Third Quarter 2023

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor’s Note

by Susan Motter

Summer 2023 has been a scorcher so far! And, we (pun intended) at the *Quarterly Update* are here to bring on more heat with reporting on hot areas of interest to our readers!

This edition of the *Quarterly Update* opens with an article about an exciting opportunity for plan sponsors with pension plans that have 401(h) account assets. A reduction in retiree medical plan coverages and greater investment performance has led to overfunded 401(h) accounts in some pension plans. Plan sponsors, looking to access stranded 401(h) account assets (perhaps since a plan termination is on the horizon and 401(h) account assets must first be exhausted before the plan can be wound up), are keen on finding a solution. Our first article discusses an Aon-developed solution that may be of interest to our readers with 401(h) accounts in their pension plans.

Litigation against plan fiduciaries involving alleged fiduciary breaches and issues of plan governance continue to make the rounds on many court dockets. We include reporting on two noteworthy cases. First, we update our reporting on *Hughes v. Northwestern Univ.* This case, remanded by the Supreme Court to the Seventh Circuit, continues to emphasize the importance of developing the strongest possible fiduciary process and administrative record supporting fiduciary decision-making. The second litigation-focused article reports on a recent Sixth Circuit decision involving plan governance (including the ability to delegate authority) and how plan governance may impact the standard of review used by a court in litigation.

We close out this edition of the *Quarterly Update* with an update on two SECURE 2.0 related topics. One of the more interesting provisions of SECURE 2.0 is the law’s requirement that a new Retirement Savings Lost and Found be established by the Department of Labor (DOL) by no later than December 29, 2024. We include an article describing what we know to date as far as the reporting requirements for plan sponsors to build this DOL database. We also include an article on the Internal Revenue Service’s (IRS’s) Notice 2023-43 which provides plan sponsors interim guidance on the ability to make self-corrections of certain inadvertent plan failures under the IRS Employee Plans Compliance Resolution System (or EPCRS). As more guidance is issued by the DOL and IRS related to SECURE 2.0 topics, we will continue to update our reporting in future editions of the *Quarterly Update.*

If you have any questions or need any assistance with the topics covered, please contact the author of the article or Tom Meagher, our practice leader.

Finally! A (Partial) Solution for Stranded 401(h) Account Assets

by Dan McFall and Tom Meagher

Many employers have over the course of time established and funded 401(h) accounts in their pension plans. These accounts are used to pay retiree medical expenses for employees who are treated as having retired under the pension plan.

The reduction in the number of employees covered by retiree medical plans coupled with superior investment returns on 401(h) account assets has resulted in 401(h) accounts being overfunded and unlikely to be used fully for the foreseeable future.

While this has led many an employer to bemoan their inability to access substantial 401(h) account assets, Aon recently worked with a client and the Internal Revenue Service (IRS) to open a path forward to permit the 401(h) account assets to be used for active medical plan expenses under certain prescribed circumstances.

In Private Letter Ruling (PLR) 202305001 (issued on February 3, 2023), the IRS agreed with Aon's position that active participants eligible for a pension benefit based on an age 59½ in-service distribution option should be treated as "retired employees" under the pension plan and thus permitted to have medical benefits reimbursed from a 401(h) account. This newly determined "retired" status allows the 401(h) account assets to be used to reimburse the employer for the medical expenses incurred by these active pension plan participants.

In issuing the PLR, the IRS has opened the door—albeit a small crack—such that employers having pension plans with 401(h) accounts may now access those assets for active employee participants over age 59½, provided that the pension plan is amended to permit in-service distributions for employees age 59½ or older.

As part of the employer's representations to the IRS, they had to indicate that the 401(h) account assets were not accumulated by reason of a Section 420 transfer and that the employer did not have a contractual obligation to fund active or retiree health benefits.

While Aon had an active role in helping the employer obtain the PLR, the ruling technically may only be relied upon by the employer that requested it. Nonetheless, the ruling does provide other employers with a view to how the IRS may treat a similar situation. There are several other issues that can arise if an employer is going down this path, and we would be pleased to discuss them with you in more detail if accessing 401(h) account assets may be of interest. Please do not hesitate to contact the authors of this article or your Aon consultant for more information.

