2024 Employee Benefits Webinar

HansonBridgett

Mid-Year Fiduciary Update

Private Sector Employers

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Agenda

SECURE Act 2.0 Fiduciary Issues

Update on Fiduciary Breach Litigation

Update on General Fiduciary Issues

Annual Review of Plan Document and Operational Compliance

SECURE Act 2.0 Update

SECURE Act 2.0 – Waiting for Guidance

- The SECURE Act 2.0 made significant changes to the IRS' Employee Plans Guidance Compliance Resolution System (EPCRS), including changes to the rules for self correction of plan errors, and collection of inadvertent overpayments to plan participants and beneficiaries for ERISA-covered pension plans.
- IRS is anticipated to issue an updated version of the EPCRS Revenue Procedure before the end of the year.

Update on Fiduciary Breach Litigation

Excessive Fee Cases Update

Excessive Fee Cases

- In 2022, the Supreme Court provided some guidance on the duty of ERISA plan fiduciaries to continually monitor plan investments in *Hughes v. Northwestern University* (595 U.S. 170 (2022))
- Following *Hughes*, the district courts have attempted to interpret the Supreme Court's guidance, which has created a circuit split on the standards that need to be met for an action to survive summary judgement

Excessive Fee Cases –9th Circuit Update

- *Salesforce* – During our February webinar, we reported that the 9th Circuit had reversed the lower court's grant of defendant's motion for summary judgment and dismissal of the case, allowing the case to go forward, emphasizing the need for fiduciaries to actively manage plan costs
  - Case proceeded through discovery and was scheduled for trial
  - Settled a week before trial was to begin

  (*Miguel et al. v Salesforce.com et al.,* Case No. 3:20-cv-01753, U.S. District Court for the Northern District of California)
- *LinkedIn* – After the Northern District of California found that the plantiffs had adequately stated a claim for breach of the fiduciary duties of prudence and loyalty related to the selection of fund offerings and excessive fees, LinkedIn entered into a settlement agreement for $6.75 million

  (*In Re LinkedIn ERISA Litigation,* Case No. 5:20-cv-05704-EJD, U.S. District Court for the Northern District of California)

Excessive Fee Cases –9th Circuit Update

- *Carpenters of Western Washington Board of Trustees* – 9th circuit court of appeals reversed lower courts dismissal of class action against two multiemployer defined benefit pension plans, Carpenters of Western Washington Board of Trustees and Callan, LLC, finding that plaintiffs had sufficiently stated their claims of breach of fiduciary duty of prudence and failure to monitor investments.
  - Not required to allege absolute losses to retirement accounts to sufficiently show a concrete financial injury. Court of appeals held that it was sufficient that the value of their accounts would be greater today had the defendants not invested in the challenged funds.
  - COVID-19 pandemic was not an independent intervening cause of plaintiffs' injury. 9th circuit accepted plaintiffs' argument that the defendants' action left the plans vulnerable to a negative market event, and the fact that such an event (the pandemic) occurred, is not an independent intervening cause of the injury, but rather a foreseeable consequence.
  - Plaintiffs sufficiently alleged a violation of the duty of prudence by making the challenged investments, despite significant risk factors, given the plans' conservative investment strategy.

  (*Johnson v. Carpenters of Western Washington Board of Trustees*, 2024 WL 3579492, (July 30, 2024)).

Excessive Fee Cases – Loss Causation Circuit Split

- In addition to the circuit split on pleading standards, we also see a circuit split related to which party has the burden of proof for loss causation in excessive fee cases
- *Pizzaro v. Home Depot,* 2024 WL 3633379 (11th Cir. Aug. 2, 2024)
  - Home Depot employees brought suit alleging that Home Depot had failed to prudently manage its 401(k) plan, resulting in excessive fees and subpar returns for participants
  - 11th Circuit Court of Appeals ruled that the employees had the burden of proof to show that the company's conduct had caused them loss and under ERISA, the plaintiff has the burden to prove the loss was caused by the defendant's actions
  - Circuit Split:
    - 1st, 4th, 5th and 8th Circuits have held that once an ERISA plaintiff has proven there was a breach of fiduciary duty and a related loss, the burden of proof of causation shifts to the defendants
    - 6th, 7th, 9th, 10th and 11th Circuits had held that the plaintiff also bears the burden of proof of causation and must show that the defendant's actions caused the loss

