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

Federal Trade Commission Issues Report on PBMs

You Need to Know:

- The FTC has studied PBM business practices over the last few years and recently issued a report critical of PBMs, focusing on market concentration and vertical integration.
- The FTC is continuing its study of PBMs and there are reports it may also bring lawsuits against some PBMs, but no lawsuit has yet been filed.
- Meanwhile, the Council continues to urge Congress to pass legislation providing increased transparency for PBMs before the end of this year. The FTC report may give more momentum to those efforts.

Earlier this month, the U.S. Federal Trade Commission (FTC) released an interim report on pharmacy benefit manager (PBM) business practices. The report is part of an ongoing study by the FTC on PBMs and their impact on access to and affordability of prescription drugs. The FTC is the federal agency focused on antitrust and consumer protection.

Over 2022 and 2023, the FTC issued requests for data and documents from several of the country's largest PBMs. The FTC also interviewed industry experts and issued a request for public comment on the impact of PBM practices, to which it received over 1,000 comments. In that letter, the Council explained that while the PBM industry has played an important role in helping expand access to critical drug therapies, and in developing strategies intended to help employers manage the costs of prescription drug benefits, employers have also been frustrated by complexity and a general lack of transparency.

Based on this collective information, the FTC issued a 71-page report which is largely critical of the PBM industry. (The FTC Commissioners voted 4-1 to allow staff to issue the report). The report is wide-ranging but sets out several "key insights," including that:

- The PBM industry has become highly concentrated.
- Many large PBMs are vertically integrated with health insurers and specialty and retail pharmacies, and that due to this consolidation and integration, the leading PBMs have significant power over access to drugs and drug prices.
- Vertically integrated PBMs may have the ability and incentive to prefer their own affiliated pharmacies. The report further explains various impacts on smaller, unaffiliated pharmacies.

Although the report principally focuses on the relationship between PBMs and pharmacies, the report also notes the extent to which PBMs and drug manufacturers negotiate drug rebates that are conditioned on limiting access to potentially lower-cost generic alternatives.

The FTC indicates that this is an "interim" staff report because it has not yet received all the information that it requested from PBMs. In addition to continuing its study of this topic, media reports suggest that the FTC is considering bringing related lawsuits, though no lawsuit has yet been filed.

The PBM industry has sharply criticized the report. A statement by the Pharmaceutical Care Management Association (PCMA), the trade association for PBMs, said that the "interim FTC report falls far short of being a definitive, fact-based assessment of PBMs or the prescription drug market. Members of the commission themselves disagree with the content of the report and the decision to release it."

The Council has actively advocated for enactment of the Lower Costs, More Transparency Act (H.R. 5378), which requires greater transparency and oversight of PBMs. The legislation passed the U.S. House of Representatives in a bipartisan vote of 320-71 on December 11, 2023. The Council has also offered its support for the Pharmacy Benefit Manager Reform Act (S. 1339), which was approved by the Senate Health, Education, Labor, and Pensions Committee on May 11, 2023. The FTC report may add momentum to include such legislation in any year-end legislative package.

PBGC Releases FY 2023 Projections Report with Positive Outlook

You Need to Know:

- The PBGC's FY 2023 Projections Report reveals a continued outlook for large and growing surpluses in its single-employer pension insurance program, further underscoring the need to lower insurance premiums for single-employer pension plan sponsors.
- The report shows that the multiemployer pension insurance program has stabilized, though future trends remain uncertain.

The Pension Benefit Guaranty Corporation (PBGC) released its **Fiscal Year (FY) 2023 Projections Report**, providing a very positive outlook for its single-employer program and a stable view of its multiemployer pension insurance program. The strong position of the single-employer employer program strengthens the American Benefits Council's argument that PBGC single-employer insurance premiums should be lowered.

In a statement unveiling the report, PBGC Acting Director Ann Y. Orr noted, "PBGC's insurance programs are financially strong and projected to remain so, and that's good news for the workers and retirees who depend on PBGC for the security of their pension benefits."

Single-Employer Program

The single-employer program's projected net position increased by $8 billion from the previous year's projections, reaching a projected surplus of $71.6 billion by the end of FY 2033. This reflects a significant improvement from the actual reported net financial position of $44.6 billion (as of September 30, 2023).

The PBGC's projected funded status is 234%, with $124.9 billion in assets and $53.3 billion in liabilities. Notably, PBGC uses extremely low interest rates to value its liabilities, lower than even the non-smoothed interest rates applicable to private plans. If the interest rates that plan sponsors use were applied, the surplus would be even larger.

Multiemployer Program

The new projections indicate that the multiemployer program is likely to have a $4.7 billion deficit by the end of FY 2033, an improvement from the ten-year projected deficit of $7.1 billion estimated for the end of FY 2032 in last year's report. This improvement reflects ongoing efforts to stabilize the program. The multiemployer program is still expected to remain solvent for more than 40 years, with a median projected insolvency after 2063.

