BENEFITS INSIDER

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The ***Benefits Insider*** is a bimonthly member exclusive publication prepared for WEB members by the American Benefits Council ("the Council"), a premiere benefits advocacy organization based in Washington, DC. This newsletter provides the latest news and analysis on the most important benefits-related policy matters in Congress, executive branch agencies and the federal judiciary.

Please note: any views or opinions expressed in these stories represent the advocacy positions of the American Benefits Council and its membership. They do not necessarily reflect the views of WEB or its membership. To inquire about membership with the American Benefits Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

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RECENT LEGISLATIVE ACTIVITY

Congress Approves Resolution to Repeal Biden's ESG Investing Rule

A bill has cleared Congress that would repeal a Biden administration rule that allows retirement plans to consider environmental, social and corporate governance (ESG) factors when selecting investment options.

The Congressional Review Act (CRA) resolution was approved March 1 in the U.S. Senate 50-46, with two Democrats voting alongside Republicans – Sens. Joe Manchin (D-WV) and Jon Tester (D-MT). The day before, the House voted 216-204 mostly along party lines with one Democrat joining Republicans in favor of the measure.

Under the CRA, Congress is permitted to nullify any regulation finalized by the executive branch within the last 60 days of the previous congressional session. If the CRA resolution is approved by Congress and the president, the agency is prevented from reissuing a "substantially similar" rule in the future unless Congress authorizes it to do so via subsequent legislation. The CRA can be passed with a simple majority in the Senate and is subject to a presidential veto.

The U.S. Department of Labor rule finalized late last year makes it easier for retirement plans to take into account climate change and other ESG factors when they choose investments.

In December 2021, the American Benefits Council filed written comments in response the then-proposed rule, supporting much of the proposal, but also making suggestions for improvement, emphasizing the importance of "regulatory stability and maintaining a focus on flexibility and ERISA's requirements to follow a prudent process." The continued partisan approach to ESG investment issues continues to jeopardize the development of a stable, flexible long-term solution.

The White House has said President Biden will veto the measure.

RECENT REGULATORY ACTIVITY

White House Proposed 2024 Budget Includes Provisions Addressing Mental Health, Prescription Drugs, Retirement Savings, Many Others

The White House Office of Management and Budget (OMB) released President Biden's fiscal year (FY) 2024 budget proposal on March 9, with numerous proposals related to employee benefit plans.

While the executive branch's annual budget proposal is not binding and most elements are unlikely to receive serious legislative consideration, it quantifies the Biden administration's policy priorities and serves as its starting point for negotiations with Congress. The president's budget submission includes the U.S. Treasury Department's annual Green Book, outlining the tax (or "revenue") proposals through which much of the president's policy agenda would be funded. Many of the proposals included in the president's $6.9 trillion budget represent expansion of certain policies included in the Inflation Reduction Act of 2022 (IRA) (and the

Build Back Better Act (BBBA), which was the earlier version of the IRA in 2021)) or a restoration of provisions that were dropped from the IRA prior to enactment.

In the foreground of this proposal is the White House's ongoing high-level negotiations over a measure to increase the national debt limit, with Republicans holding out for steeper cuts in federal spending. President Biden's tax proposals described below likely represent his current position on these negotiations.

Mental Health

The 2024 budget reiterates the previous year's budget proposal's emphasis on mental health care, an issue that gathered momentum in Congress since the pandemic exposed gaps in the nation's mental health infrastructure.

Under the heading "Transforms Behavioral Healthcare," the budget says, "for people with private health insurance, the Budget expands coverage of mental health benefits and strengthens the network of behavioral health providers." This includes:

- Require all health plans to cover mental health benefits.
- Require health plans to ensure provider networks include an "adequate number" of behavioral health providers.
- Authorize the U.S. Department of Labor (DOL) to assess civil monetary penalties for mental health parity violations. The Council has strongly advocated against such a change at this time due to the current lack of clarity regarding the mental health parity requirements; including the reporting requirements on so-called non-quantitative treatment limitations.
- Increase DOL's budget by $275 million over ten years for increased enforcement of existing mental health parity requirements, including expanding DOL's "capacity to take action against plans and issuers that do not comply."

The budget does not include additional detail on these policies, which would represent a significant change in the requirements for group health plan coverage of mental health benefits. As we await a statutorily required report from the U.S. departments of Health and Human Services, Labor and Treasury on mental health parity compliance, the Council continues its efforts to bring about clear guidance and fair enforcement of these requirements.

Prescription Drug Pricing

The White House is seeking to expand two of the prescription drug pricing programs established by the IRA, each with potential effects on private plans.

