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Benefits-Plan Sponsors Face A Tough Year On Compliance

By **Ivelisse Berio LeBeau** (January 5, 2021, 5:49 PM EST)

Given the chaos of 2020, many ushered in the new year with open arms.


Ivelisse Berio LeBeau

The pandemic, remote work and changing needs have created unique and novel challenges that have necessarily dominated employer attention in the past nine months.

The pandemic hasn't affected, however, the constant drum of change to employee benefit plan requirements. Here are some things for plan sponsors to look out for this year.

Fiduciary Duties

New Investment Duties Regulation Effective Jan. 12

Last June the U.S. Department of Labor made waves when it proposed new regulatory standards for fiduciary consideration of environmental, social and corporate governance, or ESG, factors in making investment decisions.

The DOL's proposal had reworked the investment duties regulation,[1] that had been in effect since 1979, and imposed new and different standards specifically for consideration of ESG.

More than 8,700 comments were submitted. The vast majority were critical of the proposed regulation, with mutual fund companies, law firms, unions and academics arguing that the DOL's proposal was inherently flawed.

The criticisms hit their mark, and the DOL subsequently eliminated all references to ESG factors it the final rule amending the investment duties regulation published on Nov. 13, 2020.[2]

Stripping references to ESG factors lay bare, however, that the newly reformed regulation fundamentally changes the DOL's standards on how fiduciaries are expected to evaluate plan investments beginning Jan. 12.

The revised version of the investment duties regulation adds new standards for exercising the fiduciary duty of loyalty and expands existing standards for exercising the fiduciary duty of prudence.

Loyalty now demands that fiduciaries consider only defined pecuniary factors in making investment decisions to the exclusion of other, nonpecuniary, factors.

Prior guidance had counseled fiduciaries to make investment decisions based on pecuniary factors in the context of relevant facts and circumstances.

The new rule shifts the focus of investment decisions and is described by the DOL as a required standard of conduct, not a safe harbor.

The amended regulation also describes fiduciary obligations of prudence and loyalty in selecting designated investment options for self-directed 401(k) plans.

The final rule explains that fiduciaries are not prohibited from selecting investment options with nonpecuniary objectives or benefits, as long as the selection is based on pecuniary factors or under a described exception.

The revised regulation does not allow, however, selection of an investment vehicle with non pecuniary objectives or goals as a plan's qualified default investment alternative.

In a less dramatic, yet still significant, manner the DOL also tacked on a new requirement to the safe harbor for prudent fiduciary action; fiduciaries must now also compare investment vehicles as part of their evaluation.

Given that such comparisons are already considered an industry best practice it seems like the regulation is catching up with this practice rather than influencing it.

The revised investment duties regulation applies to investment choices for all types of plans, including welfare plans.

Benefit plan fiduciaries would be wise to review their methods for selecting investments and change them as needed to comply with the newly amended regulation.

Late in 2020, the DOL also issued final regulations on shareholder proxy voting,[3] and prohibited transaction class exemption 2020-02 related to investment advice,[4] both of which will also have impact on fiduciary investment decision-making in 2021. Plan sponsors should consider asking their investment advisers about compliance with these new developments.

Cybersecurity and Mitigating Against Potential Cyber Liability

We all benefit from the wonders of computers and electronic devices in our daily lives. That is, until the power goes out, or our digital devices freeze or the systems we rely on are hacked.

Lurking in the shadows, and poised to spring in 2021, are concerns about cybersecurity for employee benefit plans.

Although the DOL has not offered direct guidance, DOL investigators have begun to ask questions about cybersecurity issues in investigations.

Recent cyber incidents with employee benefit plans have resulted in ongoing litigation, where service providers and sponsors are debating in court over their respective responsibilities.[5] Each plan sponsor's concerns may be different depending on employee benefit plan features and administration.

Where is employee benefit pan data stored? Do fiduciaries have control over the data or does a third party provider? Does the plan sponsor store employee benefit plan data?

