Reinhart

Benefits Counselor – January 2023

POSTED:

Jan 17, 2023

RELATED PRACTICES:

Employee Benefits

https://www.reinhartlaw.com/practices/employee-benefits

RETIREMENT PLAN DEVELOPMENTS

Year-End Spending Package Includes SECURE 2.0 Act

On December 29, 2022, President Biden signed into law the Consolidated Appropriations Act of 2023 (2023 CAA), which includes the SECURE 2.0 Act of 2022 (SECURE 2.0), building upon 2019's expansive SECURE Act. SECURE 2.0 includes provisions that modernize the retirement system by encouraging additional retirement savings, ensuring greater access to workplace retirement plans and easing administrative requirements.

While most changes take effect in upcoming years, some changes became effective on the date of enactment, December 29, 2022, and others on the first day of a plan year beginning on or after January 1, 2023.

For an in depth analysis of the retirement plan changes included in SECURE 2.0, please see our recent alert series. We discuss key provisions applicable to all qualified retirement plans, as well as provisions applicable to only defined contribution and defined benefit plans.

IRS Proposes Regulation on Alternative In-Person Witnessing of Spousal Consent

The IRS issued proposed regulations relating to the use of electronic media to make participant elections and spousal consents. Currently, the rules require spousal consent for plan distributions to be signed in the physical presence of a notary or plan representative. The proposed regulations would allow plans to accept remote notarization or witnessing by a plan representative if the remote process meets certain integrity standards.

These proposed regulations are similar to the previous temporary relief the IRS had granted in response to the COVID 19 National Emergency that expired at the end of 2022. To avoid any gap in relief, the IRS stated that the proposed regulations can be relied upon prior to the applicability date of any final regulations. The proposed regulations are subject to public comment, with comments due by March 30, 2023.

IRS Issues Final Rules on Foreign Pension Funds Exception

The IRS released final rules clarifying that foreign pension funds are broadly

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

eligible for a tax exemption when they record gains or losses on the sale of U.S. real estate. The rules are meant to ensure that foreign pension funds are treated the same as U.S. pension funds, which similarly do not pay taxes on the sale of U.S. real estate.

The Protecting Americans from Tax Hikes Act of 2015 had granted this exemption to foreign pension funds but left unclear exactly what kinds of entities qualified since foreign pension funds are often structured differently from U.S. pension funds. The final rules detail what kinds of entities owned by the funds can claim the exemption.

IRS Announces Notice 2022-22 Defined Benefit Pension Plan Mortality Will Apply in 2023

As discussed in our May 2022 Benefits Counselor, the IRS and the U.S. Department of the Treasury released proposed regulations and Notice 2022 22, which provided mortality tables defined benefit pension plans would use to determine present value and make minimum funding contribution computations. The IRS had explained that if the proposed regulations were finalized effective for plan years beginning on or after January 1, 2023, then the mortality tables would apply for purposes of calculating minimum required contributions only for a plan with a plan year that begins in 2022, and a valuation date in 2023.

The IRS has now announced that it is no longer planning to finalize the proposed regulations with an effective date during 2023. Thus, pursuant to existing regulations, the mortality tables provided in Notice 2022 22 will apply for purposes of calculating minimum required contributions for a valuation date in 2023 for all plans.

Notice 2022-22 also provides a modified version of the mortality tables used to determine the minimum amount of a lump sum distribution from a defined benefit pension plan for stability periods beginning during 2023. The applicability of this mortality table for 2023 is not affected by the delay in the finalization of the proposed regulations.

IRS Publishes Covered Compensation Tables for 2023

On December 8, 2022, the IRS issued compensation tables for 2023 for employers to determine benefits for retirement plans that use "permitted disparity" when integrating benefits under tax qualified pension, profit sharing and stock bonus plans with Social Security benefits. The taxable wage base to determine covered compensation increased from $147,000 for 2022, to $160,200 for 2023.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

Sixth Circuit Holds That Underpayment Claim Limitations Period Accrues At "Injury"

In *Gragg v. UPS Pension Plan*, 2022 WL 17729625 (6th Circ. 2022) regarding a dispute alleging the underpayment of pension benefits, the U.S. Court of Appeals for the Sixth Circuit held that the statute of limitations period for an ERISA underpayment claim does not expire before the alleged underpayment has occurred.