Seventh Circuit Reconsiders Prior *Hughes* Decision

by Hitz Burton

On March 23, 2023, on remand from a 2022 Supreme Court decision, the Seventh Circuit Court of Appeals, in *Hughes v. Northwestern Univ.,* reconsidered three fiduciary breach allegations that the Supreme Court held warranted further consideration. Those three claims included allegations relating to (i) the failure of plan fiduciaries to properly monitor designated investment options; (ii) the payment of excessive recordkeeping fees; and (iii) the retention of various duplicative designated investment options resulting in confusion and poor investment decisions by participants. The Seventh Circuit, in rejecting specific parts of Northwestern's motion to dismiss, held that the allegations contained under items (i) and (ii) warranted further deliberations and remanded the case back to the federal district court for further action.

With respect to the allegation regarding the failure to prudently monitor, the *Hughes* decision found that the selection of a designated investment option under a retirement plan carries with it the obligation to systematically review such investment option at both the time of the investment's initial inclusion in the qualified retirement plan's designated fund line-up and at regular intervals thereafter. The Seventh Circuit's holding here relies, in large part, on the Supreme Court's 2015 decision in *Tibble v. Edison Int'l,* which we previously summarized in the **First Quarter 2015** issue of our *Quarterly Update*.

To support its allegations that the recordkeeping fees paid by the Northwestern University Retirement Plan and the Northwestern Voluntary Savings Plan (Northwestern DC Plans) were excessive, the *Hughes* plaintiffs argued that fiduciaries for these plans failed to (i) solicit bids from competing providers; (ii) negotiate with existing recordkeepers over contractual fees; or (iii) meaningfully evaluate the possibility of consolidating recordkeeping services with a single entity.

Fiduciaries concerned about responding to allegations which are the same as or similar to items (i) and (ii) above should focus on creating a robust and detailed record of the steps taken to negotiate the best possible fee structure and services agreement for participants. The goal of this administrative record should be to demonstrate that the decisions reached by the fiduciaries are, in the words of the instant *Hughes* decision, "within a range of reasonable judgments" understanding the "difficult tradeoffs" that fiduciaries must inevitably evaluate when entering into fee and level of service negotiations with a recordkeeper.

The consensus view of commentators reacting to this latest decision in the litigation involving *Hughes* is that, on balance, the decision is likely to encourage additional fee litigation. While likely accurate, it may also be helpful to realize that many of the plaintiffs' allegations likely resulted from Northwestern's prior decision to have the Northwestern DC Plans jointly administered by the Teachers Insurance and Annuity Association of America (TIAA) and the Fidelity Management Trust Company (Fidelity). To support this arrangement, Northwestern specifically argued that (i) TIAA's traditional annuity product was popular with many participants in its Northwestern DC Plans; and (ii) removing TIAA as a recordkeeper would result in a penalty for participants with amounts invested in the traditional annuity product. While the Seventh Circuit found both of these arguments "reasonable," it also found that the arguments did not explain why Northwestern did not take substantive steps to reduce recordkeeping expenses by negotiating with TIAA or Fidelity for rebates, additional revenue sharing, or through other means.

As such, the *Hughes* decision once again emphasizes the importance of developing a prudent process and the strongest possible administrative record supporting fiduciary decision-making. If you would like to understand more about how to develop the strongest possible record in support of the decisions made regarding the design and administration of one or more of your qualified retirement plans, please reach out to one of the members of Aon's Retirement Legal Consulting & Compliance practice.

Courts Again Underscore Importance of Strong Plan Governance

by Clara Kim and Tom Meagher

Plan governance includes the management and administrative oversight of a plan under the Employee Retirement Income Security Act of 1974 (ERISA). Various legal documents—such as the plan and trust agreement, committee charters or bylaws, and/or corporate delegations of authority—should state the individual or organization responsible for the various aspects of plan governance. Typically, a committee or committees will be responsible for plan governance with the authority to delegate some of their responsibilities to third parties.

Protecting a plan's claims and appeals decisions is one reason to have a strong plan governance structure in place. In a claims and appeals case, for example, plan administrators will often benefit from a court's willingness to defer to the decision of the plan administrator under the very deferential "arbitrary and capricious" standard of review. Essentially, the courts will uphold the decision of the plan administrator if the decision represents a reasonable interpretation of the plan and is supported by prior practice. In order for the arbitrary and capricious standard of review to apply, however, the plan must grant discretionary authority to the administrator to determine facts and interpret the plan. In the absence of such discretionary authority, the courts will default to a much less attractive "de novo" standard of review when analyzing a claim denial during litigation challenging the decision of the plan administrator. The de novo standard essentially permits the courts to review the facts and plan terms relating to a denial of benefits "anew" and not necessarily defer to the prior practices or interpretations by the plan administrator in reaching a final decision.

