2025 Employee Benefits Webinar

HansonBridgett

Mid-Year Fiduciary Update

Private Sector Employers

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Agenda

- Legislative and Regulatory Update
- Litigation Update
- Annual Review of Plan Document and Operational Compliance

Legislative and Regulatory Update

Federation of Americans for Consumer Choice v DOL

- Brief Background
  - The Department of Labor ("DOL") published regulations in 1975 for determining fiduciary investment advice
  - The rule states that an investment fiduciary is anyone who 1) provides advice 2) on a regular basis 3) pursuant to a mutual agreement 4) that was the primary basis for investment decisions and 5) was individualized to the plan (the "5-Part Test")
  - In 2016, the DOL issued a New Fiduciary Rule which removed the "regular basis" criteria and was otherwise more inclusive such that stockbrokers, insurance agents and anyone offering rollover advice would become an ERISA investment fiduciary

Federation of Americans for Consumer Choice v DOL

- Brief Case History
  - In 2018, the 5th Circuit struck down the New Fiduciary Rule as arbitrary and capricious
  - In 2020, the DOL tried again to broaden fiduciary status and reinterpreted the old 5-Part Test to look more like the New Fiduciary Rule
  - The FACC then sued the DOL to vacate the 2020 interpretation as an end-around the 5th Circuit decision
  - On July 9, 2025, the Northeastern District Court of Texas stuck the latest DOL interpretation regarding rollover advice based on a 2023 magistrate judge's recommendations, but left the balance in play (concerning stockbrokers and insurance agents, etc.)
  - On August 6, 2025, The FACC filed a motion for reconsideration to strike the balance of the New Fiduciary Rule on the basis of the intervening case law between 2023 and 2025 including the USSC case, *Loper Bright*

DOL ESG Investing & Proxy Voting Rules Update

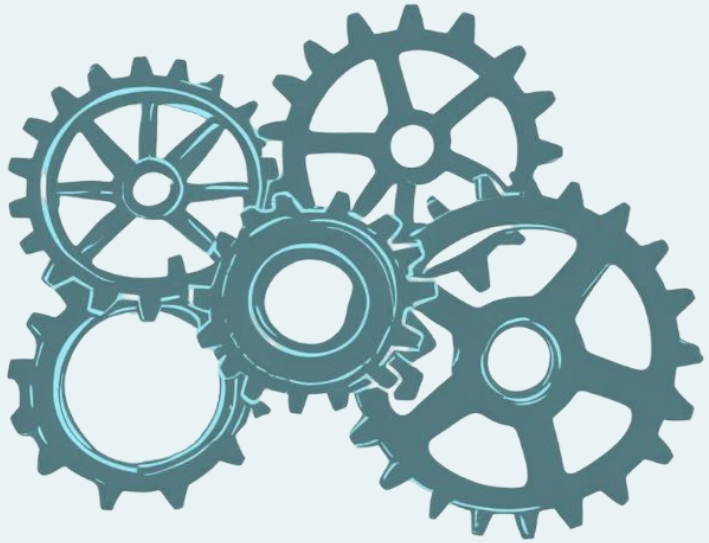
- The DOL under Biden issued rules that provided that ESG factors can be valid considerations when selecting plan investments and for proxy voting (the "Biden ESG Rule")
- In 2023, the Northern District of Texas upheld the Biden ESG Rule on the basis that the rule did not diminish a fiduciary's obligation to make prudent investment choices designed to maximize returns
- In 2024, the 5th Circuit vacated the District Court's decision and remanded the case for consideration under *Loper Bright*
- In early 2025, the District Court again upheld the Biden DOL Rule because the rule still did not dimmish ERISA's duty of prudence
- Soon thereafter, the DOL announced that they will no longer defend the Biden ESG Rule and that they intend to issue a New ESG Rule

Alternative Asset Classes for Defined Contribution Plans

- Plan fiduciaries should expect guidance on the inclusion of alternative asset classes in defined contribution plans in the next six moths
- On August 7, 2025, the White House issued an executive order directing the Department of Labor to clarify the DOL's position on alternative asset classes and the appropriate fiduciary process associated with offering alternative assets under ERISA in defined contribution plans. See, Democratizing Access to Alternative Assets for 401(k) Investors
- https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/

Alternative Asset Classes for Defined Contribution Plans

- Alternative asset classes include:
  - Private equity
  - Crypto currencies
  - Real estate
- Considerations for fiduciaries
  - Liquidity of alternative asset classes
  - Fees and transparency, and the duty of prudence
  - Litigation. See, *Anderson v. Intel Corporation Investment Policy Committee*, 137 F.4th 1015 (9th Circ. 2025)



