First Quarter 2024

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

by Susan Motter

Welcome to our first edition of the *Quarterly Update* of 2024!

This edition of the *Quarterly Update* opens with a very newsworthy update regarding the Aon Pooled Employer Plan (PEP) which continues to grow and add value to employers and participants alike. We are pleased to report that the Aon PEP has reached a significant milestone in terms of assets held in the Aon PEP program, and recent survey results are presented that demonstrate the Aon PEP's value proposition and how participating employers in the Aon PEP appreciate this value.

Litigation involving retirement plans and allegations of breaches of fiduciary duties continues to be of significant concern to our readers. We are currently monitoring a number of lawsuits involving the use of defined contribution plan forfeitures alleging that their use to offset the cost of future matching or other employer contributions is a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), as well as a prohibited transaction under ERISA. Our reporting in this *Quarterly Update* reflects litigation as of the publication date and includes some potential strategies to mitigate risk. We will continue to update our readers as these cases develop.

As we continue to hope that 2024 will bring our readers additional guidance regarding how plan sponsors may comply with SECURE 2.0, we include four articles advising our readers on the latest formal and informal guidance to date. The first article reports on Internal Revenue Service (IRS) Notice 2024-2 which provides SECURE 2.0 guidance in a helpful questions and answers (or Q&As) format. We next report on the Blue Book issued by the Joint Committee on Taxation which serves as a resource on legislative history and intent as well as guidance on SECURE 2.0.

Closing out our SECURE 2.0 coverage are two companion articles relating to guidance with respect to long-term, part-time employee (LTPTE) eligibility in retirement plans. While the SECURE Act expanded the rules regarding eligibility of part-time employees for participation in retirement plans, SECURE 2.0 expanded these eligibility rules even further. These companion articles cover recently issued proposed IRS regulations related to LTPTEs—one focusing on the determination of who is (and is not) an LTPTE and the other on the testing requirements related to LTPTEs.

We close this edition of *Quarterly Update* with recent IRS guidance related to pre-approved retirement plans. Our reporting focuses on the guidance as it applies to adopting employers of qualified or 403(b) pre-approved plans.

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.

The Aon PEP Gathers Steam

by Rick Jones

The Aon Pooled Employer Plan (PEP) continues to grow and add value to plan participants and employers alike. Aon recently **announced that it had crossed $2 billion in live and committed assets** into the program, covering 50,000 eligible current and former employees across more than 70 employers.

The Aon PEP is resonating across a range of organizations in a variety of industries across the country. In particular, we're seeing significant uptake among growing organizations and those involved in mergers, acquisitions, spin-offs, and other corporate structure activities. The ability to outsource significant work and risk in providing 401(k) benefits, while providing an enhanced employee benefit and experience is very attractive to these organizations.

Case Studies: Organizations Using the Aon PEP

We'd like to highlight two organizations that have chosen to use the Aon PEP to deliver 401(k) benefits for their people:

- **A growing organization** with approximately 1,000 U.S.-based employees had prior 401(k) compliance issues and related penalties. This organization's management wanted to "shore up" its 401(k) compliance, and at the same time enhance the benefit and employee savings experience and chose the Aon PEP to do so.
- **A new entity being spun off from a Fortune 500 organization** has 2,500 employees and was attracted to the turn-key approach available in the Aon PEP to provide a customized and comprehensive 401(k) benefit for the new employee base. They avoided all the work and cost associated with plan documents and administrative set-up, staffing and training, vendor selection, compliance activities, and much more. When added to the savings in time and risk for future 401(k) plan management, this was an easy decision for this new organization.

Employers and 401(k) Savers Appreciate the Aon PEP

The feedback we are receiving on the Aon PEP has been very strong, and participating employers are clearly appreciating the model. The following chart provides some highlights:

98%	Participation satisfaction[1]
9.4/10	Employee communications and financial education[2, 3]
9.6/10	Ease of implementation[2]
9.6/10	Likelihood to recommend[2]
9.8/10	Aon client service team[2]

[1] Aon PEP participant satisfaction score as of September 30, 2023

[2] Aon PEP client satisfaction scores as of September 30, 2023

[3] Includes both transition communications and ongoing communications and educational outreach

Update on PEPs for 403(b) Benefits

As noted in the **First Quarter 2023** edition of our *Quarterly Update* following the passage of the SECURE 2.0 legislation at the end of 2022, PEPs are now able to be offered for 403(b) benefits. Additional information was provided in Aon's **403(b) Plans and the SECURE 2.0 Opportunity Webinar**. To date, we are aware of two organizations that have registered as Pooled Plan Providers for 403(b) PEPs.

Aon has not yet registered with the DOL to provide 403(b) benefits in a PEP as we are waiting for Collective Investment Trust (CIT) investment options to be available for 403(b) plans. CITs have been available to 401(k) and other tax-qualified retirement plans for decades and are an important part of the value equation for the Aon PEP for 401(k) benefits. We are waiting for Congress to level the playing field by also making CITs available to 403(b) benefits. This will allow Aon to deliver maximum value in a 403(b) PEP. We, and other industry leaders, are urging Congress to take this important step.