The importance of good plan governance is underscored by the Sixth Circuit Court of Appeals' recent decision in *Laake v. Benefits Committee, Western & Southern Financial Group Co. Flexible Benefits Plan et al.,* 68 F.4th 984 (6th Cir. 2023). *Laake* involved a claim for long-term disability benefits where the plaintiff argued that the Benefits Department, rather than the Benefits Committee, improperly adjudicated her claim. In *Laake,* the plan document conferred claim decision authority on the Benefits Committee and permitted the Benefits Department to "assist" the Benefits Committee. The court held that the plan's terms permitting the Benefits Department to "assist" the Benefits Committee did not constitute an explicit delegation of voting authority from the Benefits Committee to the Benefits Department to determine *Laake's* claim. Because the Benefits Committee, not the Benefits Department, was granted discretionary authority under the terms of the plan to decide claims, the plaintiff successfully argued that the employer's denial of her claim (by action of the Benefits Department) should be reviewed by the court under the de novo standard of review and not the more plan-friendly arbitrary and capricious standard. The *Laake* case highlights the importance of having and following a strong plan governance structure.

The plan governance analysis in the *Laake* case is a good reminder of the importance of having strong plan documentation in place for all of an employer's ERISA plans. From a plan administrator perspective, plans continue to be on notice to review a plan's governance structure and related processes—plan by plan—to ensure they are appropriately documented, updated to reflect new corporate, legal, or regulatory developments, and that operationally, the governance structure is followed.

Aon's Retirement Legal Consulting & Compliance consultants are available to review a plan sponsor's plan governance processes and related practices, along with providing training to plan committee members and other plan fiduciaries to the extent helpful.

Missing Money? Try the Retirement Plan Lost & Found!

by Dan Schwallie

Section 303 of SECURE 2.0 directs the Department of Labor (DOL), in consultation with the U.S. Department of the Treasury, to create an online Retirement Savings Lost and Found no later than December 29, 2024. This searchable database is intended to permit an individual, who is or was a participant or beneficiary, to obtain information not only about retirement savings plans, but about any retirement plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), including both defined contribution and defined benefit plans. Governmental plans, church plans, and certain 403(b) plans of tax-exempt employers that do not provide employer contributions are not subject to ERISA and, therefore, are not subject to inclusion in the database.

New Reporting Requirements for Plan Sponsors

For plan years beginning after December 31, 2023, SECURE 2.0 creates new reporting requirements with respect to distributions from a plan subject to inclusion in the database. The plan sponsor must submit the following information to the DOL, at the time and in the form and manner as provided in regulations to be issued:

- The name of the plan and the name and address of the plan administrator (the plan sponsor or administrator as designated by the plan document);
- Any change in the name of the plan, any change in the name or address of the plan administrator, the termination of the plan, the merger or consolidation of the plan with any other plan, or the division of the plan into two or more plans; and
- The name and taxpayer identification number of each participant or former participant in the plan:
  - Who, during the current plan year or any previous plan year, separated from service covered by the plan and was entitled to a deferred vested benefit under the plan and with respect to whom the deferred vested benefit was fully paid during the current plan year;
  - With respect to whom any involuntary cashout was transferred during the current plan year to an IRA (individual retirement account or individual retirement annuity), along with the name and address of the designated trustee or issuer and the account number of the IRA to which the cashout was transferred; or
  - With respect to whom a deferred annuity contract was distributed during the current plan year, along with the name and address of the annuity contract issuer and the contract or certificate number.

Features of the Lost and Found

SECURE 2.0 requires that the Retirement Savings Lost and Found permit:

- An individual to search for information that enables locating the plan administrator of any plan subject to inclusion in the database to which the individual is or was a participant or beneficiary, and provide contact information for the plan administrator;
- The DOL to assist an individual in locating any plan in which the individual is or was a participant or beneficiary; and
- The DOL to make any necessary changes to plan administrator contact information on record, based on any changes to the plan due to merger or consolidation of the plan with any other plan, division of the plan into two or more plans, bankruptcy, termination, change in name of the plan, change in name or address of the administrator, or other causes.

