Verrill
Benefits Law Update
Employee Benefits & Executive Compensation Group

Client Advisory
December 2020

This Client Advisory highlights important developments in the law governing employee benefit plans over the past year. It offers insight into what these developments mean for employers and plan sponsors and previews developments we expect to see in 2021. The following topics are covered (click on a topic to go directly to the summary):

- **A Chronology of COVID-19 Relief for ERISA Plans** – highlights:
  - **CARES Act Summary**
  - **Extended COBRA Deadlines**
  - **Retirement Plan Loan Suspensions and Recontributions of Coronavirus-Related Distributions**
- **FFCRA COVID-19 Paid Leave Requirements Expire December 31, 2020**
- **New Transparency in Coverage Healthcare Reporting Rule Requires Employer Health Plan Contract Review**
- **New DOL Rules Likely to Chill Socially Responsible Investing in Retirement Plans**
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A Chronology of COVID-19 Relief for ERISA Plans

In 2020, the employee benefits world was dominated by the COVID-19 pandemic. The following chronology highlights the ongoing relief provided by legislation, regulatory action, and other agency guidance to assist ERISA plan participants, fiduciaries, and sponsors during the ongoing COVID-19 pandemic through November 30, 2020. (Superseded agency guidance has been omitted.) We provide a number of links to articles on our blog, Benefits Law Update, which offer additional information about many of these important regulatory changes.

Much of the guidance is temporary, with effects limited to 2020. However, with the pandemic and the declared national emergency extending into 2021, we anticipate that some of these measures will be renewed or extended, and similar relief may be offered in the year to come.

The following terms and acronyms are used:

- COVID-19 – includes statutory and regulatory references to *coronavirus*, *SARS-CoV-2*, and *pandemic*

- FSA – flexible spending account
- HDHP – high deductible health plan
- Outbreak Period – begins March 1 and ends 60 days after the yet-to-be-declared end of the federally declared national emergency
- RMDs – required minimum distributions

March 11 – **IRS Notice 2020-15** – Verrill commentary: High-Deductible Health Plans can Cover Coronavirus Costs

The IRS's first benefits-related response to the pandemic provides that HDHPs may cover testing and treatment for COVID-19 before satisfaction of the deductible or with a deductible below the HDHP minimum.

March 13 – **Declaration of National Emergency**

The President declared a national state of emergency under the Stafford Act for all U.S. states, territories and possessions. Among other effects, the Stafford Act declaration permits hardship withdrawals from 401(k) and 403(b) plans for the duration of the national emergency. As of publication, the end date of the national emergency has not been announced.

March 27 – **CARES Act** – Verrill commentary: With CARES Act, Congress Provides Retirement Plan Relief and Group Health Plan Changes

The Coronavirus Aid, Relief, and Economic Security (CARES) Act includes several provisions with implications for employer retirement and health plans, as well as a temporary tax benefit for employer payments towards student loans.

Although the effect of several key aspects of the CARES Act is limited to 2020, going into 2021 it is important for plan sponsors to identify the CARES Act benefits that were offered to employees (and the effective date of the benefits), so that plan documents can be amended accordingly. Additionally, some provisions, such as the plan loan repayment relief and repayment of coronavirus-related distributions have administrative implications in 2021 and beyond.

Retirement Plans. The CARES Act includes the following retirement plan provisions:

- Creates a new type of distribution from defined contribution plans other than money purchase pension plans (a "coronavirus-related distribution"), which allows individuals affected by COVID-19 to take distributions of up to $100,000 until December 31, 2020. Coronavirus-related distributions are not subject to the 10 percent penalty tax on distributions before age 59-1/2, are eligible for reduced federal income tax withholding, and are subject to special tax rules that generally result in any taxable amount being spread over three years. Recipients are generally permitted to repay coronavirus-related distributions within three years to avoid taxation.

- Temporarily increases the maximum amount a participant affected by COVID-19 may borrow from qualified retirement plans and 403(b) plans to $100,000 for loans made during the 180-day period beginning on March 27, 2020. The Act also provides for a one-year delay of the due date for any loan repayment that occurs between March 27, 2020, and December 31, 2020, for individual affected by COVID-19.

- Waives RMDs for 2020 from defined contribution qualified retirement plans, 403(b) plans, defined contribution 457(b) plans (except those maintained by tax-exempt entities), and IRAs. The waiver applies to required minimum distributions for 2019 for which the required beginning date is April 1, 2020 (and that were not already made in 2019), in addition to required minimum distributions for 2020.