Voluntary Fiduciary Correction Program ("VFCP")

- What is VFCP?
  - A program sponsored by the DOL and used by fiduciaries and service providers to take corrective steps to avoid civil enforcements and penalties pertaining to certain prohibited transactions
  - Most commonly used for delayed deposit of participant contributions into the plan trust after being withheld from paychecks
- The final amendments to the U.S. Department of Labor's VFCP took effect March 17, 2025
- New self-correction component procedures:
  - For transactions that result in **"lost earnings"** (i.e., late transmittals) of $1,000 or less and the correction occurs within 180 days of when the amounts were withheld from the paycheck
  - Participant loan errors due to "eligible inadvertent" mistake and not due to **"egregious"** failure

Voluntary Fiduciary Correction Program ("VFCP")

Other changes:

- Self-correction must be reported via **"SCC notice"** to DOL
- Notice to interested persons not required for excise relief under PTE 2002-51 but payment of excise tax to the affected plan required
- Softens the definition of "not under investigation" to permit more plans to participate in VFCP
- Most applicants with complete applications will receive an automatic email confirmation that no additional DOL approval is needed
- Permits plan service providers to submit **"bulk applications"**
- Changes to PTE 2002-51 (three-year limitation and notice requirement)

DOL Opinion Letter Program

- DOL announced expansion of pre-existing opinion letter program in June 2025
- The program spans five key enforcement agencies within DOL:
  - Wage and Hour, Occupational Safety and Health Administration, **Employee Benefits Security Administration**, Veterans' Employment and Training Service and Mine Safety and Health Administration
- Similar to the IRS's Private Letter Rulings, Opinion Letters are:
  - Limited in scope
  - Binding on applicant
- Opinion Letters cannot be cited as authority but can be persuasive authority

Collective Investment Trusts 403(b) Plans

- SECURE 2.0 amended the Internal Revenue Code to allow 403(b) plans with custodial accounts to invest in CITs
- SECURE 2.0 did NOT amend the securities laws that prohibit investment in CITs by 403(b) plans
- Bipartisan legislation is pending to make the corresponding amendment to securities laws
- See, H.R. 1013

2025 Legislation The Act

- We don’t have time today to discuss the Act, which was signed into law on July 4, 2025
- We will be releasing an Alert covering the employee benefit issues in the Act

DOL Information Sharing Agreements

- DOL has used common interest agreements ("CIAs") nine times since 2022, six of which were with private plaintiffs' firms and three of which were with independent fiduciaries
- CIAs are agreements between two parties pursuing similar but different legal actions to share information
- This has involved EBSA investigators sharing information they have obtained with private litigators
- Became a public controversy in Nov. 2024 when Rep. Virginia Foxx (R-NC) harshly criticized this type of use of CIAs
- On 6/13/2025 the DOL's Office of the Inspector General announced it will launch an audit into the use of CIAs by the EBSA and how its investigative information has been shared with non-governmental entities involved in class action litigation

Litigation Update

Cunningham v. Cornell University, 604 U.S. ___ (2025)

- Prohibited Transactions
  - ERISA §406 prohibits fiduciaries from causing plan to engage in a PT with a PII
    - Plan service provider = PII
    - Furnishing goods, services, or facilities between plan and PII = PT
  - ERISA §408 exempts if services are necessary and compensation is reasonable
- Procedural history
  - Cornell DC plan participants from 2010-2016 filed class action alleging Cornell caused plans to engage in PTs with TIAA-CREF and Fidelity for RK services
  - District court granted Cornell's motion to dismiss for failure to state a claim
  - 2d Cir. Ct. App. aff'd, but on different basis: Π failed to also plead exemption N/A
  - Supreme Court granted cert. to resolve circuit split: 2d Cir. required; 8th did not

Cunningham v. Cornell University, 604 U.S. ___ (2025)

- Issue: Whether Π must also plead §408 doesn't apply to survive a demurer
- Held: Π must only plausibly allege §406; needn't also allege §408 N/A
  - Rejected argument §406's **"except as provided in §408"** incorporates exemptions
  - §408 exemptions separate; Δ must plead as affirmative defenses to §406 breach
  - Impractical to require Π to negate all potentially relevant exemptions
  - Statutory text and structure outweighs practical concerns re meritless litigation
  - Other tools available to a court to limit impact of decision
- Bottom line: The Court's decision could lead to increased litigation and higher costs by making it easier for Πs survive a demurer
- Why care if ERISA doesn't apply?

