PITTA LLP
Labor, Employment & Employee Benefits Law Firm

LABOR & EMPLOYMENT ISSUES

EMPLOYEE BENEFITS - IN FOCUS

FOR CLIENTS & FRIENDS DECEMBER 21, 2023 EDITION

SECURE 2.0 TECHNICAL CORRECTIONS ACT OF 2023

On December 6, 2023, members of the House Committee on Education and the Workforce and the House Committee on Ways and Means announced the release of a draft bill titled “SECURE 2.0 Technical Corrections Act of 2023” (“Technical Correction”). According to the announcement, the Senate Finance Committee and Senate Committee on Health, Education, Labor and Pensions released an identical draft bill in the Senate. The draft bill seeks to clarify certain provisions of the SECURE 2.0 Act of 2022 (“SECURE 2.0”) affecting retirement plans. Of note is that the bill does not elongate or postpone any deadlines applicable to provisions affecting qualified retirement plans.

The following is a brief summary of some of the provisions affecting retirement plans included in the Technical Correction.

Automatic Enrollment in Retirement Plans

Under SECURE 2.0, effective for plan years after December 31, 2024, certain 401(k) plans must include an automatic enrollment feature for eligible employees with a default elective deferral rate between three percent (3%) and ten percent (10%) as well as an automatic escalation of contributions of one percent (1%) per year up to at least ten percent (10%) with a maximum limit of no more than fifteen percent (15%). Subsequent to enactment, questions arose as to whether the automatic enrollment provision applied to multiple employer[1] 401(k) plans and multiemployer[2] 401(k) plans.

The Technical Correction appears to clarify that this provision of the SECURE 2.0 Act only applies to multiple employer plans, and is not applicable to multiemployer plans.

Increase in Age for Mandatory Distributions

SECURE 2.0 increased the age for required beginning dates for mandatory distributions to age 73 effective January 1, 2023, and to age 75 effective January 1, 2033. Subsequent to enactment, questions arose because this provision also provided that an individual who attained age 74 after December 31, 2032 would have a required beginning age of 75. The Technical Correction revises the prior provision and clarifies that the required beginning date for those attaining age 73 before January 1, 2033 is age 73 while the required beginning age for those attaining age 73 after December 31, 2032 is age 75.

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[1] A multiple employer plan is a plan maintained by two or more employers who are not related.

[2] A multiemployer plan refers to a collectively bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union. These plans are often referred to as "Taft-Hartley plans”.

Elective Deferrals Generally Limited to Regular Contribution Limit

SECURE 2.0 made amendments to catch-up contributions for individuals who (i) are eligible to make catch-up contributions and (ii) earn at least $145,000 in FICA wages. In the event that any such individuals opt to make catch-up contributions, they would no longer be eligible to make the catch-up contributions on a pre-tax basis, rather the contributions would have to be made on an after-tax basis. Subsequent to enactment, questions arose regarding language in the provision which seemed to eliminate all existing and future catch-up contributions after 2023. The Technical Correction clarifies that eliminating existing and future catch-up contributions was never the original intent of the law.

Recovery of Retirement Plan Overpayments

SECURE 2.0 provides plan fiduciaries with discretion to decide whether to recoup overpayments to participants or beneficiaries. That discretion contained certain limitations. One such limitation was that overpayments made more than three (3) years before written notice to the participant or the beneficiary who received the overpayment may not be recouped, except in the case of fraud or misrepresentation by the participant or beneficiary.

Pursuant to the Technical Correction, the three (3) year time limit for notification would be absolute and would apply regardless of whether there was fraud or misrepresentation by the participant or beneficiary.

