Quick Takes:

Q3 2024 Review of Defined Contribution Regulation, Legislation, & Litigation

endeavor retirement

Generally, this time of year sees less legislative and regulatory activity, but a few important bills were introduced in the third quarter of 2024. These bills would allow 403(b) plans to invest in collective investment trusts (CITs), expand retirement plan eligibility to include younger workers, and increase tax credits for non-profit employers to offer retirement plans.

On the regulatory front, we received clarity on the required minimum distribution (RMD) provisions of the SECURE and SECURE 2.0 Acts. The Internal Revenue Service (IRS) has published helpful guidance on the new student loan matching provisions. Additionally, the Treasury and IRS are seeking input on how to administer the new Saver's Match.

Litigation continues to be introduced at a record pace, with new law firms entering the fray on lawsuits involving forfeiture reallocation. Traditional excessive fee lawsuits are also expanding to include allegations about forfeiture reallocations. Challenges regarding pension risk transfers continue to be filed, and the law firms representing plaintiffs are growing in number.

Regulatory Updates

Swing Pricing Proposal Postponed

The Securities and Exchange Commission (SEC) amended Forms N-PORT and N-CEN. These changes mean that registered funds, including mutual funds, will now require more frequent disclosure of portfolio data. The proposed changes that would require open-ended funds to use "swing pricing" and require a daily "hard close" for relevant funds were not adopted. Although these parts of the proposal were not adopted, they are still under consideration and could have a significant impact on trading and transaction deadlines for 401(k) plans.

Non-Compete Case "Call"

A Texas district court blocked a rule from the Federal Trade Commission (FTC) that would have banned most non-compete agreements starting on September 4. Non-compete agreements are widely used in the financial services industry, so this legal battle is of keen interest for financial services employers who use non-competes or want to hire people who are under them.

The FTC finalized a rule in April that would render all future non-competes invalid, starting September 4. The ban also would have applied retroactively, with the exception of executive employees. This rule faced immediate legal challenges. The U.S. Chamber of Commerce filed a case in the U.S. District Court for the Northern District of Texas seeking an injunction against the rule. On August 20, the court ruled in favor of the plaintiffs. The court ruled that the FTC lacks the authority to create significant rules and can only manage procedural issues and adjudicate unfair competitive practices on a case-by-case basis. Because of this ruling, the FTC's rule did not go into effect on September 4, but an appeal to the Fifth Circuit Court is likely.

Student Loan Matching Guidance

In mid-August, the IRS released temporary guidance (Notice 2024-63) about the student loan match provision in the SECURE 2.0 Act.

The guidance applies to plan years after December 31, 2024, and it encompasses:

- General student loan matching contribution eligibility rules, including dollar and timing limitations.
- What is required for employee certification to confirm that student loan matching contribution requirements have been met (which includes a requirement for annual self-certification).
- Procedures that a plan may use to adopt the provision.
- Special nondiscrimination testing relief.

The IRS is looking for public comments on the notice, but provide this interim guidance so that plans may implement the provision until additional guidance is issued.

SECURE Acts Final RMD Regulations

The IRS recently published final regulations for required minimum distributions (RMD) as outlined in the SECURE Acts 1.0 and 2.0. According to these regulations, distributions to a beneficiary must continue at the same pace as they were during the participant's lifetime. Additionally, the entire distribution must be made within the period specified in the SECURE Act, which is generally 10 years after the participant's death.

Legislative Updates

Bills Introduced (Not yet Passed) to Boost Non-Profits, CITs & Young(er) Savers

The Helping Young Americans Save for Retirement Act (H.R. 9281), which was introduced on August 2 by Republican Brittany Pettersen and co-sponsored by Republican Tim Walberg, aims to amend the Employee Retirement Income Security Act (ERISA) to allow more Americans aged 18 to 20 to access employer-sponsored retirement plans. Currently, ERISA only requires employers to offer 401(k) plans to employees aged 21 and over. While a company can offer a 401(k) plan to their younger employees, many do not due to cost and administrative concerns.

In early August, Senators James Lankford and Catherine Cortez Masto introduced the Small Nonprofit Retirement Security Act of 2024, which proposes a tax credit of up to $5,000 for the three years of a retirement plan's operation. It also includes an additional $500 for auto-enrollment features. Since nonprofits typically do not have an income tax liability, the credit would be applied against their payroll tax liability.

A bipartisan group of Senators introduced a bill on July 31 that would allow 403(b) plans to include collective investment trusts (CIT) as part of their investment menu options. Currently, 403(b) plan participants do not have the same access to some investment options available to savers in other plans like 401(k) plans, 457(b) plans, and the federal Thrift Savings Plan.