If a retirement plan offers any of these CARES Act enhancements to participants, the plan (and the plan's loan procedures in the case of enhancements affecting loans) must be amended by the last day of the first plan year beginning on or after January 1, 2022 (for calendar year plans, by December 31, 2022).

The CARES Act allows sponsors of single-employer defined benefit plans to delay minimum required contributions due during calendar year 2020 until January 1, 2021 (payments made by Monday, January 4, 2021, will be considered timely). Additionally, sponsors of single-employer defined benefits plans may elect to treat the plan's adjusted funding target attainment percentage ("AFTAP") for the last plan year ending before January 1, 2020, as the AFTAP for plan years which include calendar year 2020.

Health Plans. The CARES Act includes the following health plan provisions:

- Requires group health plans and health insurance issuers to cover medical care intended to prevent or mitigate COVID-19 within 15 business days after the date the item or service is recommended. In addition, the Act requires that health insurance plans provide coverage without imposing cost-sharing or prior authorization requirements for in vitro diagnostic products that meet certain specifications to detect COVID-19. The Act also creates certain restrictions on the reimbursement rates that group health plans and health insurance issuers may use to reimburse providers for COVID-19 diagnostic tests.

- Allows HDHPs to cover telehealth and other remote care services without participants satisfying their plan deductible. Accordingly, group health plans can now offer free telehealth visits for any reason without the risk of participants becoming ineligible to make contributions to their HSAs. The provision was effective on March 27, 2020, and will be discontinued for plan years beginning on or after January 1, 2022.

Employer-Paid Student Loan Payments. The CARES Act allows employees to exclude from income employer payments up to $5,250 applied to pay the employee's federal student loan debt. To be excluded from income, the employer payments must be made before January 1, 2021

April 10 – **PBGC Disaster Relief Announcement**

Extended the deadline for PBGC premium payments and filings due on or after April 1 to July 15.

April 28 – **DOL Disaster Relief Notice 2020-01**

Provides relief for retirement plan fiduciaries who cannot meet certain ERISA requirements during the Outbreak Period due to COVID-19. This includes good faith failures to timely furnish ERISA notices, disclosures, and other documents, if furnished as soon as administratively practicable, and good faith failures to timely remit participant contributions and loan payments to a plan, if remitted as soon as administratively practicable. Also provides guidance related to granting CARES Act distributions and loans, and guidance on blackout notices, Form 5500 and Form M-1 filing relief, and other general compliance guidance on ERISA fiduciary responsibilities during COVID-19.

May 4 – **DOL/IRS Final Rule: Extension of Certain Timeframes for Employee Benefit Plans, Participants & Beneficiaries Affected by the COVID-19 Outbreak** – Verrill commentary: IRS and DOL Extend Certain Health & Welfare Benefit Plan-Related Deadlines & COVID-19 Extension Guidance Makes the Interplay Between COBRA and Medicare (a Bit) Trickier

A joint DOL and IRS notice provides unprecedented extensions of certain HIPAA, COBRA, and claims procedure deadlines for participants, beneficiaries, group health plans, and plan administrators. The following summary focuses on the COBRA extensions and provides tips for navigating the uncertainty that these extensions may cause for group health plan sponsors and COBRA administrators.

The joint notice requires plans to disregard the "Outbreak Period" when determining specified deadlines. The Outbreak Period is defined as the period from March 1, 2020, until 60 days after the yet-to-be announced end of the COVID-19 national emergency (or such other date announced in future guidance).

The joint notice extends the deadlines for:

(1) electing COBRA
(2) paying COBRA premiums
(3) notifying the plan of a COBRA-qualifying event, and
(4) providing qualified beneficiaries with COBRA election notices.

Because the national emergency has lasted longer than most would have anticipated (examples included in the joint notice used June 29, 2020, as the Outbreak Period end date), these deadline extensions have the potential to create complications for plan and COBRA administrators in 2021.

COBRA Election Period Deadline. Ordinarily, COBRA qualified beneficiaries have 60 days from the later of: (1) the loss of coverage, or (2) the date of COBRA election notice, to elect continuation coverage. The extension afforded by the joint notice gives qualified beneficiaries who received

COBRA election notices as early as January 2020 until 60 days after the end of the Outbreak Period to elect coverage. With this in mind, plan administrators are encouraged to:

- Monitor potential COBRA continuants (*i.e*., individuals who have been furnished COBRA election notices within 60 days of the beginning of the Outbreak Period to present) in order to keep track of the election deadline.