MEDICAL PROVIDER CANNOT SUE ON BEHALF OF PARTICIPANT UNDER ERISA

A medical provider does not have standing to sue a benefits plan on behalf of a plan participant, according to a decision from the United States District Court for the Northern District of Illinois. The Court granted defendants SEIU Healthcare IL Personal Assistants Health Plan's (the "Plan") and its Board of Trustees' motion to dismiss the ruling that medical provider OSF Healthcare Saint Anthony Medical Center ("OSF") did not have standing to enforce a patient's rights because OSF is neither a "participant" nor a "beneficiary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The patient was a participant in the Plan and originally sought medical treatment from a Plan in-network provider. However, the in-network provider did not offer the particular treatment she needed, so the provider referred her to OSF. The participant was unaware that OSF was out-of-network, and as a result, after receiving treatment, she was faced with an unexpected pricey medical bill. In fact, OSF billed the Plan $78,448.60 for the treatment and the Plan only paid $9,847.14. The participant filed an appeal with the Plan for the remainder of the bill, but the Plan denied her appeal. Following the appeal denial, the participant appointed OSF as her personal representative to sue the Plan for

the balance of her medical bill. After filing the suit, OSF requested relevant administrative documents from the Plan, but the Plan refused to provide them until a court ordered it to.

OSF sued the Plan seeking (1) recovery of benefits for services rendered under § 1132(a)(1)(B) which provides that a ". . .civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan . . ."; and (2) redress for a violation of § 1132(c)(1)(B), which requires plan administrators to provide documents to a beneficiary or participant within thirty (30) days of a request. The Plan argued that as an authorized representative, OSF did not have standing because it was neither a beneficiary nor a participant in the Plan. Further, OSF could not sue on the participant's behalf because ERISA contains an anti-assignment provision explicitly prohibiting third parties from enforcing the rights of participants. In response, OSF argued that it was "standing in the shoes" of the participant, and that it was thus entitled to invoke her standing.

The Court agreed with the Plan, stating that "if Congress intended to allow an authorized representative to bring suit under § 1132 of ERISA, it would have done so in the ERISA statute." Moreover, the regulations governing ERISA expressly allow representatives to file *internal* claims and appeals, whereas Congress explicitly limited civil actions to beneficiaries or participants. The Court further held that, even if the statute allowed representatives to bring civil actions on behalf of participants or beneficiaries, OSF did not plausibly allege that the Plan's governing document would allow for such an arrangement. This is so because the Plan document contained its own anti-assignment language. The decision did not address the Plan's refusal to timely provide documents to OSF.

DEPARTMENTS TRY TO CLARIFY CULTURALLY AND LINGUISTICALLY APPROPRIATE NOTICE REQUIREMENTS FOR HEALTH PLANS

On November 28, 2023, the Departments of Labor, Health and Human Services and the Treasury (collectively, the Departments) published Affordable Care Act (ACA) Frequently Asked Questions Part 63 ("FAQ"), to address questions related to The Public Health Service Act section 2719 ("PHS Act"). The PHS Act generally requires certain group health plans and health insurance issuers to provide certain notices, including a summary of benefits and coverage, as well as claims and appeals notices, in a "culturally and linguistically appropriate manner." The FAQ may be read in its entirety here.

Specifically, the PHS Act and its regulations apply to non-grandfathered health plans (non-grandfathered plans are any plans that did not exist prior to 2010 or that have generally decreased benefits; increased coinsurance, copayments or deductibles payable by its participants; or added annual limits since 2010). Under the PHS Act, plans and plan issuers must provide "(1) oral language services (such as a telephone assistance hotline) that include answering questions in any applicable non-English language and providing assistance with filing claims and appeals (including external review) in any applicable non-English language; (2) notices in any applicable non-English language, upon request; and (3) in the English versions of all notices, a statement

prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the plan or issuer." These accommodations must be made for notices sent to any address in a county where at least ten percent of the population is literate only in a common non-English language as determined by American Community Survey data published by the United States Census Bureau.

The FAQ also includes information about the 2023 Culturally and Linguistically Appropriate Services ("CLAS") Guidance, which the Departments likewise published in November 2023. The CLAS Guidance, available here, includes sample "taglines," which inform readers to call a certain number to obtain assistance in their language. It also includes a table of counties meeting or exceeding the ten percent threshold for applicable non-English languages. The FAQ clarifies that non-grandfathered plans will be required to provide notices consistent with the CLAS Guidance for plan years beginning on or after January 1, 2025.

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.