Please let Rick Jones, the author of this article, know if you'd like further conversation on this important innovation in 401(k) and employer-sponsored retirement benefits, or see **What is a Pooled Employer Plan?** on Aon's website for more information.

Litigation Challenges Use of Forfeitures

by Hitz Burton

At least five recent proposed class action complaints have been filed challenging how defined contribution (DC) plans use forfeitures, and the number of lawsuits on this topic will likely continue to grow. The complaints allege that the plan's use of forfeitures to offset the cost of future matching or other employer contributions represents a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). Plaintiffs also allege that using forfeitures to reduce future employer or other contribution commitments represents a prohibited transaction under ERISA.

Forfeitures in a DC plan typically arise when a participant terminates employment from the plan sponsor before being fully vested in the employer matching or nonelective contributions (e.g., profit sharing) previously allocated. Plan documents typically have language describing how these forfeitures are to be utilized. Typical uses include allowing the plan sponsor to use the forfeitures to (i) help fund new employer matching or other nonelective contributions under the plan; (ii) reduce reasonable plan expenses; or (iii) allocate to participants as additional contributions.

Importantly, some plan documents are drafted to provide a hierarchy of specific uses for these forfeitures (e.g., first to reduce future employer matching contribution commitments and next to reduce future administrative expenses paid by the employer). Other plans, however, simply provide a listing of permitted uses without providing explicit direction to fiduciaries for how forfeitures are to be allocated. Aon believes it is advisable that plan documents be drafted in a manner to remove discretion by fiduciaries such as by providing an explicit hierarchy for use of plan forfeitures. Eliminating discretion in how forfeitures can be utilized should be an effective defense to any allegations raised in litigation that plan fiduciaries violated their ERISA duties of loyalty or prudence when forfeitures are used to reduce future employer contributions. Among other considerations, a court should attach importance to the idea that fiduciaries are generally obligated to follow the terms of the plan document in their oversight and direction of plan administration unless the court determines such terms violate ERISA. It is also advisable that a description as to the use of forfeitures be included in the plan's summary plan description and other plan-related disclosures.

While authorizing plan language by itself may not be sufficient to defeat a prohibited transaction allegation, presumably any court evaluating the issue will also consider the IRS's long-standing position on permissible uses for forfeitures, reflected in regulations, favorable IRS determination letters relating to plan terms, and other guidance, as well as the absence of any clear direction from the Department of Labor to the contrary.

Plan sponsors interested in ensuring that their DC plan documents are drafted in the most protective manner possible regarding the use of forfeitures should reach out to a member of Aon's Retirement Legal Consulting & Compliance group for assistance in assessing their current plan provisions and for making suggested changes to such terms to mitigate the risk of future litigation.

IRS Issues Clarifying Guidance on SECURE 2.0

by Tom Meagher

While employers may have additional time to adopt plan amendments to comply with SECURE 2.0, many of the provisions are being administered presently. In the absence of clear guidance, many employers have been wondering how to interpret many of the SECURE 2.0 provisions, until now.

On December 20, 2023, the Internal Revenue Service (IRS) released Notice 2024-2 (Notice) to provide guidance in the form of questions and answers (or Q&As) with respect to certain provisions of SECURE 2.0. While the guidance is of course helpful, it does not answer all of the questions that plan sponsors have in terms of complying with SECURE 2.0.

While there are a number of Q&As relating to small employer issues (e.g., credits for small employers), for larger employers, the topics of most interest include:

- **401(k) Plans in Place Prior to SECURE 2.0.** The Notice clarifies when a 401(k) plan is considered to be a pre-enactment cash or deferred arrangement for purposes of determining whether it is required to satisfy the automatic enrollment requirements of SECURE 2.0.
- **Financial Incentives for 401(k) Plan Participation.** SECURE 2.0 relaxed the contingent benefit rule (precluding employers from conditioning benefits (other than matching contributions) on an employee's election to defer) to permit de minimis financial incentives to be provided. The Notice indicates that an amount (not paid from plan assets) which does not exceed $250 will be considered a de minimis financial incentive and will not violate the contingent benefit rule.
- **Terminally Ill Plan Distributions.** The Notice addresses the exception to the 10% additional tax that may otherwise apply to a plan distribution to a terminally ill individual. SECURE 2.0 indicates that the 10% early distribution tax will not apply to the extent that the reasons for the distribution have been certified by a physician, and the certification indicates that the participant has an illness or physical condition that can reasonably be expected to result in death in 84 months or less. The Notice defines who is considered a "physician" for purposes of the certification and sets forth the information required to be included. While the inclusion of a terminally ill distribution provision in a 401(k) (or 403(b)) plan is optional, to the extent that the plan does not permit terminally ill distributions, the employee is permitted to treat an otherwise permissible in-service distribution as a terminally ill distribution for purposes of avoiding the 10% additional tax penalty when filing his or her tax return (with appropriate documentation).
- **Cash Balance Plans.** The Notice also provides guidance with respect to the SECURE 2.0 special rule for applying the anti-backloading rules for applicable defined benefit plans and addresses cash balance plans that provide for pay credits to participants that increase with a participant's age or service and provide for a variable interest crediting rate. Only certain changes to the plan's interest crediting rate may be made pursuant to SECURE 2.0, and these changes must be in accordance with the Notice.
- **Correcting Certain Administrative Errors.** The Notice also provides guidance for self-correcting a plan or arrangement so that it will not fail to be treated as qualified solely by reason of a reasonable administrative error made (i) in implementing an automatic enrollment or automatic escalation feature with respect to an eligible employee (or an affirmative election made by an eligible employee covered by such a feature); or (ii) by failing to afford an eligible employee the opportunity to make an affirmative election because the employee was improperly excluded from the plan.
- **Matching and Nonelective Roth Contributions.** The Notice provides significant guidance on how to structure and operate a Roth contribution program involving elective, matching, and nonelective contributions that should be very helpful to employers considering adding such features to their plans.
- **Plan Amendment Timing.** From an amendment timing standpoint (for both required and discretionary plan amendments under SECURE 2.0 and certain prior legislation), the Notice indicates that a retirement plan or annuity contract will be treated as being operated in accordance with the terms of the plan provided that, for a qualified plan that is not a governmental plan or an applicable collectively bargained plan, the plan amendment deadline is December 31, 2026; to the extent that a plan is an applicable collectively bargained plan, the plan amendment deadline is December 31, 2028; and to the extent that the plan is a governmental plan, the plan amendment deadline is December 31, 2029. Special timing rules apply to when cash balance plan amendments must be adopted to take advantage of the relief under the Notice.

The information in Notice 2024-2 provides significantly more detail than we have provided above and should prove quite helpful to plan sponsors looking to address compliance with SECURE 2.0, both in terms of required as well as discretionary provisions.

Please do not hesitate to reach out to your Aon consultant if you have any questions in connection with complying with SECURE 2.0 requirements.

No More Blues: Guidance on Recent Legislation

by Linda M. Lee and Susan Motter

On December 21, 2023, the U.S. Joint Committee on Taxation released its much anticipated "Blue Book" that provides in-depth information and explanations for the legislation enacted in the 117th Congress. While the Blue Book covers eight tax bills that became law, of greatest interest for plan sponsors is SECURE 2.0 which significantly impacted retirement plans and was enacted as part of the Consolidated Appropriations Act, 2023. Most notably, this Blue Book is significant since it is a source for legislative history and intent related to SECURE 2.0 as well as an interim guide as we await formal SECURE 2.0 guidance.

The Blue Book coverage of SECURE 2.0 provides some helpful clarification of the new law and includes information explaining several important topics:

- Expanding automatic enrollment in retirement plans, modifying pooled employer plans, and increasing the age for the required beginning date for mandatory distributions;
- Promoting the saver's credit for qualified retirement savings contributions to certain retirement accounts;
- Removing required minimum distribution barriers for life annuities;
- Simplifying and clarifying retirement plan rules as they relate to the recovery of retirement plan overpayments, retirement savings lost and found, and updating the dollar limit for mandatory distributions;
- Applying technical and other amendments to retirement plans; and
- Revenue provisions providing, among other things, hardship withdrawal rules for 403(b) plans, elective deferrals, and optional treatment of employer matching and nonelective contributions.

What we have included is a brief summary of the Blue Book's coverage of SECURE 2.0. Please reach out to Aon's Retirement Legal Consulting & Compliance group to discuss how this and other enacted legislation may impact your retirement plans.

It's Been a Long-Term, Part-Time Coming for Employees: Who?

by Daniel Schwallie

Proposed regulations regarding long-term, part-time employee (LTPTE) rules were published on November 27, 2023. Due to the technical nature of the proposed LTPTE rules, this edition of the *Quarterly Update* covers these proposed rules in two articles. This first article starts with a summary of who is and is not an LTPTE, except as applied to SIMPLE Plans, and closes with issues related to the tracking of LTPTEs. The companion article, which immediately follows, summarizes the proposed rules regarding nondiscrimination, coverage, and top-heavy testing.

Written or electronic comments on the proposed rules were required to be submitted by January 26, 2024, and a public hearing has been scheduled for March 15, 2024. Prior to the date the proposed rules are finalized and published, taxpayers may rely upon the proposed rules.

Identifying LTPTEs

- **Who Is an LTPTE?** The proposed rules apply to an employee who is eligible to make elective deferrals (which include Roth contributions) to a 401(k) plan solely because the employee completes at least 500 hours of service in each of two consecutive 12-month periods or, with respect to a plan year beginning before 2025, three consecutive 12-month periods; provided that the employee has attained age 21 by the end of the last of those 12-month periods. However, an LTPTE does not include collectively bargained employees, nonresident aliens who receive no U.S.-source income from the employer, or any other employees described in Section 410(b)(3) of the Internal Revenue Code (Code).

