2024 Employee Benefits Webinar

HansonBridgett

Private Sector Employers

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Presentation Team

Edward Bernard
Partner | San Francisco, CA
415.995.5807
ebernard@hansonbridgett.com

Judy Boyette
Partner | San Francisco, CA
415.995.5115
jboyette@hansonbridgett.com

Mikaela Habib
Senior Counsel | San Francisco, CA
415.995.5875
mhabib@hansonbridgett.com

Soohuen Ham
Associate | San Francisco, CA
415.995.5148
sham@hansonbridgett.com

Liz Masson
Partner | San Francisco, CA
415.995.5106
lmasson@hansonbridgett.com

Andrew Schmidt
Associate I Sacramento, CA
916.491.3054
aschmidt@hansonbridgett.com

Alison Wright
Partner I Walnut Creek, CA
415.995.5083
awright@hansonbridgett.com

Health and Welfare Plan Update

ACA FAQs Part 58 - Guidance on End of COVID-19 National Emergency & Public Health Emergency

- Tri-agencies issued FAQs in March 2023 regarding the end of COVID-19 National Emergency (NE) & Public Health Emergency (PHE) – available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-58
- Non-grandfathered group health plans must continue to cover in-network COVID vaccines without cost sharing
- Plans no longer need to cover COVID tests, including OTC
- Ends temporary extension of deadlines regarding HIPAA special enrollment, COBRA, or claims and appeals – "Outbreak Period" ended on July 10, 2023

COVID-19 Coverage & High Deductible Health Plans (HDHPs)/Health Savings Accounts (HSAs)

- IRS issued Notice 2023-37 to provide guidance on coverage of COVID-related care under HDHPs for purposes of HSA eligibility following end of NE/PHE
  - During NE/PHE, COVID testing and treatment could be covered by HDHPs without a deductible, or with a deductible below the HDHP minimum (i.e. “first-dollar” coverage) under temporary relief provided in Notice 2020-15
- Temporary relief ends this year - HDHPs can cover COVID-19 testing and treatment without a deductible, or with a deductible below the minimum, only through December 31, 2024
- COVID-19 vaccines are “preventive care” and may be covered without a deductible, or with a deductible below the minimum

Proposed Rules on Fixed Indemnity & Specific Disease Coverage "Excepted Benefits" – Tax Issues

- Proposed rules issued on July 12, 2023 clarify tax treatment of "excepted benefits" hospital and other fixed indemnity coverage (e.g., $100/day of hospitalization) and specific disease coverage (e.g., lump sum upon diagnosis)
  - Proposed rules clarify IRS view that these benefits are taxable under IRC § 105(b), if premiums are paid on a pre-tax basis, because benefits are paid irrespective of whether "qualified medical expenses" as defined in IRC § 213(d) are incurred
    - Applies even to amounts used to reimburse medical expenses, because benefits are paid without regard to amount of 213(d) expenses actually incurred, and employee can keep excess

No Surprises Act – Guidance, Proposed & Final IDR Rules

- NSA prohibits "balance billing" for emergency services, air ambulance services & OON provider care at IN facility (unless notice and consent)
  - Payment disputes between plan and out-of-network provider subject to independent dispute resolution (IDR) process
- Prior rules regarding "qualifying payment amount" & fees for IDR challenged in several lawsuits – agencies have appealed
  - ACA FAQs Part 62 issued October 6, 2023 regarding determination of QPA pending appeal, available at: https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-62.pdf
  - Proposed rules issued November 3, 2023 regarding pre-IDR negotiation process
  - Final rules issued December 21, 2023 regarding administrative fees

Gag Clause Prohibition Compliance Attestation – ACA FAQs Part 57 & CMS Guidance

- "Gag clauses" in provider contracts are prohibited under the NSA
  - Contracts cannot include any terms or conditions that would restrict:
    - providing cost or quality-of-care information to referring providers, the plan sponsor, or participants;
    - electronically accessing de-identified claims and encounter information; or
    - sharing this type of information and data with a HIPAA business associate
- Plans must submit annual attestation of compliance with gag clause prohibition by Dec. 31 using online portal at CMS website:
  - See https://www.cms.gov/marketplace/about/oversight/other-insurance-protections/gag-clause-prohibition-compliance-attestation
  - FAQs available at: https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-57.pdf

Affordable Care Act Update

ACA FAQs Part 64 - Guidance on Preventive Services

- Tri-agency FAQs issued on January 22, 2024 on contraceptive preventive services, available at: https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-64.pdf
  - Guidance provides "therapeutic equivalence approach" to address reports of continued barriers and difficulty accessing contraceptive coverage
    - "Therapeutic equivalence" determined based on FDA "Orange Book"
  - Medical management techniques are reasonable if plan covers all FDA-approved contraceptive drugs and drug-led devices in a category without cost sharing, other than those for which there is at least one therapeutic equivalent drug or drug-led device that is covered without cost sharing
  - Plans must provide an easily accessible, transparent and expedient exceptions process, including for coverage of medically-necessary therapeutic alternative

