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# Rewards Policy Insider
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## DOL Requests Comments on SECURE 2.0's Reporting and Disclosure Provisions

In a step towards additional future guidance on the SECURE 2.0 Act of 2022 ("SECURE 2.0"), the Department of Labor ("DOL") published a Request for Information ("RFI") requesting public comments on the SECURE 2.0 provisions that affect plan reporting and disclosure requirements.

## Background

SECURE 2.0, which was enacted at the very end of 2022, contains several provisions that update or otherwise require federal agencies to review existing ERISA reporting and disclosure requirements for retirement plans. These provisions include:

- Paper Benefit Statements. Under ERISA, retirement plan administrators must provide plan participants with benefit statements that include certain information about their accounts and benefits. In many cases, DOL allows plan administrators to provide these statements in electronic form. SECURE 2.0 requires administrators to provide certain statements on paper, subject to two "safe harbor" exceptions: (1) for plans that furnish benefit statements under DOL's 2002 safe harbors that allow electronic delivery; and (2) if a recipient requests that his or her statements be delivered electronically. For defined contribution plans, such paper statements must be delivered to participants at least once a year (and every three years for defined benefit plans). SECURE 2.0 also requires DOL to update its existing guidance governing electronic disclosure statements.
- Emergency Savings Accounts. SECURE 2.0 creates a new type of account called a "pension-linked emergency savings account" ("PLESA"), which allows a 401(k), 403(b), or governmental 457(b) defined contribution plan to include an additional account for the purpose of allowing participants to set aside and access savings in the case of emergency.
- Fee Disclosures. Under current law, DOL's participant fee and investment disclosure regulations require plan fiduciaries to inform participants who have the right to direct the investment of their account about the plan's fees and the investments on the plan menu. SECURE 2.0 directs DOL to review these regulations and to explore, through a public RFI or otherwise, how the content and design of the disclosures could be improved to enhance a participant's understanding of fees and expenses.

In months since SECURE 2.0's enactment, preliminary guidance on the law's provisions has begun to trickle in from the federal agencies.

## DOL's Request for Information

On August 11, 2023, DOL published an RFI asking for public comments on the provisions of SECURE 2.0 that impact reporting and disclosure requirements. DOL states that any later action it takes on these SECURE 2.0 provisions – whether rulemaking or another agency action – will be better informed by responses to the RFI. The SECURE 2.0 provisions that DOL focuses on in the RFI include (but are not limited to):

- Paper Benefit Statements. In connection with the changes made by SECURE 2.0 regarding paper and electronic benefit statements, the RFI asks whether the available electronic safe harbors should contain a new

condition that plan administrators must monitor whether individuals actually logged on to the website to view their electronically delivered benefit statement, and if they didn't, whether the plan would have to send them a paper disclosure or take some other action. This may raise concerns for many administrators, as this type of requirement would create additional administrative burdens and could limit their use of electronic statements.

- Emergency Savings Accounts. With respect to the new emergency savings accounts created by SECURE 2.0, DOL asks what guidance, if any, plan administrators need to effectively implement PLESAs, and to indicate the priority of any issues on which guidance is needed. DOL also asks whether a model notice or model language for certain notice requirements for PLESAs would be helpful to plan administrators.
- Fee Disclosures. Regarding SECURE 2.0's requirement that DOL review the current fee disclosure regulations, the RFI asks whether the information currently being provided to participants is adequate in helping plan participants make informed investment decisions. If inadequate, the RFI asks whether there is evidence that this inadequacy is tied directly to the regulations, as opposed to other factors impacting financial literacy. The RFI also states that DOL may take steps in addition to the RFI to conduct its review, but that responses to the RFI will be a helpful start.

Comments on the RFI can be submitted through October 10, 2023.

# Circuit Court Decision Provides Reminder that ACA Does Not Require Plans to Cover All Emergency Services

In a case involving a plan participant who received bariatric surgery and then required an additional emergency procedure, the U.S. Court of Appeals for the Eighth Circuit ruled that it did not violate the Affordable Care Act ("ACA") for the plan to exclude from coverage the additional emergency surgery when such procedures were excluded from the plan's policy.

## Background

Under the ACA and the accompanying regulations, if a group health plan or insurance issuer that offers group health insurance coverage provides any benefits with respect to emergency services, the plan or issuer must cover emergency services in accordance with specific parameters. As an example, a plan or issuer that provides coverage for emergency services must provide such coverage without the need for any prior authorization determination and regardless of whether the health care provider is a participating network provider. The ACA also allows insurers to limit coverage under the terms of the health care plan.

In 2015, an individual underwent bariatric surgery to lose weight. A few months later, he began working for Zimmerman Transfer, a trucking company based in Wisconsin. The plaintiff then became a participant in Zimmerman's self-insured ERISA-covered employee benefit plan, of which Zimmerman serves as the plan sponsor and plan administrator. The plan's schedule of benefits includes covered services such as emergency room services, hospital services, urgent care, and preventative care services. The plan's policy provides that benefits are payable for "Medically Necessary Covered Expenses" incurred by a covered individual while covered for a particular benefit if they are not excluded under the exceptions provision of the policy. Under a separate section, the plan excludes "treatment . . . in connection with weight reduction, including . . . any procedure performed to alter the digestive process for the purpose of weight loss," and "treatment, service or supplies due to complications of a non-Covered Expense."