Use of Forfeitures

Use of Forfeitures

- Prop. IRS Reg. §1.401-7(b): DC plans may provide forfeitures are used to: 1) pay plan administrative expenses, 2) reduce employer contributions, or 3) both
- *Perez-Cruet v. Qualcomm Incorporated,* 2024 WL 2702207 (S.D. Cal. 2024)
  - Qualcomm used 401(k) plan forfeitures as plan permitted to reduce employer matching contributions instead of to pay plan administrative expenses
  - In May, despite the plan terms allowing this the Court denied Qualcomm's motion to dismiss participant's claims this breached its duties of loyalty, prudence, and monitoring and violated ERISA's prohibited transaction and anti-inurement rules
- *Hutchins v. HP Inc.*, 2024 WL 3049456 (N.D. Cal. 2024)
  - Based on similar facts, participant filed a proposed class action challenging HP's use of 401(k) plan forfeitures solely to reduce employer contributions instead of to pay plan administrative expenses, alleging essentially the same fiduciary breaches and ERISA violations

Use of Forfeitures

- In June, the U.S. District Court for the Northern District of California dismissed plaintiff's proposed class action, concluding HP's practice:
  - Wasn't a breach of fiduciary duty
    - » Broad allegation of fiduciary breach in all cases where forfeitures are used in this manner regardless of context or circumstances was *implausible*
    - » Allegation fiduciaries must always use forfeitures to pay administrative expenses contrary to Congress' and IRS' settled position in proposed regulations
  - Didn't violate ERISA's anti-inurement rule because forfeitures remained part of plan assets used to benefit plan beneficiaries
  - Wasn't a prohibited transaction – using plan assets to fund a benefit an employer might otherwise be required to pay isn't a prohibited transaction
- Similar suits filed against Wells Fargo, Tetra Tech Inc., Honeywell International Inc., Intuit, and Clorox

Bugielski v. AT&T Services, Inc.

Bugielski v. AT&T Services, Inc.

- Former employees brought a class action against AT&T alleging it and its 401(k)-plan investment committee's failure to consider the reasonableness of fees paid to Fidelity made recordkeeping services contract a prohibited transaction
- In September 2021, the U.S. District Court for the Central District of California granted AT&T's motion for summary judgment, concluding it prudently monitored and evaluated the reasonableness of fees paid to Fidelity and didn't engage in a prohibited transaction by contracting with Fidelity as a result
- On August 4, 2023, the Ninth Circuit Court of Appeals largely reversed and remanded to the district court, concluding there were triable issues of fact whether AT&T engaged in a prohibited transaction by contracting with Fidelity for recordkeeping services and breached its duty of prudence

Bugielski v. AT&T Services, Inc.

- Circuit Split of authority: The Ninth Circuit ruling diverges from those of the Third and Seventh Circuits which have held that routine contracts aren't prohibited transactions
- In April, AT&T filed a petition with the U.S. Supreme Court for review

Spence v. American Airlines

Spence v. American Airlines, Inc., et al.

No. 4:23-CV-00552-O, 2024 WL 733640 (N.D. Tex. Feb. 21, 2024) (addressing and denying AA's motion to dismiss);
No. 4:23-CV-00552-O, 2024 WL 3092453 (N.D. Tex. June 20, 2024) (addressing and denying AA's motion for summary judgment)

- 6/2023: An American Airlines' 401(k) plan participant filed a class action complaint against AA, Inc., AA Employee Benefits Committee, Fidelity Investments Institutional, Financial Engines Advisors, LLC alleging breach of fiduciary duties by elevating ESG strategy goals through proxy voting and shareholder activism over financial performance
- $26B assets, 100,000+ participants
- Issue raised: American Airlines' companywide commitment to ESG
  - American Airlines' corporate ESG strategy affirming focus on priority issues such as climate change & sustainable aviation fuel, customer satisfaction & operational performance, DEI, safety, and team member & labor relations:

> The last two years have brought enormous change and disruption to our industry, economy and the world. More than ever, rigorous management of environmental, social and governance (ESG) risks and opportunities is critical to the success of American Airlines and to the health of our planet. We have long recognized the importance of these issues and have developed an integrated and transparent approach to ESG management, measurement and reporting. That said, there's always room for improvement, and we continue to look to best practices within and outside our industry as we refine and strengthen our policies, practices and disclosures.

