



**HansonBridgett**

# 2023 Annual Employee Benefits Update

**2023 Update for Public Sector Employers**

February 7, 2023

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## Recording

- Today's presentations are being recorded. They will be emailed to you along with the presentation materials.

# For CLE ONLY: Sign-In Using QR Code

# Agenda

## Health and Welfare Plan Updates

### Qualified Plan Updates

- **SECURE 2.0 Act**
- **Other Updates**

## CalPERS Updates

## PEPRA-ATU Lawsuit

# **Health and Welfare Plan Updates**

# Permanent Extension for ACA reporting

- Large employers (50 or more FT employees or FTEs ) must provide a Form 1095-C to full-time employees, no later than March 2 of the following year of coverage.
  - ACA reporting includes health coverage offered to full-time employees in the past year. The IRS uses such information to assess any “shared responsibility” penalty.
- Transitional penalty relief has been discontinued
- Effective: Calendar years beginning after Dec. 31, 2021
- Note: Reporting deadline to the IRS is unchanged

# Year-End Legislation Extends Safe Harbor for Telehealth

- *HDHP Telehealth Safe Harbor:* The Consolidated Appropriations Act of 2023 extended the safe harbor to January 1, 2025, allowing high deductible health plans to cover telehealth and other remote care services pre-deductible, and allowing stand-alone coverage for telehealth and other remote care services without impacting the ability to contribute to a health savings account.



# Transparency in Coverage (TiC)

- For 2023 plan years, most group health plans must make pricing information available for 500 items and services through self-service online pricing tool
- Includes estimated cost-sharing, accumulated amounts, negotiated rates for in-network, and allowed amounts for out-of-network
  - Pricing information must be provided in paper form, upon request
  - Must include notice regarding balance billing for out-of-network care
- List of 500 items and services is available at: <https://www.cms.gov/healthplan-price-transparency/resources/500-items-services>
- Begin planning for 2024, when requirements apply all items and services

# No Surprises Act (NSA)

- Generally prohibits “balance billing” for emergency services, air ambulance services, and out-of-network provider care received at in-network facility
- Agencies issued new Frequently Asked Questions in August 2022
  - Includes new “model notice” regarding balance billing protections – must be posted on plan’s public website
- Disputes about payment between plan and out-of-network provider when NSA applies are subject to “independent dispute resolution” process
  - Final revised regulations issued in August 2022 regarding IDR process
  - Agencies report that +90,000 disputes were submitted from April-Sept. 2022

# New Drug Pricing Disclosure/Enforcement Relief

- The Consolidated Appropriations Act of 2021 added new prescription drug and healthcare spending reporting requirements for insured and self-insured health plans.
- On December 23, 2022, DOL, HHS and Treasury issued a new FAQ granting flexibility for plans and issuers ahead of the December 27, 2022 prescription drug data collection reporting deadline for the 2020 and 2021 data submissions required to be made to CMS.
- The agencies indicated that enforcement action will not be taken against any plan or issuer that uses a good faith, reasonable interpretation of the regulations and the complex reporting instructions that were issued for making submissions.
- Reporting for the 2022 year is due by June 1, 2023.

# COVID-19 National Emergency Ending in 2023

- The COVID-19 National Emergency has been in place since March 2020, and tolls certain plan deadlines (such as COBRA election periods) for a period of 1 year or 60 days from the end of the National Emergency.
- Recently, the White House announced that the National Emergency will end May 11, 2023.
- Plan terms and procedures will need to be reviewed to determine the impact of any delayed deadlines, and whether any plan amendments are required.

# COVID-19 Public Health Emergency Ending in 2023

- The COVID-19 Public Health Emergency, which has been in place since January 2020, provides increased access to COVID-19 tests, vaccines, and treatments.
- Recently, the White House announced that the Public Health Emergency will end May 11, 2023.
- We will continue to watch for guidance in this area, and Plans should consider whether changes will need to be made mid-year or during the next open enrollment period regarding any changes to services related to COVID-19.