Are there controls for protecting personal identifying information? Who is charged with ensuring that participants can conveniently yet securely access their accounts through the internet? Who is responsible for unauthorized access to or theft from those accessible accounts?

For health plans, are providers complying with standards of the Health Insurance Portability and Accountability Act for protected health information? Do HIPAA standards provide sufficient protection?

Plan fiduciaries should consider a self-audit on cybersecurity issues in 2021.

These issues include: requesting information from service providers regarding their data security processes and data transmittal policies; reviewing and revising service provider contracts, focusing on cybersecurity standards, breach notification requirements, cybersecurity insurance, and indemnification provisions; reviewing fiduciary liability policies for coverage and considering obtaining separate cybersecurity insurance; reviewing fidelity bond coverage, and reviewing internal controls on how personally identifiable information is stored, shared, and transmitted.

What to Do About Missing Participants

People leave jobs, move and change careers.

They don't always let benefit plan administrators know, however, and plans find themselves with terminated vested participants and no contact information, otherwise known as missing participants.

This has been an issue since the dawn of the Employee Retirement Income Security Act of 1974 and raises both legal and practical concerns.

What is a plan fiduciary expected to do to find these missing participants? Can plan assets be transferred to a state unclaimed property fund?

If so, how is a plan to comply with tax code requirements, such as issuing 1099s or income tax withholding, without participant data? What if a terminated vested participant is at required minimum distribution age?

The Internal Revenue Service offered informal snapshot guidance in 2020 on what to do about missing participants, supplementing informal guidance previously offered by the DOL.[6]

Following the lead of the regulatory agencies, plan administrators should start missing participant searches by exhausting all available plan and employer records and using free internet search tools.

If cost effective under the circumstances, plan administrators should consider using resources such as commercial locator services or credit reporting agencies as well.[7]

In recent years the DOL has significantly increased its enforcement efforts in this area; the EBSA website boasts that in fiscal year 2020 the DOL recovered more than 1.4 billion for more than 29,000 missing terminated vested participants.

If they haven't done so already, plan sponsors should consider reviewing their plan participant data and their procedures for locating terminated vested participants in 2021 before the DOL comes knocking.

Plan administrators should also pay attention to potential upcoming legislation which might address issues related to missing participants.

New Developments for Defined Contribution Retirement Savings Plans

Long Term Part-Time Employees

Part-time workers typically do not work sufficient hours in a plan year to qualify for workplace retirement savings plans.

Beginning for work performed in 2021, however, the Setting Every Community Up for Retirement Enhancement Act of 2019. known as the SECURE Act,[8] creates a new opportunity for part-time employees who work at least 500 hours in three consecutive years to make elective deferrals to an employer sponsored 401(k) plan.

This broadened access for workers traditionally excluded from employer sponsored retirement plans will not require part-time employee participation until 2024, however sponsors must start tracking part-time employee hours for plan years beginning in 2021.

Sponsors should ensure that their systems have been reprogrammed as necessary to comply with this new standard.

Pooled Employer Plans

This year, small unrelated employers may be able to join forces and participate in pooled employer plans for retirement savings, as also added by the SECURE Act.

This provision was designed to encourage small and midsize employers to band together to offer cost effective defined contribution retirement plan benefits to their employees.

The DOL issued a final rule on Nov. 16, 2020, facilitating registration for entities seeking to sponsor pooled employer plans.[9]

Unfortunately, however, the DOL has not yet offered substantive guidance on how this new type of multiple employer plan, newly defined by the SECURE Act at ERISA Sections 3(43) and 3(44), will operate, and how its named fiduciary is expected to ensure compliance with all factors necessary for sponsoring and operating an employee benefit plan.

Time will tell as to whether pooled employer plans will lead to changes in how smaller employers provide retirement benefits to their employees.

Small and midsize employers who currently offer retirement benefits through their own defined contribution plans, as well as those interested in providing these benefits, should keep an eye out for potential opportunities to offer retirement savings benefits in a more cost effective way through a pooled employer plan.

