Quick Takes:

Q3 2025 Review of Defined Contribution Regulation, Legislation, & Litigation

Regulatory Updates

Trump Signs Order to Open the Door to "Alternative Assets" in DC Plans

President Donald J. Trump issued a widely anticipated executive order (EO) in early August that would make it easier to include private market investments (including debt, equity, credit, and infrastructure) and cryptocurrencies in 401(k) plans. More specifically, it directs the Department of Labor (DOL) within 180 days to work with other agencies (including the Internal Revenue Service and Securities and Exchange Commission) to examine "past and present guidance regarding a fiduciary's duties" under ERISA in connection with making an asset allocation fund available to participants that includes investments in alternative assets[i]. In so doing, it purports to "relieve the regulatory burdens and litigation risk that impede American workers' retirement accounts from achieving the competitive returns and asset diversification necessary to secure a dignified, comfortable retirement." The EO also directs the DOL to consider whether to rescind its December 21, 2021, Supplemental Statement on Private Equity[ii], which it, in fact, rescinded on August 12.

Despite its apparent interest in expanding access, the EO acknowledges that "fiduciaries of 401(k) and other defined contribution retirement plans must carefully vet and consider all aspects of private offerings, including investment managers' capabilities, experiences, and effectiveness managing alternative asset investments".

EBSA Greenlights Lifetime Income Feature in QDIA

On September 23, the DOL's Employee Benefits Security Administration (EBSA) issued Advisory Opinion 2025-04A which it said "follows President Trump's Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors[iii]," which directed the department to reexamine its guidance regarding fiduciary duties under the Employee Retirement Income Security Act in connection with making asset allocation funds that include alternative asset investments available to participants". Specifically, in response to an inquiry regarding AllianceBernstein's Lifetime Income Strategy (LIS) program, the advisory opinion concluded that the requestor's lifetime income strategy program meets the department's requirements to be a qualified default investment alternative under ERISA section 404(c)(5) and the implementing regulation at 29 CFR 2550.404c-5(e).

More specifically, it did so on the assumption that the lifetime income products satisfy the QDIA regulation's transferability requirements and other provisions. It did explain that AllianceBernstein's LIS program would not fail to be a QDIA solely because it is offered through a variable annuity contract with a guaranteed lifetime withdrawal benefit (GLWB) component. Fiduciaries selecting and monitoring the program must still meet ERISA's prudence requirements, but AllianceBernstein, as the ERISA section 3(38) investment manager, assumes responsibility for insurer selection and monitoring under safe harbor provisions, while the plan fiduciary remains responsible for prudently selecting and monitoring Alliance Bernstein itself.

DOL Asks for Input on Increasing PEP Usage

The DOL's Employee Benefits Security Administration (EBSA) announced on July 28[iv] that it wants public input on how to help smaller employers choose a pooled employer plan (PEP). It also provided some guidance for small employers, notably fiduciary considerations for reviewing those options. In the guidance and request for information (RIN 1210–AC10), EBSA says it is concerned that because PEPs are "relatively new," having been made possible with the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), small employers might not be aware of them, nor how ERISA applies to them. It hopes that the information it gathers will help them to address challenges that may impede small employers' adoption of PEPs.

Final Catch-up Regulations Published

On September 15, the IRS and Treasury Department released final regulations[v] reflecting statutory changes made in Section 603 of the SECURE 2.0 Act of 2022 (SECURE 2.0), specifically the requirement that catch-up contributions made by certain catch-up eligible participants must be designated Roth contributions. These final regulations apply to retirement plans that permit participants who have attained age 50 to make additional elective deferrals that are catch-up contributions, where such individuals making more than $145,000 in FICA wages (indexed) have all catch-up contributions made on a Roth (after-tax) basis. This requirement does not apply to SIMPLE IRAs or SEPs.

A recent Plan Sponsor Council of America survey found that fewer than 5% of plan sponsors said they were "ready to go" with these changes, while 44% were "struggling with payroll logistics." On the other hand, nearly as many (40.2%) said they expected to be ready by January 1, 2026. Ready or not, the regulations become effective on November 17, 2025 (60 days after publication in the Federal Register). Most provisions apply to tax years beginning after December 31, 2026, giving plans time to adjust systems, documents and communications. What's important to note is that while the final regulation generally applies with respect to contributions in taxable years beginning after December 31, 2026, the limits on catch-up contributions are effective after December 31, 2025. Between that date and the effective date of the final regulation, the IRS says a "reasonable, good faith interpretation standard applies." *This standard means that plans should start to comply and not wait until 2027 to impose the Roth requirement.*

Note that the final regulations do not include a rule permitting a plan to require that all participants' catch-up contributions be designated Roth contributions, as some had requested for administrative simplicity. Additionally, a plan may, but is not required to, include a qualified Roth contribution program within the meaning of section 402A(b). Moreover, a plan that allows catch-up contributions but does not have a qualified Roth contribution program is not required to adopt a Roth provision. In that case, the plan would be allowed to permit catch-up eligible participants who are not subject to the Roth catch-up requirement to make catch-up contributions, but could not permit catch-up eligible participants who are subject to the Roth catch-up requirement to make catch-up contributions.

