United States | Human Capital | 21 October 2022

Rewards Policy Insider
2022-21

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We would like to understand the topics you are most interested in and how Rewards Policy Insider can better inform on the latest employee benefits and compensation news and legislation. If you weren't able to complete this survey last week (should only take 2-3 minutes), the link is still open and we would greatly appreciate your feedback!

IRS Extends Additional Plan Amendment Deadlines

In a follow-up from previous guidance that extended plan and IRA amendment deadlines for the SECURE Act and certain provisions of the Bipartisan American Miners Act and the CARES Act, the IRS extended the previously-granted relief for plan amendment deadlines to an additional section of the CARES Act as well as the Taxpayer Certainty and Disaster Tax Relief Act of 2020.

Background

On August 3, 2022, the Internal Revenue Service ("IRS") released Notice 2022-33, which extended the deadlines for retirement plans and IRAs to adopt amendments reflecting changes included in: (1) the SECURE Act; (2) section 104 of the Bipartisan American Miners Act (which lowered the in-service distribution age for pensions and governmental 457(b) plans to 59½); and (3) section 2203 of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act (which waived required minimum distributions for 2020). The extension was welcome news to many plan sponsors and service providers because without these extensions, many plans and IRAs would have been required to adopt the necessary amendments by the end of 2022.

Extended Deadlines

On September 26, 2022, the IRS released Notice 2022-45, which extended the relief announced in Notice 2022-33 to cover the plan amendment deadlines in section 2202 of the CARES Act and the retirement-related relief of the Tax Relief Act. The extended amendment deadlines for all the above provisions are as follows:

- For *non-governmental qualified retirement plans, 403(b) plans (including applicable collectively bargained plans) that are not governmental plans, and IRAs*, the deadline is December 31, 2025.
- For *qualified governmental qualified plans and governmental 403(b) plans*, the deadline is 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023.
- For *governmental 457(b) plans*, the deadline is the later of: (1) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023; or (2) if applicable, the first day of the first plan year beginning more than 180 days after the date of notification by the IRS that the plan was administered in a manner that is inconsistent with the requirements of section 457(b) of the Internal Revenue Code.

Even if plan sponsors take advantage of the relief and defer adopting the relevant plan amendments, they should operate their plans in accordance with the appropriate changes.

Regular FSA Grace Period and Carryover Rules Return in 2023

Special COVID-era rules that permitted unlimited health FSA carryovers and full year FSA grace periods do not apply to 2022 plan years. Plan administrators should check to make sure the proper administrative procedures are in place and the right information is being communicated to participants in order to ensure their plans are operating correctly and that participants are making informed decisions about using their account balances before 2022 ends.

Background

The Consolidated Appropriations Act (CAA), 2021, made a number of temporary changes to the rules for health and dependent care FSAs to help ensure the pandemic would not prevent participants from being able to fully utilize their benefits. Relevant here:

- For plan years ending in 2020 and 2021, health <u>and</u> dependent care FSAs could permit unlimited carryovers of unused balances to the following plan year. But for this special rule, only health FSAs are permitted to allow carryovers – and only up to an annual limit of $570 (indexed).
- For plan years ending in 2020 and 2021, health and dependent care FSAs could offer up to 12-month grace periods for participants to incur expenses against unused balances. Under normal rules, these grace periods can last no more than 2 months and 15 days immediately following the end of the plan year.

The grace period and carryover rules, including the special rules for plan years ending in 2020 and 2021, are optional for FSAs.

Normal Rules Return for 2022

As the end of the 2022 plan year approaches, health and dependent care FSAs that took advantage of these special temporary rules should be preparing to return to normal rules. This includes clearly communicating with participants during the open enrollment period about how their FSA carryover or grace periods will be changing.

For example, a health FSA that allowed unlimited carryovers at the end of the 2021 plan year will have to again impose a $570 limit on carryovers from the 2022 to 2023 plan year (if it continues to allow carryovers at all). Participants with larger balances, whether attributable to 2022 salary reduction contributions or carryovers from 2021, should be aware that they will forfeit any remaining balances exceeding $570 if they don't use them before the end of the year.

For example, assume a calendar-year health FSA permitted unlimited carryovers from the 2021 plan year to the 2022 plan year. If a participant carried over $1,000 from 2021 to 2022 and made salary reduction contributions of $2,000 for 2022, they would potentially have a balance of as much as $3,000 at the end of 2022 (assuming they did not incur any reimbursable claims during 2022). The most the participant could be allowed to carry over from 2022 to 2023 would be $570.

Dependent care FSAs that allowed carryovers at the end of the 2021 plan year will not be able to allow any amounts to be carried over at the end of the 2022 plan year. Participants should be reminded that, unlike last year, any remaining unused balances will be forfeited at the end of 2022.