HHS Drops Appeal in *HIV & Hepatitis Policy Institute v. HHS* regarding Drug Coupons & Cost Sharing

- Case challenged 2021 regulation that permitted, but did not require, plans to count financial assistance patients receive from drug manufacturers towards annual limits on cost sharing
  - Example: Coupon from drug manufacturer that directs pharmacy to bill patient's copayment amount to drug company
- District court's ruling leaves in place prior rule that requires plans to count drug manufacturers' assistance towards annual limits on cost sharing
- Agencies intend to issue rulemaking on whether financial assistance provided by drug manufacturers counts as "cost sharing" under ACA

2024 ACA Affordability Threshold

- Under the Affordable Care Act ("ACA"), Applicable Large Employers ("ALEs"), (generally those with 50 or more full-time employees or FTEs), may be subject to penalties for failing to offer at least 95% of their full-time employees or FTEs minimum essential coverage, or if the coverage does not provide "minimum value" or is not "affordable" within the meaning of the ACA
- If the employee's "required contribution" (i.e., share of the premium cost) for the lowest-cost self-only employee coverage from the prior year is equal to or under the affordability percentage of the employee's household income, then the coverage is "affordable"
- Rev. Proc. 2023-29 – Lowered the "affordable" threshold for 2024 to 8.39%, down from 9.12%

Braidwood Management v. Becerra

- ACA generally requires non-grandfathered group health plans to cover preventive care that falls into one of four categories without cost sharing. The HHS is responsible for determining what qualifies as "preventive care"
  - US Preventive Services Task Force (USPSTF)
    - Independent body of volunteers that provides recommendations on evidence-based items or services that have a rating of "A" or "B"
  - Advisory Committee on Immunization Practices (ACIP) and Health Resources and Services Administration (HRSA)
    - Created by HHS, and advise on immunizations and preventive care/screenings for infants, children and adolescents and additional preventive care services for women that don't fall under items or services that have a rating of "A" or "B"

Braidwood Management v. Becerra

- In *Braidwood Management, Inc. v. Becerra,* 627 F. Supp. 3d 624 (N.W. Tex. 2022) individuals and employers sued the joint agencies, claiming that requiring coverage of PrEP drugs, the HPV vaccine, contraceptive services, and screening and behavioral health counseling as preventive care violated their religious rights under the U.S. Constitution and the Religious Freedom and Restoration Act (RFRA)
- District court ruled that delegation of the USPSTF violates the Appointments Clause in the U.S. Constitution because HHS cannot direct USPSTF as an independent entity to give a specific preventive service an "A" or "B" rating.
- Any ratings of "A" or "B" given by USPSTF under the ACA mandate requiring group health plans to cover items or services (including PrEP drugs) as preventive care violated the U.S. Constitution
- As a result of the decision, the HHS, DOL and IRS issued a set of FAQs

Braidwood Management v. Becerra

- Agencies appealed, and the 5th Circuit Court of Appeals stayed (put on hold) enforcement of the district court's decision during the appeal process
- The 5th Circuit court of Appeals' order requires the USPSTF preventive health services recommendations and the corresponding coverage mandate to remain in effect while the appellate court decides the case
- Not all preventive services are impacted by this litigation
  - USPSTF recommendations before March 23, 2010;
  - ACIP immunization recommendations (including the COVID-19 vaccine); and
  - HRSA guidelines for women's and children's preventive services (including contraceptives)

ACA FAQs Part 60

- No Surprises Act – Generally prohibits balance billing and limit cost sharing for emergency services, certain non-emergency services provided by out of network providers in an in-network facility, and air ambulance services.
- ACA- Provides limits for annual cost-sharing (the maximum out of pocket limit, or MOOP limit) on in-network essential benefits offered under non-grandfathered group health plans
  - The MOOP limit does NOT include amounts for premiums, balance billing amounts for non-network providers, or spending for non-covered services
- Transparency in Coverage Act - Requires price comparison information to be made available to participants. Includes an Advanced Explanation of Benefits (AEOB) requirement, but enforcement of this requirement has been deferred

ACA FAQs Part 60

- Clarifies that cost sharing for services by a "participating provider" is "in-network cost-sharing" for the MOOP Limit, and cost sharing for services by a "non-participating provider" is "out-of-network" cost sharing for the MOOP Limit
- Clarifies that a plan cannot treat a provider, facility, or provider of air ambulance services with which it has a contractual relationship as "out-of-network" for purposes of the MOOP Limit, but also treat that same provider as a "participating" provider under the NSA
- Clarifies that "facility fees" are considered "items and services" under the TiC requirements and must be included in the price comparison tool. Once AEOB requirement takes effect, the AEOB will have to include facility fees
- FAQs available at: ACA FAQs Part 60

