Labor & Employment Issues

Employee Benefits

In Focus

Pitta LLP

For Clients and Friends

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QUESTIONS ABOUND OVER ROTH CATCH UP CONTRIBUTIONS

Currently, plan sponsors may allow retirement plan participants aged 50 and over to make catch up contributions up to $7,500 on a pre-tax and/or Roth basis at the participant's election. However, a provision in the SECURE 2.0 Act of 2022 modifies this longstanding rule for participants aged 50 and older who earn more than $145,000 in wages in the prior year. The new provision is effective for taxable years after December 31, 2023 and requires participants who meet the wage threshold and choose to make catch up contributions to make them on a Roth basis. Unavoidably, the new rule has sparked a lot of questions from employers and plan sponsors, ranging from (i) whether employers are allowed to take away the participants' ability to make catch up contributions only for those who meet the wage threshold in the prior year; (ii) whether employers may mandate that all participants' catch up contributions, regardless of income limit, be made on a Roth basis; (iii) whether employers are allowed to take away all participants' ability to make catch up contributions and (iv) how does the wage threshold apply when a participant is hired in the middle of the year. In addition, employers that offer plans that do not have a Roth contribution feature must determine whether to incorporate a Roth feature or eliminate the catch-up contribution feature altogether. Understandably, the industry awaits guidance from the Internal Revenue Service that would hopefully clarify some of the questions in advance of the fast-approaching effective date for the provision.

PBM SCRUTINY UNDERWAY IN CONGRESS AND AT FEDERAL TRADE COMMISSION

In recent months, there has been increasing scrutiny from Congress and the Federal Trade Commission ("FTC") of pharmacy benefit managers ("PBMs"). In fact, committees in both the Senate and House are currently drafting regulatory legislation, while the FTC has begun an investigation on PBMs' internal practices. PBMs are middlemen that negotiate prescription drug prices with manufacturers on behalf of health plans, plan sponsors and insurance companies. PBMs also advise as to which specific drugs are included in a plan's formulary, work with plan sponsors to design and administer prescription plans and reimburse pharmacies for prescription drugs. Much of the interest in PBM reform is due to concerns about transparency and the continued increases in prescription drug prices.

PBMs hold a significant amount of power over how much individuals pay for their prescriptions while being subjected to little meaningful oversight. Legislation proposed in the Senate and House seeks to change this. In the Senate, the most prominent proposed bill so far is the Pharmacy Benefit Manager Reform Act, advanced by the Health, Education, Labor, and Pensions ("HELP") Committee in May 2023. This bipartisan bill targets a number of current PBM practices, including: (i) clawbacks, which are fees

charged to pharmacies after Medicare Part D prescriptions have been filled; (ii) spread pricing, which is a common practice where PBMs charge insurance plans an additional premium over the price they pay for drugs to pharmacies; and (iii) gag clauses, which prohibit pharmacists from informing patients that it may be cheaper for them to purchase prescription drugs without using insurance. The proposed bill would also mandate that PBMs pass on earnings from the rebates and fees they receive from drug manufacturers to health plans and provide reports to the Department of Health and Human Services before raising some drug prices. Finally, the proposed bill would require the Government Accountability Office to study access to overdose reversal drugs and the Department of Labor to conduct a report on PBMs' role as fiduciaries under ERISA.

While the HELP Committee's bill is the most comprehensive, other committees in the legislature have also advanced proposals for PBM reform in 2023. For instance, the Senate Finance Committee released a proposed framework for PBM reform in April 2023, with a focus on "misaligned incentives." According to the proposed framework, industry practices do not incentivize PBMs to deliver prescription drugs at affordable prices; transparency and access issues are rampant in the industry, as well as practices that cause less competition and higher costs for consumers. Similar legislation has been proposed by the Senate Committee on Commerce, Science, and Transportation, the House Committee on Oversight and Accountability, and the House Energy and Commerce Committee. With respect to the FTC investigation, the FTC announced in early June 2023 that it was beginning an investigation into PBMs as an industry. Thus, the agency issued compulsory orders requesting information to several prominent PBMs and their affiliates.