Investment Fund Selection Challenges

- In *Mills v. Molina Health Care, Inc.*, 2024 WL 1216711 (C.D. California 2024), Plaintiffs sued for breach of fiduciary duty and prohibited transactions in violation of ERISA, challenging the selection and retention of certain target date funds ("TDFs") as the plan's qualified default investment alternative ("QDIA")
- Following a bench trial, the U.S. District Court for the Central District of California found that the appropriate comparators for loss determination were the three relevant benchmark indices rather than specific individual TDF funds
- The TDFs at issue outperformed all three benchmark indices, therefore Plaintiffs had failed to allege a loss

Investment Fund Selection Challenges

- In *Anderson v. Intel Corporation Investment Policy Committee,* 137 F.4th 1015 (9th Cir. 2025), Plaintiffs sued for breach of fiduciary duty, challenging the inclusion of hedge funds and private equity funds in Intel's target dates funds
- The 9th Circuit Court of Appeals upheld the lower court's decision, finding Plaintiffs had failed to plausibly allege that the funds underperformed as compared to other similar funds, failed to state a claim for breach of prudence by causing the plans to incur higher fees, and failed to adequately plead an ERISA claim for breach of duty of loyalty
- Court noted that inclusion of hedge funds and private equity was not per se imprudent, and emphasized the need for Plaintiffs to provide specific and plausible allegations, and use meaningful comparable benchmarks when comparing performance and fees

Forfeiture Litigation

- **Defined Contribution Plan Forfeitures**
  - Amounts forfeited when a plan participant leaves employment prior to fully vesting in their employer contributions (e.g., matching contributions)
- **Regulatory Guidance**
  - Current forfeiture practices pre-date ERISA
  - Forfeitures in a DCP may be used for one or more of the following purposes, as specified in the plan document: (1) to pay plan administrative expenses, (2) to reduce employer contributions under the plan, or (3) to increase benefits in other participants' accounts in accordance with plan terms. Prop. Reg. § 1.401-7(b)

Forfeiture Litigation

- **Forfeiture Litigation**
  - Claims: Using forfeitures to offset future employer contributions to a DCP is a breach of the plan sponsor's ERISA duties of loyalty and prudence, and violates ERISA's anti-inurement and prohibited transaction rules
  - Conflicting Decisions at the District Court Level re: Initial Motions To Dismiss
    - So far, most cases have been dismissed in favor of Plan Sponsors/ Fiduciaries
    - Only a handful of exceptions
      - *McManus v. Clorox Co.*, Case No. 4:23-cv-05235 (N.D. Cal., Mar. 3, 2025)
        - ✓ Motion to Dismiss Denied
      - *Hutchins v HP Inc.*, Case No. 5:23-cv-05875-BLF (N.D. Cal., Feb 5, 2025)
        - ✓ Motion to Dismiss Granted

Forfeiture Litigation

- Forfeiture Cases on Appeal
  - *Hutchins v HP Inc.,* Case No. 25-826 (9th Cir., 2025)
    - DOL Amicus Brief
- Takeaways
  - Plan document language has been a key component of forfeiture litigation
  - Review plan documents and administrative practices to ensure forfeiture provisions comply with fiduciary guidance
  - Remain up-to-date regarding new developments in the regulatory and forfeiture litigation arena

Pension Risk Transfer Litigation

- What are Pension Risk Transfers?
  - When a pension plan sponsor transfers some or all of its pension benefit obligation to an insurance company, that then assumes responsibility for paying retiree pensions
  - These transfers shift pension obligation from the plan sponsor to an insurance company
- Plan Sponsors must comply with ERISA's fiduciary standards when selecting an insurance company for this purpose
  - DOL Interpretive Bulletin 95-1
    - Must act solely in the interest of plan participants and beneficiaries
    - Conduct an objective, thorough and analytical search for selecting annuity provider
    - Take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the best interest of participants to do otherwise

Pension Risk Transfer Litigation

- Pensions Annuity Protection Act of 1994
  - Creates right of action to obtain relief for ERISA violations related to the purchase of an insurance contract or insurance annuity
- Next Wave of Fiduciary Litigation
  - Plan sponsor, by not choosing the safest annuity provider, breached their fiduciary duty
  - Plan sponsors engaged in prohibited transaction
- Conflicting Legal Outcomes
  - *Camire v. Alcoa USA Corp.*, Case No. 1:24-cv-01062, 2025 WL 947526 (D.C.C. Mar. 28, 2025).
    - Case dismissed. The Court found that Plaintiffs did not have standing because they failed to show any actual harm or imminent risk of future harm as a result of the pension risk transfer to the insurance company selected by plan sponsor. Because plaintiffs lacked standing, the Court did not address the merits of plaintiffs' ERISA claims.