Tri-Agency Proposed MHPAEA Regulations

- MH/SUD NQTL must meet three-part test:
  - No more restrictive than *predominant* NQTL applicable to *substantially all* M/S benefits in same classification
    - *Predominant*: most common or frequent variation – i.e., applies to the highest portion of M/S benefits within classification (based on expected plan payments)
    - *Substantially all*: applies to at least *2/3* M/S benefits (based on dollar amount of plan payments in a plan year) in a classification; if not, can't apply NQTL to any MH/SUD benefits in same classification
    - Exceptions: NQTLs that impartially apply independent medical or clinical standards or apply standards re fraud, waste, and abuse that meet specific requirements
  - Design and application:
    - Plans can't impose NQTL on MH/SUD benefits, unless (as written and in operation) the processes, strategies, evidentiary standards, or other factors used in *designing and applying* it are comparable to and applied no more stringently than those for M/S benefits in same classification
    - Plans can't rely on any factor or evidentiary standard, if the information, evidence, sources, or standards on which it is based discriminate (biased or not objective) against MH/SUD benefits versus M/S benefits

Tri-Agency Proposed MHPAEA Regulations

- Relevant data evaluation:
  - When designing and applying an NQTL, plan must collect and evaluate relevant data in a manner reasonably designed to assess its impact on access to MH/SUD and M/S benefits, and consider that impact in analyzing whether it meets the other NQTL requirements
  - Tri-agencies permitted to specify type, form, and manner for data collection/evaluation in future guidance
  - Relevant data includes:
    - Number/percentage of relevant claims denials and any other data relevant to the NQTL required by state law or private accreditation standards
    - Relevant data for NQTLs related to network composition, including in-network/out-of-network utilization rates, network adequacy metrics, and provider reimbursement rates
  - To extent relevant data show material differences in access to MH/SUD benefits, the differences would be a *strong indicator* of noncompliance with the NQTL rule
  - Plan must:
    - Take reasonable action to address material differences to ensure compliance; and
    - Document in comparative analyses any such action taken

Tri-Agency Proposed MHPAEA Regulations

  - Special rule re network composition: When designing and applying NQTLs re network composition, a plan fails to meet the NQTL rule in operation, if the relevant data show material differences in access to in-network MH/SUD v. M/S benefits in a classification

- Financial requirements and treatment limitations that apply only to MH/SUD benefits and not to any M/S, benefits in the same classification prohibited
- If plan provides any benefits for a MH/SUD condition in any classification, benefits for that condition must be provided in every classification in which M/S benefits are provided
  - Plan meets this requirement only if it provides *meaningful benefits* for treatment of the MH/SUD condition in each classification
- If final DOL/HHS determination of NQTL noncompliance, DOL/HHS may direct plan not to impose NQTL, until it demonstrates compliance/takes appropriate remedial action
- The proposed rules, applicable on 1st day of 1st plan year beginning on or after 1/1/25, also:
  - Clarify that comparative analyses are plan documents subject to disclosure under ERISA
  - Contain further detail on NQTL comparative analysis contents and timing for response to agency request for same

Health Plan Litigation

Wit v. United Behavioral Health, 79 F.4th 1068 (9th Cir. 2023) - Ninth Circuit Changes Prior Ruling Again

- Third Ninth Circuit opinion in long-running class action involving challenges to medical necessity guidelines applied by UBH for mental health care
  - District court ruled in plaintiffs' favor and ordered "reprocessing" of over 60,000 prior claims
  - Ninth Circuit reversed in March 2022 and issued second opinion in January 2023, holding claim "reprocessing" is not an available remedy under ERISA
- August 22, 2023 opinion vacated and replaced January 2023 opinion
  - Reprocessing as a remedy may be available in some ERISA benefit claim cases
  - Remanded to District Court to answer threshold question of whether exhaustion of administrative remedies is required for fiduciary breach claims involving benefits

S. Coast Specialty Surgery Ctr., Inc. v. Blue Cross of Cal., 90 F.4th 953 (9th Cir. 2024) – Assignment of Benefits under Group Health Plan

- Out-of-network provider sued insurer/claims administrator for failure to reimburse costs for patients covered by ERISA health plans
- District court dismissed for lack of standing – provider is not a participant, beneficiary or fiduciary and so cannot bring suit under ERISA
- Ninth Circuit reversed on basis of valid "assignment of benefits" by participants which necessarily included assignment of right to sue for unpaid benefits under ERISA

Notice 2023-70
Adjusted PCORI Fee for 2024

If the Plan Year End Date is:	Adjusted PCORI Fee Per Participant
On or after 10/1/2022 and on or before 9/30/2023	$3.00
On or after 10/1/2023 and on or before 9/30/2024	$3.22

2024 Health & Welfare Plan Limits

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

Health Flexible Spending Accounts	2023	Trend	2024
Maximum salary deferral limit	$3,050	Up	$3,200
Health FSA Carryover limit	$610	Up	$640

Dependent Care Flexible Spending Accounts – Annual Contribution Limits	2023	Trend	2024
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	2023	Trend	2024
Maximum amount made newly available for the plan year for Excepted Benefit Health Reimbursement Arrangements (EBHRA)	$1,950	Up	$2,100
Qualified mass transportation fringe benefit & Qualified commuter parking (monthly limit)	$300	Up	$315