- **Who Is Not an LTPTE?** If an employee attains age 21 in a 12-month period in which the employee completes fewer than 500 hours of service, the employee does not become an LTPTE at the end of that 12-month period, even if that employee had previously completed two (or three) consecutive 12-month periods. The proposed rules also provide that an employee who becomes eligible to participate in elective deferrals by reason of having completed any other permissible service requirement under the terms of the plan (including immediate participation) would not be an LTPTE, and the proposed rules would not apply to the employee, even if classified as a part-time employee.

  A former employee who previously was eligible to participate in a 401(k) plan (but not as an LTPTE) and who is rehired, generally would be immediately eligible to again participate based on the employee's prior service with the employer. However, such former employee would not be eligible to participate as an LTPTE upon rehire, unless the former employee's eligibility service is disregarded under the regular break in service rules for nonvested participants. Furthermore, an employee who was immediately eligible to participate or satisfied another permissible service requirement under the terms of the plan prior to an amendment to apply the proposed rules does not become an LTPTE on or after the effective date of the amendment merely because of such amendment.

  The proposed rules permit a 401(k) plan to have eligibility conditions (other than age or service conditions) for an employee to participate in elective deferrals; provided that the conditions do not have the effect of imposing age or service requirements that require an employee to complete a period of service extending beyond the close of the earlier of the LTPTE service requirements or the regular year of service requirement (i.e., 1,000 hours). However, with respect to an employee who otherwise would be eligible to participate as an LTPTE but is excluded due to conditions imposed by the plan, the rules that permit an LTPTE to be disregarded for purposes of nondiscrimination and coverage testing and top-heavy benefits do not apply to that excluded employee. In addition, the right to make elective contributions by an LTPTE who is an eligible non-highly compensated employee (NHCE) may not be restricted in a manner that would not be permitted by Treasury regulations for an NHCE under an actual deferral percentage (ADP) safe harbor plan.

Service Crediting Alternatives to Tracking Actual Hours

The proposed rules permit a plan to credit hours of service using any permitted equivalency method, rather than counting actual hours, as provided by the terms of the plan document. For example, 10 hours of service for each day or 190 hours of service for each month for which the employee would be required to be credited with at least one hour of service would count toward the 500 hours to be an LTPTE. The proposed rules do not permit a plan to use the elapsed time method of crediting service because that method is not based on hours credited during a 12-month period. An employee who was credited with 12 months of service based on elapsed time will have satisfied the year of service requirement irrespective of the proposed rules. The proposed rules do not provide that two consecutive 12-month periods of at least six months of elapsed time service each would satisfy the LTPTE eligibility rule.

- **What Counts As a 12-Month Period?** Generally, all 12-month periods during which an employee is credited with at least 500 hours of service with the employer maintaining the plan are considered to determine whether an employee is eligible to participate as an LTPTE, although 12-month periods beginning before January 1, 2021 are not counted. However, if an employee who is not yet eligible to participate is credited with fewer than 500 hours in a 12-month period, then any prior 12-month periods the employee was credited with at least 500 (but less than 1,000) hours would not be considered for purposes of determining whether the employee is eligible to participate as an LTPTE. If an employee has already become eligible to participate as an LTPTE:
  - The employee's eligibility to participate as an LTPTE would not be affected if the employee is thereafter credited with fewer than 500 hours for one or more 12-month periods.
  - If the employee is rehired, then prior 12-month periods credited with at least 500 hours of service must be counted to determine whether the rehired employee is eligible to participate as an LTPTE.

  An employee's initial 12-month period begins on the first day the employee is credited with an hour of service, although the plan by its terms may switch to plan years beginning with the plan year commencing within the initial 12-month period. Subsequent 12-month periods may then be the plan year regardless of whether the employee is credited with at least 500 (but less than 1,000) hours during the initial 12-month period. If the plan switches to plan years after the initial 12-month period, an employee's initial 12-month period and second 12-month period (i.e., the first plan year) are treated as consecutive 12-month periods for purposes of determining the employee's eligibility to participate as an LTPTE, even though the two periods overlap, and some service may be counted for both periods.

- The LTPTE must become eligible to make elective deferrals by the earlier of:
    - The first day of the first plan year beginning after the date the LTPTE completed two consecutive 12-month periods of at least 500 hours of service and attained age 21 by the close of the last of those two 12-month periods; or
    - The date six months after the date the LTPTE completed two consecutive 12-month periods of at least 500 hours of service and attained age 21 by the close of the last of those two 12-month periods.
- **What Counts As Vesting Service?** Generally, all 12-month periods during which an employee is credited with at least 500 hours of service with the employer maintaining the plan are considered for purposes of determining whether an employee is vested as an LTPTE. However, a plan may designate any 12-consecutive-month period that is not otherwise prohibited for purposes of determining vesting service of an LTPTE (or former LTPTE) and may exclude any such 12-month period beginning before January 1, 2021. Under the proposed rules, a one-year break in service is incurred if at least 500 hours (rather than more than 500 hours) are not completed in such 12-month period.
- **Who Is a Former LTPTE?** A former LTPTE is an employee who became eligible to participate in the plan as an LTPTE and subsequently ceased to be an LTPTE because the employee either (i) satisfied the regular one year of service requirement; or (ii) ceased to satisfy the plan's eligibility conditions other than age or service conditions and has not subsequently satisfied those conditions during a plan year.