One of the IRA's key provisions was a requirement that drugmakers pay a rebate to the government when the price of certain drugs exceed the level of inflation. While the original version of IRA legislation expressly included commercial market prices from the calculation of the rebate, because the measure passed Congress under strict "budget reconciliation" rules, the law as enacted excludes commercial market prices from the calculation. The budget proposal seeks to "curb inflation in prescription drug prices" for the commercial market by "expanding the IRA's Medicare inflation rebate to include the commercial health insurance market." This provision is estimated to cost $40 billion over 10 years.

Another provision under the IRA empowered the federal government to "negotiate" lower prices for select drugs within the Medicare program and imposes a 95% non-deductible excise tax on manufacturers that do not accept the government-determined prices. The government-determined price was not made available to the commercial market. The President proposes to make certain medications – especially so-called "small-molecule" drugs, which comprise most of the market – eligible for negotiation sooner than the IRA currently allows. Most specifically, the budget seeks to cap the out-of-pocket cost of insulin products at $35 for a monthly prescription in the commercial market.

Based on a Congressional Budget Office (CBO) report that accompanied the l legislation as introduced (with the commercial market included in the rebate calculation), the Council expressed serious concerns when those provisions were removed prior to its enactment, that the inflation rebate and negotiation provisions, as they were modified, would increase the launch prices for drugs that are not yet on the market relative to what such prices would be otherwise. We will continue to analyze these proposals as more detail becomes available and emphasize the importance of lowering costs for employer-sponsored health plans.

Paid Family Leave

The White House proposes a paid family and medical leave measure that was deleted from the BBBA and then not included in the IRA. The budget calls for the establishment of "a national, comprehensive paid family and medical leave program administered by the Social Security Administration," providing workers with partial wage replacement for "up to 12 weeks of leave" to be used for a variety of purposes. This provision is estimated to cost $325 billion over 10 years.

The budget itself provides little detail of this proposal, but as originally drafted in the BBBA, the federal government would have established a new entitlement program guaranteeing up to 12 weeks of paid family and medical leave for all workers, available through one of three sources: (1) a new public program administered by the U.S. Department of the Treasury, (2) existing state paid leave programs or (3) employer sponsored paid leave programs.

While the Council has consistently asserted its support for universal paid leave, we were vocal about our concerns with the proposal before its ultimate deletion, arguing that it would introduce "a host of complex operational challenges, the most acute of which is a rigid deference to the states." In addition to the fundamental insistence on the need for nationwide uniformity, the Council described numerous operational issues for employers and three priority concerns that would need to be addressed legislatively.

The budget proposal also calls on Congress to "to require employers to provide seven job-protected paid sick days each year to all workers" without penalty.

ACA Tax Credits

The budget proposal would make permanent the expansion of Affordable Care Act (ACA) tax credits provided by the IRA, under which the credits are set to expire in 2026. This proposal is estimated to cost $183 billion over 10 years.

Pandemic Preparedness

The president's budget includes $20 billion in discretionary funding for the Department of Health and Human Services (HHS) to build advance public health systems and capacity in the Centers for Disease Control and Prevention (CDC) while expanding research and stockpiles of vaccines, therapeutics and tests.

Cap on Retirement Assets

The budget proposal includes a version of the $10 million cap on IRA and defined contribution plan accumulations that was originally included in the BBBA but deleted before the legislation's approval as the IRA. Various versions of that idea have been proposed in the past. The BBBA provision would have limited to $10 million an individual's total vested balances (as of the close of preceding calendar year) in IRAs and defined contribution plans, with no grandfathering of existing amounts.

While there are no details on this updated version of the proposal, the budget estimates it would raise $22.7 billion over 10 years.

Other Retirement & Compensation Provisions

The president's budget includes a number of retirement policy proposals designed to raise revenue. Many of these proposals were included in the original BBBA legislation but were not enacted as part of the IRA.