2024 Health & Welfare Plan Limits

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

HDHP – Maximum annual out-of-pocket limit (excluding premiums)	2023	Trend	2024
Self-only coverage	$7,500	Up	$8,050
Family coverage	$15,000	Up	$16,100

HDHP – Minimum annual deductible	2023	Trend	2024
Self-only coverage	$1,500	Up	$1,600
Family coverage	$3,000	Up	$3,200

HSA – Annual contribution limit	2023	Trend	2024
Self-only coverage	$3,850	Up	$4,150
Family coverage	$7,750	Up	$8,300
Catch-up contributions (age 55 or older by the end of the year)	$1,000	Same	$1,000

Qualified Plan Update

SECURE 2.0 “Grab Bag” Notice 2024-2

Auto-Enrollment for New 401(k) & 403(b) Plans

- 401(k) & 403(b) plans that were “established” before December 29, 2022 are exempt from auto-enrolling participants

- In cases of a plan merger, the exemption may still apply if the continuing plan was exempt from auto-enrollment. One caveat: multiple employer plan

De Minimis Incentives for Participation

- A de minimis financial incentive is limited to $250 in value. May be provided in contingent installments

- Only available to participants who have not already elected to defer

Terminally Ill Individual Distributions

- Terminally Ill: certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months (seven years) or less as of the date of the certification
- Distribution is includible in gross income but not subject to the 10% additional tax imposed on distributions made to participants under age 59½
- Optional provision for all qualified plans and 403(b) plans
- Participant may treat an otherwise permissible in-service distribution as a terminally ill individual distribution
- Participant self-certification not permitted

Cash Balance Plan Anti-Backloading Relief

- Cash balance plans that provide for pay credits to participants that increase with a participant's age or service and provide for a variable interest crediting rate no longer risk violating the accrual requirements of Code Section 411(b)(1) if that interest crediting rate falls below a certain threshold
- To prevent a violation prior to the enactment of SECURE 2.0, this type of cash balance plan had to provide for a fixed annual minimum interest crediting rate
- With the enactment of SECURE 2.0, the fixed annual minimum interest crediting rate is no longer required
- Plan can be amended prospectively to eliminate the fixed minimum interest rate or make other specified changes without violating the anti-cutback rule

Safe Harbor – Correcting Missed Deferrals

- SECURE 2.0 Act § 350 codified the safe harbor for correcting missed deferrals set to expire 12/31/2023 that occur in implementing auto-enrollment/escalation features or failing to give improperly excluded employees the chance to make an affirmative election
- No missed deferral restoration required if: (1) corrected within 9½ months after the end of the plan year in which error first occurred (unless employee notifies earlier); (2) missed matching contributions are restored; and (3) notice to employee within 45 days after correct deferrals begin
- The notice provides:
  - The permanent relief applies for both active and terminated employees;
  - Corrective matching contributions (adjusted for earnings) must be made within a reasonable period (generally six months) after month correct deferrals begin;
  - A plan sponsor may correct an implementation error under the permanent safe harbor by following the safe harbor method described in Rev. Proc. 2021-30 that it makes permanent

Plan Amendment Deadlines

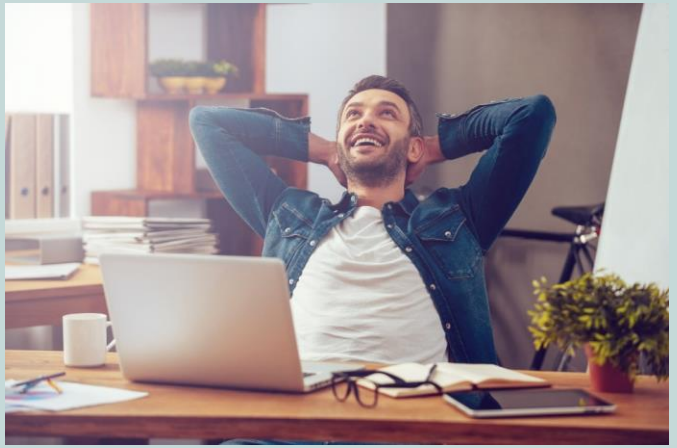
- SECURE 2.0 Act § 501
  - SECURE 2.0 Act Amendment Deadline
    - General Rule: On or before the last day of the first plan year beginning on or after January 1, 2025
    - Collectively Bargained Plan: On or before the last day of the first plan year beginning on or after January 1, 2027
  - SECURE Act and CARES Act amendment deadlines conformed to SECURE 2.0 Act amendment deadline
- The notice extends the amendment deadlines for all the Acts to:
  - December 31, 2026 for non-collectively bargained plans, and
  - December 31, 2028 for collectively bargained plans

Roth Treatment for Employer Contributions

- SECURE 2.0 Act § 604 currently permits applicable 401(a) and 403(b) plans to allow employees to designate employer matching or nonelective contributions as Roth contributions.
- The notice provides designated Roth employer contributions:
  - Are subject to rules similar to designated Roth elective deferrals: irrevocable election by date allocated, income inclusion, separate accounting, and elections/changes at least once annually
  - Includable in income in year allocated to the individual account even if deducted for the prior year
  - Apply only to 100% vested contributions, but won't cause nondiscrimination test failure
  - Aren't wages for federal income or FICA tax withholding
  - Must be reported on Form 1099-R for the year in which allocated in boxes 1 and 2a, and code G entered in Box 7

Transition Relief for Mandatory Roth Catch-Up Contributions for Higher Income Participants

- We have been waiting and will continue to wait for guidance from the IRS on a number of SECURE 2.0 changes---the question is, what type of guidance will it be?