  The change to former LTPTE status takes effect as of the first day of the first plan year beginning after (i) or (ii) above occurs. However, an employee to whom (ii) applies generally will return to LTPTE status as of the first day of the plan year during which the employee again satisfies the plan's eligibility conditions other than age or service conditions, unless the employee also is a former LTPTE by reason of (i) above.

Tracking LTPTEs and Other SECURE 2.0 Changes

It is possible that some part-time employees will be eligible to make elective deferrals in 2024 under the three-year rule of the SECURE Act. Sponsors of 401(k) plans that do not provide for immediate eligibility (nor some other eligibility criteria more generous than the proposed rules) should review their administration for consistency with the proposed rules, which can be relied upon currently. Furthermore, part-time employees may become eligible under the two-year rule of SECURE 2.0 as soon as the following year. Plan sponsors may want to consider a plan design change that avoids tracking who is an LTPTE.

Plan sponsors will need to work with their recordkeepers and plan advisors to ensure that their plans comply with the proposed rules. Aon can assist plan sponsors in complying with the proposed rules.

It's Been a Long-Term, Part-Time Coming for Employees: Testing 1, 2, 3

by Dan Schwallie

The preceding article summarizes who is and is not an LTPTE under the proposed rules and closes with issues related to the tracking of LTPTEs. What follows is a summary of the proposed rules with respect to excluding LTPTEs from nondiscrimination, coverage, and top-heavy testing, except as applied to SIMPLE Plans.

Excluding LTPTEs from Testing

- **Matching and Nonelective Contributions Are Optional.** Neither nonelective nor matching contributions are required to be made on behalf of an LTPTE, even if those contributions are made on behalf of other employees eligible for a 401(k) plan. Even if no matching or nonelective contributions are provided under the plan, elective deferrals will require testing in nongovernmental plans.
- **Nondiscrimination and Coverage Testing.** An employer may elect to exclude LTPTEs from application of the nondiscrimination requirements of Section 401(a)(4) of the Code, the actual deferral percentage (ADP) test, the traditional or qualified automatic contribution arrangement (QACA) ADP safe harbors, the actual

contribution percentage (ACP) test, the traditional or QACA ACP safe harbors, and the minimum coverage requirements of Section 410(b) of the Code. Such election must apply for purposes of all nondiscrimination and coverage testing provisions listed in the prior sentence, to the extent the provision otherwise would apply to the plan and apply with respect to all LTPTEs eligible to make elective deferrals to the plan. Note, however, that the LTPTE provisions regarding nondiscrimination and coverage testing cease to apply to any employee as of the first plan year beginning after the plan year in which the employee satisfies the regular one year of service requirement, but the LTPTE vesting rules continue to apply to the employee.

If LTPTEs are excluded for purposes of determining whether a plan satisfies an ADP or ACP safe harbor, then the plan will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is an LTPTE (or makes a nonelective or matching contribution that would not satisfy the safe harbor contribution requirements on behalf of the LTPTE). The exclusion of LTPTEs for purposes of the ADP and ACP safe harbors must be stated in the plan document (along with nondiscrimination and coverage requirements that otherwise apply to the plan) and satisfy the plan year requirements unique to ADP and ACP safe harbor plans.

If a plan is not intended to satisfy an ADP or ACP safe harbor, an election to exclude LTPTEs from any of the nondiscrimination and coverage requirements that otherwise apply to the plan need not be set forth in the plan document. However, the plan document must contain enabling language that authorizes the ability to elect to exclude LTPTEs from application of such requirements or else they cannot be excluded.

- **Exclusion from Top-Heavy Requirements.** A plan sponsor can elect to exclude LTPTEs for purposes of determining whether the plan satisfies top-heavy vesting and benefit requirements, but such election does not apply for purposes of determining whether a plan is a top-heavy plan. The employer may elect to exclude LTPTEs, whether or not the employer makes nonelective or matching contributions on behalf of LTPTEs under the plan and whether or not such contributions satisfy those requirements. This election is separate from the election regarding nondiscrimination and coverage testing.
- **Age-50 Catch-Up and Roth Contributions.** An LTPTE is a catch-up eligible participant for a taxable year if the employee is eligible to participate in a 401(k) plan and the employee's 50th or higher birthday would occur before the end of the employee's taxable year. An LTPTE is disregarded for purposes of the universal availability requirements applicable to age-50 catch-up contributions if the employer elects to exclude LTPTEs from making such catch-up contributions.