Source: American Airlines, ESG Report 2021, https://news.aa.com/crr/

Spence v. American Airlines, Inc., et al.

No. 4:23-CV-00552-O, 2024 WL 733640 (N.D. Tex. Feb. 21, 2024) (addressing and denying AA's motion to dismiss);
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- Plan participants alleged that BlackRock, which manages the majority of the plan's funds, and other investment managers prioritized ESG factors over financial performance
- **2/2024**: Court denied AA's motion to dismiss noting plan participants adequately alleged that AA and the AA Benefits Committee failed to consider that ESG-focused funds tend to underperform in comparison to other available options, and that investment managers engaged in proxy voting and shareholder activism
- **6/2024:** Court denied summary judgment in which AA argued that prudent procedures were in place for selecting and monitoring investment managers, in line with comparable plans, and have resulted in benefits to plan participants
- **7/2024:** Bench trial, in which plan participants are seeking approximately $16 million in damages plus attorneys' fees, has concluded, and a decision is imminent

Arbitration Provisions

Arbitration and Class Action Waiver

- When plan participants sue plan fiduciaries, the case is typically brought as a class action. Class action litigation is beneficial for plan participants (and their counsel) because bringing individual claims against plan fiduciaries would not be cost effective
- The inclusion of an Arbitration Provision and Class Action Waiver in the plan document may prohibit plan participants from using class action lawsuits in fiduciary breach litigation

Arbitration and Class Action Waiver

- The Ninth Circuit held Arbitration Provisions and Class Action Waivers are enforceable when those provisions are included in an ERISA plan document
  - *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019)
- Other courts have held Arbitration Provisions and Class Action Waivers are not enforceable in this context
  - *Cedeno v. Sasson*, 2024 WL 1895053 (2d Cir. May 1, 2024)
  - *Henry v. Wilmington Tr. N.A.*, 72 F.4th 499 (3d Cir. 2023)
  - *Smith v. Bd. Of Dirs. Of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021)
  - *Harrison v. Envision Mgmt. Holding, Inc. Bd. Of Dirs.*, 59 F.4th 1090 (10th Cir. 2023)
- We predict the Supreme Court will address the enforceability of Arbitration Provisions and Class Action Waivers given the split among the circuits

Target Date Fund Litigation

Target Date Fund Litigation

- 12 substantially similar lawsuits filed against plan fiduciaries offering BlackRock target date funds
- Claims made against plan fiduciaries:
  - Breach of duties of prudence, loyalty and failure to follow plan documents
  - Failure to monitor
  - Knowing breach of trust (applicable to plan administrators who are not plan fiduciaries)

Target Date Fund Litigation

- Plan fiduciaries defended the lawsuits by filing motions to dismiss, most of which were granted by district courts. Some plan participants were able to amend their complaints but ultimately most lawsuits were dismissed without the right to appeal
- Plan participants were permitted to amend their complaint in the Genworth case and added two additional facts
  - Certain committee minutes did not include references to monitoring the TDFs
  - The investment policy statement stated that TDFs should be compared to the S&P 500 TDF indices, which provide a meaningful benchmark for plan participants

Target Date Fund Litigation

- Plan participants have had early success in the case against plan fiduciaries at Stanley Black & Decker
- The District Count denied the plan fiduciaries' motion to dismiss holding that underperformance coupled with an inadequate fiduciary process can survive a motion to dismiss
- Stanley Black & Decker case moves into the discovery phase of litigation

Update on General Fiduciary Issues

USSCT Overules *Chevron* Case Ending Deference to Federal Administrative Agencies

Loper Bright Ends *Chevron* Deference to Legal Interpretations Made by Federal Agencies

