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Senate Finance Committee Pushes Retirement Reform Closer to Enactment

The Senate Finance Committee on June 22, 2022, favorably reported "The Enhancing American Retirement Now ('EARN') Act" by a vote of 28-0. Now begins the work of combining the EARN Act with the "Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg ('Rise & Shine') Act" that the Senate Health, Education, Labor and Pensions (HELP) unanimously approved on June 14. Ultimately, the resulting Senate bill will need to be reconciled with the House-passed "Securing a Strong Retirement Act," which is also known as SECURE 2.0.

What is in the Senate Finance Committee's Bill?

The EARN Act features a variety of provisions addressing a range of issues relating to expanding coverage and increasing savings, and others relating to plan administration and compliance. Some of the more noteworthy provisions are as follows:

- Minimum Required Distributions: The required beginning date for mandatory distributions would be increased to 75 starting on January 1, 2032. Additionally, the bill would reduce the penalty for failing to take required minimum distributions from 50% to 25%. (The House bill would phase in the increased RBD in 3 intervals, beginning in 2023 for individuals who are not yet 72. The reduced penalty is generally the same in both bills.)
- Catch-up Contributions: The $6,500 catch-up contribution limit for participants who are age 50 or older would be increased to $10,000 for participants who are ages 60 - 63. (Generally same as the House bill, except the affected ages in the House bill would be 62-64.)
- Matching Contributions for Student Loans: Employers would be permitted to make matching contributions to 401(k), 403(b), and 457 plans against "qualified student loan payments." Plans would be permitted to separately test matching contributions on student loan repayments for nondiscrimination testing purposes. (Generally same as the House bill.)
- Immediate Incentives for 401(k) and 403(b) Plan Participation: Employers would be permitted to offer de minimis financial incentives, such as low dollar gift cards, to encourage employees to enroll in 401(k) and 403(b) plans. This would be an exception to the contingent benefit rule, which generally prohibits employers from making any benefits (except matching contributions) contingent on employees making a deferral election. (Generally same as the House bill.)
- Recovery of Overpayments: Retirement plan fiduciaries would be given latitude to decide not to attempt to recover overpayments of benefits that were mistakenly made to retirees. In cases where fiduciaries do try to recoup such overpayments, new limitations and safeguards would be provided to safeguard innocent retirees. (Generally same as the House bill.)

Outlook

Clearly, there is significant bipartisan, bicameral support for retirement reform legislation. But that is no guarantee a bill will be enacted this year. As noted, there is still work to be done to come up with a final bill that is agreeable both

to the House and Senate. And even then, a legislative vehicle will need to be identified to push it across the finish line. With the number of legislative days growing short and many competing priorities, there are no guarantees. Keep reading RPI for future updates.

IRS Announces New Pre-Examination Compliance Pilot Program for Retirement Plans

On June 3, 2022, the Internal Revenue Service ("IRS") announced in its Employee Plans newsletter that the agency is piloting a pre-examination retirement plan compliance program, beginning in June 2022. Plan sponsors will be given advance notice of an upcoming examination by the IRS, along with a 90-day window to self-correct errors.

Program Overview

Under the pilot program, the IRS will notify a plan sponsor by letter that its retirement plan was selected for an upcoming examination. The letter will give the plan sponsor 90 days to review its plan's document and operations to determine if they meet the necessary current tax law requirements and correct errors that are located during the review. A plan sponsor that fails to respond within the 90-day window will be contacted by the IRS in order to schedule an examination.

If a plan sponsor discovers a mistake while reviewing the plan documents and operations, the plan sponsor can self-correct in certain circumstances using IRS's Employee Plans Compliance Resolution System ("EPCRS"), which is designed to allow plan sponsors to fix mistakes voluntarily and thus avoid potential plan disqualification.

If a plan sponsor discovers a mistake that is not eligible for self-correction via EPCRS, the plan can request a closing agreement. In that case, the IRS will use the fee structure under its Voluntary Correction Program ("VCP") to determine any sanction amount that will be paid under the closing agreement. The use of the VCP fee structure—rather than the Audit Closing Agreement Program ("CAP") fee structure that would typically be used in a closing agreement—is beneficial to plan sponsors because the Audit CAP fees tend to be higher than VCP fees. Therefore, this will provide plan sponsors with the opportunity to correct errors at a lower fee.

The IRS will review the plan's documentation and determine whether it agrees with the plan sponsor's conclusions with respect to any mistakes and whether those mistakes were appropriately self-corrected, if applicable. The IRS will then issue a closing letter or conduct a limited- or full-scope examination, as necessary.

According to the IRS, the goal of the program is to reduce taxpayer burden and reduce the amount of time spent on retirement plan examinations. The IRS has

not provided a timeline for how long the pilot will last, but it noted in its June 3rd announcement that at the end of the pilot, it will evaluate its effectiveness and determine if the program should continue.

