

Benefits Counselor – June 2021

RETIREMENT PLAN DEVELOPMENTS

“SECURE 2.0” Approved by House Ways and Means Committee Unanimously

On May 5, 2021, the House Ways and Means Committee approved the Securing a Strong Retirement Act of 2021 by a unanimous vote. This bill contains multiple key provisions that would enable employees and retirees to save more money at the conclusion of their careers, as well as increase coverage for retirement plans.

Some of these key provisions are as follows:

- 401(k) plans adopted after the date of enactment must default participants into the plan at a contribution rate of at least 3 percent of pay, increasing by 1 percent annually until it has reached the 10 percent threshold.
- Sponsor contributions to 401(k) plans matching student loan repayments would be treated as normal 401(k) employer matching contributions, with student loan repayments being treated as elective deferrals only for the purposes of this rule.
- Increasing cap on mandatory distributions to \$6,000.
- Increasing required reporting for mandatory transfers.
- Increasing the required beginning date for required minimum distributions (RMDs) from age 72 to age 75 and increasing the catch up contribution limit to \$10,000 for ages 62 to 64.
- Expanding the Internal Revenue Service (IRS) Employee Plans Compliance Resolution System to include individual retirement accounts (IRAs).
- Increasing tax incentives for small businesses to establish retirement plans.
- Encouraging use of lifetime products, like annuities, in retirement plans.
- Prohibiting any requirement that premiums for qualified longevity annuity contracts (QLACs) be limited to 25 percent of an individual account balance.
- Compiling the \$100,000 qualified charitable distribution (QCD) limit for inflation.

Additional minor changes can be found within the bill itself. Now that the bill has

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Jun 11, 2021

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been approved by the House Ways and Means Committee (with widespread bipartisan support), the bill must next be approved by the House and then the Senate before President Biden could sign the bill into law.

New Federal Bill Expands ESG Considerations Under ERISA

On May 20, 2021, democrats in both the House and the Senate introduced the *Financial Factors in Selecting Retirement Plan Investment Act* that would amend the Employee Retirement Income Security Act of 1974 (ERISA) to allow: (1) retirement plans to consider environmental, social and governance (ESG) factors when facing investment decisions; (2) ESG investments to qualify as default investment alternatives in ERISA covered plans; and (3) plans to consider ESG factors as “tiebreakers” when deciding between similar options.

HEALTH AND WELFARE PLAN DEVELOPMENTS

IRS Provides Limits for HSA and HDHP in 2022

On May 10, 2021, the IRS announced the 2022 inflation adjusted amounts for health savings account (HSA) contribution and cost-sharing limits for high deductible health plans (HDHP). For self only coverage, HSA contribution limits are increasing by \$50, while family coverage HSA contribution limits are increasing by \$100. The annual limit on HSA contributions for self only coverage and family coverage will be \$3,650 and \$7,300, respectively. The maximum out of pocket amounts for HDHPs are also increasing to \$7,050 for self-only coverage and \$14,100 for family coverage. HDHP deductible minimums remain unchanged at \$1,400 for self-only coverage and \$2,800 for family coverage. The contribution amounts for excepted benefit health reimbursement arrangements (HRAs) for plans also remain unchanged in 2022 at \$1,800. These changes will allow employers that sponsor HDHPs time to prepare for open enrollment at the end of this year.

IRS Issues Guidance on Taxability of Dependent Care Programs Through 2022

On May 10, 2021, the IRS issued guidance on the taxability of dependent care assistance programs through 2022. IRS Notice 2021 26 prevents excess reimbursements and clarifies that benefits from dependent care assistance programs that would have been excluded from income if used in the past two taxable years are still eligible for exclusion from the participant's gross income. Generally, any dependent care expenses reimbursed this year or next year will not be taxable if the additional amount was attributable to a Consolidated Appropriations Act (CAA) carryover or was the product of an extended grace



period. For non-calendar plan years, the increased exclusion amount will not apply to reimbursements incurred during 2022.