- Recent decision by U.S. Supreme Court in *Loper Bright Ent. v. Raimondo*, 144 S.Ct. 2244 (2024), overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984)
  - 40 year-old precedent required courts to defer to interpretations of law by federal agencies charged with administering the law if:
    - the law is ambiguous = Congress did not "speak to" the issue &
    - the agency's interpretation is reasonable, even if the reviewing court would interpret the law differently
- *Loper Bright* will make it much easier for regulated entities to challenge federal regulations

Loper Bright Ends *Chevron* Deference

- In *Loper Bright*, the Court (6-3, along political lines) held:
  - Reviewing courts must independently decide on the best interpretation of a law
  - *Chevron* deference conflicts with the Administrative Procedures Act (APA), which authorizes reviewing courts to interpret laws that federal agencies administer
- In *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S.Ct. 2440 (2024), U.S. Supreme Court held that 6-year statute of limitations for challenging a federal regulation begins when "injury" occurs = date regulation applies to the plaintiff, not date the regulation was finalized, as most Circuit Courts held
- Existing cases that were decided under the *Chevron* doctrine are not overturned by *Loper Bright*, BUT *Corner Post* will allow challenges to long-settled rules by newly-created entities

Loper Bright Ends *Chevron* Deference

- An agency's interpretation still may be used as guidance by a reviewing court
- *Loper Bright* decision refers to *Skidmore* deference, which predates *Chevron* = courts could defer to agencies' interpretation on case-by-case basis
- Applying *Skidmore* deference, courts still may give weight to an agency's interpretation of law if agency's interpretation:
  - Relies on factual premises within the agency's expertise, or
  - Was issued around the same time as the law and has remained consistent
- Court had no problem overturning a 40 year-old precedent because *Chevron* was "unworkable" and "poorly reasoned"

Loper Bright Ends *Chevron* Deference

- Decision is already affecting DOL regulations under ERISA on "ESG" and investment advice fiduciary rule
- Dissent in *Loper Bright* = agencies have technical expertise and are better-suited to:
  - Fill in gaps left by Congress
  - Address unforeseen issues that arise after law is enacted
- Could lead to inconsistent interpretations in different jurisdictions? Or nationwide injunction/vacatur?
- Republican-led Congressional Committees recently sent letters to agencies about regulations issued since January 2021 and cases where courts applied *Chevron* deference

ESG Investing and Proxy Voting

Department of Labor Rules on ESG Investing and Proxy Voting

- "ESG" investing = investing that takes into account collateral economic or social factors and effects on investment return
  - Significant growth in amount of ESG assets under management in US and worldwide in recent years
- Proxy voting = applies to plans that own equities that require voting
  - Latest DOL rules on proxy voting were incorporated into ESG investing rules, reflecting political framing of fiduciary issues
- For many years, guidance from DOL has varied based on policy considerations

Department of Labor Rules on ESG Investing and Proxy Voting

- Anti-ESG rules issued before January 2020 were rescinded and then replaced with final pro-ESG rules issued in December 2022 that provide:
  - Fiduciaries may consider risk and return factors that "include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action"
  - Fiduciary may consider participants' preferences, e.g., to encourage greater participation thereby increasing retirement security
  - Fiduciaries encouraged to vote proxies = no formal cost benefit analysis required

Department of Labor Rules on ESG Investing and Proxy Voting

- Lawsuit filed by 26 Republican state attorneys general in response to 2022 regulations
- Relying on *Chevron*, the District Court upheld the rule in September 2023, and declined to vacate the rule - states then appealed to Fifth Circuit
- In July, based on *Loper Bright*, Fifth Circuit remanded the case back to the District Court to assess the merits without *Chevron* deference
  - *Utah v. Su* (No. 23-11097, 2024 WL 3451820, 5th Cir. July 18, 2024)

State Action regarding ESG Investing

- In July, case was dismissed against three New York City employees' pension plans sued by participants over fossil fuel divestments (*Wong et al. v. NYCERS*, 2024 N.Y. Misc. LEXIS 3082 (July 2, 2024))
  - In 2023, pension plans committed to "net zero emissions" portfolio by 2040
  - Court's ruling is similar to U.S. Supreme Court's decision in *Thole v. US Bank N.A.*, 140 S. Ct. 1615 (2020), holding defined benefit pension plan participants whose own benefit payments are not affected by investment choices cannot sue on behalf of the plan – no concrete stake in lawsuit because their benefits won't change, regardless of whether they win or lose