The final regulation outlines both the process for corrections and provides an extended deadline for corrections; the last day of the next taxable year for errors resulting from misapplying limits and the last day of the next plan year for ADP corrections. The regulation also provides a $250 de minimis threshold or corrections.

IRS Issues Guidance on Uncashed Retirement Plan Distribution Checks

On July 16, the IRS issued guidance on withholding and reporting concerning uncashed retirement plan distribution checks. The guidance came in Revenue Ruling 2025-15, outlining a couple of different fact scenarios by way of explaining that the reissuance of an uncashed distribution check requires no additional withholding (assuming the amount hasn't changed). However, if the amount of the reissuance is greater than the amount of the first check, the excess amount is subject to withholding in accordance with Internal Revenue Code Section 3405.

Inadequate Managed Account Disclosures Trigger Mammoth SEC Fines

In late August, the Securities and Exchange Commission (SEC) announced two massive financial settlements involving "inadequate disclosure of conflicts of interest and misleading statements" regarding managed account investments. The fines — $5,989,969.94 by Empower[5] and $19,500,000 by Vanguard[vi] — constituted offers made by the firms — and accepted by the SEC after years in which the firms failed to provide "full and fair written disclosure of the capacity in which Retirement Plan Advisors were acting when providing advice or a recommendation that a Plan Participant enroll in their managed account services."

In both cases, the firms were said to be providing financial incentives to those promoting the managed account services that the SEC said were either not, or inadequately disclosed over extended periods of time, arguably leaving participants with the impression that the recommendations were being made by individuals with their best interests in mind.

Legislative Updates

New legislation has been introduced, though no new legislation has been recently passed. Legislation under consideration impacting retirement plans includes:

New Bill Would Create Startup Credit for Small Non-Profits

Both Houses of Congress have introduced the "Small Nonprofit Retirement Security Act," which would provide a tax credit of up to $5,000 for the three years of a retirement plan's operation and an additional $500 for auto-enrollment features. Additionally, the bill extends to nonprofits the Employer Contribution Credit, which provides a tax credit up to $1,000 per employee for employer retirement contributions (excluding deferrals) to workers earning under $100,000 annually, with the full credit available for the first year and phasing down over five years.

Since nonprofits generally do not have any income tax liability, the credits will be delivered against their payroll tax liability.

New Legislation Would Expand Benefits to Contractors

Senate Republicans have introduced bills that would expand job benefit access for independent contractors. The Unlocking Benefits for Independent Workers Act, sponsored by Sen. Bill Cassidy (R-La.) and Sen. Tim Scott (R-SC) would create a "safe harbor under federal law for companies that would like to voluntarily provide benefits" to contractors.

The Independent Retirement Fairness Act would permit contractors to participate in "retirement benefit plans like single pension IRA plans and pooled employer plans." The Modern Worker Empowerment Act would create a federal test to determine if a worker is an employee or independent contractor and would generally make it easier for workers to be classified as contractors.

Senate Committee Advances ESOP Legislation

The Senate Committee on Health, Education, Labor, and Pensions (HELP) advanced two bills that would promote employee stock ownership plans (ESOP) in late July. The bills – the Retire Through Ownership Act, and the Employee Ownership Representation Act – were passed unanimously by voice vote and will go to the full Senate, though no dates have been set.

Litigation Updates

DOL Backs Plan Fiduciaries in Forfeiture Suit

Perhaps the biggest news on the litigation front during the quarter was the DOL's decision to weigh in via a "friend of the court" amicus brief supporting the fiduciary defendants in a case alleging a fiduciary breach for the use of plan forfeitures to offset employer contributions by HP. It happens to be the first of more than sixty cases to get to the appellate court level.

While acknowledging that the HP Plan Committee's decision on reallocating forfeitures to offset matching contributions was both "explicitly granted by the Plan document and the proposed Treasury regulation," the DOL argued that that alone did not constitute a "plausible claim for breach." The DOL also presented an alternative scenario where a decision by the plan committee to reallocate forfeitures to participant accounts might run afoul of the employer's willingness to fund the remaining contributions – and thus result in a delay or reduction of employer contributions to the plan, which arguably would not be in the "best interests" of participants.

Of course, this is the DOL weighing in with a specific opinion in a particular case. That said, the broad commentary — the settlor versus fiduciary decisions, the boundaries established by the plan document, and significantly, the acknowledgement of the long-standing norms and legality of the decisions on forfeiture reallocation, are not only a welcome and respected opinion from the government agency regulating these practices, but should be helpful in a handful of cases currently waiting for the ruling in this case.

Forfeiture Suits (Still) Stacking Up

The DOL's perspective on the HP case notwithstanding, a number of forfeiture-related fiduciary breach suits continued to be filed during the past quarter, notably WakeMed Hospital System, RTX, Siemens Energy (along with allegations regarding a stable fund option), NextEra (along with some excessive fee allegations), and Aldi. That said, there were also several court decisions in favor of plan fiduciaries in these types of suits, with motions to dismiss granted to Home Depot, Honeywell (for the second time), Amentum/DynCorp (though certain claims not related to forfeitures were left alive) – while Bank of America was rebuffed in its attempt.