IRS Issues Guidance on COBRA Subsidy

On May 18, 2021, the IRS issued Notice 2021-31, providing guidance on the administration of Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) premium subsidy and refundable premium assistance tax credit. The following are highlights from Notice 2021-31:

Eligibility

The American Rescue Plan Act of 2021 (ARPA) COBRA premium subsidy provisions require assistance-eligible individuals (AEI) to be treated as having fully paid the premium owed for COBRA continuation coverage (COBRA Subsidy) during the period from April 1, 2021 through September 30, 2021 (Subsidy Period). An AEI is a qualified beneficiary, whose COBRA qualifying event is either a reduction of hours or an involuntary termination of employment resulting in loss of coverage, who is not eligible for Medicare or other group health plan (GHP) coverage and who elects COBRA continuation coverage. AEI determination is made at the time of the first qualifying event and an individual may become an AEI multiple times. However, an AEI must inform his or her employer if he or she ceases to be an AEI during the COBRA Subsidy Period.

COBRA Subsidy

Coverage under COBRA Subsidy includes GHPs and HRAs. The COBRA Subsidy primarily applies to months during an extended COBRA period that overlaps with the COBRA Subsidy Period. The COBRA Subsidy Period beginning date occurs when premiums would be charged and ends on the first to occur: (1) the individual becomes eligible for other GHP (including retiree coverage offered under a separate GHP) or Medicare coverage; (2) the individual ceases to be eligible for COBRA; or (3) the end of the last period of coverage before September 30, 2021.

Premium Assistance Credit

Employers claiming premium assistance credit are required to retain records validating the individual's eligibility for the COBRA Subsidy. The employer is prohibited from claiming premium assistance credit for amounts considered as qualified health plan expenses or qualified wages. The employer is permitted to claim premium assistance credit for a fiscal quarter on its federal employment tax



return, however, the premium assistance credit claimed for that fiscal quarter is equal to premiums not paid by AEs and is reduced to the extent the employer subsidizes COBRA premium costs for similarly situated qualified beneficiaries.

EEOC Provides Vaccine Guidance for Employers

On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) provided advice on how employers should approach vaccination mandates. The EEOC provides that even though employers may mandate that employees be vaccinated, employers should first consider the negative impact mandatory vaccination policies may have on protected classes of individuals. Employers can encourage employees to become vaccinated and can offer incentives, but the extent of the incentive varies depending on whether the employer (or employer's agent) provides the vaccine or the employer merely requires proof of vaccination from a third party.

- Employers that provide vaccinations directly to employees: may offer vaccination incentives to employees, so long as the incentives are not so substantial as to be coercive. However, incentives for employees' family members who become vaccinated continue to be prohibited.
- Employers that request proof of vaccination from a third party: may offer incentives to employees and/or their families that have been vaccinated.

Employers should maintain confidentiality about the vaccination status of its employees and be accommodating to all employees, regardless of whether they are vaccinated, to create a safe work environment.

CASES

Boley v. Universal Health Servs., Inc.

Boley is a class action lawsuit, involving a \$1.6 billion 401(k) plan, which has been brought before the Third Circuit of the U.S. Court of Appeals for a ruling on an issue regarding excessive fee litigation under ERISA. The defendant, *Universal Health Services, Inc.*, has argued that this class of 60,000 participants should never have been certified because several plaintiffs were invested in only 19 percent (seven of the available 37) of the plan's investment options provided in the suit. This case should determine whether a plaintiff who was not invested in the funds in question can bring forth a suit.

Wilson v. Craver



The plaintiff alleged that the fiduciaries of the employee stock ownership plan (ESOP) in question knew about the ex parte communications before they were publicly disclosed and failed to take appropriate action to prevent potential harm to plan participants. The district court dismissed the complaint and the plaintiff appealed. On April 14, 2021, a Ninth Circuit panel unanimously affirmed the dismissal. The district court rejected the plaintiff's argument that delaying disclosure increased eventual negative price impact and reputational harm. This decision provides protection to ESOP fiduciaries and reaffirms the strict pleading standard in ESOP duty of prudence cases, requiring plaintiffs to plead "context specific" allegations describing an alternative action "so clearly beneficial" that a reasonable and prudent fiduciary "could not conclude that it would be more likely to harm the fund than to help it."

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Model COBRA Election Notices

The U.S. Department of Labor (DOL) Model COBRA Election Notice should be sent to qualified beneficiaries who experience qualifying events before September 30, 2021, but only if the qualifying event occurred after April 1, 2021. Notice of expiration only needs to be sent to AEs whose subsidies will end by September 30, 2021 pursuant to ARPA.

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