# HIPAA Cybersecurity Guidance

- 2022 Cybersecurity newsletters issued by Department of Health and Human Services (HHS) provide suggested actions for HIPAA regulated entities:
  - Provide periodic security reminders to workforce members
  - Use a combination of approaches to identify and correct vulnerabilities
  - Consider using a privileged access management (PAM) system
  - Form a security incident response team and create a response plan that includes:
    - (i) determining nature and scope of incident, (ii) removing malicious data, (iii) reporting and documenting, and (iv) conducting regular tests
  - Proactively mitigate harmful effects by backing up data and testing restorations

# Self-Insured Non-Federal Governmental Plans Cannot Opt Out of MHPAEA

- Under the Public Health Service Act, self-insured non-federal governmental health plans previously were permitted to elect annually to opt out of Mental Health Parity and Addiction Equity Act (MHPAEA) compliance requirements
- CAA 2023 eliminated the ability of those plans to opt out of compliance with MHPAEA, effective as of 12/29/22
  - No new MHPAEA opt out elections can be made
  - Existing elections that expire within 180 days after 12/29/22 cannot be renewed
    - Delayed effective date for collectively bargained plans with existing elections

# New Mid-Year Cafeteria Plan Election for Family Member Exchange Coverage Enrollment

- Notice 2022-41 expands the cafeteria plan change-in-status rules to permit a prospective mid-year revocation of a family coverage election, if:
  - One or more related individuals are eligible for a special enrollment period to enroll in a QHP on an Exchange, or are already covered and seek to enroll in a QHP during the Exchange's annual enrollment period; and
  - The revocation corresponds to the related individual(s)' intended enrollment in the QHP for new coverage effective by the day after the revoked coverage ends.\*
- \*If the employee doesn't enroll in the QHP, they must elect self-only coverage (or family coverage including the already-covered, related individuals) under the plan.
- Effective January 1, 2023. Plan sponsors must amend the plan by last day of plan year in which effective (may be effective retroactively to first day of plan year if operated accordingly); amendments effective for the 2023 plan year may be adopted by the last day of the 2024 plan year.



# 2023 Health and Welfare Plan Limits

## Health FSAs, EBHRA, Qualified Transportation Fringe Benefit & Qualified Parking Limits

Health Flexible Spending Accounts	2022	Trend	2023
Maximum salary deferral limit	\$2,850	Up	\$3,050
Health FSA Carryover Limit	\$570	Up	\$610

Dependent Care Flexible Spending Accounts – Annual Contribution Limits	2022	Trend	2023
Maximum salary deferral (single taxpayers and married couples filing jointly)	\$5,000	Same	\$5,000
Maximum salary deferral (married couples filing separately)	\$2,500	Same	\$2,500

EBHRA; Qualified Transportation & Parking Limits	2022	Trend	2023
Maximum Amount Made Newly Available for the Plan Year for Excepted Benefit Health Reimbursement Arrangements (EBHRA)	\$1,800	Up	\$1,950
Qualified Mass Transportation Fringe Benefit & Qualified Commuter Parking (monthly limit)	\$280	Up	\$300

# 2023 Health and Welfare Plan Limits

## High Deductible Health Plans (HDHP) and Health Savings Accounts (HSA)

HDHP – Maximum annual out-of-pocket limit (excluding premiums)	2022	Trend	2023
Self-only coverage	\$7,050	Up	\$7,500
Family coverage	\$14,100	Up	\$15,000

HDHP – Minimum annual deductible	2022	Trend	2023
Self-only coverage	\$1,400	Up	\$1,500
Family coverage	\$2,800	Up	\$3,000

HSA – Annual contribution limit	2022	Trend	2023
Self-only coverage	\$3,650	Up	\$3,850
Family coverage	\$7,300	Up	\$7,750
Catch-up contributions (age 55 or older by the end of the year)	\$1,000	Same	\$1,000

# **Qualified Plan Updates**

# **SECURE Act 2.0**

# SECURE Act 1.0, CARES Act and SECURE Act 2.0 Amendment Deadlines Combined

- SECURE Act 2.0 Amendment Deadline: On or before the last day of the first plan year beginning on or after January 1, 2027.
- Notice 2022-33 and 2022-45 previously extended the SECURE Act 1.0, Bipartisan Miners Act and CARES Act Amendment Deadlines until 90 days after the end of the third regular legislative session of the legislative body with authority to amend the plan that begins after December 31, 2023.
- SECURE Act 2.0 conforms the SECURE Act 1.0 and CARES Act amendment deadlines to the SECURE Act 2.0 amendment deadline.