- Communicate with their COBRA administrator (in-house or third party) to ensure that it is aware of the deadline extensions, has updated or supplemented materials or otherwise communicated the deadline extensions to qualified beneficiaries, and has adequate procedures in place to track outstanding COBRA election notices.

- Decide whether to continue coverage during the COBRA election period or to reinstate coverage retroactively once continuation coverage is elected and premiums are paid. Given the length of the Outbreak Period and uncertainty as to when it will end, plans with a practice of continuing coverage during the COBRA election period may wish to reconsider the merits of that practice.

<u>COBRA Premium Payment Deadlines</u>. Generally, the initial COBRA premium payment (retroactive to the loss of coverage) must be sent within 45 days following the election of continuation coverage, and subsequent payments are due monthly, within 30 days of the due date. The joint notice provides that no payments are required during the Outbreak Period. With this in mind plan administrators should:

- Ensure that no COBRA terminations are occurring during the Outbreak Period due to failure to pay premiums.

- Ensure that qualified beneficiaries have been made aware of the deadline extensions.

- Remind individuals who are in their COBRA election period, as well as current COBRA continuants, that payment in full for all unpaid premiums accrued during the Outbreak Period will be due within 45 or 30 days, as applicable, of the end of the Outbreak Period.

- Ensure that COBRA administrators (in-house or third party) have procedures in place for tracking premiums owed during the Outbreak Period and collecting premiums at the end of the Outbreak Period.

<u>COBRA Notice of Qualifying Event Deadline</u>. Ordinarily, qualified beneficiaries must notify the plan administrator of certain qualifying events (divorce or legal separation, loss of dependent status) within 60 days of the date of the qualifying event. The joint notice extends the deadline for qualified beneficiaries to notify the plan administrator of these qualifying events until after the end of the Outbreak Period. This means that until the national emergency is over, plans may have unknown COBRA obligations. Because plan administrators may not know which of their employees is eligible for COBRA or otherwise affected by the extended deadlines, plan

administrators should take steps to ensure that all employees are aware of the COBRA deadline extensions.

COBRA Election Notice Deadline. Ordinarily, a plan administrator has 14 days following receipt of notice of a qualifying event (or 44 days if the employer is the plan administrator) to provide qualified beneficiaries with a COBRA election notice package. The joint notice suspends this notice requirement during the Outbreak Period. However, we would not recommend waiting until the end of the Outbreak Period to provide COBRA notices. Plan administrators should still use best efforts to timely furnish COBRA election notices. This not only avoids a situation where the plan administrator is required to track required notice recipients, possibly for an extended period of time, but may also encourage participants to elect coverage sooner.

In all cases, plan administrators should watch for announcements regarding the end of the COVID-19 national emergency and additional guidance on the COBRA deadlines.

May 12 – **IRS Notice 2020-29** – Verrill commentary: IRS Relaxes Rules for Cafeteria Plans and Clarifies Relief for High Deductible Health Plans

Provides that cafeteria plans may permit mid-year changes to employer-sponsored health coverage, health FSAs, and dependent care assistance programs (including dependent care FSAs) without a status change event. Also extends the claims period for health FSAs and dependent care FSAs. Finally, clarifies and expands relief allowing HDHPs to cover expenses related to COVID-19 and telehealth services retroactive to January 1, 2020.

May 12 – **IRS Notice 2020-33** – Verrill commentary: IRS Relaxes Rules for Cafeteria Plans and Clarifies Relief for High Deductible Health Plans

Increases the limit on carry-over amounts in a health FSA to $550, and clarifies the timing for health plan reimbursements.

June 3 – **IRS Notice 2020-42**

Provides temporary relief from the physical presence requirement for witnessing certain retirement plan elections during 2020.

June 19 – **IRS Notice 2020-50** – Verrill commentary: IRS Issues New Guidance on CARES Act Retirement Plan Distributions and Loans

Provides expanded relief and guidance for retirement plan distributions and loans under the CARES Act. Includes two pieces of guidance that will be relevant to many plan sponsors in 2021: (1) a safe harbor for implementation of suspended plan loan repayments; and (2) guidance on acceptance of repayment of coronavirus-related distributions.

Safe Harbor for Repayment of Suspended Plan Loans. The CARES Act permits retirement plans to allow participants affected by COVID-19 to delay payments on plan loans due between March 27,

2020, and December 31, 2020, for up to one year. When payments resume, they must be adjusted to reflect the delay and any interest accruing during the delay, and the period of delay must be disregarded in determining the 5-year loan repayment period. In Notice 2020-50, the IRS provided a safe harbor method of implementing these provisions.

