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SECURE 2.0 Analysis: PBGC Variable-Rate Premiums

In a welcome change for single employer defined benefit plans, under the new SECURE 2.0 legislation, the Pension

Benefit Guaranty Corporation's ("PBGC") variable-rate premium for single-employer plans will no longer be indexed for inflation and will be capped at the 2023 level going forward.

On December 29, 2022, President Biden signed into law the Consolidated Appropriations Act, 2023 (H.R. 2617), which included major retirement legislation called the SECURE 2.0 Act of 2022 ("SECURE 2.0"). SECURE 2.0 makes sweeping changes to retirement plans, including changes relating to, among many other things, required minimum distributions, catch-up contributions, and the ability of long-term, part-time employees to participate in their employer's 401(k) plans.

In this article, we take a deeper dive on one SECURE 2.0 provision that affects defined benefit ("DB") plans, involving PBGC variable-rate premiums.

Background on Variable-Rate Premiums

There are two premiums for plans covered by the PBGC's single-employer program: a per-participant flat-rate premium ("FRP") and a variable-rate premium ("VRP"). The VRP is calculated by taking the plan's unfunded vested benefits (i.e., the difference between the present value of what the plan owes participants and the amount that it currently has to cover what it owes) and multiplying it by the variable rate set by the PBGC (which is subject to a per-participant cap, currently $652 for 2023).

Historically, both the FRP and the VRP have been indexed for inflation. In addition to being indexed for inflation, the VRP is already adjusted to account for a plan's underfunding. This can lead to employers owing 100% or 200% (and sometimes more) of their underfunding as a VRP, which is a particular burden for struggling plans.

Changes Under SECURE 2.0

SECURE 2.0 eliminates the indexing of the VRP and caps the VRP at the level for 2023, i.e., $52 per $1,000 of unfunded vested benefits. SECURE 2.0 does not make any changes to the FRP, which will continue to be indexed for inflation. The VRP per participant cap will continue to be adjusted annually for inflation as well.

This change applies to plan years beginning after December 31, 2023.

Agencies Propose Changes to Religious and Moral Exceptions to Contraceptive Coverage Mandate

Asserting that the Supreme Court's Dobbs decision has placed "a heightened importance on access to contraceptive services nationwide," the Departments of Labor, Health and Human Services, and Treasury

("Agencies") on January 30, 2023 issued proposed regulations that would eliminate the moral exemption to the Affordable Care Act's requirement for group health plans to cover contraceptives without any cost-sharing. The proposed regulation would leave the religious exemption in place and would also create a new option for individuals to obtain free contraceptives if their plans are exempt.

Background

In general, pursuant to the Affordable Care Act (ACA) group health plans (as well as plans sold in the individual market, etc.) are required to cover certain "preventive services" without any cost-sharing. This requirement does not apply to ACA grandfathered plans.

The definition of "preventive services" specifically includes certain women's preventive services "as provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA)." The HRSA guidelines include the full range of contraceptive services, including injectable contraceptives, oral contraceptives, and certain emergency contraceptives, among others.

The applicability of the contraceptive coverage requirements to employers with religious objections has been the subject of much regulatory action and litigation. Current regulations provide exemptions for plan sponsors with sincerely held religious objections and sincerely held moral objections to contraceptive coverage. For plan sponsors that qualify for an exemption, the rules also provide a voluntary accommodation to ensure their participants still have access to free contraceptives. Under the voluntary accommodation, the plan's health insurance issuer or administrator provides or arranges separate payments for contraceptives without the plan sponsor's involvement.

The voluntary accommodation is completely optional. Plan sponsors that qualify for a religious or moral exemption can choose to not take advantage of it, which means their participants will not have access to free contraceptives.

Proposed Regulations

The proposed rule would eliminate the moral objection exemption but leave the religious exemption in place.

When adopting the moral objection exemption in 2018, the Agencies acknowledged that they did so to accommodate non-religious moral objections even though they were not legally required to do so. Citing the fact that the Agencies are aware of only a few entities claiming the moral objection exemption, the preamble to the proposed regulations states the Agencies "are of the view that non-religious moral objections to contraceptives are outweighed by the strong public interest in making contraceptive coverage as accessible to women as possible."

The proposed regulations would leave in place the current voluntary accommodation for plans claiming a religious objection. However, for participants in plans that are exempt but do not take advantage of the voluntary accommodation, it would establish an alternative path for obtaining free contraceptives. Individuals could utilize this alternative path without needing the objecting plan sponsor to do anything to make it available.