# Elimination of First of Month Rule for Governmental 457(b) Plans

- For governmental 457(b) plans, employee deferral elections no longer need to be made prior to first day of the month in which compensation is paid
- Deferral elections can be changed any time before compensation is made available
  - Aligns deferral election rules with 401(k) and 403(b) plan rules
- Effective for 2023 tax years
  - Does not apply to tax-exempt 457(b) plans

# New Rules for Recovery of Overpayments

- New rules apply to recoupment of inadvertent overpayments from pension plans
- Plan will not fail to meet qualification requirements if plan sponsor elects:
  - Not to seek recovery of overpayments, or
  - To amend plan to address inadvertent overpayments
- Overpayments that are not recovered may be treated as eligible for rollover
- Effective as of 12/29/22
- Optional

# New Self-Correction Options under EPCRS

- Expanded use of self-correction for inadvertent plan errors under EPCRS
- Self-correction period is now indefinite, but corrections must be made “within a reasonable period” after error is discovered
- Applies to significant and insignificant errors that occur despite having practices and procedures reasonably designed to promote compliance
  - Does not apply to errors discovered by IRS prior to start of self-correction process
  - Does not apply to errors that are egregious or involve diversion or misuse of plan assets or abusive tax avoidance transaction
- VCP filings are no longer required to correct inadvertent loan failures
- Only applies if correction conforms to general correction principles
- Effective as of 12/29/22; EPCRS to be updated within two years



# Participant Self-Certification of Hardship or Unforeseen Emergency

- Plan sponsors may rely on participant's self-certification that
  - For 401(k) or 403(b) plans, conditions for safe harbor "deemed" hardship distributions are met
  - For 457(b) plans, conditions for unforeseen emergency are met
  - Distribution is not in excess of amount required to meet need
  - No other alternative means are reasonably available to satisfy need
- Effective for 2023 Plan Years
- Optional

# Exception to Early Withdrawal Penalty for Distribution to Terminally Ill Participant

- Code section 72(t) early withdrawal penalty of 10% does not apply to distributions made to terminally ill participants
  - Terminally ill = certified by a doctor as having an illness or physical condition that can reasonably be expected to result in death in 84 or fewer months
  - Participant must provide sufficient evidence
  - Distributed amount may be repaid within 3 years of date of distribution
- Applies for distributions made after 12/29/22
- Optional

# Limit on Repayment Period for QBAD

- Repayment of Qualified Birth or Adoption Distribution (“QBAD”) must be completed within three-year period following date distribution was received
- Exception to early withdrawal penalty under Code for QBADs was added in 2019 with SECURE 1.0 Act
  - SECURE 1.0 Act permitted repayment of QBADs but without time limit
- Effective for QBADs distributed after 12/29/22
  - For QBADs distributed earlier, repayment must be made by December 31, 2025
- Required for plans that provide for QBADs

# Treatment of Employer Matching Contributions as Roth Contributions

- Employee may designate employer matching contributions as designated Roth contributions
  - Applicable to 401(k) and other 401(a) plans, 403(b) plans and governmental 457(b) plans
  - Matching contributions must be fully vested
- Effective 2023 Plan Year
- *Optional*

# Reduced RMD Excise Tax

- Excise tax on failure to take a required minimum distribution (RMD) reduced from 50% to 25%
- Excise tax further reduced to 10% if
  - Taxpayer receives a distribution equal to the amount of missed RMD from the relevant plan on or before the earliest of (1) the date of mailing a notice of deficiency with respect to the excise tax, (2) the date on which the excise tax is assessed, or (3) the last day of the second taxable year that begins after the end of the taxable year in which the excise tax is imposed; and
  - Taxpayer submits a return during the correction period reflecting the excise tax
- Effective 2023 Plan Year
- Mandatory (no plan amendment required)