This increased interest over the last few months suggests that PBM reform is currently a priority on both sides of the aisle and changes in the industry may be forthcoming.

RECOMMENDED TIPS FOR CONDUCTING DILIGENT SEARCHES FOR MISSING PARTICIPANTS

The search for missing participants has been a focus of the Department of Labor for many years as demonstrated by the SECURE 2.0 Act of 2022's requirement for the establishment of a RETIREMENT LOST AND FOUND database. Plan sponsors are well advised to conduct a thorough search for missing participants and to well document all aspects of the search. A well-documented search is considered, by regulators to be, a diligent search. Further, regulators regard a lack of documentation of the search process a possible red flag that could result in potential fiduciary violations. Below are four (4) recommended tips for documenting missing participant searches.

Tip #1: Determine the Need for the Search

A few indicators that a search might be needed include: (1) a terminated participant's account that has no recent activity; (2) returned mail marked "return to sender," "wrong address," "addressee unknown," or otherwise, and undeliverable email;

(3) a distribution check that remains uncashed for an unreasonable period and/or (4) a required minimum distribution that remains pending. Plan sponsors should document their reasons behind the need to conduct a search, and in so doing, illustrate their procedure to determine an appropriate search methodology.

Tip #2: Determine the Search Methodology

Plan sponsors should always document a search as well as the facts and circumstances leading up to the decision as to which search methodology to use. Some search methodologies may include: (1) search publicly available information as well as internal records for additional contact information, (2) take advantage of a credit reporting service, (3) take advantage of a commercial search provider and/or (4) utilize personal outreach to contact participants or beneficiaries through email, phone, social media or the use of USPS Certified Mail.

Tip #3: Document the Search Results

It is advisable that Plan sponsors document the search results and compare them to the participant data on file. Specifically, search results should document: (1) the data regarding the participant that is currently on file when the search began, (2) the timeframes of the search, (3) the data fields utilized in the search and (4) an analysis of the data that was returned (this might include marking a search result as "data obtained, but differs from current data on file," or "no data returned").

Tip #4: Document Follow-Up Steps Taken After Search Results were Obtained

Plan sponsors should document any follow-up actions taken after completing the search such as taking no action, updating participant data or marking the participant as needing further searches.

JUDGE DISSOLVES TWO FORTY-YEAR-OLD CONSENT DECREES

On June 9, 2023, Judge Thomas M. Durkin of the Northern District of Illinois adopted the recommendation of the Independent Special Counsel ("ISC") and dissolved two (2) forty (40)-year old Consent Decrees in three (3) consolidated cases holding that there was no evidence of violations or wrongdoing since the entry of the Consent Decrees.

In 1982, a Consent Decree was entered in *Reich v. Fitzsimmons*, No. 78 C 342 (N.D. Ill.) after the Department of Labor ("DOL") filed suit charging the trustees of the Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund") with mismanaging Pension Fund assets by approving huge loans to applicants as a front for funneling money to organized crime. Accordingly, a Consent Decree was entered in 1982 mandating that the Pension Fund assets be managed by a court-appointed fiduciary as that term is defined by the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). The second Consent Decree was issued in 1985 after the DOL had

filed two suits against Loran Robbins and others (*Marshall v. Robbins*, 78 C 4075 (N.D. Ill.) and against Allen Dorfman and others (*Marshall v. Dorfman*, 82 C 7951 (N.D. Ill.), alleging mismanagement of the Central States Southeast and Southwest Areas Health & Welfare Fund (the "Health & Welfare Fund"). The second Consent Decree also mandated that the Health & Welfare Fund's assets be managed by a court-appointed fiduciary. Accordingly, the Pension Fund and Health & Welfare Fund (the "Funds") have been subject to these Consent Decrees for the past forty-one (41) and thirty-eight (38) years, respectively.