If a plan sponsor opts to offer plan loan repayment relief, participants who delayed loan repayment will need to restart contributions as of January 1, 2021, and the required payments will have to be recalculated. Under the safe harbor method in Notice 2020-50, interest that accrued during the suspension period must be added to the outstanding loan balance. The loan is then reamortized on January 1, 2021, over the remaining term of the loan, including up to a one year extension from the date the loan was originally due. Loan payments must recalculated to be substantially equal over the remaining period of the loan.

Plan sponsors are not required to use the safe harbor method, and may use another reasonable method. The IRS provides an example of another reasonable method: each payment that becomes due during the suspension period may be delayed to the one-year anniversary of the beginning of the suspension period. Then, the outstanding balance of the loan, including interest accruing during the suspension, is reamortized when the suspended payments are due, over a period that is up to one year longer than the original term of the loan.

Repayment of Coronavirus-Related Distributions. An individual who receives a coronavirus-related distribution is generally allowed to recontribute any portion of the distribution at any time during a three-year period and avoid taxation on the recontributed amount. The types of plans to which the recontribution may be made include qualified retirement plans, 403(b) plans, and IRAs. However, the plan accepting the recontribution must accept rollover contributions.

A plan administrator accepting the recontribution of a coronavirus-related distribution must determine whether the plan accepts rollover contributions, and must reasonably conclude that the recontribution is eligible for direct rollover treatment – namely, that the individual making the recontribution was eligible to receive a coronavirus-related distribution. In making this determination, the plan administrator may rely on an individual’s certification that the individual is eligible, unless the administrator has actual knowledge to the contrary.

Retirement plans generally are not required to accept rollover contributions, and if a plan does not accept rollover contributions, it may not accept recontributions of coronavirus-related distributions unless the plan is amended.

June 23 – **IRS Notice 2020-51**

Provides guidance under the CARES Act for waiver of 2020 RMDs and 2019 RMDs due in 2020, including eligibility for rollover of certain distributions into a retirement plan or IRA.

June 23 – **IRS Notice 2020-52**

Provides temporary relief related to certain mid-year changes to safe harbor 401(k) or 401(m) plans that reduce or suspend safe harbor contributions.

July 20 – **PBGC COVID-19-Related Single-Employer Plan Sponsors & Administrators Q&A**

Provides guidance for postponement of required minimum contributions under the CARES Act.

July 30 – **IRS Coronavirus-Related Relief for Retirement Plans & IRAs – Q&A, Q15** – Verrill commentary: [Employee Layoffs May Vest Retirement Plan Benefits]

Clarifies that, in general, participants terminated due to the COVID-19 pandemic and rehired in 2020 will not cause a partial plan termination.

August 6 – **IRS Notice 2020-61**

Provides guidance on the special rules relating to funding of single-employer defined benefit plans and related benefit limitations under the CARES Act.

September 23 – **PBGC Technical Update 20-2**

Allows plans that postpone required minimum contributions under the CARES Act to pay the same 2020 variable rate premium as would have been due if contributions were not postponed.

September 28 – **IRS Announcement 2020-17**

Postpones to January 15, 2021, the deadline for reporting and payment of excise taxes related to minimum required contributions to single-employer defined benefit plans delayed under the CARES Act.

November 6 – **IRS/DOL/CMS Interim Final Rule: Additional Policy & Regulatory Revisions in Response to the COVID-19 Public Health Emergency**

For group health plans, implements CARES Act coverage requirement for qualifying coronavirus preventive services, including COVID-19 immunizations. Until the national emergency ends, no cost-sharing is allowed even for out-of-network services, and coverage must be provided for any preventive service within 15 business days after a recommendation is issued for the service.

November 30 – **IRS Notice 2020-82**

Provides that contributions to single-employer defined benefit plans that are delayed under the CARES Act will be considered timely if made by January 4, 2021.

Additional Updates – With the national emergency apparently extending into 2021, we will continue to monitor the legislative and regulatory activity. Updates on important changes will be provided on our blog – Benefits Law Update.

FFCRA COVID-19 Paid Leave Requirements Expire December 31, 2020

The Families First Coronavirus Response Act (FFCRA), passed March 18, requires that employers with fewer than 500 employees provide employees with two weeks of mandatory paid sick leave and expanded paid FMLA leave for employees affected by COVID-19. All of the FFCRA paid leave requirements sunset on December 31, 2020. As it stands, employers will no longer be required to offer this leave to employees in 2021. Employers are not required to cash out unused FFCRA paid leave. However, with the pandemic continuing into 2021, it is possible these provisions will be extended or renewed.