State Action regarding ESG Investing

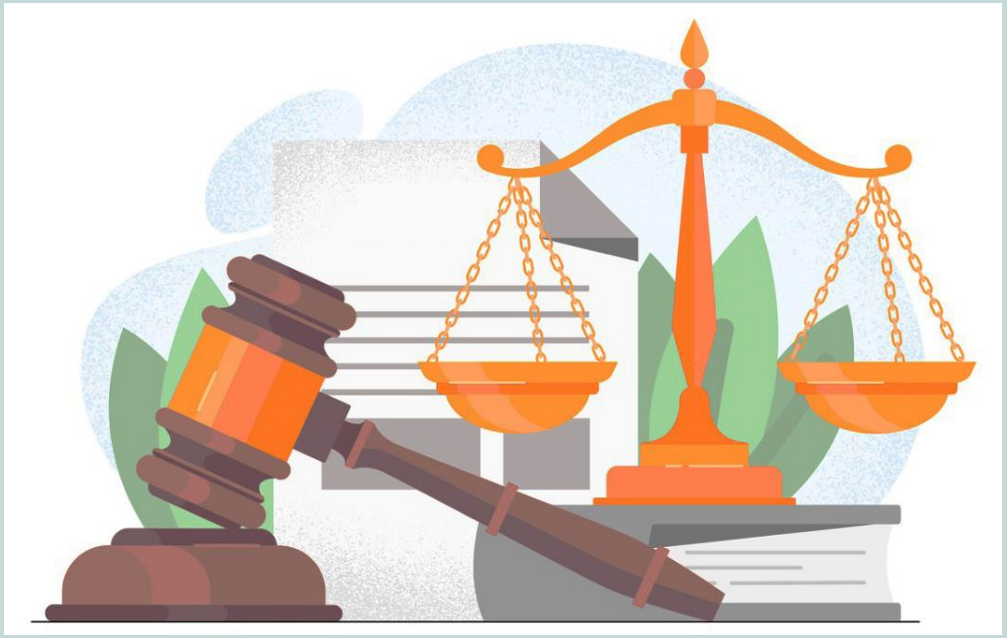
- States continue to enact anti-ESG (and, in a few states, pro-ESG) legislation
  - Anti-ESG laws in Oklahoma and Missouri recently blocked by federal courts
    - *Keenan v. Russ*, No. CV-2023-3021, 2024 WL 3022942 (Okl. Dist.) 5/7, 2024) (retiree claimed the law conflicts with exclusive benefit rule)
    - *Sec. Ind. & Fin. Markets Ass'n v Ashcroft,* No. 2-23-CV004154, 2004 WL 3842112 (W.D. Mo.) 8/14/24) (investment firms argued law is preempted by ERISA and SEC rules)
- California SB 252 would require CalPERS and CalSTRS to divest from fossil fuels
  - Passed California Senate in 2023, converted to a two-year bill last year
  - Scheduled for hearing in Assembly in June, but canceled at request of bill's author
  - Opposed by CalPERS and CalSTRS

Congressional Inquiry Into Climate Action 100+ Anti-Trust Issues

- On July 30, 2024, the House Judiciary Committee sent a letter to more than 130 investor members of Climate Action 100+ requesting details on their involvement , including how they would engage with carbon-intensive firms
- The Committee also asked the investors to preserve all documents and communications relating to their involvement in Climate Action 100+ and broader "efforts to advance ESG goals"
- The list of investors contacted included several California public sector retirement systems, as well as other investors
- Challenged anti-trust violations could also raise fiduciary duty issues

DOL Fiduciary Rule

DOL Retirement Security (Fiduciary) Rule



- Intended to protect Retirement Investors, including with respect to
  - Plan sponsor menu design
  - Rollover advice
  - Annuity sales
- Currently the DOL Fiduciary Rule, which was scheduled to take effect next month, has been stayed by two separate courts in Texas

