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 REGULATORY ACTIVITY

DOL Seeking Comment on SECURE 2.0 Reporting Requirements

On August 11, the U.S. Department of Labor (DOL) issued a **Request for Information (RFI)** seeking public feedback on the SECURE 2.0 Act's reporting and disclosure requirements.

The RFI includes 31 questions about SECURE 2.0 provisions, including pooled employer plans, pension-linked emergency savings account, review of fee disclosure rules and defined benefit annual funding notices.

Of particular interest, the RFI is seeking input on the current allowance of electronic delivery of retirement plan statements. Currently, plan sponsors are required to deliver certain statements on paper with two exceptions:

- In the case of plans that furnish benefit statements under DOL's 2002 electronic delivery safe harbors; and
- In the case of plans that permit recipients to request benefit statements to be furnished electronically, if recipients request that such statements be delivered electronically and the statements are delivered electronically.

The RFI raises the prospect of conditioning safe harbors on "access in fact," and reverting to paper if an individual forgoes access in fact. Specifically, the DOL is asking if plan administrators are able to confirm, reliably and accurately, whether an individual actually accessed, and for what length of time, an electric document.

If so, the DOL asks if safe harbors should contain conditions that plan sponsors administrators monitor whether individuals actually visited the specified website or logged on to the website, as a condition of treating website access as effective disclosure.

Further, the RFI also asks, in the event that monitoring reveals an individual has not visited the specified website, "[S]hould the safe harbors require that plan administrators revert to paper disclosures or take some other action in the case of individuals whom plan administrators know forsake such access?"

DOL is soliciting comments on the RFI – along with any relevant data – through October 10.

PBGC Grants One-Time 4010 Filing Waiver

On August 7, The Pension Benefit Guaranty Corporation (PBGC) announced a one-time waiver of filing requirements under ERISA Section 4010 for certain filers, which should help some defined benefit plan sponsors meet their compliance obligations. The waiver comes with certain conditions that only some plans will be able to meet, so there are places where a broader waiver would have been even more helpful. But PBGC was not required to provide any relief, so this was an important step from a regulator that is trying to accommodate unusual economic conditions.

The PBGC issued the relief in Technical Update 23-1. The relief provides a one-time waiver of the reporting requirement in light of "atypical market conditions of late 2022 and early 2023, and the way those conditions impact assets and liabilities for purposes of determining whether a 4010 filing is required."

Section 4010 of ERISA requires a contributing sponsor of certain underfunded single-employer plans and members of the contributing sponsor's controlled group to report identifying, financial and actuarial information to the PBGC. This reporting is generally required if one or more plans sponsored by a member of the controlled group has a funding target attainment percentage (4010 FTAP) below 80% (without regard to interest rate stabilization).

The PBGC is voluntarily providing the relief under Technical Update 23-1 to mitigate reporting burdens created by the unusual circumstance of high interest rates and depressed asset values.

Under the relief, the PBGC is waiving the 4010 filing requirement for filers for a 4010 information year if all of the following criteria are satisfied:

1. The 4010 filing requirement did not apply for the five consecutive 4010 information years immediately preceding the 4010 information year.
2. Either:
    a) None of the includable plans has a market-based 4010 FTAP below 85% (i.e., using the fair market value of assets and spot interest rates); or
    b) The market-based aggregate 4010 funding shortfall does not exceed $15 million.
3. Every includable plan with a 4010 FTAP below 80% (i.e., a plan that would trigger the 4010 filing requirement if not for this waiver) has a valuation date on or after October 1, 2022, and on or before March 1, 2023.

Plan sponsors using this waiver must notify the PBGC no later than 15 days before the date the 4010 filing would have been due. To do so:

- Send an email to ERISA.4010@pbgc.gov with the subject line "Technical Update 23-1 Waiver."
- In the body of the email, include the name of the ultimate parent and the date the applicable information year ends.

Council Calls for Additional SECURE 2.0 Guidance, Clarifications

The American Benefits Council recently submitted letters to the **U.S. Department of Labor (DOL)** and **U.S. Treasury Department** calling for additional time-sensitive guidance with respect to SECURE 2.0 Act provisions that are generally effective beginning in 2024 or 2025.

The August letters follow up on similar requests sent earlier this year asking for immediate technical corrections to the law.