The DOL is directed to take all necessary and proper precautions to ensure that an individual's plan and personal information are protected and to allow any individual to opt out of inclusion in the database.

Aon Can Help

Contact your Aon consultant for help in understanding the new reporting requirements as additional guidance becomes available and assistance in complying with those requirements. We anticipate that this new reporting requirement may require a significant undertaking by employers that may have engaged in a significant number of mergers and acquisitions (or M&A) transactions resulting in plan mergers and/or spinoffs.

Interim Guidance on SECURE 2.0's Expansion of EPCRS

by Susan Motter

Since our reporting in the **Second Quarter 2023** issue of our *Quarterly Update,* the Internal Revenue Service (IRS) has released Notice 2023-43 which provides interim guidance addressing several of the changes brought by SECURE 2.0. As we previously reported, SECURE 2.0 significantly expanded the IRS's Employee Plans Compliance Resolution System (EPCRS), particularly with respect to the ability of plan sponsors to make self-corrections of plan failures without IRS involvement via a Voluntary Correction Program (VCP) submission.

This interim guidance is intended to fill the gap until the IRS can issue its update to Revenue Procedure 2021-30, the governing IRS guidance regarding the corrections of plan failures under EPCRS. In the interim, plan sponsors may rely upon the Notice in making self-corrections of certain "eligible inadvertent failures."

Self-Correction of Eligible Inadvertent Failures

What's first notable about the interim guidance is the question-and-answer (or Q&A) format that is used to provide helpful guidance to plan sponsors. What's also notable is how broadly the guidance defines an "eligible inadvertent failure"—which means more failures than ever are eligible for self-correction. Inadvertent failures eligible for self-correction must satisfy the following conditions:

- The failure has not been identified by the IRS prior to any actions demonstrating a specific commitment to implement a self-correction with respect to the failure;
- The failure is corrected within a reasonable period after the failure is identified;
- The failure is not egregious;
- The failure does not involve an abusive tax avoidance transaction (either directly or indirectly);
- The failure does not involve the diversion or misuse of plan assets; and
- The failure occurred despite the existence of practices and procedures reasonably designed to promote and facilitate compliance with the Internal Revenue Code.

In addition, certain conditions of Revenue Procedure 2021-30 which generally apply to self-corrections (e.g., application of the correction principles described in the Revenue Procedure) must also be satisfied. These general rules of applicability still apply to corrections under the interim guidance.

Other Notable Takeaways

Also worth noting from the interim guidance are:

- Certain failures are carved out from self-correction. These include the failure to initially adopt a written plan, a failure in an orphan plan, a significant failure in a terminated plan, a demographic failure not corrected using a method set forth in existing Treasury regulations, and an operational failure corrected by a retroactive amendment that conforms the terms of the plan to prior operations in a manner that is less favorable to participants or beneficiaries. Also carved out by Notice 2023-43 are failures involving the recovery of plan overpayments and automatic contribution failures. While plan sponsors wait on further guidance regarding the failures carved out from the interim guidance, we remind our readers of our reporting on the recovery of plan overpayments which can be found in the **Second Quarter 2023** issue of our *Quarterly Update.*
- Self-correction of eligible inadvertent failures does not automatically result in the waiver of an excise or other additional tax resulting from an otherwise correctible failure. However, a plan sponsor may still request a waiver through a VCP submission or a request for a closing agreement with the IRS via its Voluntary Closing Agreement Program.
- An eligible inadvertent failure is considered "identified" by the IRS when the plan or plan sponsor is under examination (i.e., audit) by the IRS. Once identified by the IRS, the plan sponsor cannot self-correct unless the plan sponsor can demonstrate a specific commitment to self-correct the failure (i.e., there must be an active pursuit of a correction). The mere completion of an annual compliance audit or the adoption of a general statement of intent to correct failures when they are discovered are not actions demonstrating a specific commitment to implement the self-correction of an identified failure.