Pension Risk Transfer Litigation

- Conflicting Legal Outcomes (Con't)
  - *Konya v. Lockheed Martin Corp.*, Case No. 8:24-cv-00750, 2025 WL 962066 (D. Md. Mar. 28, 2025).
    - Survived motion to dismiss – Court found plaintiffs had standing and the ERISA claims had merit
    - Currently on appeal – Circuit Court of Appeals for the 4th Circuit
    - ERISA Industry Committee (joined by American Benefits Council and US Chamber of Commerce) filed Amicus Brief in US Court of Appeals
- Takeaways
  - Until further guidance is provided, employers and other fiduciaries should continue to use DOL guidance when assessing and selecting annuity providers when seeking to execute a pension risk transfer (e.g., DOL Interpretive Bulletin 95-1)
  - Remain up-to-date with new litigation developments

Bugielski v. AT&T Services, Inc. – Update

- April 2025: the U.S. Supreme Court declined to hear AT&T's challenge that entering into a contract with Fidelity is not a prohibited transaction.
- Circuit Split remains
  - In the Ninth Circuit, entering into a service agreement is a prohibited transaction unless an exemption applies
  - In the Third and Seventh Circuits, entering into routine contracts aren't prohibited transactions
- In the Ninth Circuit, plan fiduciaries should consider direct and indirect compensation paid to service providers and document such review

Schuman v. Microchip Tech. Inc., No. 24-2624, 24-2978, 2025 WL 1584981 (9th Cir. Jun. 5, 2025)

- Release of ERISA claims must be "knowing and voluntary"
- Courts should consider the totality of the circumstances, including alleged improper conduct by the fiduciary in obtaining the release of claims
- Ninth Circuit adopted a 9-point test, which is a non-exhaustive list of factors that should be considered when determining if the release was entered into knowingly and voluntarily
- Nine-point test is also a checklist for release language

Schuman v. Microchip Tech. Inc., No. 24-2624, 24-2978, 2025 WL 1584981 (9th Cir. Jun. 5, 2025)

1. Employee's education and business experience
2. Employee's input in negotiating the terms of the settlement
3. Clarity of the release language
4. Amount of time employee had for deliberation before signing the release
5. Whether employee actually read the release and considered its terms before signing it
6. Whether employee knew of his, her or their rights under the plan and relevant facts when signing the release

Shuman v. Microchip Tech. Inc., No. 24-2624, 24-2978, 2025 WL 1584981 (9th Cir. Jun. 5, 2025)

7. Whether employee had an opportunity to consult with an attorney before signing the release
8. Whether consideration given in exchange for release exceeded the benefits to which employee was already entitled by contract or law
9. Whether employee's release was induced by improper conduct on the part of the fiduciary

Challenge to IRS Authority to Assess and Collect Employer ACA Penalties

- In *Faulk Company, Inc. v. Beccerra* (2025 WL1085080 (N.D. Tex. 2025)) the Faulk Company challenged an employer shared responsibility payment assessed by the IRS in a Letter 226-J on the basis that HHS did not have the statutory authority to delegate enforcement of the penalties to the IRS
- The U.S. District Court for the Northern District of Texas agreed and ordered the IRS to refund the penalty
- HHS has appealed the ruling---however, in the meantime any employer that receives a 226-J should consider challenging the assessment

District Court Rules ERISA Preempts Tennessee State PBM Law

- In *McKee Foods Corp. v. BFP, Inc.* (2025 WL 968404 (E.D. Tenn. 2025)), the court ruled that ERISA preempted a state law that required a self-insured health plan's pharmacy benefits manager ("PBM") to allow any willing pharmacy to join their network
- The court found that ERISA preempted this law because under the reasoning of *Rutledge v. Pharm. Care Mgmt, Ass'n*, 592 U.S. 80, 86 (2020) this law impermissibly required the PBM to structure the benefit plan in a particular way
  - **NOTE**: *Rutledge* found that an Arkansas PBM law was not preempted and applied to a self=insured medical plan
- May be important to watch as states attempt to control medical plan costs by regulating PBMs (all 50 states have some PBM legislation)