The Agencies are accepting comments on the proposed regulations until April 3, 2023.

Debate Over ESG Investing by Retirement Plans Heats Up

In both Congress and the states, the highly partisan brawl over environmental, social, and governance ("ESG") investing by retirement plans has ramped up in the wake of the Department of Labor's ("DOL") issuance of its final ESG rule in December 2022. Most recently, a group of 25 states filed a lawsuit challenging DOL's final rule.

Background

On December 1, 2022, DOL released its highly anticipated final rule amending its ERISA "investment duties" regulation to address ESG investment considerations and proxy voting. The final rule amends the previous version of the investment duties regulation that was issued under the Trump Administration in 2020, which generally required ERISA fiduciaries to consider only "pecuniary" factors when taking investment courses of action. Once President Biden took office in 2021, DOL paused enforcement of the Trump rule and began a new process to modify that rule.

The final rule made some important modifications to the Trump rule, including eliminating the Trump rule's references to "pecuniary" factors, instead referencing a more general concept of risk-return analysis. The final rule also provides that risk and return factors may include the economic effects of climate change and other ESG factors on a particular investment. The final rule went into effect on January 30, 2023. (See RPI 2022-25 for more information about the final rule.)

Both before and after the finalization of the Biden Administration's final ESG rule for ERISA fiduciaries, ESG has been the subject of both strong support and equally strong scrutiny at the state and federal levels.

Lawsuit

On January 26, 2023, 25 state attorneys general – including the attorneys general of Texas, Virginia, Florida, and Ohio – and four private parties filed a complaint against DOL in a Texas district court, alleging that the final ESG rule violates ERISA and the Administrative Procedure Act ("APA"). In the lawsuit, the plaintiffs argue that the final ESG rule "undermines key protections for retirement savings . . . in the name of promoting [ESG] factors in investing" and "formally incorporates ill-defined, subjective ESG concepts into the ERISA regulations."

The plaintiffs also claim that, under the final rule, fiduciaries and investment managers could potentially "substitute their own ESG policy preferences" when making investment decisions. With respect to their claim that the final rule violates ERISA, the plaintiffs generally allege that the final rule allows a fiduciary to select an investment based on collateral benefits, rather than investment returns, if the fiduciary concludes that competing investments equally serve the financial interests of the plan over the appropriate time horizon. With respect to their claim that the final rule violates the APA – which generally requires federal agencies to follow certain procedures when they engage in the rulemaking process – the plaintiffs make several arguments, including that DOL failed to take into account relevant considerations under ERISA when developing the final rule and failed to consider proper alternatives to issuing a new rule, such as issuing clarifying sub-regulatory guidance.

The plaintiffs are seeking a preliminary injunction against the final ESG rule, as well as a ruling permanently preventing DOL from implementing the final ESG rule.

Additional Pushback on ESG

The Texas lawsuit is hardly the only challenge that the final ESG rule faces. Many congressional Republicans have rallied to strongly oppose ESG investing in various ways. Towards the end of the 117th Congress, Representative Greg Murphy (R-NC) introduced a bill (H.R. 9198) that would have generally codified the Trump Administration's ESG rule to require ERISA plan fiduciaries to make investment decisions based solely on pecuniary factors. In early February, a group of Senators led by Mike Braun (R-IN), and including Senator Joe Manchin (D-WV), introduced a Congressional Review Act resolution to invalidate the Biden Administration's final rule.

Several states have also come out strongly against ESG, while others have expressed support. In Oklahoma, for example, the state treasurer recently announced that he is compiling a list of financial institutions that implement ESG policies in order to bar Oklahoma governmental entities from doing business with them. In contrast to the Texas lawsuit, a group of attorneys general from Democrat-led states wrote a letter to Members of Congress in November 2022 espousing the benefits of ESG.

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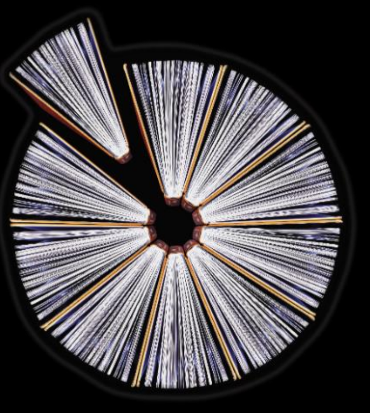

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