- Self-corrections of eligible inadvertent failures must be made within a reasonable period of time based on all relevant facts and circumstances. The guidance provides that a failure will be treated as having been corrected within a reasonable period if it is corrected by the last day of the 18th month after the failure is identified by the plan sponsor. If the correction involves an employer eligibility failure, correction is within a reasonable period if the plan sponsor stops all contributions to the plan as soon as reasonably practicable, but no later than six months, following the date the failure is identified.
- No new specified, IRS-authorized correction methods for operational failures that are common among plans are provided in the interim guidance. Revenue Procedure 2021-30, until it is updated by the IRS, remains as the source for current IRS-authorized correction methods.

Reliance by Plan Sponsors and Transition

Plan sponsors may rely on the interim guidance of Notice 2023-43 from its issue date of May 25, 2023, until such time Revenue Procedure 2021-30 is updated. For the period beginning on December 29, 2022 (the date SECURE 2.0 was enacted) to the Notice issue date, plan sponsors are permitted to apply a good faith, reasonable interpretation of the self-correction provisions of SECURE 2.0. Self-corrections made during this period in a manner that is in accordance with the Notice will be treated as having applied a good faith, reasonable interpretation of SECURE 2.0.

Currently, the IRS and the Treasury Department are collecting public comments on the Notice and other aspects of SECURE 2.0. Comments are due by August 23, 2023. In the meantime, as plan sponsors wait on additional updated guidance from the IRS, plan sponsors should continue to be diligent in their efforts to monitor the operation of their plans to ensure compliance with plan terms and the law.

Aon's Retirement Legal Consulting & Compliance consultants are here to assist you in reviewing and formalizing your retirement plan's practices and procedures, as well as provide assistance with post-SECURE 2.0 correction strategies.

Quarterly Roundup of Other New Developments

by Eric Brager, Anne Jackson, Teresa Kruse, and Mark Manning

A Scarcity of Savings

Retirement plan access is a crucial factor in determining the financial stability and security of individuals as they near retirement age. However, research indicates that women and minorities often face meaningful disparities in access to such plans. The National Council on Aging's "What Women Say™" survey notes that approximately 48% of women over age 25 report that they do not have an employer-sponsored retirement plan.[1] Similarly, the American Association of Retired Persons (AARP) noted in a July 2022 report that about 64% of Hispanic workers, 53% of African American workers, and 45% of Asian American workers lack access to an employer-sponsored retirement plan.[2]

Disparities in retirement plan access for women and minorities can be attributed to:

- **Wage Gap.** The Department of Labor (DOL) statistics show that on average, women are paid 83.7% of what men are paid,[3] and African American and Hispanic workers are paid approximately 76% and 73%, respectively, of white workers.[4] Lower earnings can make it more challenging for these individuals to save for retirement or participate in an employer-sponsored retirement plan.
- **Employment Type.** Women and minorities are more likely to work part-time or in low-wage jobs, which often do not offer access to retirement plans. Additionally, women are more likely to take career breaks or reduce work hours to care for children or other family members, further limiting their access to retirement plans.
- **Lack of Financial Education.** Women and minorities may also have less access to financial education, making it more difficult to understand and navigate retirement planning options.

[1] National Council on Aging and the Women's Institute for a Secure Retirement (WISER), What Women Say™: Insights and Policy Solutions for Lifelong Financial Security survey (May 2023)
[2] Fact Sheet, AARP Public Policy Institute, Payroll Deduction Retirement Programs Build Economic Security (July 2022)
[3] Posting of Wendy-Chun-Hoon (Director of the Women's Bureau, appointed by President Biden) to U.S. Dep't of Labor Blog, https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap#:~:text=Stats.,for%20Black%20and%20Hispanic%20women (Mar. 14, 2023)
[4] Data and Results Report, Office of Federal Contract Compliance Programs, U.S. Dep't of Labor (July 1, 2020)

The following are potential solutions:

- **Closing the Wage Gap.** Implementing policies that address pay inequity can help women and minorities increase their earnings, providing greater access to retirement plans.
- **Expanding Access to Retirement Plans.** Policies that incentivize or encourage employers to offer retirement plans to part-time and low-wage employees can help bridge the gap in access for women and minorities.
- **Financial Education Initiatives.** Providing targeted financial education and resources to women and minority communities can help improve understanding and engagement with retirement planning.

The disparities related to retirement plan access for women and minorities are complex and multifaceted. Addressing these inequalities may require a combination of policy changes, education initiatives, and cultural shifts. Contact your Aon consultant for more information about what Aon offers to help assist with these discussions.