- Elimination of Roth conversions for High-Income Taxpayers: High-income taxpayers (those with modified adjusted gross income in excess of $450,000 (joint filers), $425,000 (heads of household), or $400,000 (other taxpayers)) would be prohibited from doing Roth conversions. Income limits would be indexed.
- Elimination of "Backdoor" Roth Contributions: Under current law, "backdoor" Roth contributions are permitted under both qualified plans and IRAs. Some individuals are precluded from making Roth IRA contributions due to the income limits. The income limits can be avoided by making an after-tax contribution to a traditional IRA and then converting that traditional IRA to a Roth IRA. If this is done quickly enough, and if the individual does not have any other traditional IRA assets, this conversion can be done without any tax consequences. On the plan side, an individual who has already made the maximum permitted 401(k) contributions (Roth and/or pre-tax) may effectively exceed that limit by making after-tax contributions to the plan and then converting those contributions to Roth. The budget would preclude both types of backdoor Roth contributions by prohibiting rollovers of after-tax amounts to Roth IRAs or Roth plan accounts.
- PTEs After Death: IRA owners and beneficiaries (if the owner has died) are treated as disqualified persons for purposes of prohibited transaction rules.
- FSC/DISC proposal: The proposal would prohibit an IRA from holding an interest in a domestic international sales corporation (DISC) or foreign sales corporation (FSC) that receives a payment from an entity owned by the IRA owner. Whether an entity is owned by the IRA owner would be determined by substituting 10 percent for 50 percent in the constructive ownership rules.

- Six-Year Statute of Limitations: A six-year statute of limitations would apply in the case of "a substantial error relating to valuation of assets with respect to an IRA from three years to six years," as well as "the excise tax on prohibited transactions from three years to six years." This provision would be effective for taxes for which the three-year window would end after December 31, 2023.
- $1 Million Cap on Deductibility of Certain Compensation: Very generally, Code Section 162(m) disallows a deduction by a publicly held corporation for compensation in excess of $1 million paid to the top five employees (and former top five employees) in a taxable year. Effective in 2027, the limitation also applies to the next five highest paid employees. The proposal would accelerate the application to the next five highest employees to 2024 and aggregate related employers for purposes of this rule. The proposal would also ensure that otherwise deductible compensation paid to a covered employee is considered applicable employee remuneration (whether or not paid directly by the publicly held corporation) and expand IRS' regulatory authority to prevent the avoidance of the rule.
- Adjustment of PBGC Insurance Premium Timing: The White House budget proposal includes a line item "shift timing of Pension Benefit Guaranty Corporation (PBGC) single-employer premiums." This refers to the reversal of a provision in the Bipartisan Budget Act of 2015 that accelerated PBGC premiums for the 2025 plan year so that they were due a month earlier (for purposes of managing the budget window). Changing the timing back as it was originally intended is estimated to raise $3.6 million in each of 2025 and 2026.
- Requirement to Withhold Tax on Failed Nonqualified Deferred Compensation Plans: Under current law, if a nonqualified deferred compensation (NQDC) arrangement fails to comply with applicable election and distribution timing requirements, the covered employee must include vested NQDC in income currently and is subject to a 20% penalty tax. In some cases, there is an additional interest tax as well. Employers are not required to withhold the 20% penalty tax or the additional interest tax when an NQDC arrangement fails to comply with the tax rules. Furthermore, IRS examiners may not assess these amounts against the employer, but instead must initiate examinations of each affected employee to collect these additional amounts. The proposed budget would require employers to withhold the 20% penalty tax and additional interest tax on the NQDC included in an employee's income due to the non-compliant NQDC arrangement. The proposal would be effective after December 31, 2023, and is expected to raise $2.4 billion in revenue over 10 years.

Employee Misclassification

As in many prior budgets under Democratic administrations, the 2024 budget specifically recommends addressing "the misclassification of workers as independent contractors" in the context of funding the U.S. Department of Labor.

Tax Policy

In an effort to offset the cost of the budget's spending provisions, the White House is proposing a set of tax reforms "that ensure corporations and the wealthiest Americans pay their fair share." This includes: (1) an increase of the corporate income tax rate from 21% to 28% and of the top individual income tax rate to 39.6% (as proposed in the previous year's budget), (2) expansion of the "net investment income tax" on high earners (originally created as part of the ACA), and (3) establishment of a 25% minimum income tax on households worth more than $100 million (up from 20% in last year's budget).

The Council will continue to review the president's budget for additional provisions that could affect employer benefit plan sponsors.

Council Leads Financial, Employer Organizations in Requesting PEP/MEP Guidance

The American Benefits Council and 10 other organizations sent **a letter to the Internal Revenue Service (IRS)** on March 7, requesting confirmation that a merger of retirement plans into a pooled employer plan (PEP), or any other kind of multiple employer plan (MEP), does not cause the original retirement plan to lose grandfathered status exempting the plan from automatic enrollment and automatic escalation requirements beginning in 2025.

