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In this Issue:

Proposed Retirement Reform Legislation Also Affects Defined Benefit Plans

Comprehensive retirement bills have passed the House and two Senate committees with bipartisan support, and a final bill could be enacted before the end of 2022. While much of the attention is being given to proposed changes relating to 401(k) and other defined contribution plans, several provisions in play would affect defined benefit plans as well.

Background

Earlier this year, the U.S. House of Representatives overwhelmingly passed the "Securing a Strong Retirement Act", a.k.a. "SECURE 2.0," by a 414-5 margin. The two Senate committees with jurisdiction over retirement issues soon followed with their own bills: the Senate HELP Committee favorably reported the "Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg" ("RISE & SHINE") Act on June 14 and the Senate Finance Committee unanimously approved the "Enhancing American Retirement Now" ("EARN") Act on June 22.

Although each of the three bills is different, there is significant overlap among their provisions. Many of these provisions address issues with defined contribution plans in general and 401(k)-type plans in particular. But as noted above, there are a variety of provisions affecting defined benefit plans as well.

Key Defined Benefit Plan Provisions

- *PBGC Variable-Rate Premium*: The RISE & SHINE Act would freeze the PBGC variable-rate premium rate at $48 per $1,000 in unfunded vested benefits.
- *Cash Balance Plans*: The RISE & SHINE Act would clarify that, for purposes of applicable tax and ERISA rules (such as the Code Sec. 415 limits and anti-backloading rules), cash balance and other hybrid plans that credit interest at a variable rate can use a reasonable projection of the variable rate as the projected interest crediting rate up to a maximum of 6%.
- *Annual Funding Notice*: The RISE & SHINE Act would modify the annual funding notice requirement so that a plan's funding status would be reported using only end-of-year spot interest rates and asset values. It would also add a requirement to disclose that a plan's funded status would be different in a distress termination because the required actuarial assumptions in this case result in higher liabilities.
- *Lump Sum Windows*: The RISE & SHINE Act would enhance disclosure requirements for lump-sum windows, including the ramifications of accepting the lump sum and giving up certain legal protections.
- *Benefit Statements*: SECURE 2.0 would require defined benefit plans to provide the tri-annual pension benefit statement on paper unless the participant elects otherwise. The House-passed provision would not change current rules relating to frozen plans.
- *Section 420 Transfers*: The EARN Act would extend the ability of sponsors of over-funded defined benefit plans to use surplus assets to fund retiree health and life insurance benefits through the end of 2032. (Currently this provision is scheduled to expire at the end of 2025.) Additionally, the bill would lower the funding threshold for making these transfers from 125% to 110% if a plan satisfies certain specific safeguards.

Other Provisions Affecting Defined Benefit Plans

- *Required Minimum Distributions*: SECURE 2.0 and the EARN Act would increase the age for retirees to begin required minimum distributions from 72 to 75, but the two bills would use different schedules to phase-in the increase. SECURE 2.0 also would include a technical correction to clarify that actuarial adjustments still must begin at age 70.5 for non-5% owners who continue working.
- *Mandatory Cash-Outs*: SECURE 2.0 and RISE & SHINE would increase the mandatory cash-out limit for terminated vested participants from $5,000 to $7,000. The EARN Act would increase the limit to $6,000.

Outlook

In spite of the demonstrated bipartisan support for these three bills, the outlook for final enactment before the 117th Congress ends in January 2023 remains uncertain.

Instead of the "normal" legislative process – in which the Senate would combine the RISE & SHINE and EARN Acts into a single bill to be voted on by the Senate and then reconciled with the House-passed SECURE 2.0 in a joint conference – key House and Senate members and their staff reportedly are working to develop a compromise bill that presumably would be attached to an end-of-year spending bill. But there will undoubtedly be competing priorities that could derail this effort.

Additionally, there is no guarantee an end-of-year spending bill will materialize. If Republicans gain control of the House and/or the Senate in November, they may push to wait until the 118th Congress is seated to set spending levels for the remainder of the 2023 fiscal year.

Updates will be published in future editions of Rewards Policy Insider.

Compliance Reminder: Group Health Plans Must Provide Part D Creditable Coverage Notice before October 15

Each year, before October 15, group health plans that provide prescription drug benefits must notify all Medicare-eligible participants if the plan's prescription drug coverage is "creditable coverage."

The written notice must go to all Medicare-eligible participants and their dependents, regardless of whether they are covered as active employees, COBRA beneficiaries, or retirees. This would include those who are age 65 and older, as well as those who are Medicare-eligible due to disability or end-stage renal diseases. Some group health plans merely provide the notice to all participants in order to avoid inadvertently overlooking someone who should have received it.