# Qualified Disaster Recovery Distributions

- Up to \$22,000 automatically available to eligible plan participants who are impacted by federally declared disasters
  - Available from the first day of the incident period through 179 days after the latest of (1) the date of enactment, (2) the first incident date, or (3) the day that the disaster declaration is issued
  - Participant is eligible if participant (1) has a principal place of abode in the qualified disaster area during the relevant disaster, and (2) sustains an economic loss by reason of the disaster
- Loan relief is also available
- Effective for disasters on or after January 26, 2021
- Optional

# Updated Required Beginning Date

- Increase to age triggering required beginning date from age 72 to age 75
  - Age 73, for individuals who attain age 72 after 2022, and age 73 before 2033
  - Age 75, for individuals who attain age 74 after 2032
- Effective 2023 Plan Year
- Required (plan may continue to require participants to commence distributions at an earlier age, but such distributions are not RMDs)

# Small Immediate Financial Incentives for Contributing to Plan

- Employer may give employees de minimis financial incentives for participating in a retirement plan (e.g., gift card) if such incentives are not paid from plan assets and are provided to employees who elect to make contributions to the plan instead of receiving cash
- Effective 2023 Plan Year
- Optional



# \$1,000 Emergency Distributions Permitted

- Allows one annual penalty-free (no 10% penalty) withdrawal up to \$1,000 for "unforeseeable or immediate financial needs relating to personal or family emergency expenses" from 401(a), 401(k) and 403(b) plans. All plans in controlled group are aggregated. May rely on written employee verification.
- The withdrawal may be repaid in 3 years. No further withdrawal during the 3-year repayment period is permitted unless first withdrawal has been repaid or additional elective deferrals or employee contributions have been made.
- Effective date: Distributions on or after 1/1/24
- Optional

# Short-Term Emergency Savings Account Permitted

- Permits an individual account plan sponsor to offer short-term emergency savings accounts to non-highly compensated employees. Contributions must be Roth (after-tax) deferrals and participants can be automatically enrolled at a maximum rate of 3% of compensation, with a cap of \$2,500 (indexed) per year into the account. Must be able to withdraw monthly. Must be eligible for matching contributions (but match doesn't go into the account).
- Effective date: Plan Years beginning on or after 1/1/24
- Optional

# New Surviving Spouse Election Under RMDS

- Extends IRA rule to tax-qualified plans-Allows a spousal beneficiary to irrevocably elect to be treated as the employee for RMD purposes and, if the sole designated beneficiary, applicable distribution period after the participant's year of death is determined under the uniform life table.
- Effective date: On or after 1/1/24
- Optional for beneficiary; plans required to reflect in Code section 401(a)(9) rules

# Student Loan Payment Match Permitted

- A 401(a), 401(k), 403(b) and 457(b) governmental defined contribution plan may treat a "qualified student loan payment" as an elective deferral for purposes of matching contributions. Employers permitted to use these deferrals as elective contributions for basic safe harbor or an auto enrollment safe harbor 401(k), as well as for the 401(m) safe harbors. Also can apply the ADP test separately to employees receiving the match on account of qualified student loan payments. May rely on employee self-certification of payment.
- Effective date: Plan Years on or after 1/1/24
- Optional

## Use of Employer-Sponsored DC Plan Permitted for Forced Cash-out/Auto-Portability

- Allows plan sponsors subject to Code section 4975 to receive compensation for adopting a service provider's defined contribution plan automatic portability vehicle instead of using default IRAs for forced plan cash-outs and not violate Code section 4975 prohibited transaction rules, provided certain requirements are met.
- Note: Governmental plans are exempt from Code section 4975 and may have requirements to comply with State escheat rules. If not, since not subject to Code section 4975 prohibited transaction rules, governmental plans might be able to use DC plan auto portability vehicle, so long as complies with State law fiduciary requirements.
- Effective date: Plan Years on or after 1/1/24
- Optional

# Mandatory Cash-Out Limit Increase

- Before SECURE 2.0, retirement plans could provide that a former employee's retirement account would be transferred to an IRA if the employee did not elect a direct rollover or direct distribution and the account balance was between \$1,000 and \$5,000. SECURE 2.0 increased the mandatory cash-out dollar limit for retirement plans from \$5,000 to \$7,000.
- Effective: Distributions made after 12/31/2023
- Optional