The Council is seeking additional guidance and clarification including, but not limited to, the following sections in the law:

From DOL

- Recovery of retirement plan overpayments (Section 301)
- Paper benefit statements (Section 338)
- Pension-linked emergency savings account (Section 127)
- Unenrolled participant disclosures (Section 320)

From Treasury

- Additional credit for employer contributions (Section 102)
- Expanding automatic enrollment (Section 101)
- SEP and simple Roth IRAs (Section 601)
- Catch-up contributions required to be Roth (Section 603)

Additional Resources

The Council recently delivered a letter to Congress and the Treasury in which nearly 250 organizations called for a two-year delay of a new requirement related to "catch-up" retirement contributions.

GAO Issues Troubling Report on Disparities in Retirement Plan Participation

According to a new report by the **Government Accountability Office (GAO)**, income- and race-based disparities in retirement savings are increasing among older workers, raising concerns about the effectiveness of tax incentives for workplace retirement plans.

The GAO is an independent, non-partisan agency that is intended to provide Congress and federal agencies with analysis to help the government save money and work more efficiently. Earlier this year, U.S. Senate Health, Education, Labor and Pensions (HELP) Committee Chair Bernie Sanders (I-VT) and Budget Committee Chair Sheldon Whitehouse (D-RI) formally asked GAO to research income- and race-based disparities in the distribution of retirement account balances.

Specifically, the GAO report examines (1) how the distribution of retirement account balances among older households (aged 51-64) by income changed over time; (2) factors associated with the distribution of retirement account balances among older households by income; and (3) how selected strategies meant to increase retirement savings affect high-, middle- and low-income workers.

Among the key findings from the report:

- Disparities between low-income (defined as the lowest income quintile) and high-income (defined as the highest income quintile) older workers households' (ages 51-64) retirement accounts were greater in 2019 than in 2007.
- One in 10 low-income households had a retirement account balance in 2019 (compared to 1 in 5 in 2007)
- Nine in 10 high-income households had a retirement account balance between 2007-2019.
- More White households had approximately double the median retirement account balance than those of all other races.

While the GAO does not explicitly draw any conclusions about retirement plan tax incentives, the report notes “the tax incentives for workers to save in tax-preferred retirement accounts cost the federal government nearly $200 billion in forgone revenue” and members of Congress “and others are concerned these incentives accrue primarily to high-income workers and not low-income workers.” The report also compares the U.S. system to that of Germany, which targets its financial incentives to low-income workers.

In communications with policymakers over many years, the American Benefits Council has emphasized that the tax deferral for qualified plans is a net positive for the federal government, since the amounts taxable at distribution are generally larger because those amounts include earnings over time. We have also explained that the prevailing nondiscrimination rules encourage plan sponsors to provide commensurate benefits for rank-and-file workers.

Nevertheless, this report seems likely to fuel skepticism about these tax incentives and could revive discussion about curtailing them as part of a future tax or budget legislative package.

The Council is also engaged in efforts to promote greater benefits equity, most notably through collaboration on a report describing how health equity can be advanced through improved collection and sharing of race and ethnicity data. While this report is focused on health equity, many of its conclusions can also be applied to retirement equity.

PBGC Fiscal Year 2022 Projections Report Shows Continued Improvement in Single Employer, Multiemployer Programs

On August 2, the Pension Benefit Guaranty Corporation (PBGC) released its **Fiscal Year (FY) 2022 Projections Report**, providing estimates of PBGC’s expected financial condition as of the end of FY 2032. The report shows a continuing positive outlook for both its single-employer and multiemployer pension insurance programs.

In a statement unveiling the report, PBGC Director Gordon Hartogensis attributed the positive outlook to the American Rescue Plan Act (ARP), noting “the positive outlook for PBGC insurance programs is good news for the defined benefit pension system overall.”

While the ARP indeed provided important financial assistance to the troubled multiemployer system and funding relief for single-employer plans, the Council has consistently argued for many years that a return to historically typical interest rates would also dramatically improve the financial position of the PBGC.

Single-Employer Program

The single-employer program's net position increased by $5.7 billion in FY 2022, which exceeded the mean projection in the FY 2021 Projections Report, primarily due to a decrease in liabilities resulting from rising interest rates that exceeded the decrease in assets due to rising interest rates and poor equity returns, according to the report.

Additionally, the net financial position of the single-employer program is expected to grow to $63.6 billion by 2032, up from its current position of $36.6 billion, reported on Sept. 30, 2022, the report added.

Multiemployer Program

The new projections continue to show the multiemployer program is likely to remain solvent for more than 40 years, with a median projected insolvency after 2062, according to the report.

The projected FY 2032 net financial position of the multiemployer program is positive in 69% of model scenarios, with a median value of positive $3.9 billion but the mean net position is negative $7.1 billion, the agency noted.