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HHS Extends COVID-19 Public Health Emergency for Another 90 Days

As expected, U.S. Secretary of Health and Human Services Xavier Becerra has extended the COVID-19

Public Health Emergency (PHE) for another 90 days, effective October 13, 2022. For group health plans, the extension means certain mandates relating to coverage of COVID-19 testing and COVID vaccinations will continue at least through January 11, 2023.

Coverage Mandates

The Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES) Act established certain mandates for group health plans regarding coverage of COVID-19 testing and vaccinations that will remain in effect until the COVID-19 PHE ends.

In general, plans must cover COVID-19 tests and testing-related services without any cost-sharing, prior authorization, or other medical management requirements. Since mid-January of this year, this requirement has extended to over-the-counter, at-home tests.

Additionally, plans must cover COVID-19 vaccines provided by out-of-network providers without cost-sharing. In general, plans must use the Medicare reimbursement rate for purposes of reimbursing out-of-network providers for the cost of administering the vaccine. The costs of the vaccine itself are still being paid by the federal government, but that practice is expected to end sometime in 2023.

As noted, these mandates will remain in effect until the COVID-19 PHE ends.

When will the PHE End?

As discussed, Secretary Becerra extended the public health emergency for another 90 days effective October 13, 2022. That means the public health emergency is currently scheduled to remain in effect at least until January 11, 2023.

Whether Secretary Becerra will extend the public health emergency again or let it expire in January is an open question. Some have been pressuring the Administration to bring both the public health emergency and the COVID-19 National Emergency to an end. But there is more at stake than just these group health plan mandates. Also tied to the public health emergency are special rules for Medicare and Medicaid, as well as the validity of Emergency Use Authorizations issued by the Food and Drug Administration.

Secretary Becerra has indicated that he will give at least 60 days advance notice if he plans not to extend the public health emergency. That means a decision will need to be made in mid-November if he is not going to renew it in January. To date, no announcement has been made.

Note that the Public Health Emergency is different from the COVID-19 National Emergency, which is currently in effect through February 2023. The "outbreak period" relief for COBRA election and premium payment deadlines, among other ERISA requirements for group health plans, is tied to the National Emergency declaration. If President Biden extends the National Emergency again, the IRS and DOL could choose to end the outbreak period relief if they believe it is no longer needed.

Significantly, the Senate approved a resolution to end the National Emergency on November 15 by a 62-37 margin. President Biden has threatened to veto

the resolution, and the Senate vote fell 5 short of the 67 votes that would be needed to override his veto. However, the Senate vote is a signal that political pressure is building for both the National and Public Health Emergencies to end sooner rather than later.

ESG Investing by Retirement Plans Remains a Contentious Issue

The Biden Administration's final ERISA Environmental, Social, and Governance ("ESG") rule was sent to the White House Office of Management and Budget for review, and Republican lawmakers recently introduced a bill that would require ERISA fiduciaries to act solely on pecuniary factors when making investment decisions.

The debate over using ESG factors in investment decisions by ERISA plan fiduciaries has become contentious in recent years, with fierce support and opposition from both lawmakers and different presidential administrations. Below is a summary of recent developments in the ESG landscape.

Update on Biden Administration Proposed ESG Rule

On October 14, 2021, the Department of Labor ("DOL") released a proposed rule to amend its ERISA "Investment Duties" regulation to address prudence and loyalty in selecting plan investments and exercising shareholder rights. The proposed rule is an effort to modify two final rules that were released in the waning days of the Trump Administration that generally made it more difficult for plan fiduciaries to consider so-called "ESG" factors—such as climate change and social issues—when making investment decisions by requiring fiduciaries to act solely on the basis of pecuniary factors.

The Biden Administration's proposed rule would make it easier for fiduciaries to consider ESG factors and specifically references ESG factors in the regulation as examples of factors that may be material to a risk-return analysis of an investment. Specifically, the proposed rule would, among other things, add a new provision to the regulations stating that a prudent fiduciary "may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis."

On October 6, 2022, the final ESG rule was sent to the White House Office of Management and Budget ("OMB"). Generally, the OMB review process takes between 30-90 days, with 60 days being typical. As a result, the final rule could be released in late 2022 or early 2023.

Proposed ESG Bills

While the Biden Administration's ESG rulemaking progresses, some lawmakers have moved to combat ESG-based investing by ERISA plan fiduciaries.

On October 18, 2022, Representative Greg Murphy (R-NC), along with three Republican co-sponsors, introduced the Safeguarding Investment Options for Retirement Act (H.R. 9198). The bill would essentially codify the Trump Administration rule (described above) that generally requires plan fiduciaries to act solely based on pecuniary factors. The bill would allow investments on a plan menu that promote non-pecuniary goals, but only if the investment otherwise meets ERISA's rules and the investment is not the plan's default investment. The rules would apply to ERISA plans as well as state and local government 401(a), 403(b) and 457(b) plans. In a press release, Representative Murphy criticized the Biden proposed rule as putting Americans' retirement savings at risk in favor of "politically motivated" ESG issues.