New Reporting and Disclosure Requirements

Health Plan Transparency

The cost of health care services is one of the great mysteries of the century.

Under the transparency in coverage final rule issued by the IRS, DOL, and U.S. Department of Health and Human Services on Nov. 12, 2020, group health plans and health insurers will be required to disclose more information about participant cost sharing responsibility as well as information such as negotiated in-network provider rates geared toward allowing "the public to have access to health coverage information that can be used to understand health care pricing and potentially dampen the rise in health care spending."[10]

Disclosures will be required in phases beginning Jan. 1, 2022, through 2024.

For now, plan sponsors should be aware of these significant upcoming requirements and consider asking their providers about their plans for compliance or, for self-funded health plans, starting to consider their own compliance obligations.

Lifetime Income Disclosures

Linking retirement savings accounts to retirement readiness can also be a challenge.

Under a SECURE Act amendment participant benefit statements for defined contribution plans issued after September 18 will be required to disclose additional, specific information about potential lifetime income expectations, intended to help participants "better understand how the amount of money they have saved so far converts into an estimated monthly payment for the rest of their lives, and how this impacts their retirement planning."[11]

The DOL published this new rule as an interim final regulation on Sept. 18, 2020, and asked for public comment, so it is possible that the DOL will issue a final rule before updated benefit statements are required. Plan sponsors of defined contribution plans should be looking ahead to implementation of this new standard.

Electronic Disclosure Rules

The DOL also updated rules for electronic distribution of retirement plan documents. Existing standards for electronic disclosure for all types of plans were largely left intact, and new safe harbor options were added for sponsors of retirement plans to share information through notice and electronic posting or direct email, beginning July 27, 2020.[12]

The Pandemic Is Not Over

While plan sponsors may take some comfort in focusing on requirements that aren't related to COVID-19, the pandemic continues to reign, and plan sponsors should continue to take heed of temporary pandemic related benefit plan standards, such as mandatory health plan coverage for COVID-19 related services and relaxed deadlines for both employee and employer notices.

Plan sponsors should also anticipate legislative responses this year to 2020 pandemic-related legislation to restore or modify standards once the pandemic eases.

Post-pandemic related legislation will also likely contain benefit plan provisions for employees returning to work after layoffs or furloughs.

Conclusion

As 2021 waltzes in with the promise of coronavirus vaccines and renewed hope of stemming the pandemic, employee benefit plan sponsors should remember that, pandemic or not, they have new employee benefit plan compliance standards and concerns to address in 2021.

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[1] Title 29 of the Code of Federal Regulations, Section 2550.404 a–1.

[2] 85 Fed. Reg. 72846 (November 13, 2020).

[3] 85 Fed. Reg. 81658 (December 16, 2020).

[4] 85 Fed. Reg. 82798 (December 18, 2020).

[5] See Leventhal v. MandMarblestone Group, LLC , 2019 Us Dist Lexis 74123, 2019 WL 1953247 (E.D. Pa. May 01, 2019), and Bartnett v. Abbott Laboratories, et. al. , 2020 Us Dist Lexis 182645 (N.D. Ill. Oct. 02, 2020).

[6] In 2020 the IRS explained that a plan administrator was expected to withhold income taxes and issue a 1099-R if assets are transferred to an unclaimed property fund on behalf of a missing participant, but it avoided explaining how to do so if a plan administrator doesn't have information about the participant. Revenue Ruling 2020-24. While this Revenue Ruling answered some questions, it left many other questions unanswered.

[7] See DOL Field Assistance Bulletin 2014-01.

[8] Public Law 116–94 (Dec. 20, 2019).

[9] 85 Fed. Reg. 72934 (November 16, 2020).

[10] 85 Fed. Reg. 72158 (November 12, 2020).

[11] 85 Fed. Reg. 59132 (September 18, 2020).

[12] 85 Fed. Reg. 31884 (May 27, 2020).