New Transparency in Coverage Healthcare Reporting Rule Requires Employer Health Plan Contract Review

The "Transparency in Coverage" final rule published on November 12, 2020, has enormous potential to disrupt healthcare markets by requiring group health plans to make both public and member-specific disclosures regarding the price of health care services and equipment. The rule applies to group and individual health insurance coverage, including self-insured group health plans subject to ERISA, and is designed to work in conjunction with the hospital price transparency rule that requires hospitals to publish prices for several medical services beginning January 1, 2022.

The public disclosure portion of the Transparency in Coverage rule, effective January 1, 2022, requires plans and insurance carriers to create an internet tool that makes detailed cost-sharing information for the plan's health care providers available to the public. The internet tool must make files containing three types of information available to the public:

(1) The negotiated rate between the plan and in-network providers for all covered services,

(2) The plan's payments to and billed charges from out-of-network providers, and

(3) Negotiated rates and historical net prices for all covered prescription drugs (including the cost of drugs obtained through a pharmacy benefit manager (PBM)).

Group health plans will be required to update the three data files on a monthly basis and provide the information in a readily accessible format.

The Transparency in Coverage rule also requires plans to provide members with a cost comparison tool that will allow a member to estimate medical costs prior to the member's episode of care. This disclosure must include information regarding a particular member's cost-sharing obligations, similar to an Explanation of Benefits form. Plans must provide cost

comparison information through an internet-based self-service tool and in paper form if requested.

The cost comparison tool requirement phases in over time. Information concerning a list of 500 "shoppable services" such as tonsil removal, knee replacement, x-rays, and colonoscopies must be available for plan years beginning on or after January 1, 2023. Information regarding all remaining services must be available for plan years beginning on or after January 1, 2024.

Certain group health plans are exempt from the Transparency in Coverage rule, such as all forms of Health Reimbursement Arrangements, including ICHRAs and QSEHRAs, plans offering solely excepted benefits (for example, limited scope vision and dental plans), and grandfathered plans.

Carriers, third-party administrators (TPAs), and PBMs – who consider pricing information strictly confidential and proprietary – will almost certainly file suits challenging the Transparency in Coverage rule. The likelihood that these suits will succeed in voiding or limiting the rule is uncertain. An additional source of uncertainty is whether the Biden administration will seek to delay, reverse, or modify the Transparency in Coverage rule. Because the rule is final, however, legislative action would be required to overturn it, and modification of the requirements would require the Biden administration to engage in the rulemaking process anew.

Nevertheless, given the enormity of the disclosure obligations required under the Transparency in Coverage rule, the time for employers to think about compliance is now.

Like many rules affecting self-insured health and welfare plans, employers will rely heavily on their TPAs to implement the transparency requirements but will ultimately be held accountable for compliance. Accordingly, employers are strongly encouraged to begin discussing amendments to their Administrative Services Agreements with their TPAs to ensure they are ready to begin compliance with the Transparency in Coverage rule in 2022. Employers should also begin working with their PBMs to ensure they have access to the pricing and rebate information necessary to comply with the prescription drug disclosure requirements.

For employers sponsoring fully-insured plans, the carriers will be directly liable for compliance with the Transparency in Coverage rule. Employers should contract with their carriers to provide the required disclosures.

New DOL Rules Likely to Chill Socially Responsible Investing in Retirement Plans

The DOL announced two changes to the investment duties regulations under ERISA that affect retirement plan efforts to engage in socially responsible investing. Socially responsible investing – often referred to as "environmental, social, and governance" or ESG investing – has become more widespread among retirement plans in recent years. ESG investing generally involves choosing investment vehicles with an eye to their collateral social merits, along with their expected risks and returns.

This year, the DOL issued final rules related to (i) the selection of plan investments, and (ii) proxy voting by retirement plan fiduciaries, both of which are expected to chill the selection of ESG investments by retirement plan fiduciaries.

Final Regulation Regarding ESG Investments. On October 30, 2020, the DOL issued a final rule that amends the investment duties regulation under ERISA (ERISA Reg. § 2550.404a-1). The DOL explained in its news release that it was updating the regulation in light of recent trends involving ESG investing issues.

In particular, the DOL noted the rapid increase in ESG investments and concerns about the "shortcomings of the rigor of the prudence and loyalty analysis" by some fiduciaries participating in the ESG investment marketplace. As a result, the DOL adopted the amendments to the investment duties regulation, according to U.S. Secretary of Labor Eugene Scalia, to ensure fiduciaries "are focused on the financial interests of plan participants and beneficiaries, rather than on other, non-pecuniary goals or policy objectives."

