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

Council Responds to Paid Leave RFI, Urging Support for Employer Plans, Nationwide Harmonization of State Laws

On January 30 the American Benefits Council provided a detailed response to a bipartisan, bicameral request for information (RFI) on expanding access to paid leave.

To reach the goal of expanding access to paid leave for all Americans, federal legislative solutions must support and leverage employer-provided paid leave benefits," Ilyse Schuman, the Council's senior vice president, health and paid leave policy, wrote. "To support and leverage employer-provided paid leave benefits, it is critical that federal legislation promote the harmonization of existing and potential forthcoming state paid leave programs so that multi-state employers can treat their employees equitably across the country."

The RFI was issued in December 23 by a bipartisan group of lawmakers including the U.S. House of Representatives bipartisan Paid Family Leave Working Group, which recently issued its "A Year in Review" report and framework for possible legislative options.

The RFI specifically sought "suggestions for expanding access to paid parental, caregiving, and personal medical leave in a bipartisan and fiscally responsible way." In answering the working group's questions, the Council explained how lawmakers can address the challenges facing employer-sponsored paid leave programs—which provide immense value for employees, businesses, governments and taxpayers—stemming from the proliferation of increasingly complex, inconsistent, administratively burdensome and overlapping paid family and medical leave (PFML) mandates across the country (as illustrated in a detailed infographic prepared by the Council and the law firm Seyfarth Shaw LLP).

Invoking its longstanding principles on paid leave, the Council proposed a voluntary federal private plan option for PFML benefits, under which employers who provide a minimum standard of paid family and medical leave benefits would be deemed in compliance with state requirements. Under this approach, state PFML programs would continue to operate and play a core role in delivering paid leave benefits to employees who are not covered by an employer-provided plan that satisfies such standards.

The Council praised the House working group's inclusion of "Coordination and Harmonization of Paid Leave Benefits Across States" as one of the pillars of its legislative framework, targeting states that provide leave benefits (or might provide benefits in the future) as well as multi-state employers and employees who offer and utilize benefits. "In particular, the proposal to create an 'Interstate Paid Leave Action Network (I-PLAN)' is a positive step forward in acknowledging the need for harmonization across states and provides an opportunity to drive greater harmonization, and must be meaningful, reasonable, long-term and administrable," Schuman said in a media statement.

The Council will continue to work closely with the House working group, led by Representatives Stephanie Bice (R-OK) and Chrissy Houlahan (D-PA), and their counterparts in the Senate, led by Bill Cassidy (R-LA, the ranking Republican on the Senate Health, Education, Labor and Pensions Committee), and Sen. Kirsten Gillibrand (D-NY), as they move forward with possible legislation.

House Subcommittee Hears Testimony to Improve Health Care Costs

The U.S. House of Representatives Energy & Commerce Committee Subcommittee on Health held a January 31 hearing on Health Care Spending in the United States: Unsustainable for Patients, Employers, and Taxpayers, during which lawmakers heard from witnesses on how price transparency and competition can lower health care costs.

The hearing followed recent House passage of the bipartisan Lower Cost, More Transparency (LCMT) Act (H.R. 5378), endorsed by the Council, which advances many key measures aimed at reducing costs through enhanced transparency, and increased competition in the health care market. The LCMT Act was approved by the House by a strong bipartisan vote of 320 – 71 on December 11, 2023.

The following witnesses provided oral testimony to the committee:

- Sophia Tripoli, director of health care innovation, Families USA (A member of the Alliance to Fight for Health Care (the "Alliance"), the diverse stakeholder coalition established by the Council to promote employer-sponsored coverage), and the Consumers First Coalition, of which the Council is a steering committee member
- Benedic Ippolito, senior fellow in economic policy studies, American Enterprise Institute
- Kevin Lyons, plan administrator, New Jersey State Policemen's Benevolent Association
- Chapin White, director of health analysis, Congressional Budget Office
- Katie Martin, president and CEO, Health Care Cost Institute

Lawmakers' questions focused on how site-neutrality and increased transparency, both the provisions included in the LCMT Act and beyond, can help lower health care costs.

For example, Representative Tony Cárdenas (D-CA) asked what steps could be taken to improve patient choice past the initial steps of improving transparency.