# Penalty Free Withdrawal in the Case of Domestic Abuse

- Retirement plans may permit participants who have experienced domestic abuse to take a withdrawal from the plan.
  - Participants can self-certify that they have experienced domestic abuse;
  - The maximum dollar amount is the lesser of \$10,000 (indexed for inflation) or 50% of the participant's account balance;
  - Not subject to 10% early withdrawal penalty;
  - Opportunity to repay the withdrawal over 3 years.
- Effective: Distributions made after 12/31/2023
- Optional

# Safe Harbor – Correction of Elective Deferral Failures

- Codifies the safe harbor set to expire at the end of 2023 for corrections of employee elective deferral failures that occur (1) in implementing an auto-enrollment or auto-escalation feature; or (2) by failing to afford an eligible employee the opportunity to make such an election because the employee was excluded from the plan.
  - Requires restoration of missed matching contributions (but not missed deferrals);
  - Correction must be made within 9½ months after the end of the plan year in which the error first occurred (unless notified by the employee earlier); and
  - Notice must be given to the employee no later than 45 days after the date on which the correct deferrals begin.
- Effective: Corrections occurring after 12/31/2023
- Optional



# 403(b) Plan Hardship Distributions

- 403(b) plans may, like 401(k) plans:
  - Expand the amounts distributable upon hardship to include salary deferrals, QNECs, QMACs and earnings on those contributions
  - Eliminate the requirement to take all available nontaxable loans.
- Effective for plan years beginning after December 31, 2023
- Optional

# Required Minimum Distributions From Roth Accounts

- SECURE 2.0 conforms the RMD rules for designated Roth accounts under 401(k), 403(b) and governmental 457(b) plans to those for Roth IRAs by eliminating the pre-death distribution requirement for those accounts.
  - Does not apply to distributions required with respect to years beginning before December 31, 2023, but permitted after that date.
- Effective for taxable years beginning after December 31, 2023
- Required

# Catch-Up Contributions Must be Roth

- Age 50 catch-up contributions to 401(k), 403(b), and governmental 457(b) plans for participants who earn more than \$145,000 (indexed) in the prior year must be designated Roth contributions.
  - Applies only if participants may designate catch-up contributions as Roth.
  - IRS may issue regulations to permit affected participants to change their catch-up contribution election after it's made.
  - Technical Correction Needed: Conforming amendment deleted paragraph (C), which permits catch-up contributions, from IRC § 402(g)(1).
- Effective for calendar years beginning after December 31, 2023
- Required

# Repeal of Direct-Pay Requirement for Public Safety Health Insurance Premium Exclusion

- SECURE 2.0 repeals the direct payment requirement to qualify for the up to \$3,000 exclusion from gross income for distributions from a governmental retirement plan to a public safety officer to pay for their health insurance premiums.
- Effective for distributions after December 29, 2022
- Required

# Expansion of Public Safety Early Distribution Tax Exception

- SECURE 2.0 extends the exception to the 10% early distribution tax for governmental retirement plan distributions to public safety officers who are at least age 50 to those who have at least 25 years of service, even if not yet age 50.
- Effective for distributions after December 29, 2022
- Required

# **Other Qualified Plan Updates**

# Proposed RMD Regulations

- Purpose: Update existing regulations to reflect major changes made by SECURE Act 1.0 and make other conforming changes, including updating the rollover rules.
- Key Takeaways:
  - The age 72 RBD age applies to participants born after June 30, 1949.
  - If a participant dies after their RBD, both at-least-as rapidly rule and 10-year rule apply.
  - If participant died before January 1, 2022 with multiple beneficiaries, the 10-year rule applies after their deaths if the oldest of them dies after December 31, 2021.
  - Age of majority for determining whether a child is an eligible designated beneficiary is 21.
  - Determination of whether a beneficiary is disabled may be based on SSA determination.
  - Documentation of disability or chronically ill status required by 10/31 after year of death.
  - Plan may provide a uniform RBD for all of 4/1 after year participant attains age 72 or 70½.
- Applicability Date: Proposed to apply to distributions on or after January 1, 2022.