In July 2010, Plaintiff Ralph Gragg received a letter from two pension plans he was participating in that stated his expected benefit amount from each plan before and after he turned age 65. Each plan planned to reduce his monthly payment by his Social Security benefit upon Gragg turning age 65. Eight years later, Gragg turned age 65 and began receiving Social Security benefits. Each plan reduced his monthly benefit by the entire amount of his Social Security benefit, which led to a reduction of double the amount of his Social Security benefit.

Gragg brought suit alleging that the plans paid him less than he was entitled. The District Court found his claim untimely due to the six year statute of limitations because he brought the claim eight years after he received the letter from his pension plans.

Reviewing the District Court's dismissal *de novo*, the Sixth Circuit reversed the District Court's judgment, stating, "the letters did not cause the injury upon which Gragg sued; the underpayments did. And before that injury his claim had not accrued." Applying this understanding, the District Court concluded that Gragg was not "injured" until he was first underpaid in 2018. Furthermore, the District Court stated that Gragg could not have commenced legal action after receiving the letter as his claim was not ripe for controversy.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Year-End Spending Package Contains Group Health Plan Provisions

As mentioned above, on December 29, 2022, President Biden signed into law the 2023 CAA, which includes the following provisions that impact group health plan sponsors and advisors:

- Extended Telehealth Relief for HDHP Plans. The 2023 CAA further extends the safe harbor allowing high deductible health plans (HDHPs) to offer first dollar coverage of telehealth services without ruining HDHP members' ability to make or receive pre tax contributions into their health savings accounts. The safe

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

harbor extension is applicable during plan years beginning after December 31, 2022, and before January 1, 2025. In addition, HDHPs may provide coverage for telehealth and other remote care services during those plan years before the minimum deductible is satisfied without losing their HDHP status.

- Elimination of Opt Out for Non Federal Governmental Health Plans. The 2023 CAA prohibits self insured non federal government health plans from opting out of the Mental Health Parity and Addiction Equity Act (MHPAEA) compliance. The 2023 CAA prohibits new MHPAEA related opt-out elections as of the statute's enactment date, December 29, 2022. For non-federal government plans that have an existing election, the 2023 CAA prohibits the renewal of elections that expire on or after 180 days following the enactment date. However, non-federal governmental plans that are subject to multiple collective bargaining agreements (CBA) may extend their existing elections until the date their last CBA expires.

Good-Faith Relief for Aspects of RxDC Reports

On December 23, 2022, the U.S Department of Labor (DOL), U.S. Department of Health & Human Services (HHS) and U.S. Department of the Treasury (Departments) confirmed that they will not take enforcement action against any plan that uses a good faith, reasonable interpretation of the prescription drug and health care spending (RxDC) reporting instructions and regulations. This relief applies for the initial filing for 2020 and 2021 data. The Departments also provided a submission grace period through January 31, 2023, an extension from the prior December 27, 2022, deadline. Further, for this initial reporting deadline, the Departments provided relief for a number of the data elements required by the guidance.

IRS Publishes Final Regulations on ACA Reporting

The IRS published final regulations on December 15, 2022, permanently extending the deadline to provide Form 1095 B and Form 1095 C to individuals to March 2 (the next business day if March 2 falls on a weekend or holiday). This extension does not apply to the deadline to file these forms with the IRS.

The final regulations also make permanent the option to post a notice on the plan sponsor's website that Forms 1095 B (and 1095 C for certain covered individuals) are available upon request rather than mailing. The final regulations also reiterate that relief from penalties for reporting incorrect or incomplete information is no longer available.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

Lastly, the final regulations revise the definition of "minimum essential coverage" to provide that coverage solely for COVID 19 testing and diagnostic services is not considered "minimum essential coverage."