Price transparency, not only for hospitals and for plans, but across the entire health care system—transparency of information—is going to be critical to unveil the curtain of what is happening underneath the system that is driving unaffordable care and low quality, Tripoli said.

Further, "enacting site-neutral payments, which gets underneath the hood of the health care system, takes on this broken financial incentive," Tripoli added. "That allows consumers to have more affordable care options."

The Council has strongly advocated for expansion of site-neutral payment reform, as summarized in our Health Policy Priorities for the 118th Congress document shared with Congress earlier this year and in our testimony before the Health Subcommittee.

In written testimony submitted for the hearing record, the Alliance highlighted the importance of the LCMT Act and many of its provisions that address employer concerns.

Council Comments on SECURE 2.0 Technical Corrections Discussion Draft

The American Benefits Council has offered **feedback** on **a bipartisan discussion draft of the SECURE 2.0 Technical Corrections Act**, legislation to address certain outstanding issues related to the 2022 retirement savings law that is now being implemented.

The SECURE 2.0 Act, named after the original Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, was enacted in late 2022 as Division T of the Consolidated Appropriations Act 2023. The Council was instrumental in developing and shaping many components of the bill.

House Ways and Means Committee Chair Jason Smith (R-MO) and the committee's ranking Democrat Richard Neal (D-MA), along with House Education and the Workforce Chair Virginia Foxx (R-NC) and the committee's ranking Democrat Bobby Scott (R-VA), have introduced the technical corrections bill to resolve various drafting errors and inconsistencies in the bill. The legislation follows a May 2023 letter to the U.S. Treasury Department and Internal Revenue Service (IRS) from Smith and Neal, as well as their Senate counterparts, previewing technical corrections legislation.

Nearly a year ago the Council provided to Congress and key committee staff a list of important technical corrections to SECURE 2.0. (One of these, an extended transition period for the implementation of the new "catch-up" contribution rule, was provided by the Internal Revenue Service (IRS) in August 2023 after intense lobbying by the Council.) The discussion draft incorporates some of these suggestions.

The Council's newest comments offered a critique of certain elements of IRS Notice 2024-2, issued in December 2023, related to post-enactment multiple employer plans (MEPs) and pooled employer plans (PEPs). The Council's comments also briefly address the discussion draft's provisions related to recoupment of overpayments and transfers of excess pension assets to fund retiree health benefits and retiree life insurance coverage under Internal Revenue Code Section 420.

To receive consideration in the House the measure will likely need to be attached to another must-pass vehicle, making the timing and prospects for enactment very unclear.

House Subcommittee Hears Testimony on Fiduciary Rule Proposal

On January 10, the U.S. House of Representatives Financial Services Committee's Subcommittee on Capital Markets held a hearing to discuss the U.S. Department of Labor's (DOL) proposed "retirement security" rule and its potential impact on retirement savings and access to financial advice. The hearing followed the issuance of a bipartisan letter signed by 50 lawmakers urging DOL to withdraw its proposed rule, citing concerns about its impact on American workers and retirees.

The DOL proposal revises the fiduciary standards for retirement plan investment advice, seeking to address potential "conflicts of interest" by extending fiduciary status to a wider array of investment advice relationships than is done by the existing rules. The Biden administration is touting the proposal as a means of improving retirement security by doing away with "excess fees and costs, and financial losses" by participants.

This is the latest iteration of a DOL fiduciary rule proposal, dating back to the Obama administration. The American Benefits Council offered a detailed critique of the DOL proposed rule in **written comments to the agency** on December 29, 2023, arguing the proposal is "at odds with the direction in which employers are moving and the pressing needs of participants in terms of facilitating employee engagement with their benefit plans."

The DOL also hosted a hearing (in two parts) on the proposal to collect initial responses from stakeholders. Nearly 50 witnesses, including the Council, testified over the course of December 12 and 13.

The January 10 hearing featured testimony from Brad Campbell, partner at Faegre Drinker Biddle & Reath LLP and a member of the Council's Policy Board of Directors. Campbell (testifying on his own behalf, not on behalf of his firm or the Council) discussed the congressional intent in drafting ERISA and stated that DOL is attempting to impermissibly expand the definition of fiduciary advice in order to regulate retail advice.

The hearing also featured testimonies from other industry experts, including witnesses representing the American Council of Life Insurers (a Council policy board member firm), the Insured Retirement Institute, Finesca and the Certified Financial Planner Board.