# RMD Rule Transition Relief

- Notice 2022-53: IRS response to comments re proposed rule that both at-least-as rapidly rule and 10-year rule apply if participant dies after RBD.
- Applicability Date: Final regulations will apply no earlier than 2023.



# Determination Letter Program for Individually Designed 403(b) Plans

- Rev. Proc. 2022-40: Individually designed 403(b) plans can apply to IRS for determination letters for initial qualification, plan termination, and other to-be-specified circumstances.
- Effective 6/1/2023: Plans may first be submitted for initial determination: 6/1/2023 (EIN ending in 1, 2, or 3); 6/1/2024 (EIN ending in 5, 6, or 7); 6/1/2025 (EIN ending in 8, 9, or 0).
- Initial Determination: No previous determination letter filing on Form 5300 and determination letter issued as individually designed plan.
- Deadline for Applications for Determination Upon Termination: By the later of: 1) one year from the termination effective date, or 2) one year from the action terminating the plan, but no later than 12 months after distribution of substantially all plan assets.
- New Plan RAP: Ends the later of 1) last day of 2nd calendar year after calendar year in which plan is effective, or 2) 90 days after close of 3rd regular legislative session of legislative body beginning after the end of the plan's initial plan year.

# Cybersecurity and Fraud Prevention

- Employee benefit plan transactions are increasingly occurring through online tools
- The law is evolving to broaden opportunities for electronic transmission of plan data
  - Final DOL Electronic Disclosure Rules (29 CFR § 2520-104b-31)
  - IRS Electronic Disclosure Rules (Treas. Reg. § 1.401(a)-21)
- Consider how data breaches can occur: transmittal of unencrypted data, unauthorized disclosures, stolen/lost devices, ransomware, phishing, etc., etc.
- Consider incorporating DOL guidance released 4/14/21—DOL is including these issues in audits
  - CYBERSECURITY PROGRAM BEST PRACTICES <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf>
  - TIPS FOR HIRING A SERVICE PROVIDER WITH STRONG CYBERSECURITY PRACTICES <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/tips-for-hiring-a-service-provider-with-strong-security-practices.pdf>
  - ONLINE SECURITY TIPS (for participants) <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/online-security-tips.pdf>

# Cybersecurity and Fraud Prevention

- Litigation Involving DOL's Authority to Investigate ERISA Plan Cybersecurity Issues
  - U.S. Court of Appeals for the 7<sup>th</sup> Circuit recently upheld the DOL's broad authority to investigate any actual or potential ERISA violation. Authority extends to compelling a non-fiduciary service provider to turn over information so DOL could determine if provider's clients may have violated ERISA. *Walsh v. Alight Solutions, LLC* ( Case No. 21-3290) (August 12, 2022).
  - In this case, the court ruled in favor of the DOL in connection with the DOL's 2019 investigation into the processing of unauthorized distributions of plan benefits due to cybersecurity breaches in the ERISA plan accounts serviced by Alight Solutions, LLC, a third-party administrator.
  - For plan sponsors, this case reinforces the DOL's broad subpoena authority in connection with plan-related requests, even if such requests are made to an independent third-party service provider. Plan sponsors may want to discuss these issues with their service providers and review contracts to determine how response to subpoenas would be handled under the agreement.

# Cybersecurity and Fraud Prevention

- Fiduciary Litigation Resulting from Cyber-Related Fraud
  - Cyber attacks of plan providers
    - *Sherwood v. Horizon Actuarial Services, LLC, Case No. 1:22 CV 01495 (April 19, 2022); Class action alleging the defendant actuarial firm failed to secure, monitor, and maintain personally identifying information (“PII”).*
    - A criminal cyberattack in November 2021 caused unauthorized disclosure and theft of the class members’ PII.
    - The lawsuit alleges that Horizon had deficient cyber security measures in place, and could have prevented the attack.
  - Trend in litigation alleging that plan fiduciaries have failed to properly secure plan data
    - *Leventhal v. MandMarblestone Group LLC, No. 18-cv-2727, 2019 WL 1953247 (E.D. Pa. 2019)*
    - *Mandli v. American Trust Company, No. 21-cv-18 (W.D.Wis. 2021).*
    - *Disberry v. Emp. Rels. Comm. Of the Colgate-Palmolive Co., No. 22-cv-05778 (S.D.N.Y. 2022).*