Transition Relief for Mandatory Roth Catch-Up Contributions for Higher Income Participants

- On August 25, 2023, the IRS issued Notice 2023-62, that extended from 2024 until 2026 the new requirement under SECURE 2.0 that any catch-up contributions made by participants in 401(k), 403(b), and 457(b) governmental plans whose prior-year Social Security wages exceeded $145,000 be designated as Roth contributions
- The IRS also made clear that eligible higher income participants can continue to make catch-up contributions for the transition period, and that plans were not required to add the Roth feature during this period if it was not already offered under a plan

IRS Guidance on EPCRS Self-Correction Expansion

- In late May of 2023, the IRS provided important interim guidance in Notice 2023-43 on the permitted use of the expanded self-correction for errors provided under SECURE 2.0. Guidance was immediately effective and can be used until a new version of EPCRS is issued
- The new process for eligible inadvertent failures, including plan loan errors, is available (unless specifically excepted) as long as (1) the failure isn't identified by the IRS prior to action demonstrating commitment to implement the self-correction; (2) the self-correction is made within a reasonable time after the failure is identified; (3) the failure is not egregious; and (4) the correction satisfies the current self-correction rules under EPCRS

IRS Guidance on EPCRS Self-Correction Expansion

- Advice is provided in helpful Q&A format
- Provides some helpful clarifications—for example:
  - What conditions apply to the new self-correction? Plan sponsor must have established practices and procedures and follow existing EPCRS general rules
  - What is correction within a "reasonable period"? Safe harbor for corrections made by the last day of the 18th month following identification, except for employer eligibility failures where the period is 6 months following identification
  - What corrections are still not eligible for the new process? Several failures, including those where correction is proposed to be accomplished by a retroactive amendment reducing benefits

DOL Requests Public Feedback

- On August 11, 2023, DOL issued a Request for Information ("RFI") requesting stakeholder feedback regarding certain regulatory issues related to SECURE 2.0
  - Pooled Employer Plans ("PEPs"); Pension-linked Emergency Savings Accounts ("PLESAs"); performance benchmarks for asset allocation funds; fee disclosure improvements; eliminating unnecessary plan requirements related to unenrolled participants; paper statements; consolidated notices; lump sum disclosures; annual funding notices
- On January 19, 2024, DOL issued a RFI requesting stakeholder feedback regarding the effectiveness of existing reporting and disclosure requirements for retirement plans as required under ERISA and the Internal Revenue Code
  - Number and frequency of disclosures to workers; accessibility and understandability of disclosures; how plans obtain and update worker contact information; plans' experiences completing and filing reports and obtaining assistance from government agencies

Technical Corrections Legislation

- A bipartisan draft technical corrections bill was released at the end of 2023 aimed to fix errors contained in SECURE 2.0
  - Divided into three sections: technical amendments; clerical amendments (fix minor word errors); other clarifications
  - Proposed fixes include items on:
    - Catch-up contributions
    - RMDs
    - Roth contributions to SEP and SIMPLE IRA plans
    - Small employer start-up credit
    - Automatic enrollment mandate

Proposed Regulations on Automatic Portability

- On January 18, 2024, DOL issued proposed regulations on auto-portability transactions under SECURE 2.0
  - The proposed regulations would implement Section 120 of SECURE 2.0, which allows an automatic portability provider to receive a fee in connection with executing an automatic portability transaction for certain distributions into Safe Harbor IRAs, through an added exemption to IRC section 4975
  - The proposed regulations outline requirements that the auto-portability provider must satisfy for such transactions to be covered under the exemption including:
    - Acknowledgment of fiduciary status, data safeguarding, required disclosures *(e.g.*, to DOL, plan administrator, impacted individuals, accessibility of notices including standards for culturally and linguistically appropriate notices), searches for transfer-in plans, timeliness of auto-portability transactions, written policies and procedures that apply to auto-portability transactions, and annual audit and correction procedures

