Quick Takes:

Q4 2023 Review of Defined Contribution Regulation, Legislation, & Litigation

endeavor retirement

Regulatory Updates

Proposed Fiduciary Rule

Employee Retirement Income Security Act (ERISA) Section 3(21) sets forth three categories of authority, responsibility, or control in which one may be a fiduciary. The second of those categories is when one "renders investment advice for a fee or other compensation" with respect to the plan or plan assets. That language is subject to interpretation, much of which occurs within the scope of a "five-part" test the DOL articulated in a 1975 regulation. In recognition of significant changes to the retirement plan market since 1975, the Department of Labor (DOL) has been working for more than a decade to provide updated guidance that will redefine the scope of when a financial professional becomes an ERISA fiduciary when giving advice for a fee.

On October 31, 2023, the DOL released a proposed regulation that would broaden the scope of when a financial professional would be an "investment advice fiduciary." Among other contexts, the proposed regulation would confirm fiduciary status in the context of recommending a rollover or distribution, or when making recommendations regarding the investment of those rollover or distribution proceeds.

At this time, the rule is merely proposed. As a result, plan sponsors need not yet be concerned with any specific changes until and unless the DOL issues a final regulation, which it intends to do in 2024. As always, though, plan sponsors should be aware of the plan's service providers, whether they serve in a fiduciary capacity, and how they interact with participants – particularly given the increase in wellness programs. Without regard to the fate of the proposed rule, plan sponsors should also appreciate that the DOL's proposal again highlights the significantly higher standard of care that one must meet when serving as a fiduciary.

Long-term Part-time Employees

The SECURE Act of 2019 included provisions intended to expand retirement plan coverage for "long-term part-time" (LTPT) employees who work 500 hours for three consecutive years. Beginning January 1, 2024 – looking back at service beginning in 2021 – these provisions ***require*** that a plan permit LTPT employees to make contributions, but also permit a plan sponsor to exclude LTPT employees from any employer contributions. Beginning January 1, 2025, the SECURE 2.0 Act of 2022 (SECURE 2.0) shortens the three-year measurement period to two consecutive years.

As is commonly the case, plan sponsors and service providers desired additional guidance that would aid with the interpretation and application of the LTPT rules. The IRS responded with a proposed regulation released on November 24, 2023, available here. This proposed regulation is undergoing a comment period and will eventually become a final rule. In the interim, plan sponsors can rely on this proposed rule for determining how to apply vesting, testing and other special issues for their LTPT employees.

Legislative Updates

Technical Corrections for SECURE 2.0 Introduced

Following the issuance of massive legislation, Congress frequently cleans up minor and inadvertent errors through a bill that makes "technical corrections." In December, members of Congress issued a discussion draft of a bill that would make those corrections to SECURE 2.0. Perhaps the most prominent correction in the discussion draft would clarify that Congress indeed did not intend to eliminate catch-up contributions when it adopted the rule that would require Roth catch-up contributions for higher paid employees. The IRS has already provided interpretive guidance confirming that plan sponsors should assume catch-up contributions are available in 2024; the technical corrections bill would solidify that conclusion.

Roth 401(k) Rollover Legislation Introduced

SECURE 2.0 turned our attention to Roth contributions in a number of ways. Congress continued its Roth focus with the introduction of a new bill in mid-December 2023 that would allow individuals to roll over their Roth individual retirement account (IRA) into a qualified retirement plan – such as a 401(k), 403(b), or 457(b) plan – that permits Roth contributions. This bill has bipartisan support, but is far from making it to the President's desk for signature. For plan sponsors, it will be important to track if this bill is enacted and becomes an available option for your participants in the future.

Litigation Updates

Cybersecurity

In the matter of *Sherwood v. Horizon Actuarial Services, Inc.*, the actuarial firm Horizon settled for nearly $8 Million chiefly because they failed to have the proper cybersecurity protocols in place to handle participant data. Horizon handled the participant data of many multiemployer and Taft-Hartley plans. When it experienced a data breach, it failed to notify participants until several months after the breach. For plan sponsors, this is an important reminder that the DOL issued cybersecurity guidance in April 2021 confirming its position that the DOL considers cybersecurity to be a fiduciary responsibility. As we near the three-year mark since that guidance, 2024 may be an optimal time to ask its service providers to provide written confirmation of its conformance with the DOL's expectations.

Forfeiture Accounts

In recent months, one law firm has filed two lawsuits relating to the plan sponsor's use of forfeiture accounts to pay for the company matching contribution. While the lawsuits acknowledge that the plan does allow for such use of forfeitures, the lawsuit also argues that these funds were used for the benefit of the company and not in the best interests of participants and beneficiaries. At this point, the cases are in the early stages. For plan sponsors, these cases are a great reminder of three important steps: (1) review the Plan's terms for permissible uses of forfeitures; (2) closely monitor any use of forfeitures to ensure the use is consistent with the plan's terms; and (3) document any use of forfeitures. While a plan sponsor cannot prevent litigation, a strong fiduciary file will end litigation quickly.

Health & Welfare Litigation

In 2020, the Consolidated Appropriations Act added requirements for health and welfare plans (H&W Plans) to create more fee transparency. These requirements resemble the 408(b)(2) requirements for retirement plans that require service providers to more clearly disclose fees. Any plan sponsor representative who serves on ERISA fiduciary committees or otherwise bears a fiduciary role for both a retirement plan and a H&W Plan should consider reviewing the new disclosure requirements and taking steps to document. While there is not yet a rush of litigation, there are rumors it is coming.