The ISC recommended that the Consent Decrees be dissolved because the Consent Decrees' objectives "had been fully achieved." However, the DOL argued that the Consent Decrees should remain in place because the Pension Fund recently received $35.8 billion in special financial assistance ("SFA") from the Pension Benefit Guaranty Corporation. The Funds did not petition for the Consent Decrees' dissolution but maintained that they did not oppose the ISC's recommendation. The Court relied on its equitable power to dissolve the Consent Decrees and followed Supreme Court precedent in analyzing whether to dissolve them. According to precedent from the Supreme Court, the proper standard for deciding whether to dissolve a decree was whether the purposes of the "litigation, as incorporated in the decree, have been fully achieved." The Court also relied on Sixth Circuit precedent in its decision by examining certain factors, including: (1) the consent decree's underlying goals, (2) whether defendants made a good effort to comply and (3) the length of time the consent decree had been in effect.

Determining that the circumstances have "so changed" since 1982 and 1985 and that the purpose of the Consent Decrees in the consolidated cases "has long since been achieved," the Court adopted the ISC's recommendation. Indeed, holding that there was no evidence of wrongdoing or ERISA violations since the entry of the Consent Decrees, the Court emphasized that all parties agreed that the purpose of the Consent Decrees had long been achieved, and the DOL's opposition arose out of its own interest of continuing supervising the management of the SFA funds received by the Pension Fund. Ultimately holding that the DOL had other avenues available to monitor the SFA funds, the Court determined that the "Court [was] no longer concerned about the threat of the Funds being mismanaged or used as a front for organized crime, the prevention of which was the original purpose of the Consent Decrees."

A FEW REMINDERS

(Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

JULY

ALL PLANS

- **Summary of Material Modifications ("SMM")**
  - July 29, 2023 is the deadline by which plan administrators must furnish an SMM to participants and beneficiaries receiving benefits explaining a material plan change that was adopted in Calendar Year 2022 unless a revised Summary Plan Description containing the modification was distributed.

- **Form 5500 Series (Annual Return/Report of Employee Benefit Plan) and Schedules**
  - July 31, 2023 is the deadline by which a plan administrator must file the Form 5500 unless an extension is granted after filing the Form 5558 before the due date.

- **Form 8955-SSA**
  - July 31, 2023 is the deadline by which the Form 8955-SSA must be filed unless an extension is granted after filing the Form 5558 before the due date.

HEALTH AND WELFARE PLANS

- **Form 720, Quarterly Federal Excise Tax Return**
  - July 31, 2023 is the deadline by which self-insured group health plans must pay fees to the Patient-Centered Outcomes Research Institute ("PCORI") through Form 720.
- **Transparency Rule – Disclosure to Public**
  - July 1, 2023 is the deadline by which plan administrators must post machine-readable files related to in-network negotiated rates and out-of-network allowed amounts on a public-facing website.
    - This requirement is applicable to: group health plans and health insurers.
    - This requirement is not applicable to: excepted benefits, account-based plans or grandfathered health plans.

DEFINED BENEFIT PLANS

- **Quarterly Installments of Required Contributions**
  - July 15, 2023 is the deadline by which second quarter 2023 contributions are due.

DEFINED CONTRIBUTION PLANS

- **Form 5330**
  - July 31, 2023 is the deadline by which the Form 5330 must be filed which is required if your plan had delayed contributions for the prior calendar year.
- **Cycle 3 Plan Document Restatements**
  - July 31, 2023 is the deadline by which all pre-approved defined contribution plan sponsors must restate plan documents.

AUGUST

DEFINED CONTRIBUTION PLANS

- **Second Quarter Pension Benefit Statements**
  - August 14, 2023 is the deadline by which benefit statements for the quarter ending June 30, 2023 must be sent to participants and beneficiaries.

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