Discussion at the hearing generally continued the ongoing debate over the DOL's proposed fiduciary rule, with lawmakers expressing varying perspectives on its potential impact on retirement savings and access to financial advice. Industry experts highlighted concerns about increased costs, reduced access to advice, and potential negative consequences for low- and middle-income Americans.

RECENT REGULATORY ACTIVITY

Council Raises Concerns with Proposed 401(k) Rules for Long-Term, Part-Time Employees

In **a January 26 letter to the Internal Revenue Service (IRS)**, the American Benefits Council expressed concern that the agency's proposed rules for long-term, part-time (LTPT) employees will limit retirement plan participation opportunities for these employees and could increase costs and administrative burdens for employer plan sponsors.

Under the SECURE 2.0 Act of 2022, the "lookback" period for determining whether an individual is a long-term, part-time employee was reduced from three years to two years, beginning with the first plan year effective on or after January 1, 2025. SECURE 2.0 does not change the effective date for 401(k) plans under the original Setting Every Community Up for Retirement Enhancement ("SECURE 1.0") Act of 2019 for 401(k) plans), so those rules are still effective and the regulations will apply for purposes of the changes made by that law.

The proposed regulations, issued in November 2023, apply for plan years beginning after 2023 in accordance with the SECURE 1.0 LTPT rules, which were effective for plan years beginning after 2020. Because SECURE 1.0 required three consecutive years of at least 500 hours, service in 2021, 2022 and 2023 is generally counted to determine long-term part-time employee eligibility for the 2024 plan year.

The Council's January 26 comments explain that, in the absence of additional guidance on the interaction of the special rules for LTPT employees and the elapsed time method for crediting service, plans that have never tracked hours for eligibility and vesting purposes might be forced to do so under the new rules. We are also concerned that the proposed interpretation of the tax code provisions that allow employers to exclude employees before they attain age 21 may actually result in more plans electing to exclude employees before they turn 21.

Given these concerns, the Council's comments include a series of recommendations intended to avoid these negative consequences, including:

- Delay the proposed applicability date and provide relief for good-faith interpretations of the statute.
- Confirm flexibility for eligibility computation periods and provide transition relief for plans that did not permit LTPT employees to make deferrals prior to January 1, 2024.
- Confirm that plans using the elapsed time method satisfy the tax code's LTPT eligibility requirements and permit plans to continue using the elapsed time method for vesting purposes.
- Modify the rules relating to the "Age 21" requirement.
- Do not treat minimum vesting rules "as if" they apply to governmental and church plans.
- Provide guidance on the application of the LTPT rules to 403(b) plans.
- Provide relief for breaks in service for non-vested LTPT employees.

A public hearing on the proposal has been scheduled for March 15. The Council has requested permission to testify at the hearing.

Agencies Request Feedback on Retirement Plan Reporting, Disclosure Requirements

On January 19, the U.S. departments of Labor (DOL) and Treasury (including the Internal Revenue Service) and the Pension Benefit Guaranty Corporation jointly issued **a request for information (RFI)** seeking public input as the agencies review the current reporting and disclosure requirements for retirement plans under ERISA and the Internal Revenue Code.

The RFI was issued pursuant to Section 319 of the SECURE 2.0 Act of 2022, which requires the agencies to conduct a review of the current reporting and disclosure requirements and make recommendations regarding those requirements to Congress. The 24-question RFI covers an array of reporting and disclosure topics, ranging from the cost of creating such documents to the effectiveness of such communications.

The RFI contains multiple questions about whether it would be helpful for plan sponsors to have fewer, shorter, simpler disclosures, and whether that would increase the likelihood that individuals would read and understand the disclosures.

The RFI also suggests a renewed interest in the use of paper disclosures. For example, the agencies ask whether there are certain disclosures that participants and beneficiaries prefer to receive on paper, such as quarterly and annual benefit statements.

This is unlike DOL's August 2023 reporting and disclosure RFI asking whether the use of e-delivery with respect to an individual should be conditioned on a showing that the individual actually accessed the electronically delivered material. While this RFI does not discuss such a proposal, it does probe plans' ability to track the extent to which participants access disclosures.

The agencies are accepting comments through April 22.