The final rule makes five major changes to the investment duties regulation:

(1) ERISA fiduciaries must evaluate investments based solely on pecuniary factors, unless item 2 below applies. Pecuniary factors are defined as factors that a fiduciary prudently determines are expected to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy.

(2) If a fiduciary is choosing between investments it is unable to distinguish on the basis of pecuniary factors alone (a situation the DOL anticipates will arise "very rarely"), non-pecuniary factors may be used if investment analysis and documentation requirements are met. The documentation requirement is intended to prevent fiduciaries from improperly finding economic equivalence or making investment decisions based on non-pecuniary benefits without careful analysis and evaluation.

(3) ERISA's duty of loyalty (Section 404(a)(i)(A)) prohibits fiduciaries from subordinating the interests of participants to unrelated objectives. In the final regulations, the DOL codified its interpretation that this prohibition bars fiduciaries from sacrificing investment return or taking on additional investment risk to promote non-pecuniary goals.

(4) Fiduciaries must consider reasonably available alternatives to meet their loyalty and prudence duties under ERISA.

(5) A fiduciary is not prohibited from including an investment fund merely because the fund seeks or supports non-pecuniary goals, provided the fiduciary satisfies ERISA's duties of loyalty and prudence and the new investment duties rules (including the requirement to evaluate investments solely on pecuniary factors); however, a fiduciary may not offer any investment fund as a qualified default investment alternative (QDIA) if its investment

objectives or goals or its principal investment strategies "include, consider, or indicate the use of" non-pecuniary factors.

A significant difference between the final rule and the proposed version of the rule issued in June 2020, which generated over 1,100 written comments and 7,600 petitions (many of which were critical of the rule), is that the final rule removes all ESG terminology. For example, the proposed rule specifically referred to "environmental, social, and corporate governance" factors. Although some commentators have characterized the change as a "softer stance" on ESG investing by the DOL, the final rule appears to maintain the DOL's basic positions: fiduciaries must focus on pecuniary factors; fiduciaries must put the economic interests of the plan first; and (without explicit reference) the DOL remains skeptical of ESG investing. (More information about the proposed rule is available on our blog.)

The bottom line is that ERISA fiduciaries must carefully evaluate and document investments that promote ESG goals. The final rule will apply to all investment decisions made after January 12, 2021. However, the strict ban on the use of non-pecuniary factors in QDIAs applies regardless of when the investment was selected. Plans will have until April 30, 2022, to bring their QDIAs into compliance.

Final Rule on Proxy Voting and ESG Investing. On December 11, 2020, the DOL announced a final amendment to the investment duties regulation adding specific standards that fiduciaries must satisfy when determining whether and how to exercise shareholder rights, including proxy voting. This rule is a corollary to the ESG investment rules.

The preamble to the rule describes a "persistent misunderstanding" that ERISA requires retirement plan fiduciaries to vote all proxies related to investments held by the plan. According to the DOL, a fiduciary's duty is to vote "only proxies determined to have a net positive impact on the plan." The DOL explained when it proposed the rule in September that it is "concerned that some fiduciaries and proxy advisory firms . . . may be acting in ways that unwittingly allow plan assets to be used to support or pursue proposals for environmental, social, or public policy agendas that have no connection to increasing the value of investments used for the payment of benefits or plan administrative expenses, and in fact may have unnecessarily increased plan expenses."

The rule specifically states that a fiduciary is not required to vote every proxy and it describes several issues a fiduciary must consider when deciding whether to exercise shareholder voting rights. In particular, a fiduciary must:

(1) "Act solely in accordance with the economic interest of the plan and its participants and beneficiaries,"

(2) "Consider any costs involved,"

(3) "Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote

non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries,"

(4) "Evaluate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights," and

(5) Maintain records of proxy voting activities and other exercises of shareholder rights.

The rule allows fiduciaries to adopt safe harbors for satisfying their fiduciary responsibilities with respect to deciding whether to vote proxies. The safe harbors permit fiduciaries to adopt policies that voting resources will focus only on particular types of proposals or adopt policies of refraining from voting on certain types of proposals.

Importantly, the rule does not apply to voting rights on shares held in defined contribution plans (such as 401(k) plans) that are passed through to participants and beneficiaries.

