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Efforts Still Underway to Pass SECURE 2.0 Legislation Before Year's End

As the end of the 117th Congress draws near, lawmakers are reportedly continuing to work on finalizing the comprehensive retirement legislation package known as "SECURE 2.0." If enacted, the bipartisan legislation – which is intended to expand coverage of retirement plans, increase retirement savings, and make changes to plan administration and compliance – would be the most significant retirement bill passed since the original SECURE Act in 2019.

Background

The legislative proposal referred to as "SECURE 2.0" currently consists of three separate bills. In March 2022, the U.S. House of Representatives passed the "Securing a Strong Retirement Act" (H.R. 2954) (the "House bill") by a vote of 414 to 5. Shortly thereafter, two Senate Committees approved their own bills. On June 14th, the Senate Health, Education, Labor, and Pensions ("HELP") Committee favorably reported the "Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg" ("RISE & SHINE") Act (S. 4353) (the "HELP bill"). On June 22nd, the Senate Finance Committee approved the "Enhancing American Retirement Now" ("EARN") Act (the "Finance bill"), which was formally introduced on September 8th (S. 4808). While the bills share many similarities, there are also crucial differences in many of the details as well as provisions that are unique to each bill. Lawmakers have been working to reconcile the three bills, with many hoping to pass a single, final SECURE 2.0 bill before the 117th Congress ends on January 3, 2023.

Key SECURE 2.0 Provisions

The details of a final SECURE 2.0, if it should pass, are still not known. However, a final bill could include, among many other provisions, the notable provisions described below:

- Required Minimum Distributions. Both the House bill and the Finance bill contain a provision that would increase the age by which an individual must take required minimum distributions from a retirement plan or IRA from 72 to 75. The House bill would increase to age 75 in three phases, while the Finance bill would not use phases.
- Catch-up Contributions. The House bill and the Finance bill would increase the catch-up contribution limitations for certain ages to $10,000 for 401(k), 403(b), and 457(b) plans, and $5,000 for SIMPLE IRA or SIMPLE 401(k) plans. The applicable ages in which an individual could make an increased contribution varies by bill.
- Lump Sum Windows. The HELP bill, but not the other bills, would implement enhanced disclosure requirements with respect to defined benefit plans that offer participants a "lump sum window," during which participants can elect to receive their benefit immediately as a lump sum or in another form.
- Recovery of Overpayments. All three bills would generally allow retirement plan fiduciaries to decide not to recoup certain accidental overpayments to plan participants.
- Part-Time Workers. Under current law, employers maintaining a 401(k) plan must generally allow certain long-term, part-time workers to participate in the plan if they complete three years of employment. All three bills would reduce the three-year requirement to two years.

- **Mandatory Cash-Outs.** Under current law, a plan can "cash out" a participant who terminates their employment if the value of the employee's benefit does not exceed $5,000. All three bills would increase the mandatory cash-out limit to $6,000 (the Finance bill) or $7,000 (the House and HELP bills).

Outlook

While it is not yet clear whether SECURE 2.0 will become law in 2022, reports indicate that lawmakers are continuing to negotiate to determine the components of a final bill. Like the original SECURE Act in 2019, a year end omnibus appropriations bill is the only available legislative vehicle for SECURE 2.0. As RPI goes to press, key Congressional leaders reportedly have agreed on a framework for an omnibus package – but the details, including the fate of SECURE 2.0, are still unknown.

The current plan is for Congress to pass another short-term continuing resolution to keep the government operating after the current resolution expires on December 16, 2022. The reported goal is to have a final omnibus bill – with or without SECURE 2.0 – ready to vote on by December 23.

DOL Releases Long-Awaited Final ESG Rule

On November 22, 2022, the Department of Labor ("DOL") released its highly anticipated final rule amending its investment duties regulation to address environmental, social, and governance ("ESG") investment considerations and proxy voting. The final rule largely follows the 2021 proposed rule, but also makes important changes, such as simplifying certain references to ESG factors.