  A 401(k) plan may permit LTPTEs to make designated Roth contributions. If the employer elects to exclude LTPTEs for purposes of nondiscrimination and coverage testing, as discussed above, LTPTEs are disregarded for purposes of determining whether the right to designate elective deferrals as Roth contributions is a right, that discriminates in favor of highly compensated employees.
- **Application of Proposed Rules to Governmental and Church 401(k) Plans.** The proposed rules would apply to a governmental plan (as defined in Section 414(d) of the Code), such as a grandfathered 401(k) plan, and a nonelecting church plan (as defined in Section 414(e) of the Code). Comments were specifically requested with respect to the application of the proposed rules to such a governmental plan or church plan.
- **Application of Proposed Rules to 403(b) Plans.** The proposed rules appear to apply only to qualified cash or deferred arrangements (or CODAs) under a 401(k) plan. Presumably, the 403(b) plan regulations will be amended to reflect the proposed rules for 403(b) plans subject to similar rules under ERISA.

Testing LTPTEs and Other SECURE 2.0 Changes

Sponsors of 401(k) plans may need to consider whether or not to exclude part-time employees from nondiscrimination, coverage, and top-heavy testing or, perhaps, consider changes to plan eligibility so there are no LTPTEs. For instance, provide for immediate eligibility or some other eligibility criteria that preclude creation of LTPTEs under the plan.

Plan sponsors should work with their recordkeepers and plan advisors to ensure that their plans comply with the proposed rules as well as other SECURE 2.0 changes. Aon has a well-considered **Action Plan** that can help plan sponsors make thoughtful decisions and timely implement those decisions to ensure successful SECURE 2.0 outcomes. As part of this process, plan sponsors may want to consider overall plan design and benchmark plan competitiveness. Benchmarking a plan's recordkeeper, reviewing overall plan and payroll compliance, and updating participant communications and other disclosures can also be an important step. Some plan sponsors may even want to consider a pooled employer plan (or PEP) as an alternative to facilitate SECURE 2.0 implementation and compliance for their defined contribution plans. Aon is prepared to assist plan sponsors with its multidisciplinary expertise in legal, actuarial, administrative, and fiduciary matters.

New IRS Guidance for Pre-Approved Plans

by Susan Motter

On November 21, 2023, the Internal Revenue Service (IRS) released Revenue Procedure (Rev. Proc.) 2023-37 which combines, conforms, clarifies, and updates rules for qualified pre-approved and 403(b) pre-approved plans which were previously set forth in a myriad of prior Revenue Procedures. While Rev. Proc. 2023-37 outlines rules for pre-approved plans for both pre-approved plan providers (Providers) and employers that adopt the pre-approved plans (Adopting Employers), this article will not cover the rules applicable to Providers.

Why Are Pre-approved Plans of Interest to Employers?

As a consequence of the IRS's reconfiguration and reduction in scope of its determination letter program in recent years, many employers have evaluated, and continue to evaluate, whether they should restate their qualified or 403(b) plans using pre-approved plan documents (e.g., volume submitter or prototype). By "pre-approved" we mean a plan document whose terms have been reviewed and approved by the IRS. This pre-approval can be important to employers that may have individually designed plans, the terms of which have not been recently reviewed by the IRS and for which IRS approval is no longer available.

A Provider (typically a financial institution or law firm) drafts and maintains the pre-approved plan document; submits the document to the IRS for approval in the form of an IRS opinion letter that the document satisfies the legal requirements for IRS approval; and offers the pre-approved plan to employers for adoption. By converting to, and adopting, a pre-approved plan, an Adopting Employer can rely on the pre-approved plan's IRS opinion letter, and the Provider would be responsible for maintaining and resubmitting the plan document to the IRS from time to time for an updated opinion letter.

In addition, an Adopting Employer that adopts a pre-approved plan may choose to make minor modifications to reflect the Adopting Employer's chosen plan design and may choose to submit a determination letter application on Form 5307 (Application for Determination for Adopters of Modified Nonstandardized Pre-Approved Plans) to the IRS for an individual favorable determination letter on these modifications.

Determination Letter Submissions and Plan Amendments

Rev. Proc. 2023-37 provides detailed opinion letter submission procedures for Providers, as well as detailed determination letter submission procedures to be used by Adopting Employers.

In addition, Rev. Proc. 2023-37 details the amendment adoption deadlines for Providers and Adopting Employers of pre-approved plans. For nongovernmental pre-approved plans, an interim amendment will be timely adopted, if applicable, by an Adopting Employer if it is adopted by the last day of the second calendar year that begins after the issuance of the required amendments list by the IRS in which the change in qualification requirements or 403(b) requirements appears. A discretionary amendment, however, is timely adopted if the Adopting Employer adopts the amendment by the end of the plan year in which the amendment is operationally put into effect. Governmental pre-approved plans have slightly different amendment deadlines for interim and discretionary amendments, taking into consideration the legislative session of the applicable legislative body with the authority to amend the plans.