Agencies Report on the IDR Process for 2022 Q2 and Q3 and Increase Fees for 2023

The Departments recently published a report on the Federal Independent Dispute Resolution (IDR) process for claims protected from balance billing under the No Surprises Act. The Departments found that (1) significantly more disputes were submitted than was projected; and (2) determining the eligibility of disputes for IDR requires more review and processing than was anticipated. Accordingly, a significant number of disputes have not been decided, as 90,000 have been initiated and only 23,000 have closed.

As a result of these developments, the per party, non refundable administrative fee for the IDR process increased from $50 to $350 for 2023. Fees are also due to the IDR entity that decides the dispute. The IDR entity sets these fees; for 2023, the fee for a single IDR determination can be up to $700. The fee for a batched IDR determination can be up to $938, with the fee increasing from the set amount in 10 percent increments if there are 21 plus, 51 plus or 81 plus items or services included in the batch.

HRSA Updates Supported Women's Preventive Service Guidelines

In December 2022, the Health Resources & Services Administration (HRSA) approved updates to the Guidelines for (1) Screening for Gestational Diabetes Mellitus (Screening for Diabetes in Pregnancy); and (2) Screening for Diabetes Mellitus after Pregnancy (Screening for Diabetes after Pregnancy). The updated Guidelines remove language recommending a specific type of screening test and clarify screening recommendations after pregnancy.

As a reminder, non grandfathered group health plans must provide coverage without cost sharing for certain preventive services, including those provided for in the HRSA supported Guidelines. The updated Guidelines become effective for plan years beginning after December 31, 2023.

Transgender Discrimination Cases

C.P. v. Blue Cross Blue Shield of Illinois, 2022 WL 17788148 (W.D. Wash. 2022). The U.S. District Court for the Western District of Washington found that Blue Cross Blue Shield of Illinois (BCBSIL) violated ACA section 1557 when acting as a third party administrator (TPA) for a self funded plan. The District Court

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

determined that BCBSIL discriminated on the basis of sex by administering a plan's categorical exclusion for gender affirming care for gender dysphoria. The District Court decided not to defer to the 2020 final regulations under which BCBSIL would not have been subject to ACA section 1557, at least with respect to its TPA business. The District Court also rejected BCBSIL's argument that, among other things, it did not design the plan exclusion and ERISA required it to administer the plan consistent with its terms, and that there was no medical consensus on gender affirming care and the exclusion, therefore, did not discriminate on the basis of sex.

Kadel v. Folwell, 2022 WL 2106270 (M.D.N.C. 2022). Similarly, a North Carolina district court concluded that a state group health plan was a "health program or activity" subject to ACA section 1557's nondiscrimination protections. As a result, the plan's coverage exclusion for treatment related to gender dysphoria violated ACA section 1557.

The plaintiffs in this case were state employees who, as participants in the state's group health plan, asserted that the plan's categorical exclusion for gender affirming care discriminated against them on the basis of sex and transgender status in violation of the Equal Protection Clause, Title VII of the Civil Rights Act and ACA section 1557.

The plaintiffs also brought these claims on behalf of their children, who were covered dependents under the plan, and transgender individuals. The plan had denied coverage for treatment for the plaintiffs (or their dependents) related to gender dysphoria, citing the plan's exclusion for benefits related to "sex changes or modifications and related care."

The court acknowledged that HHS's section 1557 implementing regulations from 2020 remained in effect and expressly defined the term "health program or activity." However, the court declined to give deference to those regulations in light of August 2022 re proposed regulations and because the court concluded that the ACA statute's "health program or activity" language clearly included health insurance providers and health plans, though not expressly defined under the ACA itself.

While the scope of entities subject to HHS's section 1557 implementing regulations has changed over the years, plan sponsors and TPAs should monitor developments and be mindful of plan provisions that could invite costly legal challenges. Further, these lawsuits may lead to claims payers and TPAs refusing to

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

administer plan exclusions for transgender coverage, regardless of whether the plan is subject to ACA section 1557.