Fiduciaries should carefully review their proxy voting procedures to ensure they comply with the new rule. This review should include:

- Reviewing agreements with proxy advisory firms,
- Ensuring that voting guidelines are consistent with the plan's economic interests,
- Ensuring proper documentation supporting the rationale for voting decisions is maintained and based on the economic interests of the plan,
- Determining whether policies and procedures consider the costs and benefits of exercising shareholder rights appropriately, and
- Consideration of whether to implement one or both of the safe harbors.

The rule will be generally effective 30 days after its publication in the Federal Register, but fiduciaries that are not SEC-registered investment advisers have until January 31, 2022, to comply with the requirements to evaluate material facts and maintain records, and all fiduciaries have until January 31, 2022, to comply with the requirement that fiduciaries must review service provider proxy voting guidelines prior to following their recommendations.

Two SECURE Act Changes Affecting Retirement Plans Now

The Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act) made a number of changes to the rules governing retirement plans. Of potential concern are the increase to the triggering age for required minimum distributions and the new mandatory 401(k) plan eligibility rule for long-term, part-time employees.

<u>New Triggering Age for Required Minimum Distributions</u>. The SECURE Act amended Internal Revenue Code § 401(a)(9), which sets the age at which retirement plan participants are required to begin receiving distributions by delaying the triggering age for required minimum distributions from 70-1/2 to 72 for participants who attain age 70-1/2 after December 31, 2019. For many participants in defined contribution plans, a delay in required minimum distributions is a

welcome opportunity to leave assets in the plan and defer taxation. For sponsors of defined benefit plans, however, a delay in distributions can mean a significant increase in the cost of maintaining the plan.

This provision of the SECURE Act is effective for distributions required to be made after December 31, 2019, with respect to participants who attain age 70-1/2 after December 31, 2019. Plans that adopt the delayed starting date in practice must be amended to reflect the change by the last day of the first plan year beginning on or after January 1, 2022 (for calendar year plans, by December 31, 2022).

But a plan is permitted to require distributions to begin earlier, and plans that want to retain the age 70-1/2 starting date may do so. In particular, defined benefit plan sponsors may wish to consult with their actuaries about how a delay in required minimum distributions will affect the cost of funding the plan. Sponsors that intend to retain the age 70-1/2 starting date should review their plan document to ensure that it clearly states the age that triggers required distributions, and does not set the age for required minimum distributions by reference to § 401(a)(9).

More information about the SECURE Act change to required minimum distributions is available on our blog.

Long-Term, Part-Time Employee Eligibility Rules. The long-term, part-time employee eligibility rules are a major change that 401(k) plan sponsors must be prepared to implement in 2021.

For plan years beginning after December 31, 2020, the SECURE Act requires that a 401(k) plan must permit long-term, part-time non-union employees to make elective deferrals, even if they have not completed a 12-month period during which they are credited with at least 1,000 hours of service. For this purpose, a "long-term, part-time employee" is an employee who completes at least 500 hours of service in each of three consecutive 12-month periods. This requirement only applies to employees who have attained age 21 by the end of the three consecutive 12-month periods. Periods before January 1, 2021, are not taken into account, so the earliest a long-term, part-time employee could become eligible to make elective deferrals under the new rule is January 1, 2024. However, in 2021 many plan sponsors will need to begin tracking whether employees may become eligible under this rule.

Employees who become eligible solely under the new rule only have to be provided with the opportunity to make elective deferrals. These employees may be excluded from eligibility for other types of employer contributions made to the 401(k) plan, such as matching contributions and nonelective contributions.

Although the rule is effective in operation as of January 1, 2021, plan documents must be amended to comply with the SECURE Act's long-term, part-time employee eligibility provisions by the last day of the first plan year beginning on or after January 1, 2022 (for calendar year plans, by December 31, 2022).

Detailed information about the new long-term, part-time employee eligibility rules, including discussion of special vesting and break-in-service rules, the effect of the new rules on nondiscrimination and coverage testing, and a discussion of important considerations for plan sponsors implementing these changes, is available on our blog.

Lockman on Litigation

Our ERISA litigation partner, Chris Lockman, provides the following brief summaries of decisions published by the United States Supreme Court in 2020, a case currently pending before the Court that should interest benefits professionals, and one case of critical importance to colleges and universities that may come before the Court soon.