The Council continues to advocate for policies that ease defined benefit plan sponsorship and reduce PBGC single-employer premium burdens. In October 2023, the Council issued a detailed plan to bolster the single-employer defined benefit pension system.

The plan begins with a brief description of the cause of the decline of the defined benefit plan system — including a discussion of the important role of excessive PBGC premiums in causing that decline — and consists of eight specific recommendations. Among these is a call to adjust PBGC premiums based on the PBGC's funded status, so that if PBGC is so well funded that it does not need the current level of premiums, premiums would be reduced.

Treasury, IRS Aim to Issue Guidance on Repurposing of VEBA Assets

You Need to Know:

- Treasury and IRS recently added to their "regulatory agenda" guidance that we anticipate will address the extent to which assets in overfunded welfare benefit funds may be repurposed both for other health and welfare benefits and for other employees.
- This is a positive development that signals Treasury and IRS are working to issue guidance, although timing is unclear.
- Over the last four years, the Council has continually advocated on this issue, formally and informally, as this is an important issue for many large employers due to the significant amount of "stranded" funds.

The U.S. Department of Treasury and Internal Revenue Service (IRS) recently released their portion of the Biden administration's spring regulatory agenda for 2024, and in so doing added to its docket proposed regulations regarding overfunded welfare benefit funds (such as voluntary employees' beneficiary associations (VEBAs)).

For years, the Council has been urging Treasury and IRS to issue guidance confirming that companies may repurpose assets from overfunded welfare benefit funds for other employees and other health and welfare benefits without being subject to a 100% excise tax. The addition of this project to the regulatory agenda is a positive step.

Employers commonly set aside assets in welfare benefit funds to provide a reserve for employee benefits, such as post-retirement medical benefits. Many welfare benefit funds have accumulated significant surplus assets and some sponsoring employers would like to repurpose the assets to fund other welfare benefits, such as active medical benefits. However, there is concern that, in some circumstances, the IRS could consider such repurposing an employer "reversion," which would be subject to a 100% excise tax.

Neither Treasury nor the IRS have published guidance of general applicability as to whether repurposing welfare benefits would give rise to the excise tax. In the past, the IRS would issue rulings for specific employers confirming that the excise tax does not apply, which were extremely helpful to employers and the individuals served by those employer-provided benefits. However, the IRS stopped issuing these rulings in 2019.

Since then, we have continually urged Treasury and IRS to issue guidance giving employers the certainty needed to enable them to access substantial welfare benefit fund assets to provide benefits to employees and their beneficiaries. The Council has also asked the agencies to resume issuing rulings (at least in the absence of clarifying guidance) confirming that the excise tax does not apply.

While Council staff were under the impression that guidance has been underway, the slow pace of progress has caused concern. Therefore, the inclusion of guidance related to the excise tax on VEBAs to the regulatory agenda suggests that the guidance project is progressing. With respect to timing, the regulatory agenda lists December 2024 as a possible date for proposed regulations. However, this date is not binding in any way and just conveys a very general sense of schedule.

Council staff will continue to advocate on this issue, urging the release of favorable guidance as soon as possible

IRS Releases Finalized, Proposed RMD Rules

You Need to Know:

- Treasury and the IRS have finalized regulations on RMDs from qualified plans and IRAs, incorporating changes from the SECURE Act and SECURE 2.0.
- The Council provided extensive feedback on the proposed RMD rules in 2022, highlighting issues that added complexity and were inconsistent with the SECURE Act.

The Internal Revenue Service (IRS) and U.S. Treasury Department have issued long-awaited final regulations on required minimum distributions (RMDs) from qualified plans and IRAs, aligning with changes from the SECURE Act of 2019 (SECURE Act) and the SECURE 2.0 Act of 2022 (SECURE 2.0).

Since enactment of the law, the American Benefits Council has extensively communicated with regulatory agency officials to address a number of the provisions from Secure and Secure 2.0 laws that require agency guidance to implement. In addition to working with agency officials, the Council provided comprehensive recommendations to the IRS back in 2022, responding to the agency's notice of proposed rulemaking. The letter highlighted provisions in the proposal that were contrary to a plain reading of the SECURE Act or that otherwise add burdens and complexity to RMD compliance.

The finalized regulations will apply January 1, 2025. Along with the final regulations, Treasury and the IRS also released proposed regulations addressing certain SECURE 2.0 provisions requiring further public input.

The final regulations generally reflect amendments to the RMD rules Congress made as part of the SECURE Act. They also reflect some provisions from SECURE 2.0, which were not reflected in the 2022 proposed regulations.