DECEMBER

HEALTH AND WELFARE PLANS

- **Summary of Benefits and Coverage ("SBC")**
  - December 2, 2023 was the deadline by which the plan administrator or health insurer must send the SBC to participants and beneficiaries if the plan does not conduct open enrollment and if the plan operates on a calendar-year cycle.
- **Summary Annual Report ("SAR")**
  - December 15, 2023 was the deadline by which health and welfare plans must distribute the SAR to all plan participants if the Form 5500 deadline was extended by Form 5558 or because of a corporate tax filing extension.

DEFINED BENEFIT PLANS

- **SAR**
  - December 15, 2023 was the deadline by which defined benefit plans must distribute the SAR to all plan participants if the Form 5500 deadline was extended by Form 5558 or because of a corporate tax filing extension.

- ☐ **Actuary's Certification of 2022 Adjusted Funding Target Attainment Percentage ("AFTAP")**
  - o December 31, 2023 is the deadline by which the actuary must certify the 2022 AFTAP to avoid a presumed AFTAP of less than 60%.
- ☐ **Election to Reduce January 1, 2022 Credit Balances**
  - o December 31, 2023 is the deadline by which the plan sponsor must elect to reduce January 1, 2023 credit balances.
- ☐ **Revoke Election to Use Credit Balances in Excess of 2023 Minimum Required Contributions**
  - o December 31, 2023 is the deadline by which the plan sponsor must revoke an election to use credit balances in excess of 2023 minimum required contributions excluding small plans that use year-end valuation dates.

DEFINED CONTRIBUTION PLANS

- ☐ **401(k) Plan Annual Safe Harbor Notice for 2024 Plan Year**
  - o December 1, 2023 was the deadline by which the 401(k) Plan Annual Safe Harbor Notice for the 2024 Plan Year is due.
- ☐ **Annual Auto-Enrollment Notice(s) for 2024 Plan Year**
  - o December 1, 2023 was the deadline by which the annual auto-enrollment notice(s) for the 2024 Plan Year are due.
- ☐ **Annual Qualified Default Investment Alternative ("QDIA") Notice for 2024 Plan Year**
  - o December 1, 2023 was the deadline by which the annual QDIA Notice for the 2024 Plan Year must be furnished.
- ☐ **SAR**
  - o December 15, 2023 was the deadline by which the SAR must be distributed to all plan participants if Form 5500 deadline was extended by Form 5558 or because of a corporate tax filing extension.
- ☐ **Ongoing Required Minimum Distributions**
  - o December 31, 2023 is the deadline by which eligible participants must receive their ongoing required minimum distributions for 2022.

JANUARY

ALL PLANS

- ☐ **Form 1099-NEC (Nonemployee Compensation)**
  - o January 31, 2024 is the deadline by which to furnish the Form 1099-NEC to recipients and file it with the Internal Revenue Service ("IRS")
- ☐ **Form W-2 (Wage and Tax Statement if plan has employees)**
  - o January 31, 2024 is the deadline by which to file the Form W-2 with the Social Security Administration ("SSA").
- ☐ **Form W-3 (Transmittal of Wage and Tax Statements)**

- January 31, 2024 is the deadline by which to file the Form W-3 with the SSA.

DEFINED BENEFIT PLANS

- **Form 1099-R**
  - January 31, 2024 is the deadline by which to furnish the Form 1099-R to recipients of 2023 distributions.
- **Form 945**
  - January 31, 2024 is the deadline by which to file the Form 945 with the IRS for 2023 nonpayroll withholding if taxes were not paid in full and deposited timely. If taxes were paid in full for the year and timely then the deadline for the Form 945 is extended by 10 days.

DEFINED CONTRIBUTION PLANS

- **Form 1099-R**
  - January 31, 2024 is the deadline by which to furnish the Form 1099-R to recipients of 2023 distributions.
- **Form 945**
  - January 31, 2024 is the deadline by which to file the Form 945 with the IRS for 2023 nonpayroll withholding if taxes were not paid in full and deposited timely. If taxes were paid in full for the year and timely then the deadline for the Form 945 is extended by 10 days.

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