# Cybersecurity and Fraud Prevention

- Best Practices - First remember: One comprehensive body of law governing data security does not exist
  - DOL continues to be asked to clarify whether for ERISA plans, ERISA preempts the many differing state law rules on privacy and breach notices See e.g. <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2022-cybersecurity-issues-affecting-health-benefit-plans-gelfand-07-20.pdf>. At this point in time, plan sponsors should consider in establishing policies and procedures that state law privacy and cybersecurity requirements may not be preempted.
- Create cybersecurity policies and procedures that comply with DOL's 2021 guidance and latest applicable guidelines
  - Understand how and where plan data is stored and transmitted
  - Establish data control monitoring plan
- Establish breach response procedures that comply with DOL's 2021 guidance and latest applicable guidelines
  - Identify individuals responsible for monitoring and breach response
- Train employees; periodically test monitoring and data breach procedures and address control weaknesses
- Consider cybersecurity fiduciary insurance; incorporate review of cybersecurity coverage into rfps for service providers
- Continue to assess the legal landscape

# Physical Presence Relief Extended

- Extended to 12/31/22. On 5/13/22, in Notice 2022-27 the IRS extended the temporary relief from the physical presence requirement for tax-qualified plans through 12/31/22 due to pandemic. Relief had been provided several times during the pandemic from the requirement in Treas. Reg. §1.401(a)-21(d)(6)(i) that certain participant elections be witnessed in the physical presence of a plan representative or a notary public—referred to as the “physical presence” requirement.
- New Proposed Regs. Extend Until Final Regs. Issued. On 12/30/22, the IRS released proposed regulations that provide for an alternative to the in-person witnessing of spousal consents and clarify certain rules for the use of electronic elections to also apply to spousal consents. Requesting comments by 3/30/23.
- Substantially Same Requirements. Requirements to use the remote witnessing alternative are substantially the same as those under the Notices issued during COVID.
  - When witnessed by a notary, physical presence satisfied if executed via live audio-video technology that otherwise satisfies the requirements and is consistent with state law requirements applying to notarization.
  - When witnessed by a plan representative, individual must present a valid photo ID during the live audio-video conference, live session must allow for direct interaction between the signer and the plan representative, signer must transmit by fax or mail a legible copy of the signed document the same day it was signed, and the plan representative must acknowledge signature has been witnessed in accordance with rules and transmit the signed document, including acknowledgment, back to the individual. A recording of the audio-video conference must be retained under record retention rules.
- Effective date: May rely on proposed rules now. Becomes effective 6 months after publication of final regulations.

# Physical Presence Relief Extended

- Proposed Regs. Clarify Electronic Election Requirements. The proposed regulations also clarify that the existing rules for electronic participant elections apply to spousal consents, including requiring the following:
  - Electronic medium used is effectively accessible by the person making the election or consent
  - Electronic system being used is reasonably designed to preclude any person other than the appropriate individual from making the participant election or spousal consent
  - Electronic system must provide a reasonable opportunity to review, modify, or rescind the election or consent before it goes into effect
  - Person making the election or spousal consent must receive a written or electronic confirmation of the election or spousal consent within a reasonable time
  - Witnessing must satisfy the physical presence regulations, if applicable
- Effective date: May rely on proposed rules now. Becomes effective 6 months after publication of final regulations.

