

Employee Benefits Update: Retirement Plan Roundup

▪ Jeff Gray



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Today's Topics

- Agency Guidance – 2022
- 401(k)/403(b) Litigation Trends
- Secure Act 2.0

DOL Investment Guidance

- December 21, 2021 “Supplemental Statement” on Private Equity investments
 - Tamps down previous guidance from 2020
 - Suggests that only plan sponsors who already closely evaluate PE investments in a defined benefit plan have the skill and ability to evaluate PE investments in a defined contribution plan
- Cryptocurrency in 401(k) plans
 - DOL hostile to it for most plans (no surprise)
 - But big surprise for brokerage accounts:
 - DOL suggests plan sponsors have duty to monitor brokerage account investments
 - ForUsAll suit currently pending against the DOL for violating APA

2022 Treasury “Greenbook” for 2023 FY Includes 409A Penalty Proposal

- Currently, employers must report 409A failures and the 20% penalty, but withholding is not required
- Because the penalty applies to the employee, Treasury complains that collecting the penalty is “time-consuming, administratively impractical, burdensome, and an inefficient use of IRS resources”
- Proposal would require employers to withhold the penalty
- Treasury claims change would generate almost \$7B over ten-year budgeting period

New IRS “Pre-Examination” Compliance Program (June 2022)

- Allows employers to potentially correct administration errors before an IRS audit
 - IRS will send the employer notice of an upcoming audit and provide 90 days to review plan administration
 - If the employer discovers an error, it may “self-correct” the error under IRS procedures
 - If the error is not eligible for “self-correction,” the employer may ask the IRS to enter into a “closing agreement” and pay a reduced penalty
 - If the IRS does not accept the employer’s response as sufficient, it will schedule a full- or limited-scope audit
 - Speed is key – 90 days is not much time!

Three-Year Deadline Extension for Certain Required Amendments

- IRS Notice 2022-33 extends amendment deadlines:
 - SECURE Act and Miners Act deadlines
 - Non-governmental qualified and 403(b) plans – December 31, 2025
 - Governmental qualified and 403(b) plans – 90 days after the close of the third legislative session that begins after 12/31/23
 - Governmental 457(b) plans – later of the deadline described above or first day of the plan year that begins more than 180 days after receiving notice of non-compliance from the IRS
 - No extension for non-governmental 457(b) plans
 - CARES Act
 - Extension only applies to RMD waiver for 2020
 - New deadlines generally track those described above
 - Many plans need to be amended for CARES Act compliance by year-end

Proposed Regulations – RMD Timing

- Issued February 23, 2022 SECURE Act changes:
 - Generally, changes age trigger from 70 ½ to 72
 - Eliminates the “stretch” RMD – most RMD payouts must now be made within 10 years (unless beneficiary is an “eligible” designated beneficiary)
- Ongoing confusion regarding the payout schedule during the 10-year window
 - IRS revised Publication 590-B in 2021 to suggest that no RMD payments are required until year 10
 - Proposed regulations adopt a different approach based on whether the decedent died before or after the decedent’s required beginning date

401(k)/403(b) Class Actions Continue at Record Pace

- U.S. Supreme Court weighed in again on January 24, 2022, deciding Hughes v. Northwestern University
 - The Supreme Court held that it was a breach of fiduciary duty to include any imprudent investments in the fund line-up made available to participants
 - Reversed the lower court decisions which dismissed the lawsuit. Sent the case back to the lower courts
 - Substantial increase in cases filed following the decision

Recent Settlements in 2022

Costco	\$5.1M
Washington University	\$7.5M
Walgreen's	\$13.75M
Zachry Holdings	\$1.88M
Wells Fargo	\$32.5M
Nextep Inc.	\$1.1M
L Brands (Victoria's Secret/Bath & Body Works)	\$2.75M
Juniper Networks	Unreported
Shoe Show	Unreported

New Set of “Cookie Cutter” Cases

- Handful of law firms filing “underperformance” lawsuits aimed at large plans with BlackRock target date funds
 - Interesting because they involve low-cost index funds that some view as less risky from a fiduciary standpoint
 - Plaintiffs allege that BlackRock’s TDFs dramatically underperformed comparable TDFs over three- and five-year periods beginning in 2016
 - Taking a “snapshot” of performance over a limited period and comparing it against any other funds that can be found to have beat that performance seems to be a new low in 401(k) litigation

What is SECURE 2.0?

- The legislation being referred to as SECURE 2.0 is a set of three separate bills.
 - The Securing a Strong Retirement Act of 2022;
 - The Enhancing American Retirement Now (“EARN”) Act; and
 - The Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg (“RISE & SHINE”) Act.