Notice 2023-54 SECURE Act RMD Relief

- Notice 2023-54 provides relief for specified SECURE Act and SECURE 2.0 Act RMD changes
  - SECURE 2.0 Act increased the RBD age for RMDs from age 72 to: (1) age 73 for participants who reach age 72 after 2022 and age 73 before 2033; and (2) age 75 for participants who reach age 74 after 2032
    - First participants affected reach age 73 in 2024, delaying first RMD from 4/1/2024 to 4/1/2025; some 2023 distributions mischaracterized as rollover ineligible under old rules
  - SECURE Act defined contribution plan post-death RMD rule change: plan must generally distribute benefits to DBs who are not EDBs by 10th anniversary of participant's death (10-year rule)
    - Many thought no distributions required until the end of period, but 2022 IRS proposed regulations propose distributions to participants who die after RBD must also comply with existing at-least-as-rapidly rule
    - IRS Notice 2022-53 provided plan wouldn't violate IRC § 401(a)(9), and the IRC § 4974 excise tax wouldn't apply, merely because it failed to make a "specified RMD" in 2021 and 2022

Notice 2023-54 SECURE Act RMD Relief

- The new notice:
  - Further delays the final regulations' effective date until at least 2024;
  - Provides a plan won't violate rollover rules by failing to treat distributions from 1/1 to 7/31/2023 to participants born in 1951 as rollover eligible;
  - Extends the 60-day deadline for indirect rollovers of 2023 distributions from 1/1 to 7/31/2023 to participants born in 1951 until 9/30/2023; and
  - Extends the relief for 2021 and 2022 "specified RMDs" to 2023 "specified RMDs"
    - "Specified RMD" = a distribution that would have been required under the proposed regulations to:
      - » A participant's DB, if the participant died in 2020, 2021, or 2022 on or after their RBD; or
      - » An EDB's DB if the EDB died in 2020, 2021, or 2022, and the EDB was using the life expectancy rule.

DOL PLESA FAQs

- SECURE 2.0 Act authorizes plans to include a new "pension-linked emergency savings account" (PLESA) feature for plan years beginning after 12/31/2023
  - NHCEs may make up to $2,500 (indexed) in Roth contributions and withdraw monthly without penalty
  - All ERISA protections apply whether employee participates in retirement plan
- FAQs:
  - All NHCEs eligible to participate in plan must be eligible to participate
  - Auto-enrollment at 3% or less, if advance written notice and opt out and withdraw at no charge
  - No minimum contribution/account balance, but whole dollar, at least 1%, or whole-percentage okay
  - Contributions count towards elective deferral limit
  - If plan has match, PLESA contributions must be matched at the same rate to plan
  - Contribution limit based on contributions, not earnings; may limit total account balance to $2,500, but no additional annual contribution limit

DOL PLESA FAQs

- Employer must remit payroll deductions as of earliest date reasonably segregable from its general assets, but no later than 15th day of the month following
- Plans must separately account PLESA contributions/earnings and separately record-keep each PLESA
- Participant can make a withdrawal without certifying emergency
- No fee for first 4 withdrawals per plan year, but reasonable fee for subsequent withdrawals okay
- Must be invested in cash, interest-bearing account, or other state/federally regulated financial institution product designed to preserve principal and offer reasonable rate of return with liquidity
- Participant notice (DOL/IRS model?) at least 30, but no more than 90, days before 1st contribution (at least annually thereafter); may combine with other ERISA-required notices, but PBS needn't address
- Form 5500: DOL working on adding PLESA feature code and instructions for aggregating and reporting PLESA information on relevant line items

IRS Notice 2024-22 PLESA Anti-Abuse Rules

- SECURE 2.0 Act directs the Treasury Department to issue guidance re *reasonable* discretionary anti-abuse procedures for PLESA matching contributions under IRC § 402A(e)(12)
- Notice 2024-22 provides that the following procedures are unreasonable and prohibited:
  - Forfeiture of matching contributions already made on account of PLESA contributions due to participant PLESA withdrawal;
  - Suspension of participant contributions to PLESA on account of PLESA withdrawal; and
  - Suspension of matching contributions on participant contributions to underlying DC plan

Pension Plan Lump Sum Distributions

- IRC § 417(e): lump sums and certain other optional DB plan distribution forms must satisfy minimum present value requirements that limit the interest/mortality discounts used
- On January 19, the IRS issued final regulations (T.D. 9987) updating the rules governing those requirements
- Preretirement mortality discount may be applied only to employer, not employee, provided accrued benefits
  - May choose not to apply preretirement mortality discount to entire benefit without violating requirement QJSA be the most valuable benefit
- Minimum present value requirements apply to Social Security level income options, but SSLIOs may be bifurcated into temporary and remaining (life) annuity portions, if:
  - The value of life annuity portion is not less than the accrued benefit, minus the temporary portion (determined using the IRC § 417(e) applicable mortality table and interest rate), both expressed in the normal form *payable at NRA* (or current age, if later); and
  - The value of the life annuity portion is not less than the accrued benefit, minus the temporary portion (determined using the IRC § 417(e) applicable mortality table and interest rate), both expressed in the normal form, *but payable at the current age*

Pension Plan Lump Sum Distributions

- Plan amendment to change lookback months or stability periods for applicable mortality table and interest rate for any purpose not a prohibited cutback, if benefit based on greater of old or new factors for one-year period
- The minimum present value changes apply to distributions commencing on or after 10/1/2024; the anti-cutback relief applies to plan amendments adopted on or after 1/19/2024