Oh Where, Oh Where Is My Retirement Plan Account?

Robert L. Johnson, business owner of Retirement Clearinghouse, has been working with recordkeepers and policymakers to establish a national auto-portability network (APN). The APN was established to automatically transfer a participant's small balance, under $5,000, from his or her former employer's plan to a current account.

The APN protects against cashouts of participant accounts. This "leakage" is disproportionately dominated by lower-income and minority workers, and results in tens of billions of dollars leaving retirement plans, thus reducing this group's ability to take advantage of compounded earnings and continued growth of their balances.

Last quarter, Empower, the second largest recordkeeper by assets, joined Fidelity Investments, Vanguard, and Alight Solutions in utilizing the APN. The network now represents 60 million participants and more than $5 trillion in assets. The system of automatic transfers between retirement plans intends to mimic automatic enrollment and has proven to be effective. SECURE 2.0 allows the transfer of a participant's retirement savings from a previous employer to a new one, unless otherwise directed.

Auto-Portability Network Breach

SECURE 2.0 and the APN have been established to help protect lower-income and minority workers, but as with the establishment of many other good things, criminals have also evolved. Retirement Clearinghouse incurred a data breach. They notified 10,500 individuals that their personal data, including retirement account numbers, may have been compromised. The May 12, 2023 notice identified that their information might be at risk for fraud, as a small number of files were affected between March 15 and 16, 2023. Retirement Clearinghouse offered three months of free credit protection. As discussed in the **Second Quarter 2023** issue of the *Quarterly Update,* the additional transfer data will require more oversight and management.

Aon's Cybersecurity and Retirement Legal Consulting & Compliance consultants are available to discuss what protocols plan sponsors should consider establishing for protection.

The Revolving Door of ESG Funds

The DOL has plans to focus on implementing the finalized environmental, social, and governance (ESG) rules with an aim at making communications clearer for plan sponsors and plan participants. The finalized rule allows fiduciaries to take ESG factors into consideration when making retirement investment decisions, but they still must evaluate them on a prudent basis like they would any other factors.

Asset managers on the other hand are reacting with some concerns over the constant changing of the requirements but are consistently creating new ESG tools and initiatives. Research reflects that ESG topics and concepts are embedded in the industry despite the surrounding negative rhetoric. Firms are acknowledging there are varying reasons for adopting and not adopting ESG investment strategies, but there appears to be a convergence of opinion that ESG investing, particularly the environmental piece, is here to stay in some form.

This convergence is reflected by the recent Amazon shareholder voting on their default fund needing to be evaluated on "climate control" along with the other factors. The question of how the long-term usage of climate control will affect investments over the long term becomes a question of whether the investment is prudent. This type of question could play a role in hiring and retaining employees in the future.

Aon Investment USA Inc.'s consultants are available to discuss the impacts and evaluation processes related to ESG investments.

Zombie Plans Will Get the DOL's Attention
Several fiduciaries have discovered in the last few years that leaving a retirement plan to wither unattended is not viewed kindly by the DOL. Sometimes a plan is no longer tended by the existing fiduciary due to a death in the C suite or company bankruptcy. In other cases, a merger or acquisition leaves a retirement plan wandering without anyone administering it. Whatever leads to a plan becoming a zombie (not quite terminated and not actively operated), the DOL does not approve.

Participant consequences of a plan in this status can include (i) active participants unable to obtain loans, withdrawals, or rollovers; (ii) terminated or retired participants unable to receive distributions; and (iii) domestic relations orders and beneficiary transfers left in limbo.

In response to these situations the DOL in some instances have asked the courts to appoint an independent fiduciary for these plans and for orders to obtain equitable relief in response to ERISA violations. The Employee Benefits Security Administration obtained $5.9 million in distributions for participants through enforcement efforts relating to abandoned plans in 2022. To help avoid a zombie plan in your future, talk with your Aon Consultant about a merger and acquisition strategy or an introduction of Aon resources to support the ongoing administration of the plan that will permit the proactive management of acquired retirement plans.

Fiduciary Fast Facts
In this edition, we are introducing a new featured section of short topics which will highlight updates in areas of interest.

