BENEFITS INSIDER

Volume 340, April 2, 2024
(covering news from March 16-31, 2024)

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

Council Urges Improved Rules for Missing Plan Participants, Removal of Provision Requiring Plan Monitoring Designee

You Need to Know:

- The Council reiterated longstanding concerns about the approach DOL has taken regarding how a fiduciary should deal with missing and unresponsive participants.
- The Council requests DOL remove the aspect of the proposal imposing requirements on companies using automatic portability services.
- The Council also requests DOL remove the unnecessary disqualification provisions it has copied from the QPAM changes.

The American Benefits Council has continued to advocate for legislative and regulatory solutions to address the growing burdens plan sponsors face with managing missing plan participants.

In a **March 29 letter** to the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA), the Council reiterated the need for greater flexibility for companies locating missing plan participants and requested the agency remove a proposal requiring plan sponsors to appoint a special plan official specifically charged with monitoring automatic portability transaction (APTs).

Under the proposal, for the automatic portability provider (APP) to receive an exemption for the fees it collects in connection with APTs, each plan that accepts APTs must designate a plan official responsible for monitoring transfers into the plan and confirming that amounts received on behalf of a participant are invested properly.

In our letter, the Council believes the proposed mandate is unnecessary and raises concerns over the agency's micromanagement and perceived overreach of authority, as the monitoring obligation duplicates existing fiduciary duties. Furthermore, the requirement may undermine existing fiduciary safe harbors and lacks flexibility in fiduciary oversight.

"This requirement to appoint a "special" fiduciary plan official flies in the fact of nearly 50 years of thinking about how fiduciary committees should do their jobs," the Council wrote.

The letter also emphasized the Council's ongoing efforts to address concerns about missing and responsive participants, particularly regarding the aggressive stance of some regional enforcement offices. Despite recent DOL guidance and legislative reforms like the SECURE 2.0 Act of 2022, uncertainties persist.

Lastly, the proposal includes concerning provisions which parallel those in the QPAM exemption, granting DOL extensive discretion in disqualifying investment managers and lacking procedural safeguards. DOL's authority to impose audits and restrictions on service providers without due process raises alarm, particularly as it could disrupt plan sponsors' operations and fairness in the process.

"As we noted in our comments on the QPAM proposal, this grants DOL too much discretion in disqualifying a QPAM and the proposed process for issuing these notices lacks procedural safeguards for parties who may disagree with DOL's assessment," the letter reads.

The 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.

Council Urges Clarity, Good-Faith Compliance for Proposed 401(k) Rules for Long-Term, Part-Time Employees

You Need to Know:

- The Council's testimony at a recent IRS hearing emphasized employer concerns regarding the proposed applicability date for SECURE 2.0 provisions affecting long-term, part-time (LTPT) employees.
- Our testimony highlighted issues with the lack of good-faith relief and potential APA violations due to the short timeframe between proposal release and applicability date.
- The Council also raised issues regarding age 21 requirements, elapsed time usage and potential administrative burdens.

The American Benefits Council continues to play a leading role in ensuring fair and orderly implementation of SECURE 2.0 Act retirement provisions.

At a recent Internal Revenue Service (IRS) public hearing on proposed regulations concerning retirement provisions for long-term, part-time (LTPT) employees, witnesses including the Council testified on the applicability date of the proposed rules, interpretive issues and potential administrative burdens for plan sponsors.

Testifying at the March 15 hearing, Adam McMahon, partner at Davis and Harman LLP on behalf of the American Benefits Council, offered critical insights into the practical compliance challenges of the proposed rule echoing the Council's concerns from written comments filed earlier this year.

McMahon focused on the proposed applicability date of January 1, 2024. He emphasized the lack of good-faith relief and the challenges posed by the short timeframe between the proposal's release and the applicability date. "The council's top concern with the long-term part-time proposal is its proposed applicability date, and its lack of any good-faith relief," McMahon said, noting that it was "really impossible" for plans to review the proposal and implement it in just over a month.

McMahon also testified that penalizing plans for reasonable interpretations made before the proposal's issuance would be unjust. Moreover, he highlighted potential violations of the Administrative Procedure Act (APA) due to retroactive application of regulations. "I think it would be incredibly unfair for the IRS to penalize plans that have developed reasonable, good-faith interpretations of the statute and took action to implement those interpretations many months before the proposal was issued," he added.

McMahon also raised interpretive issues related to age 21 requirements and the use of "elapsed time" for eligibility and vesting. He expressed concern that the proposal's linkage of the age-21 exclusion with non-discrimination relief could incentivize employers to adopt age-21 requirements, contradicting the goal of increasing participation among long-term part-time employees.

Additionally, McMahon advocated for clarifications regarding the continued use of elapsed time for eligibility and vesting determination, urging Treasury and IRS to confirm the eligibility requirements for long-term part-time employees using elapsed time.

McMahon also highlighted potential administrative burdens resulting from proposed changes, particularly for plans transitioning from elapsed time to hour-based service crediting.

He argued that such transitions could lead to less favorable eligibility and vesting outcomes for participants and increased costs for plan sponsors, urging for clarity to prevent unnecessary administrative burdens and ensure alignment with congressional intent to expand participation without imposing undue costs.

The hearing also featured testimony from other industry experts, including the Michael Hadley, also a partner with Davis and Harman LLP, on behalf of the SPARK Institute, and Corey Zeller from Preferred Pension Planning.