Long-Term, Part-Time Employees Proposed Regulations

- A long-term, part-time ("LTPT") employee must be at least 21 years old and have at least 500 hours of service in 2 (3 for pre-2025 years) consecutive years
- Eligibility conditions other than age or service are permitted
- Other methods of crediting service: elapsed time or equivalency
- Determination of 12-month periods based on two methods
- Vesting before January 1, 2021 is disregarded
- "Former long-term, part-time employee" is an employee who was a LTPT employee but has at least 1,000 hours of service in a given year

Long-Term, Part-Time Employees Proposed Regulations

- No matching or non-elective contribution is required
- May be excluded from nondiscrimination and coverage testing and top-heavy testing
- Catch-up and Roth contributions permitted
- Small plan exemption from annual audit requirement may still apply with LTPT employees

Proposed Fiduciary Rule

- Purpose of the proposed rule is to define when rendering investment advice to a retirement investor is a fiduciary act
- Retirement investor: plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, and IRA fiduciary
- Investment Advice Fiduciary: (A) provides investment advice or makes an investment recommendation to a retirement investor; (B) the advice or recommendation is provided for a fee or other compensation, direct or indirect; **and** (C) the recommendation is made in one of three situations
  - (1) discretionary authority; (2) make investment recommendations as a regular part of their business; or (3) represents or acknowledges they are acting as a fiduciary

Proposed Fiduciary Rule

- Rollover: recommendation that includes recommendations
  - As to how the plan account should be invested after the plan account is rolled over from a plan or IRA
  - As to rolling over assets from an employee benefit plan or IRA, recommendations as to whether to engage in the rollover transaction, and the amount, form, and destination of the rollover
- Targeting recordkeepers, but also wealth advisors and insurance (annuity) salespersons

Is IBM Really Moving to a DB Plan?

- IBM has a particular set of circumstances that may have led to the decision to cancel the matching contribution in the 401(k) plan and the 1% non-elective contribution, give all employees a 1% raise and provide a 5% pay credit to a defined benefit (cash balance) plan
  - Pay credits accumulate interest credits at 6% for the first three years
  - The greater of the 10-year treasury rate or 3% for the next seven years
  - The 10-year treasury rate thereafter
- Reports are that IBM has a frozen cash balance plan that, due to high interest rates, is likely fully funded or overfunded. The value locked up in the frozen cash balance plan may be used to offset the cost of the new benefits

Online Security Tips for Protecting Retirement Benefits

- In 2023, DOL issued tips on how participants can protect their online retirement savings accounts:
  - Register, set up, and routinely monitor online account
  - Use sophisticated passwords & update regularly
  - Use multi-factor authentication
  - Update contact information, provide multiple communication options, close old accounts
  - Be wary of free Wi-Fi
  - Beware of phishing attacks
  - Install antivirus software and keep software current
  - If participant is a victim of a cybersecurity attack, participant should contact the FBI or DHS

2024 Qualified Plan Limits

Retirement Plan Limits	2023	Trend	2024
Elective deferral limit for 401(k), 403(b), and eligible 457(b) plans	$22,500	Up	$23,000
The catch-up contribution limit for those aged 50 or older	$7,500	Same	$7,500
Dollar limit on annual benefit under a defined benefit plan	$265,000	Up	$275,000
Dollar limit on annual allocations under a defined contribution plan	$66,000	Up	$69,000
Annual compensation limit	$330,000	Up	$345,000
Threshold for “highly compensated employee” status used in nondiscrimination testing	$150,000	Up	$155,000
Threshold for “key employee” status for officers used in performing “top-heavy” testing	$215,000	Up	$220,000

Social Security Wage Base	2023	Trend	2024
Social Security Maximum Taxable Earnings	$160,200	Up	$168,600

Qualified Plan Litigation

The New 401(k) Plan Litigation Risk: Use of Forfeiture Accounts

- Four new lawsuits challenge the well-established use of plan forfeitures to offset employer contributions
- Three causes of action
  - Breach of fiduciary duty
  - Violation of ERISA anti-inurement provision
  - Prohibited transaction/self dealing
- Employers will likely file motions to dismiss arguing in part that the IRS and DOL have issued guidance that using forfeitures to offset employer contributions is permissible

Bugielski v. AT&T Services, Inc. 76 F.4th 894 (9th Cir. 2023)

- The Ninth Circuit held that entering into or amending a services agreement is a prohibited transaction, unless an exemption is available
  - The contract is reasonable (disclosure of direct and indirect compensation expected to be received under the contract)
  - The services are necessary
  - No more than reasonable compensation is paid (fiduciaries to consider the direct and indirect compensation expected to be received)
- The Ninth Circuit decision joins with the Eighth Circuit and breaks with precedent set in the Third, Seventh and Tenth Circuits, and more recently the Second Circuit
- Plan fiduciaries should understand all direct and indirect fees to be received by the service provider and document their process