Key updates in the final rule include:

- **10-Year Rule**: Retains the 10-year rule — a rule that says all the remaining money in a retirement account must be distributed within 10 years after the person dies — interpretation for designated beneficiaries, requiring RMDs to continue during the 10-year period in some cases.
- **RMD Age Increase**: Reflects the new starting age for RMDs. SECURE 2.0 included language that made it unclear at what age people born in 1959 need to start taking money out of their accounts. The new proposed regulations make it clear that for people born in 1959, the applicable age is 73.
- **Surviving Spouses**: Allows surviving spouses to use the Uniform Lifetime Table for calculating their RMDs as beneficiaries.
- **In-Plan Roth Accounts**: Exempts in-plan Roth accounts from lifetime RMDs.
- **Annuity Payment Reforms**: Eliminates barriers for increasing annuity payments.
- **Qualifying Longevity Annuity Contracts**: Updates premium limits and clarifies rules post-divorce.
- **Partial Annuitization**: Introduces new rules for partial annuitization.

IRS Publishes Guidance on Form 5330 Filing in Win for Council Advocacy

You Need to Know:

- Following a Council request, the IRS confirmed that paper filing of the Form 5330 is permitted for the 2024 taxable year due to limited authorized e-filing providers.

In an advocacy victory for retirement plan sponsors and the American Benefits Council, the Internal Revenue Service (IRS) has published new guidance confirming employers may file the Form 5330 on paper.

This update follows a recent guidance request from the Council. While the Council typically favors electronic filings and considers them more efficient, this situation presents unique challenges, detailed in our July 8 letter, filed in partnership with the SPARK Institute.

The Form 5330 is used by employers to report excise taxes related to employee benefit plans, such as late deposits of employee contributions. Although employers have long been permitted to file the Form 5330 on paper, recent regulatory changes newly require employers that file at least 10 returns to file the Form 5330 electronically, subject to a series of regulatory exceptions.

Most relevantly, the new posting states that, due to the limited number of authorized e-filing providers, the IRS has determined that filers are permitted to file a paper Form 5330 for the 2024 taxable year. Filers should document the reason for filing on paper is the lack of authorized vendors. The posting recognizes that the Form 5330 may also be filed electronically using the IRS Modernized e-File (MeF) System via the only authorized e-filing provider for the Form 5330.

RECENT JUDICIAL ACTIVITY

Courts Stay Implementation of Fiduciary Definition, Amendments to PTE 84-24

You Need to Know:

- Two federal court decisions have delayed the implementation of the new fiduciary definition and amendments to Prohibited Transaction Exemption (PTE) 84-24, with one of the courts also delaying the amendments to Prohibited Transaction Exemption (PTE) 2020-02 and miscellaneous other exemptions.
- The decisions effectively prevent the new rules from taking effect until a court ruling, with DOL expected to appeal.
- The ruling casts serious doubt on the long-term viability of DOL's final rule.

Recent court activity has delayed the national implementation of the U.S. Department of Labor's final "fiduciary definition" regulations and amendments to Prohibited Transaction Exemption (PTE) 84-24, PTE 2020-02, and miscellaneous related exemptions.

On July 25, the U.S. District Court for the Eastern District of Texas issued its decision in *Federation of Americans for Consumer Choice (FACC) v. U.S. Department of Labor* (DOL), which halts the September 23 effective date of the definition and the amendments to PTE 84-24. Dovetailing with the FACC decision, on July 26, a judge from the Northern District of Texas issued a stay in the separate, related case *American Council of Life Insurers v. DOL*. This case stayed the September 23 effective date of the definition and the amendments to PTEs 84-24 and 2020-02 and to miscellaneous related exemptions.

Both court decisions were based on the likelihood of the plaintiffs' success in the case's ultimate resolution. It appears probable that both the new fiduciary definition and the amendments to the PTEs will be invalidated, pending appeal.

The DOL rule – including modified prohibited transaction exemptions – 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 rule as a means of improving retirement security by doing away with “excess fees and costs, and financial losses” by participants.

The American Benefits Council has consistently raised concerns about the potential impact of these rules on typical and routine services provided by employer plan sponsors to help their employees better understand and use their benefits.

The DOL is expected to appeal the decisions. While the stay is not a preliminary injunction, it effectively prevents the rules from taking effect until the court reaches a final decision.