In 2017, the plaintiff experienced a variety of symptoms that led to the performance of a second emergency surgery. It was determined that the issues were caused by the plaintiff's bariatric surgery in 2015. Because of the plan's exclusion of treatment in connection with weight reduction, the claims for coverage were denied.

In 2022, after exhausting the administrative appeals process, the employee sued Zimmerman and the plan's former third-party administrator in Iowa district court, claiming that state insurance law and the ACA require coverage of the emergency treatment he underwent. The court in *Shafer v. Zimmerman Transfer* ruled in favor of Zimmerman and the third-party administrator, concluding that nothing in the ACA required the plan to cover such treatment.

## 8th Circuit Ruling

On appeal, on June 7, 2023, the Eighth Circuit affirmed the lower court's ruling. As a preliminary matter, the court determined that the plaintiff had standing to sue the plan's former third-party administrator. Then, the court highlighted that the ACA (and Iowa state law) does not require a plan to cover all emergency services. Instead, the ACA requires plans that *already* cover emergency services to satisfy additional requirements. For example, plans that cover emergency services must apply the same terms regardless of whether they are provided in-network or out-of-network..

The court also rejected the plaintiff's argument that his emergency surgery claim should be covered because it was an emergency service under the plan's terms and was medically necessary. The court reasoned that even though the second surgery itself was medically necessary, that didn't mean it fit under the definition of a "Medically Necessary Covered Expense" within the plan's policy. And again, the court highlighted that the plan specifically excludes coverage for complications resulting from bariatric surgery, regardless of whether the procedure was an emergency service.

This case serves as an important reminder of the contours of the ACA and the line between what the law requires – or merely permits – plans to cover.

# GAO Report Recommends Ways to Improve 403(b) Plan Participant Outcomes

A report published by the Government Accountability Office ("GAO") in July highlights potential ways to improve participant outcomes in 403(b) plans, and specifically recommends that the Department of Labor ("DOL") update its online educational materials on 403(b) plans to better inform plan participants.

## Overview of GAO's Findings

On July 24, 2023, the GAO, which provides research-based reports at the request of members of Congress, released a report focused on 403(b) retirement plans. The report explores – but does not formally recommend – several possible ways to improve participant outcomes in 403(b) plans, which are used by millions of teachers and employees of tax-exempt organizations. Among the methods discussed by the GAO is the possibility of allowing 403(b) plans to invest in collective investment trusts ("CITs"). The expansion of 403(b) plan investment options to include CITs has gained traction in recent years, and at least one bipartisan bill (H.R. 3063) has been introduced this year which would allow CIT investments for 403(b) plans. The report notes that multiple stakeholders and experts the GAO interviewed said that 403(b) plans should be allowed to contain a broader range of investment options, such as CITs, which are currently mostly limited to 401(k) plans. The GAO also discusses other recommendations by stakeholders and experts, such as adding ERISA-like fiduciary protections to non-ERISA 403(b) plans; having federal agencies conduct outreach to small K-12 and other small 403(b) plan sponsors; and allowing for automatic enrollment and automatic escalation in non-ERISA 403(b) plans.

As part of the report, GAO examined how five selected states - California, Connecticut, Delaware, Kansas, and Texas – have worked to improve outcomes in 403(b) plans within their own states. Three states have consolidated the number of service providers offering investment options, which allows for a greater level of oversight by officials. In four states, officials said they enhanced transparency surrounding 403(b) plans by providing participants with additional information on plans' investment options and fees or by making such information available.

## Recommendations by GAO

Frequently, GAO reports include recommendations to the lawmakers to whom they are addressed or to federal agencies. This report, which is addressed to Representative Bobby Scott (D-VA), Ranking Member of the House Committee on Education and the Workforce, contains one such recommendation. As part of its responsibility to oversee some 403(b) plans and their investment options, DOL conducts outreach and provide educational materials to plan sponsors and participants. However, DOL's website does not currently contain targeted educational materials that could help participants "make more informed decisions," and the agency does not provide the same level of detailed information regarding 403(b) plans as it does for 401(k) plans. The GAO recommends that DOL update educational materials provided on the agency's website to ensure these materials include information relevant to 403(b) plans for plan sponsors and participants. For its part, DOL neither agreed nor

disagreed with the recommendations, but stated that it would review its relevant publications to see if it should more specifically reference 403(b) plans.

While GAO recommendations are not binding – and are therefore not necessarily ever implemented – they do provide a window into what issues the members of Congress who requested the report are interested in, and they can provide a preview of potential future legislation or agency action.

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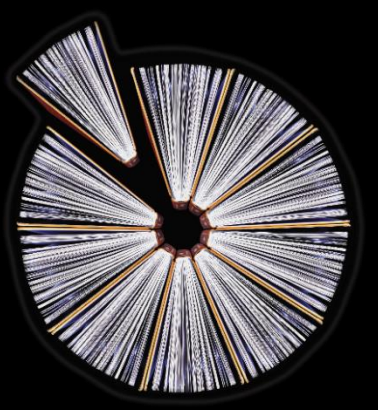

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