In addition to the annual creditable coverage notice, the notice must be provided at certain other times – such as when a Medicare-eligible individual first joins the group health plan.

The notice is important because individuals who do not enroll in Medicare Part D when they first become eligible will be subject to a late enrollment penalty unless they maintain other creditable coverage.

What Coverage is Creditable?

In order for a group health plan's prescription drug coverage to be "creditable," its actuarial value must equal or exceed the actuarial value of standard prescription drug coverage under Medicare Part D. In general, the actuarial equivalence test measures whether the expected amount of paid claims under the group health plan's prescription drug coverage is at least as much as the expected amount of paid claims under the standard Part D benefit.

In addition to the creditable coverage notice to participants, group health plans also must report its creditable coverage status to CMS each year using the Online Disclosure to CMS Form. This annual disclosure is generally required no more than 60 days before the beginning of each plan year as well as within 30 days of any change in a plan's creditable coverage status.

For additional information on these requirements, including links to official model notices of creditable coverage, see the CMS website.

7th Circuit Decision Affords DOL Broad Investigative Authority Into ERISA Violations, Including Cybersecurity Breaches

In a case involving alleged cybersecurity breaches by a plan recordkeeper, the 7th Circuit held that the Department of Labor ("DOL") has the authority to investigate non-fiduciaries for potential ERISA violations, including cybersecurity-related issues. Of particular concern for stakeholders, the court found that in complying with DOL's subpoena to turn over certain documents, the recordkeeper could not redact certain sensitive client information.

Overview

Alight Solutions, a company that provides administrative services for employers that sponsor health care and retirement plans, handles highly sensitive client information and maintains cybersecurity practices to protect that information. In 2019, DOL began an investigation into the recordkeeper's alleged cybersecurity breaches after a discovery that Alight processed unauthorized distributions of plan benefits due to cybersecurity breaches in its ERISA plan clients' accounts. As part of its ongoing investigation into those breaches and

whether Alight failed to properly disclose those distributions, DOL issued an administrative subpoena. After Alight produced only some of the documents requested, DOL asked a district court to enforce the subpoena, which Alight argued was too indefinite and overly burdensome. It also argued that DOL lacked the authority to investigate the alleged cybersecurity breaches because (1) Alight is not an ERISA fiduciary, and (2) enforcement of the subpoena would jeopardize confidential information, for which a protective order was needed. The district court ultimately granted DOL's petition to enforce the subpoena (the scope of which was modified slightly in the course of the litigation) and denied Alight's request for a protective order.

On August 12, 2022, in the case *Walsh v. Alight Solutions LLC*, the Court of Appeals for the 7th Circuit upheld the district court's decision to enforce the subpoena. The court held that whether or not Alight is a fiduciary under ERISA does *not* affect DOL's investigative authority because DOL has the power to launch investigations in order to determine whether any person—not just a fiduciary—has violated ERISA. The court noted that DOL's investigative authority hinges on the information requested and its relation to an ERISA violation.

With respect to whether DOL has the authority to conduct cybersecurity investigations, the 7th Circuit held that the issue was forfeited due to procedural issues, but noted that even if it weren't forfeited, the reasonableness of Alight's cybersecurity practices and the extent of any breaches is relevant to determining any potential ERISA violations.

Lastly, the court found that the district court did not improperly deny a protective order to protect client information, which included ERISA plan participant personally identifiable information, confidential settlement agreements, and client identifying information. The court reasoned that federal law already prohibits DOL from disclosing any confidential information; Alight failed to show that production of the information would result in disclosure to a third party; and if Alight did redact the names of its clients, DOL could not identify which employers may have violated ERISA.

Takeaway

The 7th Circuit appears to be the first appellate court that has held that DOL's investigative authority is broad enough to extend to ERISA violations of non-fiduciaries. In particular, the court's decision that sensitive plan-related information—such as information that identifies individual plan participants—may not be redacted in some circumstances is concerning for both recordkeepers and plan sponsors.

The case also serves as a reminder of DOL's focus on cybersecurity issues in recent years, which includes the release of its cybersecurity tips and best practices in 2021. Recordkeepers and plan sponsors should consider what protections they are implementing to protect sensitive information from cybersecurity incidents.

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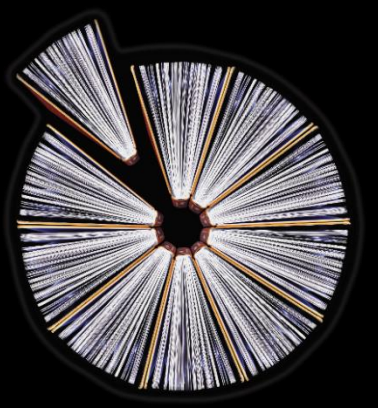

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