2024 Employee Benefits Webinar

HansonBridgett

Public Sector Employers

FEBRUARY 6, 2024

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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 CMS determination of NQTL noncompliance, CMS 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:
  - Implement CAA 2023 sunset of MHPAEA opt out for self-funded non-Federal government plans
  - Contain further detail on NQTL comparative analysis contents and timing for response to agency request for same

9th Circuit Revives Suit By Airlines Challenging SF's Health Insurance Mandate

- In August 2023, the 9th Circuit Court of Appeals reversed the decision of the District Court that had upheld SF's ability to enact an ordinance at the height of the COVID pandemic that required airlines using the airport to provide a certain level of health benefits for their employees
- The suit, brought by an association representing most of the major airlines, challenged the ordinance as being preempted by ERISA and other laws governing airlines. In order to be preempted under Federal law, the ordinance must have been adopted by SF as a government regulator and not as a private market participant. Since the ordinance imposes monetary penalties, the 9th Circuit found SF was acting as a regulator in adopting the ordinance

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 includible in gross income but is 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, including governmental 457(b) plans
- Participant may treat a permissible in-service distribution as a terminally ill individual distribution
- Participant self-certification not permitted

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

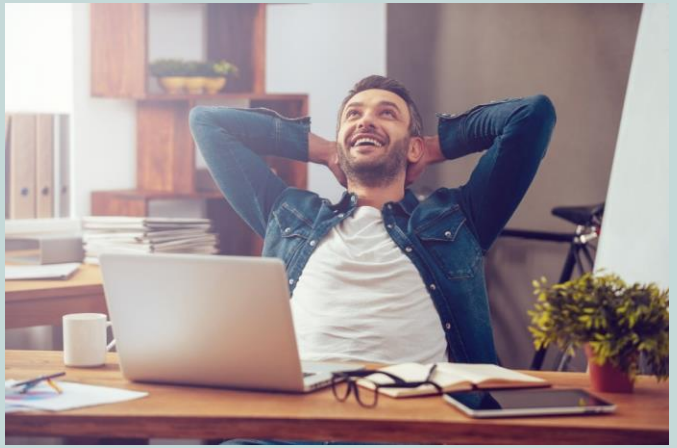
- SECURE 2.0 Act § 501
  - SECURE 2.0 Act Amendment Deadline: On or before the last day of the first plan year beginning on or after January 1, 2027
  - SECURE Act and CARES Act amendment deadlines conformed to SECURE 2.0 Act amendment deadline
- The notice extends the amendment deadlines for all the Acts to December 31, 2029

Roth Treatment for Employer Contributions

- SECURE 2.0 Act § 604 currently permits applicable 401(a), 403(b) and eligible governmental 457(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
  - Apply only to 100% vested contributions
  - Aren't wages for federal income tax withholding
  - Made to a 401(a) or 403(b) plan aren't wages or FICA tax
  - Made to a governmental 457(b) plan are wages for applicable FICA tax under special timing rule
  - 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

Technical Corrections Legislation

- Late 2023: Bipartisan draft technical corrections bill released aimed to fixed 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
    - Automatic enrollment mandate
    - Terminal illness distributions
    - Student loan match

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

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

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
- 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 (ERISA provision)
- 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 (ERISA provision)
- 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 (ERISA provision)
- Participant notice (IRS model?) at least 30, but no more than 90, days before 1st contribution (at least annually thereafter)
- Caveat: IRC § 402A(e), added by SECURE 2.0 Act provides an applicable retirement plan may include a PLESA "established *pursuant to* section 801" of ERISA, but no guidance to date addresses whether this means a governmental plan PLESA must comply with the PLESA provisions included only in ERISA

Long-Term, Part-Time Employees Proposed Regulations

- The preamble indicates that the long-term, part-time employee ("LTPT") rules also apply to governmental 401(k) plans, but the IRS is requesting comments on that issue
- A 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 and equivalency
- Determination of 12-month periods based on two methods

Long-Term, Part-Time Employees Proposed Regulations

- 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
- 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

Retirement Plan Litigation

- *Schupbach v. The Southern California Regional Rail Authority, the Board of Directors of The Southern California Regional Rail Authority and MissionSquare Retirement*
- Based on reasonable inferences from the facts set forth in this Complaint, during the relevant period Defendants failed to have a proper system of review in place to ensure that participants in the Plans were being charged appropriate and reasonable fees (i) for each of the Plans' investment options and (ii), because MissionSquare's compensation was based on a percentage of the fund balances held in the Plan, for administrative services
- Plaintiff understands that the Plan is not subject to ERISA, the fiduciary obligations specified in the California Constitution are virtually identical to the language of ERISA § 404, and obligations enumerated in ERISA, as interpreted by the federal courts, present a paradigm of prudent fiduciary conduct

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
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	$490,000	Up	$505,000
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

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!