Background

First promulgated in 1979, DOL's investment duties regulation was modified in 2020 by the Trump Administration to address ESG and proxy voting investment issues under ERISA. Generally, the Trump-era rule required fiduciaries to consider only "pecuniary" factors in investment courses of action. Shortly after he took office in 2021, President Biden, along with DOL, took steps to pause enforcement of the 2020 Trump-era rule. In October 2021, the Biden Administration's DOL released its proposed rule modifying the Trump-era rule. The proposed rule was generally intended to swing the pendulum back from the Trump-era rule towards a more ESG-friendly policy and allow fiduciaries to consider non-pecuniary investment factors.

Key Takeaways

While the final rule does make significant modifications to the Trump-era rule, ultimately DOL emphasizes that the final rule retains ERISA's core principle requiring plan fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries to objectives that are unrelated to the provision of benefits. Like the proposed rule, the final rule

eliminates the Trump-era rule's use of the term "pecuniary" factors, instead replacing the term with a more general risk-return analysis concept.

As noted above, while the final rule largely follows the proposed rule, it also makes certain important changes. One notable change to the final rule involves the simplification of specific references to ESG factors. The proposed rule suggested new language providing that a fiduciary may consider any factor in the evaluation of an investment that is material to the risk-return analysis. The proposed rule then provided three examples addressing scenarios where ESG factors might be considered in an investment decision. The final rule deletes the three ESG-specific examples. Instead, the rule contains a statement that risk and return factors may include the economic effects of climate change and other ESG factors on a particular investment. DOL indicates that the reason for this change was that the agency received comments that the final rule's provision on risk-return analysis should not include specific examples.

Among other changes, the final rule also: (1) eliminates a proposed requirement for a special disclosure for participant-directed plans offering ESG funds in circumstances involving the rule's "tie-breaker test"; and (2) removes proposed language stating that a fiduciary's consideration of a portfolio's projected return "may often require" an evaluation of the effects of climate change and other ESG factors (which some commenters worried would put too much weight on ESG factors).

With respect to proxy voting, the final rule makes minor changes to the proposed rule and generally simplifies the proxy voting rules and eliminates a recordkeeping requirement that applies in connection with exercising shareholder rights.

The final rule is generally effective starting on January 30, 2023 (with a one-year delayed effective date for certain proxy voting provisions).

IRS Announces Inflation-Adjusted PCORI (Patient Center Outcomes Research Institute) Fee

The annual fee that group health plans must pay to fund the Patient-Centered Outcomes Trust Fund will be $3.00 (up from $2.79) times the plan's average number of covered lives for plan years ending on or after October 1, 2022 and before October 1, 2023. The IRS announced the higher fee in Notice 2022-59.

Originally enacted as part of the Affordable Care Act, the fee was initially scheduled to sunset in 2019. However, the Further Consolidated Appropriations Act, 2020, extended it for an additional 10 years.

Who is Responsible for the PCORI Fee?

In the case of fully-insured plans, the PCORI fee is paid by the insurance issuer. However, the responsibility falls to the plan sponsor for any "applicable self-insured health plans." The PCORI fee applies regardless of whether the

applicable self-insured health plan is sponsored by a private employer or a government employer.

The term "applicable self-insured plans" generally includes major medical plans for active employees, retirees, and COBRA beneficiaries. The fee does not apply to accident-only and hospital or other specified disease indemnity plans.

Health Reimbursement Arrangements (HRAs) and Flexible Spending Arrangements (FSAs) technically are subject to the fee unless they qualify as "excepted benefits." Health Savings Accounts (HSAs) are not subject to the PCORI fee.

How the PCORI Fee is Calculated, Reported and Paid

The PCORI fee is calculated on the average number of lives covered under an applicable self-insured health plan. Generally, plan sponsors of applicable self-insured health plans must use one of the following three alternative methods to determine the average number of lives covered under a plan for the plan year.