Litigation Updates

A Door Opener for Litigation

While the recent Supreme Court decision rejecting the Chevron doctrine got most of the attention, another important 6-3 decision, Corner Post v. Board of Governors of the Federal Reserve System, has made it easier to start lawsuits. The majority ruled that litigation under the Administrative Procedures Act (APA) can only begin once the plaintiff is harmed by a final agency action. This ruling greatly extends the window in which a party can file a lawsuit.

Also, regarding the Chevron decision, a federal appeals court has asked the district court to reconsider its recent ruling that supported the Labor Department's final regulation regarding environmental social and governance (ESG) investing. The U.S. Court of Appeals for the Fifth Circuit has sent the case back to the district court, following the Supreme Court's decision to set aside the Chevron doctrine.

Courts Split on Burden of Proof

A federal appellate court has upheld the district court's decision in an excessive fee lawsuit. The court not only found that the process was prudent but also ruled that the plaintiffs must prove that any losses to the plan were the result of imprudent actions.

However, the First, Fourth, Fifth, and Eighth Circuits, along with the Labor Department, have ruled differently. They believe that once an ERISA plaintiff has proven a breach of fiduciary duty and a related loss to the plan, the burden shifts to the fiduciary. In 2020, the United States Supreme Court had an opportunity to weigh in on the issue but declined to do so. It seems likely that the United States Supreme Court will have another opportunity to consider this matter in the future.

A New "Twist" for Excessive Fee Suits

A second lawsuit, this one against Wells Fargo, has been filed against plan fiduciaries over their handling of healthcare benefits. The first was against Johnson & Johnson. The Consolidated Appropriations Act of 2021(CAA), said by some to be the most significant compliance challenge employers have faced since the Affordable Care Act, has extended the provisions on fee disclosure. The provision previously only applied to retirement plan providers under ERISA Section 408(b)(2) but now includes health care providers. This means that plan sponsor fiduciaries must ensure that the fees and services rendered are reasonable, just as they have long been required to do for retirement plans. While the litigation regarding these programs is just emerging, more lawsuits are likely to follow.

Plausible "Enough"

A federal judge has rejected a motion to dismiss one of the fiduciary breach lawsuits against Stanley Black & Decker, Inc., involving the BlackRock Lifepath target date funds. The lawsuit is one of many alleging a breach of fiduciary duty in chasing low fees and ignoring the allegedly poor performance of the target date funds. This lawsuit, unlike the rest in this grouping, also claims excessive recordkeeping fees.

While the allegations made were found to be sufficiently plausible to move past the motion to dismiss, the federal judge noted that they might not hold up later. It's worth acknowledging that the federal judge looked at similar, if not identical, allegations and data at a similar point in the proceedings and found that they presented a plausible case. These similar cases were seen differently by other federal courts which reminds us that identical facts can be viewed differently by different courts at the same or different points in litigation.

More Pension Risk Transfer Suits

GE and Bristol-Myers have been added to the list of plan sponsors being sued for a fiduciary breach in choosing to select Athene Annuity and Life as a pension-risk transfer provider. Like other lawsuits filed recently, the lawsuits argue that the plan fiduciaries transferred their pension obligations to Athene, which was asserted as a highly risky private equity-controlled insurance company with a complex and opaque structure.

Forfeiture Reallocation Lawsuits Expand

During the quarter, there was movement in several of the cases challenging the use of forfeitures to offset employer contributions instead of reallocating them to the remaining participants. One was dismissed, two were allowed to proceed to discovery and trial, and another was sent to arbitration.

Of the roughly dozen of these suits originally filed, a federal judge ruled that the case involving Tetra Tech should be sent to arbitration based on a provision in the plan document. The judge determined that arbitration would not prevent the plaintiff from recovering the damages sought. A case involving the use of forfeitures by HP was dismissed by a federal judge who found those allegations implausible, stating that the claim relies on a false premise that HP receives a windfall from forfeited amounts and that plan expenses are always paid before reducing employer contributions. In a suit involving Qualcomm Inc., the judge found a plausible case had been made, rejecting the motion to dismiss by the plan sponsor defendants, and keeping the lawsuit active.

While there hasn't been full adjudication on those lawsuits yet, we are starting to see some of the traditional excessive fee lawsuits also allege the misuse of forfeitures as another fiduciary breach. Among those, one involving a $2.4 billion LifePoint Health, Inc. Retirement 403(b) cast a wide net of claims, including excessive fees and the alleged misuse of forfeitures in applying them against the employer match. Similarly, a recent lawsuit targeted against Nordstrom combines allegations of excessive 401(k) fees, un-personalized and overpriced managed accounts, and misuse of forfeitures.

Bank of America has been added to the list of firms facing lawsuits from participant plaintiffs represented by Hayes Pawlenko LLP, a South Pasadena, CA-based firm known for initiating this type of litigation. Other firms in this list include Tetra Tech Inc., Honeywell, Thermo Fisher Scientific Inc. 401(k) Retirement Plan, Clorox, Intel, Qualcomm, Intuit and HP.