Representative Murphy is not the only lawmaker to take aim at ESG investment factors. A similar bill, the Ensuring Sound Guidance Act (H.R. 7151), was introduced in March 2022 by Representative Andy Barr (R-KY) and has over 20 Republican co-sponsors (but no Democratic support). The bill, which would generally require fiduciaries to consider solely pecuniary factors with respect to investments, would apply to ERISA plans and investment advisers subject to the Investment Advisers Act of 1940.

Outlook

Even if the Murphy and/or Barr bill were to pass Congress, President Biden would almost certainly veto them. As a result, the biggest ESG-related development for ERISA fiduciaries in 2023 likely will be the DOL's final rule modifying the "Investment Duties" regulation. But that will not necessarily be the end of the story since a future Republican President could be willing to re-open the regulatory process and/or sign the Murphy or Barr bills into law.

IRS Provides RMD Relief for 2021 and 2022

Notice 2022-53 provides relief for failures in 2021 and 2022 to comply with the "10-year rule" as outlined in IRS's proposed required minimum distribution ("RMD") regulations, which were released in early 2022. The guidance also delays the effective date of the upcoming final regulations to no earlier than the 2023 distribution calendar year.

Background

The SECURE Act amended the RMD rules under Internal Revenue Code ("Code") section 401(a)(9), which generally determine the minimum amount that must be withdrawn from a defined contribution plan account or IRA. Under the RMD rules as modified by the SECURE Act, there is a 10-year deadline for making distributions to beneficiaries under defined contribution plans and IRAs who

are not "eligible" designated beneficiaries ("EDBs") – e.g., a deceased participant's surviving spouse or minor child.

The scope of the 10-year rule was not clear. As a result, there was confusion about how it should be applied in situations where distributions to the employee (or IRA owner) or a beneficiary had already started. Before the February 2022 proposed regulations (as described below), many in the retirement industry interpreted the 10-year rule as not requiring annual distributions, regardless of when or how the 10-year rule is triggered.

As part of its process of updating the corresponding regulations under Code section 401(a)(9) in light of the SECURE Act, the Internal Revenue Service ("IRS") published proposed regulations on February 24, 2022. Contrary to the common interpretation that distributions would not be required during the 10-year period, the proposed regulations explained that distributions must continue during the 10-year period in two circumstances.

- First, distributions must continue during the 10-year period for any designated beneficiary if the employee or IRA owner dies on or after their required beginning date ("RBD") because the so-called "at-least-as-rapidly" rule applies in that case. (This rule provides that if an employee or IRA owner dies after distributions have already begun according to their life expectancy, any remaining amount must be distributed at least as rapidly as the distribution method that was already being used.)
- Second, distributions must continue following the death of an EDB who is "stretching" the benefits they inherited from an employee or IRA owner who died before their RBD.

Due to the difference between the interpretations, it appears likely that some taxpayers did not take RMDS in 2021 (and have not taken RMDs in 2022) because they believed that it was not required under the 10-year rule.

Notice 2022-53

On October 7, 2022, the IRS released Notice 2022-53. The guidance provides relief for failures in 2021 and 2022 to comply with the IRS's interpretation of the 10-year rule. A defined contribution plan that did not make a "specified RMD" will not be treated as having failed to satisfy the requirement to take RMDs merely because it did not make that distribution. A "specified RMD" is a distribution that would be required to be made under the interpretation in the proposed regulations in 2021 or 2022 with respect to the following individuals:

- A designated beneficiary of an employee or IRA owner if: (a) the employee/IRA owner died in 2020 or 2021 and on or after the employee's RBD; and (b) the designated beneficiary is not taking lifetime or life expectancy payments under Code section 401(a)(9)(B)(iii), i.e., pursuant to the "stretch" rule that may apply in cases where an employee dies before their RBD.
- A beneficiary of an EDB if: (a) the EDB died in 2020 or 2021; and (b) the EDB was taking lifetime or life expectancy payments under Code section 401(a)(9)(B)(iii), i.e., pursuant to the "stretch" rule.

The IRS will not impose the 50% excise tax that otherwise applies for taxpayers who fail to take an RMD; if a taxpayer has already paid an excise tax for 2021, they can request a refund.

Lastly, the Notice provides that the final regulations will apply no earlier than the 2023 distribution calendar year, which represents a one-year delay from

what was outlined in the proposed regulations. The IRS has not stated when it intends to release final regulations, but recent comments by Treasury Department officials indicate that the IRS aims to complete final regulations by the end of 2022 or early 2023.

Note that the relief provided by Notice 2022-53 applies only to specified RMD failures in 2021 and 2022, as outlined above. Going forward, plan administrators should be sure to follow the IRS's interpretation of how the 10-year rule is to be applied.

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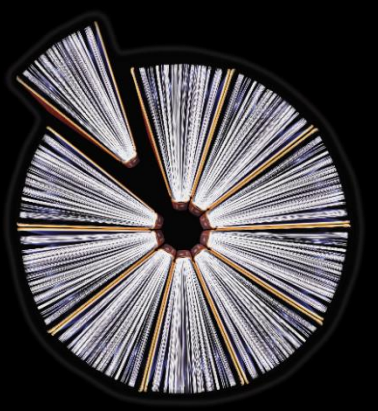

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