Cyber/Data Security and Fraud Prevention

Litigation - Cybersecurity Breaches

- *Sherwood v. Horizon Actuarial Servs., LLC*, No. 1:22-CV-01495-ELR, 2022 WL 18460459 (N.D. Ga., 2022)
  - **4/2022:** multiple complaints filed arising from a massive data breach in 2021 that exposed employer benefit plan members' sensitive data claiming negligence and injunctive & declaratory relief requiring safety protocols
  - **4/2024:** $8.7M class action settlement agreement of up to $5,000 per individual for losses from identify fraud, credit repair services, freezing credit cards
- *Disberry v. Employee Relations Committee of Colgate-Palmolive Company*, 646 F.Supp.3d 531 (S.D.N.Y., 2022)
  - **7/2022:** former Colgate executive subject to cyber breach filed complaint alleging breach of fiduciary duty where hacker stole over $750,000 of retirement savings from executive's account, alleged that cybersecurity was not a priority for ex-employer or its retirement plan administrator
  - As of **7/2024:** at settlement conference negotiation stage
- *Jackson v. Nationwide Retirement Solutions, Inc.*, 2024 WL 958726 (S.D. Ohio, 2024)
  - **9/2022:** class action complaint alleged that retirement & investment manager failed to adequately safeguard plan participants' PII asserting negligence, intentional invasion of privacy, and breach of implied contract
  - **3/2024:** court approved settlement requiring Nationwide to pay for credit monitoring services, cybersecurity training, and $5,000 award to each class representative and attorneys fees of $120,000

DOL Guidance on Cybersecurity Risks Associated with Employee Benefit Plans

DOL issued cybersecurity program best practices:

- Create cybersecurity policies and procedures
  - Understand how and where plan data is stored and transmitted
  - Establish data control monitoring plan
- Establish breach response procedures
  - Identify individuals responsible for monitoring and breach response
- Train employees on data security and the plan's established cybersecurity policies and procedures
- Periodically test monitoring and data breach procedures and address control weaknesses
- Incorporate recommendations:
  - Cybersecurity program best practices;
  - Tips for hiring a service provider with strong cybersecurity practices; and
  - Online Security tips
- Cybersecurity insurance
- Periodic assessment of legal landscape
- Provide education to participant on how they can protect their accounts from cyber fraud

Source: DOL EBSA, News Release Regarding Cybersecurity Guidance for Plan Sponsors, Plan Fiduciaries, Recordkeepers, Plan Participants (released 4/14/2021) https://www.dol.gov/newsroom/releases/ebsa/ebsa20210414

DOL Guidance on Cybersecurity Risks Associated with Employee Benefit Plans

- 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

Source: DOL EBSA, News Release Regarding Cybersecurity Guidance for Plan Sponsors, Plan Fiduciaries, Recordkeepers, Plan Participants (released 4/14/2021)
https://www.dol.gov/newsroom/releases/ebsa/ebsa20210414

Pension Derisking Litigation & DOL Update

Pension Derisking Litigation & DOL Update to Very Old Advice

- Defined benefit derisking shifts liability from the plan sponsor to an insurer. The plan sponsor uses plan assets to purchase an annuity and the insurer pays retirement benefits to plan participants
- The selection of the insurance company is a fiduciary decision and the DOL has provided guidance on how plan fiduciaries should undertake that decision-making process, Interpretive Bulletin 95-1
- SECURE 2.0 directed the DOL to revisit the guidance in consultation with the ERISA Advisory Council. In a report to Congress the DOL said it would not make changes to or update the bulletin at this time
- Meanwhile, AT&T and Lockheed Martin were sued in 2024 in connection with derisking their defined benefit plans and the selection of a nontraditional insurer, Athene