Council Urges Improvements to Delaware's EARNS Program Proposed Regulations

You need to know:

- The Council submitted recommendations to Delaware's Expanding Access for Retirement and Necessary Saving (EARNS) program on proposed regulations.
- The comments aim to align the operation of EARNS with the existing employer-based retirement system, minimizing adverse effects on employers offering retirement plans and reducing the risk of ERISA preemption challenges.

The American Benefits Council continues to advocate and support both public and private efforts to expand access to retirement savings opportunities for workers — including working with states that implement auto-IRA programs to ensure the programs do not undermine the incentive for employers to adopt and maintain an employer-based, federally regulated retirement plan with employer contributions, higher contribution limits and more participant protections.

[In an April 1 letter] to the program director of Delaware's Expanding Access for Retirement and Necessary Saving (EARNS) program on proposed regulations, the Council's comments encourage the EARNS program to operate in a manner that complements the existing employer-based retirement system without adversely affecting those employers that already offer a retirement plan to their employees in addition to helping reduce the risk that the EARNS program could be challenged as preempted by ERISA.

The letter recommends the EARNS program:
- Use Form 5500 data to reduce the number of plan sponsors receiving registration notices.
- Clarify that plan sponsors are not required to submit certification if they do not receive a notice.
- Eliminate the option for recertification, arguing it imposes unnecessary burdens.

To the extent that the EARNS program requires plan sponsors to take any action to obtain an exemption, the Council strongly supports providing that the confirmation will remain in effect as long as the employer continues to offer a plan.

Further, the letter asks that lawmakers eliminate a recertification requirement, which the Council suggests would impose "an unnecessary burden on plan sponsors and unnecessarily increases the EARNS program's risk of being preempted by ERISA."

RECENT JUDICIAL ACTIVITY

New Spate of Lawsuits Allege Fiduciary Breaches Associated with Pension Risk Transfers

You Need to Know:

- Employee benefit plans and their service providers are once again being targeted by multiple class-action lawsuits alleging breaches of fiduciary duty under ERISA.
- The latest trend appears to target companies executing a pension plan risk transfer.
- The Council will continue to urge the courts to follow proper pleading standards and quickly dismiss the cases.

The filing of several class-action lawsuits in federal court appears to signal a new avenue for the plaintiffs' bar to allege fiduciary wrongdoing on the part of employee benefit plans, now related to the selection of an insurer for the purposes of executing a pension risk transfer. These lawsuits, like past claims related to 401(k) fees and target date funds, underscore the urgent need for courts to observe proper pleading standards and dismiss the suits prior to the costly discovery stage.

Over the past several decades, plan sponsors have increasingly become the targets of large and expensive class-action litigation alleging breaches of fiduciary duty. Under ERISA, the test for whether a fiduciary acted prudently is based on whether the fiduciary engaged in a prudent process to make decisions. However, in many cases, this litigation against plan sponsors and their service providers has lacked any concrete allegations of imprudent process, focusing only on cookie-cutter allegations of imprudence without any specificity or knowledge of the fiduciary process.

In the latest wave of litigation, multiple class-action lawsuits—*Piercy v. AT&T*, *Schloss v. AT&T* and *Konya v. Lockheed Martin* – are alleging that pension plan sponsors breached their fiduciary duty when they selected Athene as the insurer to assume their companies' pension plan liabilities as part of a pension risk transfer (also known as "de-risking"). The two AT&T suits also allege self-dealing on the part of State Street Global Advisors for their role in selecting Athene. It is important to note that these complaints consist of allegations, not facts.

Existing pleading standards require that a complaint contain facts that indicate that the fiduciary's process in selecting investments was imprudent. And under these standards, courts need to dismiss complaints that do not contain plausible allegations of an imprudent process in selecting investments. Because these lawsuits contain no facts indicating a flawed fiduciary process, they generally have not properly alleged ERISA violations, and under the prevailing legal pleading standards should not survive a motion to dismiss. (For more on the importance of adherence to pleading standards, see the Council's talking points document, Frivolous Class-Action Lawsuits Are Harming the Retirement System.)

Nevertheless, we have seen some courts permit such cases to proceed, opening the defendants to costly discovery and increasing the pressure to settle the cases out of court – which then incentivizes further suits.

The Council has vigorously called upon the federal judiciary to observe and enforce proper pleading standards and will continue to encourage Congress and the executive branch—especially the U.S. Department of Labor—to file *amicus* ("friend of the court") briefs demanding the same.

MISCELLANEOUS

In Case You Missed It: Talking Health Care Policy on the Latest American Benefits Podcast

As the nation's largest organization representing major employer plan sponsors and others exclusively on employee benefits public policy, the American Benefits Council is committed to collective action, both within our membership and in partnership with others.

Falling into both of those categories is the National Alliance of Healthcare Purchaser Coalitions (the "National Alliance"), a non-profit, Council member organization whose aim is to amplify the collective voice of employers and other health care purchasers to improve health, equity and value.

Shawn Gremminger recently assumed the role of president and CEO of the National Alliance. In the **latest episode of the American Benefits Podcast**, host Jason Hammersla speaks to Shawn about the National Alliance's unique structure and composition, its policy priorities and the importance of getting value for every health care dollar.

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