Treasury, IRS Finalize Rules for Pension Plan Lump Sum Distributions

The U.S. Department of Treasury and Internal Revenue Service (IRS) published **final regulations** on January 19 updating the rules regarding the minimum present value of certain forms of distributions – most commonly lump sum distributions -- from defined benefit plans.

Section 417(e) of the Internal Revenue Code sets forth the rules for distributions from defined benefit plans, including the determination of present value. The final regulations would update the existing rules to reflect the statutory changes made by the Pension Protection Act of 2006 (PPA), including new interest rates and mortality tables.

In addition to updating the rules, the final regulations address a number of substantive issues on which the Council previously commented in response to proposed regulations published in November 2016. The Council also testified at a public IRS hearing in March 2017.

The final regulations generally apply to distributions with annuity starting dates occurring on or after October 1, 2024. For earlier distributions, however, plans are permitted to use the final regulations.

EBSA Proposes New Rules for Auto-Portability under SECURE 2.0

The U.S. Department of Labor Employee Benefits Security Administration (EBSA) released **a notice of proposed rulemaking** on January 18 describing implementation of the automatic portability provisions of the SECURE 2.0 Act of 2022.

The American Benefits Council has long supported the concept of automatic retirement plan portability, under which workers' retirement savings are automatically transferred from their old employer's plan to a new employer's plan. Auto-portability helps participants keep track of their retirement savings accounts, thereby reducing missing participants and "leakage" of plan assets.

In 2018, the Council endorsed EBSA's efforts to improve portability and urged the agency to expand the program to safe harbor IRAs. In 2022, the Council urged lawmakers to further improve auto-portability as part of the next generation of retirement policy legislation.

Congress subsequently passed the SECURE 2.0 Act, including Section 120, which allows an automatic portability provider to receive a fee in connection with executing an automatic portability transaction for certain distributions into safe harbor IRAs, through an added exemption to Internal Revenue Code Section 4975. When workers leave jobs with a retirement benefit valued at $7,000 or less, their savings plan can automatically roll over their benefits to a safe harbor IRA if the plan document allows it and the employee does not take action after receiving required notices.

The newly proposed regulations cover the eleven specific topics identified in the statutory exemption for regulations or other guidance to carry out the purposes of the auto-portability amendments, including:

- The scope of the exemption.
- Disclosures about automatic portability transactions, fees, compensation, and services, including an acknowledgement of the automatic portability provider's fiduciary status, website requirements for the automatic portability provider, and a requirement that disclosures be written in a culturally and linguistically appropriate manner.
- Investments permitted in connection with automatic portability transactions.
- The restriction on receipt or payment of third-party compensation by an automatic portability provider in connection with an automatic portability transaction.
- The prohibition on exculpatory provisions disclaiming or limiting liability if an automatic portability transaction results in an improper transfer.
- Required actions to ensure that participant and beneficiary data is current, accurate and secure.
- Limitations on the use of data related to automatic portability transactions for any purpose other than to execute such transactions or locate missing participants.
- Record retention requirements.
- Annual audit and corrections procedures if an auditor determines the automatic portability provider did not comply with the requirements of the statutory exemption and the proposed regulation.

Comments are being accepted through March 29.

IRS Issues Guidance on Emergency Savings Account Anti-Abuse Rules

The Internal Revenue Service (IRS) on January 12 issued **initial guidance** on anti-abuse measures intended to prevent manipulation of pension-linked emergency savings accounts (PLESAs). Additionally, On January 17, the U.S. Department of Labor (DOL) released guidance consisting of 20 frequently asked questions addressing PLESA eligibility requirements, the contribution rules for plans, the procedures for distributions and withdrawals and administration and investment parameters.

PLESAs, established under the SECURE 2.0 Act of 2022, allow individuals to save for emergencies by making special post-tax ("Roth") contributions to a dedicated account within a defined contribution plan.

IRS Guidance

IRS Notice 2024-22 focuses on the provisions that enable plans adopting PLESAs to limit the frequency or amount of matching contributions. The objective is to ensure matching contributions align with intended amounts and frequencies, as outlined in Internal Revenue Code Section 402A(e)(12).

The notice explicitly addresses concerns about participants making PLESA contributions solely to trigger matching contributions and subsequently withdrawing them almost immediately, although the guidance indicates such actions are permissible. The guidance also places limitations on plans' ability to curb this manipulation of plan rules.