# DOL Final ESG Regulations

- ESG funds may be added to plan investment line up in compliance with ERISA fiduciary duties – still must be a prudent investment
- ERISA fiduciary does not violate the fiduciary's duty of loyalty solely because the fiduciary takes participants' non-financial preferences into account when constructing a menu of prudent investment options for participant-directed individual account plans
  - This addition responds to commenters' suggestions that if accommodating participants' preferences will lead to greater participation and higher deferral rates, it could lead to greater retirement security
  - Considering whether an investment option aligns with participants' preferences can be relevant to furthering the purposes of the plan



# DOL Final ESG Regulations

- ERISA fiduciary's duty of prudence must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis -- such factors may include the economic effects of climate change and other ESG considerations on an investment
- The special rule under the 2020 rule that required only pecuniary interests could be considered when selecting the QDIA has been removed
- QDIA no different from other investments
- ERISA fiduciary is not prohibited from selecting an investment based on collateral benefits, meaning benefits other than investment returns, when considering investments that equally serve the financial interests of the plan over the appropriate time horizon

# Fiduciary Liability Insurance

- It is not a question of if a breach of fiduciary duty case will be filed, but when
  - Cost of fiduciary liability insurance is on the rise
  - Underwriting process is becoming stricter
- Making claims
  - Lawsuits, IRS audits, DOL investigations, VCP filings, etc.
  - Timely notice to insurance company is a must

# 2023 Qualified Plan Limits

## Significant Increases to Applicable Dollar Limits

<b>Retirement Plan Limits</b>	<b>2022</b>	<b>Trend</b>	<b>2023</b>
Elective deferral limit for 401(k), 403(b), and eligible 457(b) plans	\$20,500	Up	\$22,500
The catch-up contribution limit for those aged 50 or older	\$6,500	Up	\$7,500
Dollar limit on annual benefit under a defined benefit plan	\$245,000	Up	\$265,000
Dollar limit on annual allocations under a defined contribution plan	\$61,000	Up	\$66,000
Annual compensation limit	\$305,000	Up	\$330,000
Annual compensation limit for eligible participants in certain governmental plans that, as of July 1, 1993, allowed for the cost of living adjustments to the annual compensation limit in effect at that time	\$450,000	Up	\$490,000
Threshold for "highly compensated employee" status used in nondiscrimination testing	\$135,000	Up	\$150,000
Threshold for "key employee" status for officers used in performing "top-heavy" testing	\$200,000	Up	\$215,000

<b>Social Security Wage Base</b>	<b>2022</b>	<b>Trend</b>	<b>2023</b>
Social Security Maximum Taxable Earnings	\$147,000	Up	160,200

# **CalPERS Update**

# New CalPERS Limited Duration Regulation

- Generally, retired annuitants who work for a CalPERS employer must be “reinstated.”
  - Reinstatement: Retirement benefits are suspended and membership resumes.
- Exception: Appointment either during emergency to prevent stoppage of public business or because retiree has specialized skills needed in performing work of a “limited duration.”
- New regulation defines “limited duration.”
  - Initial appointment for up to 24 consecutive months.
  - Governing body can extend appointment twice for up to 12 consecutive months each by certifying specified resolution at a public meeting.
  - If another extension is needed, employer may ask CalPERS for exemption for either a 12-month extension or a continuous one if retiree works < 120 hours/year.

# New CalPERS Limited Duration

- Exemption request must include resolution of governing body at public meeting.
- Retiree may not continue to serve beyond 48 months until exemption approved.
- If retiree's post-retirement employment is covered by a CBA that defines "limited duration," that definition will apply up to 60 consecutive months.
- New definition also applies to "temporary upgrade pay."

# 2023 PEPPRA Pensionable Compensation Limits

## CalPERS and CAAP Publish 2023 Limits

Compensation limits under PEPPRA for New Members	2022	Trend	2023
New Members participating in Social Security	\$134,974	Up	\$146,042
New Members not covered by Social Security	\$161,969	Up	\$175,250

# **PEPRA Litigation Update**



## **California Transportation Agencies: Court Rules DOL Cannot Deny Federal Transit Funds Based on Application of PEPRA to Transit Workers**

- On December 28, 2022, the U.S. District Court for the Eastern District of California ruled that the DOL's determination to deny California transit agencies' requests for federal transportation funds on the basis of the California Public Employees' Pension Reform Act of 2013 ("PEPRA") was arbitrary and capricious
- A preliminary injunction issued in 2021 remains in place, under which DOL cannot refuse to approve applications for federal funds on the basis of PEPRA
- Court's ruling provides option for parties to "fast track" request for appellate review

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# Questions?



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