Several elements of the FACC opinion were noteworthy:

The fiduciary definition is “likely invalid” under ERISA. The court's primary finding is that the new fiduciary definition is likely invalid under the Employee Retirement Income Security Act (ERISA). The court's reasoning included several critical points:

- **Deference:** The court noted that, according to the *Loper* decision, which struck down the *Chevron* doctrine that courts had used to defer to reasonable agency interpretations of ambiguous statutes or unclear laws, the DOL is not entitled to deference. However, the court indicated that its decision would have been the same regardless of deference.
- **Essential Criteria:** The court criticized the 2024 Fiduciary Rule for eliminating the “regular basis” and “primary basis” criteria, which are fundamental to the definition of “fiduciary” under ERISA, referencing the *Chamber* decision, which vacated an Obama-era iteration of the fiduciary standard.
- **Commissions vs. Fees:** The court stated that the rule incorrectly treats commissions as fees for fiduciary advice. It emphasized that commissions are earned from completed transactions rather than from the advice itself, indicating that insurance agents are not paid for their advice but for the resulting transactions.
- **Authority Overreach:** The court found that the 2024 rule improperly imposes ERISA duties of loyalty and prudence on IRA advisors.
- **Major Questions Doctrine:** The court held that the rule is invalid under the “major questions” doctrine, which restricts agencies from creating new rules with significant economic and political implications without clear congressional authorization.

The amendments to PTE 84-24 are “arbitrary and capricious.” The court also determined that the amendments to PTE 84-24 impose ERISA duties of loyalty and prudence on IRA advisors and require an acknowledgment of fiduciary status, potentially subjecting insurance agents to state law private rights of action, which is not permissible under the *Chamber* decision. (The ACLI decision also applied this analysis to stay the effective date of PTE 2020-02 and miscellaneous related exemptions.)

The judge in the ACLI decision fully agreed with the reasoning from the *FACC* case, using that same reasoning in his case. The court found that the defendants' arguments were simply an attempt to re-argue points already settled in the 2018 *Chamber* decision by the U.S. Appeals Court for the 5th Circuit. Since that earlier ruling clearly invalidates the defendants' arguments, the court saw no need to re-explain why those arguments are ineffective.

MISCELLANEOUS

Council 401(k) Fast Facts Shows Workers of All Incomes are Saving Through Workplace Retirement Plans

You Need to Know:

- The Council's latest report shows, in a series of charts and graphs, the widespread prevalence and effectiveness of defined contribution retirement plans.

The American Benefits Council unveiled an updated and enhanced 401(k) Fast Facts, a dynamic series of infographics that highlight the dominance and success of defined contribution retirement plans.

The 2024 edition of 401(k) Fast Facts brings together the latest research and statistics from many of the most reputable sources in the employee benefits field, including key federal agencies, providing a comprehensive and clear snapshot of how these plans are delivering financial security to employees. The report provides evidence that:

- Employees of all incomes are saving through workplace retirement plans.
- Employees appreciate their retirement plans
- Employers are dedicated to employees' retirement security
- 401(k) pretax contributions today can boost future federal tax revenue
- Employees are encouraged to save more with 401(k) plans

For more information on 401(k) Fast Facts, or to provide additional data for a future edition, contact Jason Hammersla, vice president, communications, or Nick Otto, digital content director.

Council Co-Hosts Capitol Hill Briefing on Distinctions, Characteristics of Employer Benefit Plans

You Need to Know:

- The American Benefits Council co-hosted the third in a series of Capitol Hill briefings to educate congressional staff on the significance of ERISA and the value of employer-sponsored benefits.
- The event is part of the Council's broader ERISA@50 campaign to educate policymakers on the role employers play in providing health and retirement security It will culminate in a symposium recognizing this year as the 50th anniversary of ERISA's enactment.

On July 29, the American Benefits Council, in partnership with the Employee Benefit Research Institute (EBRI) and the International Foundation of Employee Benefit Plans (IFEBP), hosted the third in a series of briefings on Capitol Hill to educate congressional staff about the Employee Retirement Income Security Act of 1974 (ERISA).

The session, “Single Employer, Multiple Employer and Multiemployer Benefit Plans,” was held in the Russell Office Building in the U.S. Senate. In addition to sharing data and trends related to benefit plans, the Council, EBRI and IFEBP conducted a “deeper dive” discussion of ERISA preemption that was covered during our earlier programs held in May and June. The final briefing in the series is scheduled for September 24.

Speakers included:

- **Diann Howland**, vice president, legislative affairs, at the Council
- **Barb Marder**, president and CEO at EBRI
- **Mariah Becker**, director of research and education at the National Coordinating Committee for Multiemployer Plans
- **Michael Kreps**, principal at Groom Law Group

The series of “lunch-and-learn” events is one of many initiatives under the Council's **ERISA@50 campaign** to commemorate the 50th anniversary of this landmark law. In addition to these events, the Council is collaborating with EBRI on policy research and, as always, advocating for the preservation and protection of ERISA as the cornerstone of the employer-sponsored benefits system. This effort will culminate in a 50th anniversary symposium and gala in September.

For questions on the ERISA@50 activities of the Council’s year-long campaign, contact Jim Klein, president, or Jason Hammersla, vice president, communications.