How Aon Can Help

Employers have a number of important issues to consider when adopting and maintaining their qualified or 403(b) plans for compliance with all applicable legal requirements. Aon's Retirement Legal Consulting & Compliance consultants can assist you in evaluating whether to maintain or convert your individually designed plan to a pre-approved plan, as well as provide expertise with the preparation and filing of a determination letter submission and the timely adoption of plan amendments for your pre-approved plan.

Quarterly Roundup of Other New Developments

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

Retirement Equity and Inclusion Strategies

Research shows retirement savings disparities for workers from racial and ethnic minorities and the LGBTQ+ community. A report from the Government Accountability Office revealed that more white households held a retirement account balance than that of any other race, and those accounts held almost double the median balance of households of other races.[1] At the same time, the number of non-white U.S. workers has doubled since 1979 and is currently one-quarter of the workforce, and over 5% of U.S. adults identify as LGBTQ+.[2]

Employers searching for ways to improve retirement readiness for underserved participants have a number of options to consider:

- Adding auto-enrollment and auto-escalation to plans to get participants over the hurdle of choosing to enroll;
- Working with vendors to provide financial literacy programs to employees to increase engagement and understanding of the retirement savings process;
- Embedding financial wellness features in the plan design, such as after-tax contributions, emergency funds in a sidecar account, or penalty-free low-level withdrawals;
- Creating communication strategies that are inclusive of diverse populations;
- Updating the contribution formulas to incorporate non-elective contributions, possibly targeted to more vulnerable populations; and
- Facilitating auto-portability so participants leaving for other employment don't cash out their retirement savings.

Utilizing plan metrics and a review of your existing plan provisions can be a great starting point in determining what solutions might be a good fit for your employees. Talk to your Aon Consultant about how Aon can help you analyze your options.

DOL Reminds Plan Sponsors and Participants to Search Under the Couch Cushions

The Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA) has reminded participants to check for retirement assets they may have earned from previous employment. The EBSA posted a one-minute YouTube video[3] highlighting that employers may have plan participants who own forgotten retirement assets from their earlier working lives.

In the video they encourage individuals who apply for Medicare and other Social Security benefits to respond to the "Potential Private Retirement Benefit Information" notice they receive. Responding to the notice can help employees find old benefits and claim them. Questions regarding the notice can be handled by navigating to EBSA.gov utilizing the "Ask a Question" button, or by calling (866) 444-EBSA.

In addition, to the extent helpful, SECURE 2.0 directs the DOL to create a nationwide retirement plan database (retirement savings lost and found) with the hopes of helping former employees or their beneficiaries locate plan benefits. SECURE 2.0 requires the database to be set up no later than December 29, 2024.

Retirement Income: First Step

Retirement income continues to be a hot topic for defined contribution (DC) plan sponsors. Many plan sponsors are discussing and evaluating retirement income solutions for their participants, but there is still limited implementation. As previously discussed in the **Second Quarter 2023** edition of our *Quarterly Update*, there are many variations and considerations when thinking about how to generate retirement income in your DC plan. While many participants and plan sponsors are understanding the importance of generating income in retirement, the process to determine the best course of action should be considered.

For plan sponsors that have not started the process to consider retirement income, a first step would be to consider the philosophy of the retirement plan. Is the DC plan exclusively a savings plan for wealth

[1] U.S. Government Accountability Office, Older Workers: Retirement Account Disparities Have Increased by Income and Persisted by Race Over Time, GAO-23-105342 (July 27, 2023)

[2] Improving retirement readiness for underrepresented groups, Alight, Feb. 25, 2022

[3] U.S. Department of Labor, "Potential Private Retirement Benefit Information," YouTube video, 1:00, https://www.youtube.com/watch?v=dT4nNRRq0qs

accumulation, is the DC plan a savings plan with aspects that may appeal to retirees, or is the DC plan a retirement plan with a focus on both accumulation and decumulation in retirement? Once a plan sponsor philosophically decides that its DC plan is a retirement plan, Aon Investment USA Inc. consultants can guide you on the journey to consider and implement a retirement income solution.

Fiduciary Fast Facts

- **Aon's Pooled Employer Plan (PEP)[4] Reaches $2 Billion in Assets and Commitments.** After initial inception in early 2021, Aon's PEP reached $2 billion in assets and commitments as of November 28, 2023 which doubled the asset size during the last year. The Aon PEP includes more than 70 employers providing 401(k) benefits to over 5`0,000 employees, helping those employers shape retirement decisions for plan participants. The first article in this edition of the *Quarterly Update* provides our readers with case studies, survey results, and an update on PEPs for 403(b) benefits.
- **Changes to the Form 5500 Services Filing Extension.** In November 2023, the Internal Revenue Service (IRS) announced changes to the process to file an extension for the Form 5500. In order to file an extension, an employer must file Form 5558. Beginning January 1, 2024, Form 5558 can be electronically filed using the DOL EFAST2 website or filed with the IRS using a paper Form 5558.
- **Pension Benefit Guaranty Corporation (PBGC) Publishes New Mortality Tables for 2024.** The PBGC updated the mortality tables for 2024 valuations under Sections 4044 and 4050 of the Employee Retirement Income Security Act of 1974 (ERISA). These tables are used to calculate withdrawal liability and transfer amounts under the missing participants program.
- **Bill Aims to Allow Younger Workers to Participate in ERISA Plans.** Two senators introduced a bipartisan bill on November 15, 2023 that will allow participants under the age of 21 greater access to employer-sponsored retirement plans. The bill, The Helping Young Americans Save for Retirement Act, if enacted, would also remove barriers that discourage offering these benefits to younger workers.