The notice also emphasizes the necessity for more comprehensive guidance on PLESAs. However, this could take time due to the coordination required between the IRS, the U.S. Department of Treasury and DOL.

The notice provides little affirmative guidance on the types of reasonable anti-abuse procedures that plans may employ, instead pointing to elements of relevant statutory provisions the IRS believes already limit manipulation. It identifies a participant fact pattern that may be viewed as not manipulating the matching contribution rules, and anti-manipulation procedures that Treasury and IRS have determined to be unreasonable.

- **Confirmation that anti-abuse procedures are optional:** The notice indicates that a plan sponsor might view the statutory provisions controlling PLESAs as sufficient anti-abuse provisions, and therefore decide not to impose any other restrictions meant to prevent manipulation of matching contributions. In this regard, the notice specifically highlights: (a) the rule that treats any matching contributions as first attributable to elective deferrals other than PLESA contributions; (b) the rule limiting annual matching contributions based on PLESA contributions to the maximum account balance for PLESAs; and (c) the rule that is characterized by the Notice as only requiring plans to permit PLESA distributions once per month.

- **Participant fact pattern that may be considered as not manipulating:** The notice states that "[A] plan sponsor may consider a participant as not manipulating the matching contribution rules if the participant made a $2,500 contribution in one year, received the matching contribution on such amount, and then took $2,500 in distributions that year and repeated that pattern in subsequent years."

- **Reasonable procedures:** The notice states that "[a] reasonable anti-abuse procedure is one that balances the interests of participants in using the PLESA for its intended purpose with the interests of plan sponsors in preventing manipulation of the plan's matching contribution rules." The notice also notes that plan sponsors might find it challenging to distinguish manipulative practices from legitimate contribution and distribution patterns.

- **Unreasonable procedures:** The notice states that the following non-exhaustive types of procedures are unreasonable for a plan sponsor to implement.

    - *Forfeiture of matching contributions:* A plan may not provide that matching contributions already made on account of participant contributions to the PLESA will be forfeited by reason of a participant's withdrawal from a PLESA.

    - *Suspension of participant contributions to PLESA:* A plan may not suspend a participant's ability to contribute to the participant's PLESA on account of a withdrawal from the PLESA.

    - *Suspension of matching contributions on participant contributions to the underlying defined contribution plan:* A plan may not suspend matching contributions made on account of participant elective deferrals to the underlying defined contribution plan.

The notice does not expressly prohibit plans from suspending matching contributions made on PLESA contributions to prevent manipulation. However, because the notice only provides a non-exhaustive list of procedures that are unreasonable, plan sponsors may be uncertain about implementing this, or a similar, anti-abuse feature.

The IRS is seeking comments on Notice 2024-22 and other PLESA-related issues through April 5.

Council Urges Withdrawal of Basel III Proposed Rules

The American Benefits Council submitted **written comments** to three federal regulatory bodies on January 12, describing the potential negative consequences of the proposed Basel III Endgame package of reforms on retirement plan investments.

The Basel initiative is a set of measures designed to increase the resilience of the banking system by revising the capital requirements applicable to large banking organizations. The final set of reforms—known as Basel III Endgame—appears to create some unintended but materially negative impacts for certain funds when transacting with banks.

The U.S. Office of the Comptroller of the Currency, the Federal Reserve System and the Federal Deposit Insurance Corporation issued a notice of proposed rulemaking in September 2023, conforming U.S. banking regulations to the Basel III Endgame standards.

The Council's January 12 letter expressed "deep concerns" about the possible effect of the proposal on pension plans and the participants they serve. After providing background on common approaches for defined benefit plan sponsors managing economic volatility, the Council explained why the proposal is a threat to pension plans and should be withdrawn.

"As a whole, the proposal would significantly increase banks' capital requirements for derivatives and SFTs, among other transactions. These costs would be passed on to end users (such as plans), increasing the cost and reducing the availability of these products. The loss of these products at a reasonable price – or the unavailability of these products—will result in some plans managing risks in less effective ways, which will undoubtedly lead to higher costs (again at the expense of participants and beneficiaries) and more harmful volatility. The specter of higher costs and increased volatility will in turn result in more employers terminating their plans, again hurting participants."