GENERAL DEVELOPMENTS

Agencies Release 2022 Finalized Form 5500 and Form 5500-SF

The U.S. Department of Labor (DOL), Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation (PBGC) have released informational copies of the annual Form 5500 and Form 5500 SF as well as their respective instructions and schedules. The instructions include changes that the DOL has described in previous agency actions. The changes are generally to the actuarial and retirement plan schedule and are intended to clarify the benefit and funding information as required under the Setting Every Community Up for Retirement Enhancement (SECURE) Act.

DOL Announces Changes to EFAST2 Website Credentials

The DOL also announced that the existing EFAST2 user ID and password log in process is being phased out. Beginning January 1, 2023, EFAST2 started using the unified Login.gov single sign on process for U.S. Government websites. Existing EFAST2 users will have until September 1, 2023, to transition their log in.

Logging into the EFAST2 website is required to obtain new electronic signature credentials for the Form 5500 Series. These signature credentials will not change. EFAST2 is also required to file the Form PR or to use IFILE, the government's Form 5500 Series filing application.

Ninth Circuit Holds That *De Novo* Review Must Rely on Administrative Record

In *Collier v. Lincoln Life Assurance Company of Boston*, 2022 WL 17087828 (9th Circ. 2022), the U.S. Court of Appeals for the Ninth Circuit held that courts cannot adopt a new rationale for denying a claim when performing a *de novo* review. The claimant in this case applied for long term disability benefits based on neck and back pain. The insurer denied her claim based on a medical record and vocational review. However, in subsequent litigation, the insurer raised a new argument that the claimant's pain complaints were not credible. While the District Court accepted this argument, the Ninth Circuit found it to be a new rationale that the District Court should not have considered. The Ninth Circuit concluded that only the rationales the plan administrator relied on in denying benefits may be examined, and that the District Court cannot adopt new rationales that the claimant had no opportunity to respond to during the appeal process.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

This case serves as an important reminder to include all rationales for denial in the appeal denial letter.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Retirement Plan Compliance Deadlines and Reminders

Form 1099 R. Plan sponsors must send a 2022 Form 1099 R to plan participants and beneficiaries by January 31, 2023, and file the same with the IRS by February 28, 2023 (March 31, 2023, if e filing).

Health Plan Compliance Deadlines and Reminders

HIPAA Breach Reporting. Plans must file their annual breach reports with the HHS Office of Civil Rights by March 1, 2023. The annual breach report is for breaches involving fewer than 500 individuals that occurred during the preceding year. Breaches involving 500 or more individuals must be reported no later than 60 calendar days from the date of the breach's discovery.

Medicare Creditable Coverage. Plans must report the creditable coverage status of their prescription drug plan to the Centers for Medicare and Medicaid Services annually no later than 60 days from the beginning of a plan year. For calendar year plans, this date is March 1, 2023.

Air Ambulance Cost Reporting. Group health plans must submit reports related to air ambulance services to HHS, jointly with the DOL and Treasury Department, by March 31, 2023. Currently, the requirements are set forth in a Proposed Rule, discussed in our September 2021 Benefits Counselor. Given that the requirements are only in proposed form, it is possible that the reporting deadline will be extended, or the Proposed Rule will be modified in its final state.

RxDC Reporting. The Departments provided a submission grace period through January 31, 2023, for the initial filing of the RxDC Report for 2020 and 2021 data. Reporting for subsequent years will be due each year on June 1. Thus, RxDC Reporting for 2022 data will be due June 1, 2023.

Furnish Forms 1095 B and 1095 C to Participants/Employees. Plan sponsors of self funded health plans that elect to mail the Form 1095-B and applicable large employers (ALEs) must distribute Forms 1095 B and 1095 C to applicable individuals by March 2, 2023.

File Forms with IRS. Plan sponsors and ALEs must file the transmittal Forms 1094 B and 1094 C with their corresponding Forms 1095 with the IRS by March

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

31, 2023 (February 28, 2023, if eligible to file hard copies).

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.