- **CITs in 403(b) Plans.** While SECURE 2.0 cleared the way for 403(b) plans to use collective investment trust (CIT) vehicles by amending tax laws, it did not address securities laws that still prohibit this practice. In an effort to correct this, the House Financial Services Committee has advanced a bill that would amend securities laws such that CITs would be allowed in 403(b) plans. The bill will need to pass the full House prior to advancing to the Senate for a vote, but prospects for passage in 2023 seem good.
- **Auto-Escalation Study.** A recent study conducted by Voya Behavioral Finance Institute for Innovation has found that employers can offer higher default auto-escalation levels and frequency without decreasing participation. The study shows that using a 2% auto-escalation instead of the normal 1% doesn't materially increase the number of participants who opt out of auto-escalation. Additionally, the study found that a majority of participants were willing to auto-escalate over a period shorter than one year.
- **Final Form 5500 Rules.** The DOL, the IRS, and the PBGC have released notices that announced changes to the 2023 Form 5500 (Annual Return/Report of Employee Benefit Plan) and Form 5500-SF (Short Form Annual Return/Report of Small Employee Benefit Plan), which will be filed in 2024. The changes are expected to reduce overall filing costs and include the following changes according to the DOL:
  - A consolidated Form 5500 reporting option for certain groups of defined contribution retirement plans and improved reporting by pooled employer plans and other multiple employer plans;
  - A change in the participant-counting methodology for determining eligibility for simplified reporting alternatives available to "small plans;"
  - A breakout of reporting on administrative expenses paid by the plan on the plan's financial statements;
  - Further improvements in financial and funding reporting by PBGC-covered defined benefit plans;
  - The addition of selected Internal Revenue Code compliance questions to improve tax oversight and compliance of tax-qualified retirement plans; and
  - Technical and conforming changes as part of the annual rollover of forms and instructions.

Aon's Retirement Legal Consulting & Compliance and defined contribution teams are available to discuss and provide guidance with preparation and filing of your Form 5500.

Retirement Plan Litigation Update
Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans, among others. Defined contribution plan cases generally fall into the following three areas: inappropriate or imprudent investment choices; excessive fees; and self-dealing. Recently, several cases involving corporations, universities, and other institutions have been dismissed (in full or in part) or settled, including cases involving Baystate Health, Inc. (settled for $500K, pending court approval); DISH Network Corp. (dismissed); Eversource Energy Service Co. (settled for $15M); O'Reilly Automotive Inc. (dismissed); and Mutual of America Life Ins. Co. (settled for $2.75M and other remedies).

Plan sponsors seeking to reduce their litigation risk use a variety of strategies including improving their fiduciary process for plan governance, increasing the number of passive funds in their plans, and implementing better fee transparency. Aon has a team that can review your plan governance as it applies to plan fees, investments, and decision-making processes with an eye to mitigating the risk to plan fiduciaries.

New Retirement Plan Cases
The second quarter of 2023 brought a resurgence of litigation. Although the list of recently filed cases is only illustrative, it is intended to provide a summary of the types of claims being alleged against plan fiduciaries and their committees. Excessive fees cases were brought against Tenneco Inc., CoreLogic, Inc., and the Univ. of Vt. Medical Center, Inc. Lawsuits involving abandoned plans were brought by the DOL against Environmental Instrumentation Co. and Infinisys, Inc. Two lawsuits involving an employee stock ownership plan (ESOP) and charges of self-dealing were brought against the board of directors of Churchill Holdings, Inc. (doing business as Three Churchill Mortgage Corp.), the trustee of the company's ESOP, and others and in the other case with similar claims against Asbury Carbons, Inc. A case challenging the inclusion of ESG funds in a plan was brought against American Airlines, Inc. Aon will continue to track these cases, and others, as they develop.

Please see the applicable Disclosures and Disclaimers on page **13**.

Recent Publications

Defined Benefit Plan Changes of SECURE 2.0
By Daniel Schwallie
Journal of Pension Planning & Compliance (Fall 2023)

The SECURE 2.0 Act of 2022 (SECURE 2.0), enacted as part of the Consolidated Appropriations Act, 2023, makes many changes to both options and requirements applicable to tax-qualified defined benefit plans. This article describes such changes more or less in chronological order of the years to which they apply.

Click **here** to download and read the article.

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About Aon

Aon plc (NYSE: AON) exists to shape decisions for the better — to protect and enrich the lives of people around the world. Our colleagues provide our clients in over 120 countries and sovereignties with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

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