2024 HIPAA Privacy Rule to Support Reproductive Health Care Overturned

- In *Purl v. United States Department of Health and Human Services, (*2025 WL 1708137 (N.D. Texas 2025), Dr. Purl and his clinic challenged the HIPAA Privacy Rule to Support Reproductive Health Care (the "Rule") on the basis that the Rule unlawfully restricted mandatory child abuse reporting, redefined statutory terms like "person" and "public health," and violated the "major questions doctrine" by regulating politically significant areas without clear congressional authorization
- The U.S. District Court for the Northern District of Texas agreed and overturned the portions of the Rule related to reproductive health. The portions of the rule related to Part 2 remain valid
- Employers will not need to update their HIPAA Privacy Practice and Procedures or HIPAA Notice for the reproductive health care portions of the Rule; however, updates may still be required to comply with the changes related to entities that create or maintain records under Part 2.

Other Reproductive Health Litigation

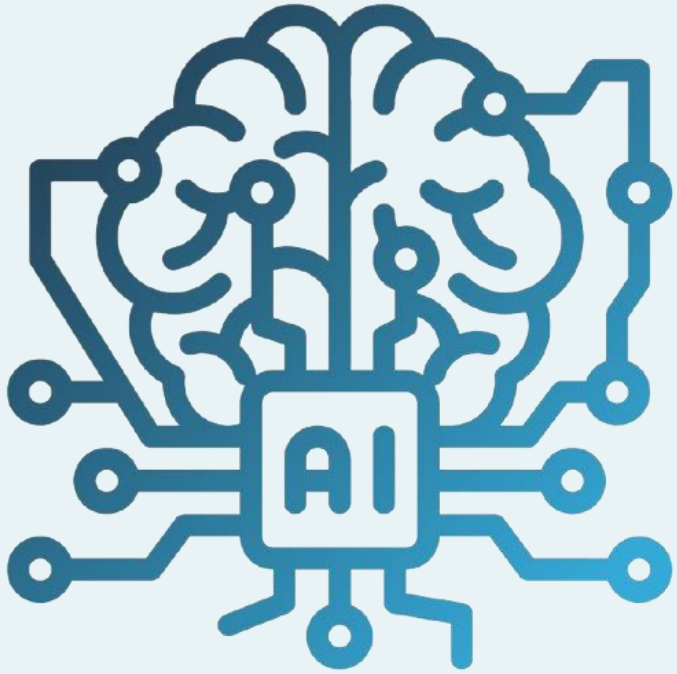
- **Portion of PWFA Final Rule Requiring Accommodation for Elective Abortions Overturned**
  - Mississippi and Louisiana and several Roman Catholic organizations filed separate lawsuits challenging the EEOC's rule under the Pregnant Workers Fairness Act ("PWFA") requiring employers to provide accommodations for elective abortions on the basis that the rule exceeded the EEOC's authority given to it by Congress under the PWFA.

Other Reproductive Health Litigation

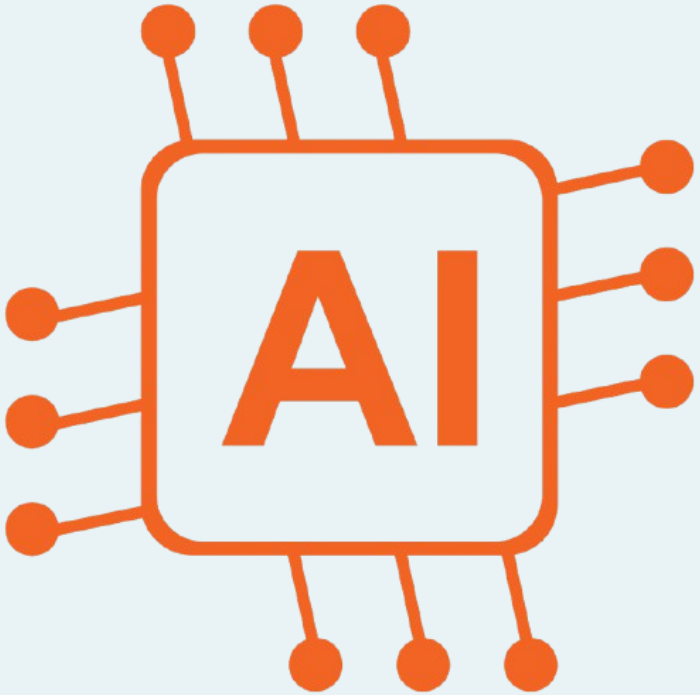
- **Portion of PWFA Final Rule Requiring Accommodation for Elective Abortions Overturned**
- The cases were consolidated, and in *Louisiana v. EEOC, (2025 WL 1462583 (May 21, 2025))*, the Western District of Louisiana overturned the portions of the rule that included "abortion" as a "related medical condition" to pregnancy and childbirth, as well as the portions that required employers to provide accommodations to employees for purely elective abortions that were not medically necessary.
- May be important to watch, as several other lawsuits related to this rule are currently pending in other states.