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, plan fiduciaries, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans, among others. DC 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 Estée Lauder (settled for $975K and other remedies); General Electric (settled for $61M, pending approval); and Montefiore Medical Center (dismissed). It should be noted that the settlements of these litigation matters do not necessarily mean that the plan sponsors or fiduciaries were at fault or did not have defensible positions. Many factors may go into a plan sponsor's or fiduciary's decision to settle plan-related litigation.

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. To the extent helpful, Aon has a team that can review your plan governance as it applies to plan fees, investments, and decision-making processes.

Aon will continue to watch for the outcome of these lawsuits, but as they resolve feel free to reach out to Aon's Retirement Legal Consulting & Compliance group. Their contact information is on page 15.

New Retirement Plan Cases

Lawsuits in the fourth quarter were mostly the same old song, but with one new note. 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. As we have noted previously, litigation involving a plan or its fiduciaries does not necessarily mean that they have engaged in any improper conduct. Excessive fee cases were brought against Whole Foods and Tyson Foods. A fund performance case was brought against Bed Bath & Beyond. The DOL sued McCullough, Campbell & Lane LLP for failure to terminate a plan. In a change of pace, lawsuits were filed against Thermo Fisher Scientific Inc. and Intuit Inc. challenging the method of forfeiture utilization in the plans.

Please see the applicable Disclosures and Disclaimers on page 16.

[4] The Aon PEP is provided by Aon Consulting, Inc. which is a separate business unit from Aon Investments USA Inc. Investment advice and ERISA 3(38) investment services are provided by Aon Investments USA Inc.

Hot Topics: Recent Aon Publications

Aon's 2024 Compliance Calendar

Plan sponsors must keep their qualified retirement and health and welfare plans in compliance with all relevant legal, tax, and ERISA obligations. Aon publishes an annual Compliance Calendar (Calendar) to alert plan sponsors, fiduciaries, and other interested parties of some of the more significant Internal Revenue Service (IRS), Department of Labor (DOL), and other federal regulatory agency due dates and deadlines. The Calendar is based on a January 1 through December 31 calendar plan year.

Some topics addressed in the Calendar include:

- Timing of participant communications and notices (e.g., summaries of material modifications, pension benefit statements, and summaries of benefits and coverage);
- Changes to health plan reporting obligations;
- Plan contribution due dates; and
- Filing dates for certain IRS and DOL forms (e.g., Forms 5500, W-2, 1094-B, 1095-B, and 1099-R).

Click **here** to access a complimentary copy of the Calendar. Please contact your Aon consultant if you have any questions about the Calendar.

The Plan Sponsor's Guide to PEPs

The Plan Sponsor's Guide to PEPs is a comprehensive, interactive guide provided by *Pensions and Investments*, the leading publication for retirement plan buyers. The Guide features the Aon PEP and provides in-depth information and video content on these important topics related to PEPs:

- What is a PEP?
- The evolution of pooled plans
- Evaluation and selection
- Responsibilities for employers
- Implementation and monitoring
- The unique advantages of the Aon PEP

Click **here** to access this guide.

Global Pension Risk Survey - U.S. Findings Report Now Available

Aon's 2023 Global Pension Risk Survey - U.S. Findings Report is now available. The Global Pension Risk Survey is one of Aon's signature pieces of thought leadership and has been taking place for well over a decade. The results provide key insights into defined benefit pension plan risk and investment strategies.

Click **here** to read this survey.

Recent Publications

Parallel or Parallax? ERISA and the Internal Revenue Code|
by Daniel Schwallie
Journal of Deferred Compensation (Spring 2024)

Many of the tax-qualification requirements of Section 401(a) of the Internal Revenue Code (Code) have parallel provisions in the Employee Retirement Income Security Act of 1974 (ERISA). However, some retirement plans are either subject to the Code but not ERISA or are subject to ERISA but not the Code. And even then, only some of the provisions of the Code or ERISA might apply. This article considers those plans.

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

Proposed Regulations on Long-Term Part-Time Employees
by Daniel Schwallie
Journal of Deferred Compensation (Spring 2024)

This article describes in some detail the proposed long-term, part-time employee Treasury regulations published November 27, 2023, replete with footnote references to sections of the proposed regulations and their preamble.

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

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AON

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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