14,000
Catch-up Contributions	$3,500	$3,000
Annual Compensation	$330,000	$305,000
Elective Deferrals	$22,500	$20,500
Catch-up Contributions	$7,500	$6,500
Defined Contribution Limits	$66,000	$61,000
ESOP Limits	$1,330,000 $265,000	$1,230,000 $245,000
HCE Threshold	$150,000	$135,000
Defined Benefit Limits	$265,000	$245,000
Key Employee	$215,000	$200,000
457 Elective Deferrals	$22,500	$20,500
Control Employee (board member or officer)	$130,000	$120,000
Control Employee (compensation-based)	$265,000	$245,000
Taxable Wage Base	$160,200	$147,000
Health Care FSA Salary Reduction Maximum	$3,050	$2,850
Individual Out-pocket Maximum Limit under the Affordable Care Act	$9,100	$8,700
Family Out-pocket Maximum Limit under the Affordable Care Act	$18,200	$17,400
High Deductible Health Plan and Health Savings Account ("HSA") Limits		
Min. Individual Deductible	$1,500	$1,400
Min. Family Deductible	$3,000	$2,800
Individual Out-pocket Maximum Limit	$7,500	$7,050
Family Out-pocket Maximum Limit	$15,000	$14,100
Individual HSA Contribution Limit	$3,850	$3,650
Family HSA Contribution Limit	$7,750	$7,300
HSA "Catch-up" Contribution Limit	$1,000	$1,000