Target Date Fund Litigation

- 11 substantially similar lawsuits filed against plan fiduciaries offering BlackRock target date funds
  - Breach of duties of prudence, loyalty, and failure to follow plan documents
  - Failure to monitor
  - Knowing breach of trust (applicable to defendants who are found not to be fiduciaries)
- Genworth case survived motion to dismiss; plaintiffs added two additional facts to complaint (i) certain committee minutes did not include references to the monitoring of the Blackrock TDFs and (ii) the investment policy statement stated that TDFs should be compared to the S&P Target Date Fund Indices, which provided a meaningful benchmark for plaintiffs

Arbitration Provisions in ERISA Plans

- The Ninth Circuit has held that a mandatory arbitration provision in an ERISA plan is enforceable, while the Third, Seventh and Tenth Circuits have held arbitration provision unenforceable with respect to claims for plan-wide relief
- In 2023, the Supreme Court declined to hear appeals on the issue, while the DOL has said it will "vigorously prosecute violations at workplaces where workers are bound by mandatory arbitration"
- Arbitration provisions, including a class action waiver, are currently available only in individually designed plans and certain conditions should be met, for example, plan participants should receive notice of the provision in an updated Summary Plan Description

Employee Retention Credits

COVID-Related Tax Credits Update

IRS Finalizes Rules to Collect Taxes on Erroneously Claimed COVID-Related Tax Credits

- In late July 2023, the IRS issued final employment tax regulations that treat erroneously claimed COVID-related employment tax credits as underpayments of federal employment tax and allow the IRS to pursue collection under those procedures
- This process will apply to COVID-related paid sick and family leave credits and to credits claimed for employee retention tax credits ("ERCs")
- There were several ways the credits could have been claimed, which may affect the period of time for the IRS to issue assessments for the underpayment of employment taxes (which were issued as refunds or credits)

IRS Places Moratorium on Processing ERC Claims

- On September 14, 2023, the IRS announced a moratorium at least through the end of 2023 on processing new claims for ERCs to protect businesses from predatory tactics and to protect the tax system
- Previously filed claims are being processed but individually reviewed for compliance in an attempt to prevent distribution of fraudulently claimed credits
- The IRS announced that it was intensifying audit work in this area and that hundreds of criminal cases are being worked

IRS Implements Withdrawal Process for ERC Claims

- On October 19, 2023, the IRS announced a special process for withdrawing pending ERC claims where employers were concerned about the accuracy of the claim
- This process would apply to those employers who had filed a claim on an adjusted employment tax return but have not yet received the refund of employment taxes, and who wish to withdraw the entire claim. This would avoid the possibility of required future repayment with interest and penalties
- More than $167M withdrawn through mid-January 2024

IRS Implements ERC Voluntary Disclosure Program—Ends March 22, 2024

- The IRS has also implemented a special Voluntary Disclosure Program under which employers that received payments of ERCs that are erroneous can repay only 80% of the amount received, in recognition that the ERC promoters often took a 20% share of the ERC received
- The program requires voluntary payment of the ERCs received minus 20%, cooperation with requests from the IRS for more information, and signing a closing agreement with the IRS
- Advantages include only having to repay 80%, no interest or penalties being charged, no amendments of income tax returns to reduce wage expense, and no audits of ERCs for the periods covered

Cybersecurity Update

Cybersecurity and Fraud

Cost of Data Breaches

- New IBM survey on the cost of data breaches indicates that the global average cost of a data breach in 2023 was $4.45M, a 15% increase over 3 years—but the average cost of a breach in the U.S. was $9.48M
- The survey also indicates that 51% of organizations are planning to increase security investments as a result of a breach, including incident response planning and testing, employee training, and threat detection and response tools

DOL Guidance on Cybersecurity Risks Associated with Employee Benefit Plans

- In addition to massive plan assets, employee benefit plans are also vulnerable to cybersecurity attacks involving personal data of participants
- While the DOL issued its guidance in early 2023 in the form of "Best Practices" (https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf), it began almost immediately to audit ERISA-covered plans to determine the level of compliance in this area

DOL Guidance on Cybersecurity Risks Associated with Employee Benefit Plans

- DOL guidance confirms " responsible plan fiduciaries have an obligation to ensure proper mitigation of cybersecurity risks"
- Growing trend of breach of fiduciary duty litigation against plans sponsors for data breach issues
- The DOL's emphasis in audits seems to be examining the processes of the record-keepers and other service providers responsible for securing plan-related IT systems and data, while also reviewing whether the fiduciary is undertaking a prudent process in hiring and monitoring these plan providers

Law Governing Data Breaches

- Must comply with all relevant applicable law---federal and state. One comprehensive body of law governing data security does not exist
- California State Law:
  - Data Security Breach Notification Law
  - California Consumer Privacy Act of 2018
  - California Privacy Rights Act of 2020
  - Enforcement
    - California Protection Agency (created by CPRA)
    - California Attorney General --inquiry letters sent in July 2023 on CCPA compliance

Thank you!