Under the SECURE 2.0 Act of 2022, enacted as part of the Consolidated Appropriations Act, 2023, new 401(k) and 403(b) plans are required to automatically enroll a participant at a minimum rate of 3% of compensation (maximum 10%). That rate must be increased, effective for the first day of each plan year, by 1% each year until it reaches at least 10%. One of the exceptions to this rule is a "grandfather" provision, under which pre-enactment plans are exempt.

The Council and its cosigners assert in the March 7 letter that a grandfathered plan that is merged into a MEP should retain its grandfathered status. Additionally, a grandfathered component of a plan that is spun off from a plan should retain its grandfather status, and covering more employees of the same employer should not affect grandfathered status. The letter asks the IRS to confirm this view as soon as possible, as confusion on this part may dissuade employers from adopting a MEP.

"We strongly believe that the points we are asking to be confirmed below are current law," the Council said in the letter. "But we are nevertheless being asked to have these points confirmed. We are concerned that without immediate confirmation, some employers may perceive there to be a penalty for joining a MEP and accordingly decide not to join a MEP, leaving behind the cost savings and improved plan administration achievable through a MEP."

IRS Issues Relief for Reporting RMDs for IRAs in 2023

The Internal Revenue Service (IRS) issued **Notice 2023-23** on March 7, providing guidance on the reporting of retirement plan required minimum distributions (RMDs) for 2023, as directed by the SECURE 2.0 Act of 2022. The Council had requested this relief from the U.S. Treasury Department in its recent list of necessary SECURE 2.0 Act guidance.

Section 107 of the SECURE 2.0 Act, enacted as part of the Consolidated Appropriations Act, 2023, amended the Internal Revenue Code to delay the required RMD beginning date (*i.e.,* the date by which RMDs must begin) applicable to Section 401(a) plans and other eligible retirement plans – including individual retirement accounts (IRAs) and annuities. For an IRA owner who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, the new required beginning date is April 1 of the calendar year following the calendar year in which the individual attains age 73, rather than April 1 of the calendar year following the calendar year in which the individual attains age 72.

The change is effective for distributions required to be made after December 31, 2022, with respect to individuals who will attain age 72 after that date. As a result of this amendment, IRA owners who will attain age 72 in 2023 (that is, individuals born in 1951) will have a required beginning date of April 1, 2025, rather than April 1, 2024.

Under IRS Notice 2023-23, if an IRA owner has an RMD due for 2023, the financial institution that is the trustee, custodian, or issuer maintaining the IRA must file a 2022 Form 5498 (IRA Contribution Information) by May 31, 2023, and indicate by a check in Box 11 that an RMD is required for 2023. The guidance also sets forth the related requirements under Notice 2002-27, which also governs reporting related to RMDs from IRAs.

Notice 2023-23 is virtually identical to IRS Notice 2020-6, which was issued in early 2020 to address the change from age 70 ½ to 72 in SECURE 1.0, with one notable exception: Notice 2023-23 did not include a statement that the IRS would consider additional guidance related to a distribution to plan participant or IRA owner who attained the prior RMD age during the year and was therefore treated as an RMD.

The notice also "encourages all financial institutions, in communicating these RMD changes, to remind IRA owners who attained age 72 in 2022, and have not yet taken their 2022 RMDs, that they are still required to take those distributions by April 1, 2023."

Council Underscores Importance of Medicare Advantage to Employers in Letter to CMS

On March 6, the Council filed a comment letter in response to the annual notice published by the Centers for Medicare and Medicaid (CMS) which sets out information related to Medicare Advantage (MA) payments for the following year, in this case for 2024 (the "2024 advance notice"). While the annual notice is typically a highly technical document focused on actuarial topics rather than a policy document, the 2024 advance notice has raised concerns among plan sponsors, and others, related to its potential impact on MA plans.

The focus of the concern is a proposal by CMS to change the risk adjustment methodology – under which plans with higher-risk populations receive higher payments – in such a way that payments could be reduced. Essentially, the notice provides that for 2024, CMS will significantly reduce the number of diagnoses it takes into account in determining if a plan has a high-risk population. CMS does not explain this change, other than to say that the diagnosis codes removed are identified more frequently in MA than in Medicare fee-for-service plans. A private analysis released in response to the 2024 advance notice indicates that this change could result in a substantial decrease in benefits per member per year, at least for some plans, and that the payment reduction will vary by plan and by geography.

Many Council members offer retiree-health coverage through MA (under employer group waiver plans (EGWPs)), and these plans provide important benefits and are popular with retirees. Following the release of the 2024 advance notice, we heard concerns from several plan sponsors about the potential impact of the risk adjustment changes announced in the 2024 advance notice.