Litigation over AI Claims Review by Insurers Increasing

- Class action cases targeting the use of AI and algorithms in claims denials have become more frequent in recent years.
- Most have been dismissed or dismissed with leave to amend the compliant.
- Common trends across the court decisions include:
  - In cases involving ERISA plans, ERISA most likely will preempt state statutory and common law causes of action;



Litigation over AI Claims Review by Insurers Increasing



- Common trends across the court decisions include:
  - Plaintiffs will need to allege specific plan terms tying the use of algorithms or AI to a plan requirement that was violated (for example, a plan requirement that ties medical claim review to a physician or health professional); and
  - Plaintiffs will have to be able to prove that their claim was denied by AI or an automated algorithm.
- *Kisting- Leung v. Cigna Corp. (2025 WL 958389 (E.D. California, 2025))*

Annual Review of Plan Document and Operational Compliance

Deadline for Amendments Delayed

- 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 amendments 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-IRS OC List

- IRS last updated its Operational Compliance List in February 2023 providing information through 2022—**Unfortunately Nothing Has Been Changed in 2024 or 2025 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.
  - No SECURE 2.0 changes shown yet

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

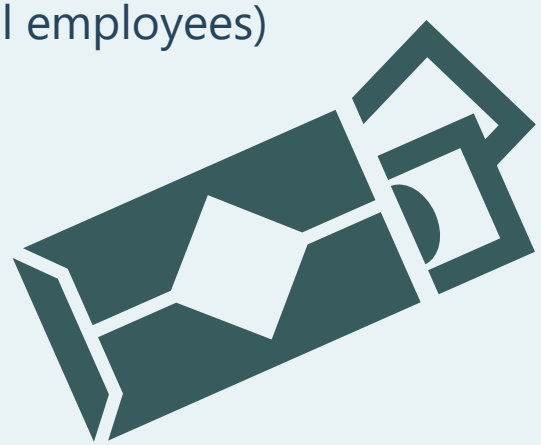
- No amendments are required to be adopted this year, even if plan administration is required to change and incorporate changes to provisions this year.
  - **New amendment deadline is generally 12/31/26, unless an applicable collectively bargained plan where deadline is 12/31/28**
- **BUT operational compliance is required** with changes effective in 2023, 2024 and now 2025, and changes in participant communications may be necessary to avoid confusion/misunderstandings

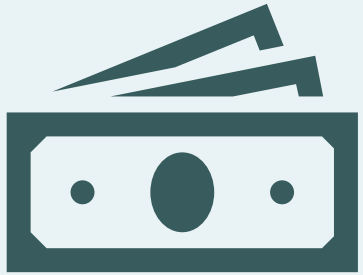
SECURE 2.0 Additional Operational Compliance Areas for 2025

- New 401(k) and 403(b) plans (established after 12/29/22) must have auto-enrollment
  - IRS Notice 2024-2 clarified requirements
- Voluntary higher catch-up limits for ages 60-63 for 401(k), 403(b) and governmental 457(b)—greater of $10,000 or 150% of regular catch-up limit (indexed after 2025)
  - The 2025 IRS limit for new super catch-up contributions is $11,250, while the standard catch-up limit is $7,500
  - Only available on a Roth basis for highly paid (more than $145,000 in FICA wages in prior year (indexed))—implementation of this provision delayed until 1/1/26

SECURE 2.0 Additional Operational Compliance Areas for 2025

- Roth catch-up contributions for highly paid (delayed for 2024 and 2025)
  - New proposed regulations issued by IRS on 1/10/25 dealing with catch-up contributions
  - If catch-up contributions available to highly paid (those who had more than $145,000 in FICA wages for prior year (indexed)), must be Roth
  - Does not apply if employee has no FICA wages (e.g. partners with only self-employment income, certain governmental employees)





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 –IRS Pilot Audit Program Still In Place

- 2nd Phase of IRS Pilot Audit Program began 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

Summary of Annual Review Process

- Verify that any periodic reports due to an appointing authority to support appropriate oversight have been filed
- 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

Thank You!