Published Decisions –

Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, (2020). On January 14, 2020, the U.S. Supreme Court vacated and remanded this case to the U.S. Court of Appeals for the Second Circuit. On remand, the Court asked the Second Circuit to consider whether to allow new arguments made by the IBM plan fiduciaries and federal agencies regarding the duty to act on inside information when managing the assets of an employee stock ownership plan (ESOP). The original opinion from the Second Circuit was a plaintiff-friendly outlier following the U.S. Supreme Court's 2014 decision in Fifth Third Bancorp v. Dudenhoeffer, which changed the pleading standard in "stock drop" litigation. After the Supreme Court's decision in *Jander*, the Second Circuit decided not to allow the defendants' new arguments and reinstated its original judgment. On November 9, 2020, the Supreme Court denied a petition to review the case again. More complete discussions of the *Jander* decision and denial of the petition for certiorari are available here and here.

Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020). On February 26, 2020, the Supreme Court held that a participant will not be deemed to have "actual knowledge" of a fiduciary breach if they did not read, or could not remember reading, disclosures made to them in accordance with ERISA requirements. Accordingly, the Court found that a six-year statute of limitations would apply to the participant's lawsuit, rather than the three-year statute of limitations that applies when a plaintiff has "actual knowledge" of an alleged breach. The Court's unanimous holding cautions plan fiduciaries that they should take steps to prove actual knowledge of plan disclosures by ensuring actual receipt of ERISA disclosures and tracking participant views and other activity on digital platforms where disclosures are made available. More information regarding the *Sulyma* decision is available here.

Thole v. U. S. Bank N.A., 140 S. Ct. 1615 (2020). On June 1, 2020, the Supreme Court held that participants in a defined benefit pension plan do not have standing to sue for a breach of fiduciary duty under ERISA because the outcome of the case has no effect on their right to receive fixed payments under the plan. The Court reserved comment regarding whether participants might have standing if fiduciary malfeasance was so egregious that it might render the plan unable to pay future benefits. Nevertheless, the holding provides a substantial benefit to potential defendants by cutting off a category of would-be class-action plaintiffs. A more complete discussion of the *Thole* decision is available here.

Rutledge v. Pharmaceutical Care Management Association, 592 U.S. --- (2020). On December 10, 2020, the Supreme Court held that ERISA does not preempt an Arkansas law regulating pharmacy benefit managers (PBMs) by creating a process for pharmacies to challenge a PBM's below-cost reimbursements for dispensing generic drugs. The Court determined that the law's requirements for PBMs do not have an impermissible effect on the administration of ERISA plans. Many states have sought to regulate PBMs in recent years, and the outcome in *Rutledge* could encourage states to become more aggressive in regulating PBMs and prescription drug pricing generally.

Pending Decision –

California v. Texas (No. 19-840). The *California* case is an attempt by Republication governors and state attorneys general to relitigate their challenge the constitutionality of the Patient Protection and Affordable Care Act (ACA). The Court previously upheld the constitutionality of the ACA's individual mandate by construing the penalty as a tax in Nat'l Fed'n of Indep. Bus. v. Sebelius. However, the Tax Cuts and Jobs Act of 2017 reduced the tax penalty for failing to comply with the individual mandate to zero. The questions currently before the court are whether the individual mandate is still constitutional with no penalty for violations, and, if the mandate is unconstitutional, whether the entire ACA is void as a result. The Court must also consider whether the individual and state plaintiffs have standing to sue. Oral arguments in *California* were held November 10, 2020.

Pending Certiorari –

Hughes v. Northwestern University, 18-2569 (7th Cir. March 25, 2020 – cert. pet. filed June 19, 2020) & *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir. 2020). The Court recently asked the U.S. Solicitor General for an opinion regarding whether to grant a petition for certiorari filed by participants in two retirement plans sponsored by Northwestern University. The participants are attempting to overturn the first U.S. Court of Appeals decision to affirm a complete dismissal of fiduciary breach claims against a college- or university-sponsored 403(b) plan. The Court's decision may have a significant effect on the 403(b) plan litigation landscape, as approximately two dozen cases have been filed against fiduciaries of college- and university-sponsored 403(b) plans in recent years. Moreover, the Court of Appeals decision rejected several allegations attempting to portray common attributes of college and university 403(b) plans as fiduciary breaches. For example, the Court of Appeals found that bundled services agreements with TIAA that require the plan to offer certain TIAA investment options are acceptable because participants have the choice whether to invest in particular funds. The Court of Appeals also found that there is no *per se* prohibition under ERISA against maintaining multiple recordkeepers or paying recordkeeping fees through an asset-based arrangement, rather than a flat fee arrangement. To date, it is not clear whether the Court will grant the petition for certiorari.

We will continue to provide updates regarding opinions issued by the Supreme Court through our blog – Benefits Law Update.

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