In response, the Council submitted a high-level comment letter that explains that employers are an important stakeholder in the MA space, the substantial number of EGWPs that employers offer, and the benefits of those plans. The letter also describes concerns from members about potential payment reductions resulting from the risk-adjustment changes and explains, because of the importance of this issue and its potential impact on retirees, this policy change needs to get the benefit of a full policy process – rather than a brief mention in a technical document with a short comment period. We therefore ask CMS not to implement this policy for 2024 and instead ask CMS to undertake a robust policy process, with a full explanation of this policy, its impact, costs and benefits, and to undertake engagement with stakeholders, including employers who sponsor EGWPs.

CMS has indicated that it will issue the final rate notice for 2024 no later than April 3, 2023. The Council will report on any relevant updates once the final guidance is issued.

Council Recommends Changes to Connecticut State Savings Plan for Private Employers

In **written comments to the Connecticut state comptroller** on February 23, 2023, the American Benefits Council strongly recommended certain changes to proposed state regulations governing employer registration, enrollment and exemption requirements with respect to Connecticut's MyCTSavings retirement Security program.

MyCTSavings is just one example of many efforts at the state level to expand retirement coverage by requiring employers without a retirement plan to enroll their employees in an automatic payroll-deduction IRA or similar vehicle. Like other state programs, the Connecticut statute provides that a qualified employer that maintains a 401(k) or similar plan is exempt from the program's requirements that qualified employers provide information, material and automatically enroll employees.

The proposed regulations implementing the MyCTSavings program, released on January 17, would affect exempt employers in two ways:

- In establishing registration deadlines for qualified employers, the proposed regulation would require an "authorized representative" of the exempt employer to take specified actions to certify that the exempt employer is indeed exempt.
- The proposed regulation appears aimed at allowing a potentially costly civil action to be brought against an exempt employer – by numerous different parties – if the exempt employer fails to certify its exemption by the registration deadline.

The Council has serious concerns with both of these changes, which appear inconsistent with the intent of the state's General Assembly and expose the program to litigation risk under ERISA's preemption provision.

The Council's letter outlines these objections and recommends specific changes to the proposed regulations to align MyCTSavings with the best practices of other state programs.

We will continue to be in contact with the Connecticut comptroller's office and other state officials where employer plans are potentially negatively affected by state-run retirement programs.

RECENT JUDICIAL ACTIVITY

Another Court Rejects Lawsuits Against 401(k) Plan Sponsors for Target Date Fund Selection

The U.S. District Court for the Eastern District of Virginia dismissed two nearly identical class-action lawsuits on March 1, aligning with *amicus* ("friend of the court") briefs filed by the American Benefits Council in late 2022.

Both cases are a part of the wave of litigation in which plaintiffs have alleged that plan sponsors breached their fiduciary duty by selecting certain target-date funds (TDFs) that they claim "underperformed" when compared to peers over a specified period of time.

The district court dismissed both of the following cases:

- *Hall et al v. Capital One Financial Corporation* | District court decision | Council *amicus* brief
- *Tullgren v. Booz Allen Hamilton* | District court decision | Council *amicus* brief

In substantively similar *amicus* briefs (filed in these and other cases along with the ERISA Industry Committee, the American Retirement Association, and the Committee on Investment of Employee Benefit Assets), the Council reiterated its longstanding position (see our 2017 letter to the U.S. Department of Labor (DOL) and our 2020 letter to DOL) that any fiduciary claim must allege specific facts showing, or at least allowing a court to infer, a flawed fiduciary process, rather than merely alleging that other funds are less expensive or have performed better. It is not a fiduciary breach to include funds that are not the least expensive or that do not have the best past performance. It is only a violation of ERISA if the plan fiduciary used a flawed fiduciary process to choose the funds. If this standard were applied, as it was in the above decisions, virtually all the underperformance suits – and similar suits related to 401(k) plan fees – would be dismissed at the pleadings stage.

The court's rulings note, pointedly, that "Underperformance of the BlackRock TDFs is all that Plaintiff alleges. Plaintiff has provided no factual allegations from which the Court may reasonably infer that the choice of the BlackRock TDFs was imprudent from the moment the administrator selected it, that the BlackRock TDFs became imprudent over time, or that the BlackRock TDFs were otherwise clearly unsuitable for the goals of the fund based on ongoing performance."

The district court's dismissals follow a very similar ruling from February 7, in which the U.S. District Court for the Western District of Washington dismissed a lawsuit in the case of *Beldock v. Microsoft*. Several of these cases remain active.

The Council will continue to monitor these cases and explore ways to weigh in against frivolous fees and underperformance litigation.