Similarly, health and dependent care FSAs that took advantage of the 12-month grace period at the end of 2021 should remind participants that the grace period for 2022 will again be limited to 2 months and 15 days. For calendar year plans, that means the grace period -- which is the period during which participants can incur qualifying expenses and seek reimbursements against their 2022 account balances – will end on March 15, 2023.

Rules Regarding Reimbursement of OTC Drugs Remain in Effect

CAA, 2021 also established new rules permitting health FSAs, health reimbursement arrangements (HRAs), and health savings accounts (HSAs) to reimburse over-the-counter drugs purchased without a prescription, as well as menstrual care products. These changes first applied to expenses incurred in 2020, and are permanent.

Bill That Would Prohibit Arbitration Clauses in ERISA Plans Passes the House

The Employee and Retiree Access to Justice Act, which passed the House on September 29, 2022 by a near-party-line vote, would very generally render arbitration clauses, class action-type waivers, and discretionary clauses in ERISA plans unenforceable. The bill now heads to the Senate, where companion legislation has been introduced.

The Employee and Retiree Access to Justice Act (Title VII of H.R. 7780) was introduced on May 16, 2022 by Representative Mark DeSaulnier (D-CA) and was later incorporated into the Mental Health Matters Act, which includes several proposals designed to increase access to various types of mental and behavioral health care. The package passed by a vote of 220 to 205, with a single Republican, Representative Brian Fitzpatrick (R-PA), voting with all Democrats in favor.

Overview of the Bill

ERISA section 502 provides for ERISA's civil enforcement scheme, which allows plan participants and beneficiaries to bring an action against the plan in certain circumstances. Some plans may have arbitration provisions in plan documents or other agreements that require participants and beneficiaries to arbitrate claims or disputes instead of bringing an action against the plan.

The bill would generally render arbitration clauses (and certain types of waivers and discretionary clauses, as described below) invalid and unenforceable (1) in civil actions brought by, or on behalf of, a participant or beneficiary under section 502 or (2) with respect to a common law claim involving a plan or plan benefit.

Arbitration Provisions. The bill addresses both pre-dispute arbitration provisions (i.e., those that require an individual to commit to arbitrating a dispute before a dispute has actually arisen) and post-dispute arbitration provisions (i.e., those that require an individual to arbitrate a dispute that arose before the provision took effect), but in different ways. Pre-dispute provisions would be unenforceable if they require arbitration of a section 502 claim or a common law claim involving a plan or plan benefit. Post-dispute arbitration provisions would be permitted, but only if a set of conditions is met, including that the provision was not a condition of participating in a plan or receiving an employment benefit and that the participant or beneficiary affirmatively consents to the arbitration provision (after a waiting period).

Litigation Waivers. Pursuant to the same rules governing pre- and post-dispute arbitration provisions, the bill would also render unenforceable class action waivers and other types of clauses that require a participant to promise not to bring individual, joint, representative, or collective claims.

Discretionary Clauses. The bill would also void discretionary clauses in plan-related documents and agreements that confer discretionary authority to a person regarding benefit determinations or interpretations of plan language or provide a standard of review for such determinations or interpretations other than *de novo*. (Multiemployer plans would not be subject to this prohibition.)

Any dispute as to whether a provision requires a participant or beneficiary to arbitrate a dispute would be determined by a court, rather than an arbitrator (regardless of any contractual provisions to the contrary).

Concerns and Next Steps

While Representative DeSaulnier has hailed his bill as helping to ensure individuals have recourse when they are denied retirement and health benefits, industry stakeholders have expressed concerns that the bill would lead to a serious uptick in litigation for ERISA plans. Increased litigation could, in turn, increase administrative costs for retirement plans, and serves to benefit the plaintiffs' bar at the expense of retirement savers.

The bill now heads to the Senate, where Senator Tina Smith (D-MN) introduced companion legislation (S. 4219). As the end of the year—and of the 117th Congress—draws near, it is not yet clear what chance the bill has of passing the Senate. Congress has a number of significant legislative packages that it may consider in the next few months, including the "SECURE 2.0" retirement legislation.

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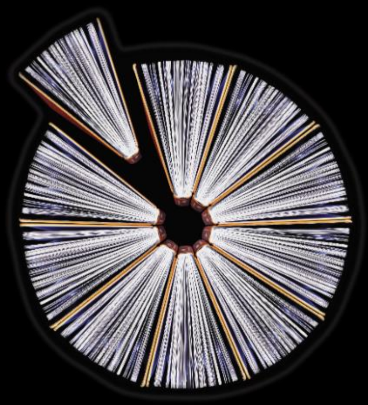

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