Passage Likely, Not Guaranteed

- The Securing a Strong Retirement Act passed in the House of Representatives in June 2022 with a vote of 414-5
- The EARN Act and RISE & SHINE Act have each unanimously passed in their respective Senate Committees
- The differences in each of the bills must be reconciled and a vote on a final form of the legislation is expected before the end of the year

Automatic Enrollment for New Plans

- The Securing a Strong Retirement Act would mandate that all NEW 401(k) and 403(b) plans with plan years beginning on or after January 1, 2024 include automatic enrollment:
 - Default rate of between 3% and 10%
 - Automatic escalation of 1% per year
 - Exceptions: existing plans, and new plans established by new businesses, employers with 10 employees or less, and governmental and church employers will be exempt

Protections for Part-Time Employees

- Under the SECURE Act (1.0), 401(k) plans must allow “long-term part-time” (LPTP) employees to at least make elective deferrals and receive vesting credit as follows:
 - LTPTs are employees who meet the minimum age requirement and work at least 500 hours per year for 3 consecutive years (or satisfy the general rule of 1,000 hours in a single year)
 - Limited to 401(k) plans
 - Rule effective in 2021, meaning LTPTs could become eligible in 2024 (three years later)
 - Credit also applies for vesting purposes

Part-Time Employee Protections (cont'd)

- Instead of 500 hours over three-consecutive-years, SECURE 2.0 lowers the limit to 500 hours over two consecutive years
- Also expands the rule to 403(b) plans
- Effective for plan years beginning after December 31, 2022
- 12-month periods after January 1, 2021 count
- First group could become eligible on January 1, 2023

Increased Cash Out Limit

- The mandatory cash out limit, which permits a plan to distribute account balances of \$5,000 or less without a participant's consent, would increase to \$7,000 (RISE & SHINE Act)

Increased Catch-Up Contribution Limits

- Beginning in 2023, the Securing a Strong Retirement Act would increase catch-up contributions for participants age 62-64 to \$10,000 (adjusted periodically for inflation)
- The catch-up limit for those age 50-61, and 65 and older, would remain the same (currently \$6,500)
- Same concept in the EARN Act, but increase applies for ages 60-63 instead

Post Tax Catch-Up and Matching Contributions

- SECURE 2.0 would require plans (other than SIMPLE IRAs and SEP plans) that offer catch-up contributions to treat them as Roth contributions
- The legislation would also allow, but not require, matching contributions to be treated as Roth contributions

Matching Contributions on Student Loan Payments

- SECURE 2.0 would allow employers to make matching contributions on behalf of participants for “qualified student loan payments.”
 - Previous IRS Private Letter Ruling permitted nonelective contributions for participants making student loan repayments.
 - SECURE 2.0 would treat student loan payments as elective deferrals (including 402(g) limit) for purposes of matching contributions.
 - Separate nondiscrimination testing permitted for this group.
 - “Qualified” basically means debit incurred solely to pay for “cost of attendance” at a higher education institution.

Incremental Delay in Required Beginning Date

- Securing a Strong Retirement Act:
 - The House legislation would increase the RMD age to 73 in 2023, 74 in 2030, and 75 in 2033
- EARN Act:
 - Senate legislation would increase the RMD age to 75 Years old beginning in 2032
- Also, the current 50% excise tax for failing to take timely RMDs would be reduced to 25%

Limited Compliance Relief Included

- Self-certification for proof that a participant has experienced a safe harbor hardship event
- New ADP testing safe harbor option (after 2023)
 - Autoenrollment of at least 6% initially, increasing 1% per year to 10% in the fifth and later years
 - Employer match of 100% on the first 2%, 50% on the next 4%, and 20% on the next 4%

Limited Compliance Relief Included (Cont.)

- More options for handling benefit overpayments
- Agencies must recommend steps for easing reporting and disclosure obligations
- Reduced excise tax for RMD violations
- Expansion of the types of errors that may be corrected through Employee Plans Compliance Resolution System (EPCRS)
- New national online searchable “lost and found” database to reduce missing participants

Other Changes Mentioned in SECURE 2.0 Bills

- The following provisions are also noteworthy, as they appear within at least one of the three SECURE 2.0 bills:
 - Allow access to \$1,000 penalty free withdrawal for “unforeseeable or immediate financial needs relating to personal or family emergency expenses”
 - Allow for penalty free withdrawals of \$10,000 or 50% (whichever is less) for victims of domestic abuse
 - Allow for repayment of withdrawals related to the birth or adoption of a new child to be repaid and treated as rollover contributions if repaid within 3 years (new limitation)
 - Direct IRS to expand types of errors that can be corrected under EPCRS
 - Allow for small incentives to be paid to employees for contributing to an employer plan
 - Several provisions would streamline reporting requirements for retirement plans (consolidating notices and allowing notices to be provided electronically)
 - Expand investment options for 403(b) plans
 - Allow 403(b) plans to participate in “multiple employer” plans

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