- Actual Count Method
- Snapshot Method
- Form 5500 Method

The fee generally must be reported and paid by filing the Form 720 (Quarterly Federal Excise Tax Return) no later than July 31 of the calendar year immediately following the last day of the policy year or plan year to which the fee applies. For calendar year plans, the $3.00 per covered participant fee will be due by July 31, 2023.

Additional information about the fee, including how to calculate and pay it, is available on the IRS's website.

Senate Overwhelmingly Approves Resolution to End COVID-19 National Emergency, But Falls Short of Votes Needed to Override Threatened Veto

In a rare show of bipartisanship, the Senate on November 15, 2022 approved a resolution (S.J. Res. 63) to end the presidentially-declared COVID-19 National Emergency. The final vote was 61-37, with 49 Republicans and 12 Democrats supporting the resolution. At least 4 more Senators would need to get behind the bill to override a threatened veto if the measure were to also pass the House.

The eventual ending of the COVID-19 National Emergency is of interest to sponsors and administrators of ERISA retirement and health and welfare benefit plans because the COVID-19 "Outbreak Period" relief – which gives ERISA plan participants an additional year to pay COBRA premiums, appeal

adverse benefit determinations, and exercise other plan-related rights – is currently scheduled to continue until the National Emergency ends.

Unless S.J. Res. 63 is enacted into law sooner, the COVID-19 National Emergency will end after February 28, 2023. However, President Biden can renew the declaration for another year. The White House has not made any formal announcement of its plans, but the President's threat to veto S.J. Res. 63 indicates the Administration is not ready to end the National Emergency just yet.

But even if the National Emergency continues, the Departments of Labor and Treasury can take steps to end the Outbreak period relief earlier. However, there has not been any indication so far when or if that might happen.

Background on Outbreak Period Relief

In 2020 the Departments of Labor and Treasury issued guidance (the "Joint Guidance") to extend certain employee benefit plan-related deadlines and other timeframes during the COVID National Emergency.

Briefly, the Joint Guidance provided that the period from March 1, 2020 through 60 days after the end of the Presidentially declared COVID-19 National Emergency (i.e., the "Outbreak Period") must be disregarded for purposes of determining certain periods and dates, including –

- The 30-day (or 60-day, if applicable) period for an employee to exercise his or her HIPAA special enrollment rights;
- The 60-day COBRA election period, as well as any deadlines for paying COBRA premiums;
- The deadline for filing claims for benefits, appealing adverse benefit determinations, and exercising other rights under the plan's claims procedure rules.

The underlying statutory authority for the Joint Guidance is ERISA Section 518 and Code Section 7508A(b), which limits the duration of "disregarded periods" to no more than one year. That one-year period ended on February 28, 2021. However, Employee Benefits Security Administration ("EBSA") Disaster Relief Notice 2021-1 ("Notice") takes the position that the one-year limit applies on a rolling basis, beginning when a participant becomes eligible for relief.

Specifically, the Notice explains that the relief provided with respect to a relevant time period will apply only until the earlier of (1) one-year from the date the participant was first eligible for relief, or (2) the end of the Outbreak Period. Because of the President's decision to extend the COVID-19 National Emergency, the Outbreak Period is still ongoing.

For example, an ERISA retirement plan participant must be given at least 60 days to appeal an adverse benefit determination. If a participant receives a notice of adverse benefit determination on December 1, 2022, the relief provides that the 60-day period cannot begin to run until December 1, 2023.

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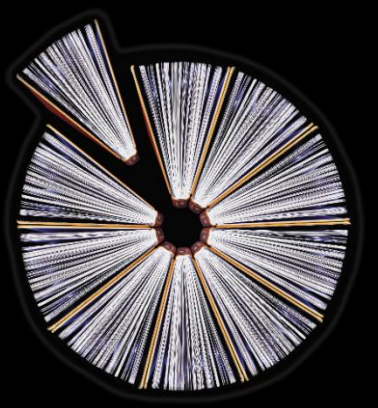

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