Supreme Court Roundup: Court Releases Decisions with Implications for Health Plans

In the last days before the conclusion of its 2021-2022 term, the Supreme Court decided two notable cases with consequences for health plans: one involving reimbursement rate cuts under the 340B Drug Pricing Program and one involving the Medicare Secondary Payer statute.

Reimbursement Rate Cuts Case

On June 15, 2022, the Supreme Court announced a decision in American Hospital Association v. Becerra, holding in a unanimous opinion that the Department of Health and Human Services ("HHS") acted unlawfully when it reduced reimbursement rates for certain hospitals in 2018 and 2019.

The case involved the 340B Drug Pricing Program ("340B Program"), which generally requires certain pharmaceutical manufacturers to sell drugs at discounted prices to certain health care organizations, such as so-called 340B hospitals, which generally service low-income and rural communities. Separately, the federal government reimburses hospitals for providing drugs to patients insured by Medicare Part B. In the past, reimbursements were provided to all hospitals providing covered outpatient drugs at a uniform rate. Beginning in 2018, however, HHS reduced the reimbursement rates for 340B hospitals, reasoning that it was overpaying the hospitals for drugs obtained through the 340B Program because they were getting the drugs at a much lower price than other hospitals. The reduction in reimbursement rates caused 340B hospitals to lose an estimated $1.6 billion in reimbursements. A group of 340B hospitals sued HHS, challenging the decision to lower the reimbursement rates because HHS had not conducted a survey of hospitals' acquisition costs, as required by the Medicare statute. (HHS eventually conducted the survey in 2020.)

The Court held that HHS lacks discretion to vary the reimbursement rates for one group of hospitals when it has not conducted the required survey of hospitals' acquisition costs. While the Court determined that HHS may set reimbursement rates and adjust those rates up or down, HHS may not vary reimbursement rates between hospital groups unless it first conducts the required survey. Because HHS failed to conduct the survey before the reimbursement reductions in 2018 and 2019, the reduction was impermissible. While the decision is a welcome one for the affected 340B hospitals, the Court's decision appears to suggest that reimbursement reductions outside of the 2018 to 2019 timeframe (i.e., in 2020 and later years after the agency conducted the survey) may be lawful.

Medicare Secondary Payer Statute Case

On June 21, 2022, the Supreme Court announced a decision in *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.*, holding that a group health plan that limited dialysis benefits in a uniform manner to all plan participants did not violate the Medicare Secondary Payer statute ("MSPS").

The case involved DaVita, a healthcare company that provides medical treatments to individuals with end-stage renal disease ("ESRD"). Some of DaVita's patients were enrolled in private group health plans and also received health insurance coverage through Medicare. Under the MSPS—which generally provides the rules for circumstances where Medicare does not have primary payment responsibility for a claim—private health insurers must first pay for any covered ESRD treatments, and Medicare is the secondary payer for any services not covered by the private insurer. The MSPS also provides that a private health plan may not differentiate in the benefits it provides between covered individuals suffering from ESRD and individuals without ESRD. In addition, a plan is prohibited from taking into account an individual's entitlement or eligibility for Medicare due to ESRD. Individuals enrolled in Marietta Memorial Hospital's employer-sponsored group health plan who were treated at DaVita for ESRD sued the plan for violating the MSPS after the plan paid limited portions of their claims for treatment, based on terms in the plan document that limited reimbursement rates for renal dialysis treatment.

The Court held in its 7-2 decision (with Justices Kagan and Sotomayor dissenting) that the plan did not impermissibly differentiate between individuals with and without ESRD because the terms of the reimbursement limitation applied uniformly to all covered individuals. For the same reasons, the plan did not impermissibly take into account an individual's eligibility for or entitlement to Medicare. The decision makes it more difficult for plaintiffs to prove that a health plan violates the MSPS by requiring patients to pay high out-of-pocket costs for ESRD-related treatments.

Other Notable Case

As discussed in RPI 2022-13, one of the most significant decisions of the Court's term is *Dobbs v. Jackson Women's Health Organization*, which struck down *Roe v. Wade* on June 24, 2022. The decision could have implications for employers seeking to add or enhance medical travel benefits to aid individuals living in states where abortion is severely restricted to travel to states to obtain an abortion.

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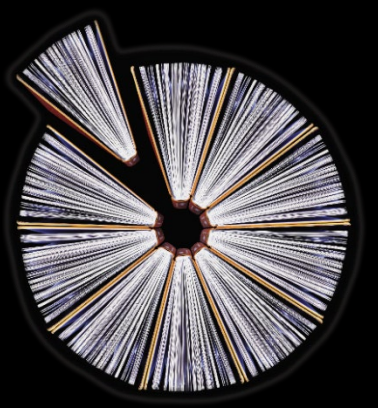

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