Participant Data Use in Managed Account "Push" Challenged

In mid-August, a new suit challenged "a scheme to significantly mislead retirement plan participants and greatly enhance corporate profits." The 80-page suit was filed by Schlichter Bogard LLC, representing plaintiffs, all of whom were participants in plans serviced by Empower, named as defendants Empower Retirement, LLC, Empower Financial Services, Inc., and Empower Annuity Insurance Company of America.

While questions about participant data as a plan asset have come up in prior cases this suit argues that Empower used data it possessed as recordkeeper to target rollover candidates that its advisory unit encouraged to move to its managed account product. The suit further alleges that the additional fees, limited personal customization (i.e., only seven available asset allocations for the managed account) and incentives to promote that offering were not disclosed. Moreover, it takes issue with the plan sponsors not monitoring or supervising these activities, though they aren't parties to the suit.

This case is still in the early phases and will be closely monitored given the issues related to control of participant data as well as the arguments related to a service provider's responsibilities for plan sponsors under a party-in-interest theory.

Federal Judge Recommends Dismissal of PRT Suit

The recommendation to dismiss all claims in a suit involving AT&T was filed by U.S. Magistrate Judge Paul G. Levenson in a report and recommendation, who determined that the decision to transfer the pension obligations (in what is referred to as a pension risk transfer, or PRT) was a settlor, not a fiduciary decision, and that while there was not yet any evidence of injury (an argument that the defendants had made in their motion to dismiss the suit, and one that has been raised successfully in other PRT suit defenses), the pension participants were determined to have standing to bring suit. Consider that a lack of present injury has been found to deny standing in other such suits.

However, Judge Levenson concluded that the plaintiffs failed to plausibly allege breaches of fiduciary duty: either the duty of loyalty or the duty of prudence. Moreover, they failed to allege facts that would support a plausible inference that AT&T was disloyal in selecting SSGA, or that SSGA was disloyal or suffered from conflicts of interest that disqualified it as a fiduciary. Lacking a plausible argument on any of those factors, claims of a failure to monitor fiduciaries fell short as well.

Significantly, he noted that the PRT arrangement here provided for a separate account to be established for these obligations, a factor outlined as a consideration by the DOL in Interpretive Bulletin 95-1, and one that he noted the plaintiffs glossed over in their recitation of the required considerations. However, that report and recommendation must be adopted by a district judge to become final.

Prudent Process Prevails Despite "Gaps"

The participant-plaintiff in question was Brian Waldner, who brought suit in 2021 against Natixis Investment Managers, L.P., its Retirement Committee, and the committee members[iii]. The suit claimed that the $440 million plan used "high-cost proprietary mutual funds" that "led to participants incurring excessive fees, substantially more than the average of comparator funds with similar investment styles."

As it turns out, while there was a documented, deliberate process (with the involvement/engagement of an external advisor/consultant), there were some time gaps in its execution, and some unexplained delays in the removal of certain funds. Specifically noted was a period where there was a full year between meetings of the plan committee.

The judge in this case explained that "to establish a breach of the duty of prudence, a plaintiff must point to a specific moment when [the fiduciary] should have made a different decision." He continued that it is not enough to "vaguely challenge the Portfolio's overall structure without reference to any specific events." For plan fiduciaries, this case shows that there is not a specific number of committee meetings that must happen at a specific interval, but rather, that there should be a consistent and ongoing process of oversight.

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[i] "Alternative Assets" are defined in the EO as: private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies; direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate; holdings in actively managed investment vehicles that are investing in digital assets; direct and indirect investments in commodities; direct and indirect interests in projects financing infrastructure development; and lifetime income investment strategies including longevity risk-sharing pools.

[ii] DOL, Supplemental Statement on Private Equity, December 2021, available at: https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.

[iii] Executive Order on Democratizing Access to Alternative Assets for 401(k) Investors, The White House, August 7, 2025. Available at: https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/

[iv] Employee Benefits Security Administration, U.S. Department of Labor. Pooled Employer Plans: Big Plans for Small Businesses. 90 Fed. Reg. 35646 (proposed July 29, 2025). https://www.federalregister.gov/documents/2025/07/29/2025-14281/pooled-employer-plans-big-plans-for-small-businesses.

[v] Department of the Treasury and Internal Revenue Service. Treasury, IRS Issue Final Regulations on New Roth Catch-Up Rule, Other SECURE 2.0 Act Provisions. IR-2025-91, September 15, 2025. https://www.irs.gov/newsroom/treasury-irs-issue-final-regulations-on-new-roth-catch-up-rule-other-secure-2point0-act-provisions

[vi] U.S. Securities and Exchange Commission. In the Matter of Vanguard Advisers, Inc. Investment Advisers Act Release No. 6912, File No. 3-22518, August 29, 2025. https://www.sec.gov/files/litigation/admin/2025/ia-6912.pdf