Review of Plan Document and Operational Compliance

Plan Document Compliance

SECURE 2.0 Continues to Bring Changes

- Setting Every Community Up For Retirement Enhancement (SECURE) Act 1.0
- Coronavirus Aid Relief and Economic Security (CARES) Act
- Setting Every Community Up For Retirement Enhancement (SECURE) Act 2.0
- Taxpayer Certainty and Disaster Tax Relief Act of 2020
  - No amendments are required to be adopted this year, even if plan administration is required to incorporate changes to provisions this year
  - IRS Notice 2024-02 extended deadline for all amendments noted above to the following new amendment deadlines
    - **Non-governmental and non-collectively bargained tax-qualified plan: 12/31/26**
    - **Applicable collectively bargained plan: 12/31/28**
    - **403(b) plans: not a public school plan 12/31/26; applicable collectively bargained plan of a 501(c)(3) 12/31/28; a public school plan 12/31/29**

Operational Compliance

Operational Compliance-IRS OC List

- IRS last updated its Operational Compliance List in February 2023 providing information through 2022—**Unfortunately Nothing Yet in 2024 on IRS Website**
- The Operational Compliance List ("OC" List) is provided by the IRS under authority in Rev. Proc. 2022-40, Section 8, to help plan sponsors achieve operational compliance by identifying changes in tax-qualification requirements and Code section 403(b) requirements effective during a calendar year
  - OC List is available on the IRS webpage only (just search for "IRS Operational Compliance List") NOTE: the IRS warns it is not comprehensive
  - No SECURE 2.0 changes shown yet

SECURE 2.0 Plan Amendment Deadlines Delayed-But Compliance Is Required!

- No amendments are required to be adopted this year, even if plan administration is required to change and incorporate changes to provisions this year
  - **New amendment deadline generally is 12/31/29, unless an applicable collectively bargained plan where deadline is 12/31/28**
  - **BUT operational compliance is required** with changes effective in 2023 and 2024, and changes in participant communications may be necessary to avoid confusion/misunderstandings

SECURE 2.0 Additional Operational Compliance Areas for 2024

- Roth catch-up contributions for highly paid (delayed for 2024 and 2025)
- Expecting IRS to issue new model 402(f) rollover notice—number of changes taking effect e.g. withdrawals for emergency expenses, domestic abuse
- Student loan repayment matching contributions may be allowed
- Short term emergency savings accounts may be added
- Updated limit for mandatory cash-outs
- Certain exclusions for top-heavy test
- Certain penalty free withdrawals for domestic abuse may be allowed
- Pre-death RMD exception extended to Roth accounts in plans
- New requirements for Annual Funding Notices

Plan Operational Compliance—Continuous Efforts

- We recommend that you annually review requirements that continuously apply such as:
  - ☑ Has the plan's Code section 402(f) notice been updated for the latest IRS guidance?
  - ☑ Have benefits and contributions been appropriately limited for the Code section 415 limit?
  - ☑ Have benefits and contributions been appropriately limited for the Code section 401(a)(17) limits?
  - ☑ Are there procedures in place to verify compliance with the updated Code section 401(a)(9) distribution rules?
  - ☑ Are there procedures in place to record compliance with error correction rules under EPCRS self-correction rules for future audit?

Plan Operational Compliance—2nd Phase of IRS Pilot Audit Program Began in 2024

- 2nd Phase of IRS Pilot Audit Program began earlier in 2024
- Make sure appropriate representatives have been alerted to notify leadership immediately of receipt of a plan audit notice
- IRS pilot program gives the plan only 90 days to make all needed corrections following receipt of notice or full audit begins

Summary of Annual Review Process

- Review information on monitoring of federal and state law tax and fiduciary compliance requirements with plan counsel
- Determine any required or desired plan document changes
- Plan for any required or desired changes in coming year that could affect operational requirements
- Review best practices (look back at what you learned today and at other fiduciary education programs or reading you have done) and recommend adoption of those that are reasonable and appropriate for your plan
- Verify that any periodic reports due to an appointing authority to support appropriate oversight have been filed

Summary of Annual Review Process

- Record reviews of vendor performance completed during year (administrative, legal and investment)
- Determine any necessary or desirable participant communications (including updates to your website)
- Have counsel review with fiduciaries (try to maintain attorney-client privilege for discussion) any areas of risk or exposure for litigation that should be addressed
- **Due to potential of only 90 days to correct any errors in the event of notice of an IRS pilot audit, annual review of plan document and operational compliance is strongly recommended during the IRS Pilot Audit Program which has been extended indefinitely**

Thank you!