Washington Update
Southwest Benefits Association
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Congress

Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act," H.R. 1994)

- Background
  - Passed on May 23, 2019 by the House of Representatives on a vote of 417-3.
  - The passage of the SECURE Act marks significant progress for retirement legislation after years of negotiations among lawmakers and various retirement industry groups.
  - The bill still faces hurdles in the Senate that could delay or prevent enactment.

Pooled Employer Plans (Section 101)

- Would permit unrelated employers (i.e., those without so-called "commonality") to pool their resources by participating in a new type of MEP, provided certain conditions are met.
- Creates new plans – Pooled Employer Plans – would be treated as a single plan under the Employee Retirement Income Security Act of 1974 ("ERISA").
- Overrides Department of Labor ("DOL") guidance, which generally prevents unrelated employers from participating in a single plan.
- Amends the Internal Revenue Code of 1986 (the "Code") to provide a procedure for ensuring that one employer's qualification problem would not lead to the disqualification of an entire Pooled Employer Plan (and certain association-sponsored plans).
- Effective for plan years beginning after December 31, 2020.

Lifetime Income Disclosure (Section 203)

- Requires employers to provide defined contribution plan participants with an estimate of the amount of monthly annuity income the participant's balance could produce in retirement (if benefits were received in a qualified joint and survivor annuity and a single life annuity).
- Included on participants' annual benefit statements, and employers and plan fiduciaries will not have fiduciary responsibility for providing estimates in accordance with DOL assumptions and guidance.
- Effective upon DOL's publication of an interim final rule or other related publications.

Fiduciary Safe Harbor for Selection of Lifetime Income Provider (Section 204)

- Creates a new fiduciary safe harbor for employers who opt to include a lifetime income investment option in their defined contribution plan.
- In 2008, DOL published a safe harbor for annuity selection in defined contribution plans, but many view the rules as too challenging to provide meaningful relief, particularly given the difficulty in evaluating the financial capability of the insurer.
- Specifies the measures that a plan fiduciary may take with respect to the selection of an insurer to comply with his or her fiduciary duties.
- Fiduciary deemed to have satisfied its fiduciary requirements with respect to the financial capability of the insurer if the fiduciary receives certain representations from the insurer as to its status under and satisfaction of state insurance laws.

Portability of Lifetime Income Options (Section 109)

- Permits participants to make direct trustee-to-trustee transfers (or transfer annuity contracts) to an eligible employer plan/IRA of "lifetime income investments" that are no longer authorized to be held as investment options under a qualified defined contribution, 403(b) plan, or governmental 457(b) plan, without regard to any plan restrictions on in-service distributions.
- Effective for plan years beginning after December 31, 2019.

Post-Death Required Minimum Distribution Rules (Section 401)

- Current post-death required minimum distribution ("RMD") rules vary depending on whether an employee or IRA owner dies on or after or before the required beginning date and whether the employee or IRA owner has a designated beneficiary.
- Changes the post-death RMD rules for non-defined benefit plans to generally require that all distributions after death (for distributions to a designated beneficiary) be made by the end of the tenth calendar year following the year of death.
- The 10-year distribution requirement generally does not apply if the designated beneficiary is an eligible beneficiary, which is defined as any beneficiary who, as of the date of death, is a surviving spouse, disabled, or chronically ill, or is an individual who is not more than 10 years younger than the employee (or IRA owner), or is a child of the employee (or IRA owner) who has not reached the age of majority.
- Generally effective for distributions by reason of a participant's death after December 31, 2019 (December 31, 2021 for governmental plans).
- Plan amendments reflecting these changes are required by the last day of the first plan year beginning after December 31, 2021 (December 31, 2023 for governmental plans).

Increase in Age for Required Beginning Date (Section 114)

- Increases the age at which required minimum distributions must begin from 70 ½ to 72.
- Effective for individuals turning 70 ½ after December 31, 2019.

Child Birth or Adoption Withdrawals (Section 113)

- Permits individuals to take penalty-free withdrawals of up to $5,000 (on a controlled group basis) from their qualified defined contribution, 403(b), and governmental 457(b) plans and IRAs for expenses related to the birth or adoption of a child for up to one year following the birth or legal adoption.
- Subject to certain requirements, these distributions may be recontributed to an applicable eligible retirement plan to which a rollover can be made.
- Effective for distributions after December 31, 2019.

Limits on Loans through Credit Cards (Section 108)

- Prohibits plan loans made through credit cards.
- Effective for loans made after the date of enactment.

Part-Time Employees (Section 112)

- Requires that 401(k) plans permit participation by long-term, part-time employees who work at least 500 hours in three consecutive 12-month periods (and have reached age 21).
- Provides nondiscrimination and top-heavy testing relief with respect to long-term, part-time employees, as no employer contributions are required for these employees.
- For vesting purposes, a year of service is a 12-month period during which the part-time employee earned at least 500 hours of service.
- Effective for plan years beginning after December 31, 2020.

Increase on Limit on Automatic Enrollment QACA Safe Harbor Default Rate (Section 102)

- The automatic enrollment safe harbor to the 401(k) plan nondiscrimination rules imposes a 10 percent limit on default automatic contribution rates.
- Increases this limit to 15 percent (10 percent cap during the participant's first year of participation).

Nonelective 401(k) Safe Harbor Changes – Applicable To Traditional and QACA Safe Harbors (Section 103)

- Makes the following changes to the rules that apply to nonelective contribution 401(k) safe harbor plans: (1) eliminates the safe harbor notice requirement with respect to nonelective 401(k) safe harbor plans; (2) permits a plan to be amended to become a nonelective 401(k) safe harbor plan at any date before the 30th day before the close of the plan year; and (3) permits a plan to be amended to become a nonelective 401(k) safe harbor plan after the 30th day before the close of the plan year if the plan is amended to provide for a nonelective contribution of at least four percent of compensation for all eligible employees and the amendment is made by the last day for distributing excess contributions for the plan year (i.e., generally by the close of the following plan year).
- Effective for plan years beginning after December 31, 2019.

Increased Penalties for Failure to File Retirement Plan Returns (Section 403)

- Increases the Code penalties for failing to file a Form 5500 to $105 per day (but not to exceed $50,000).
- Increases the penalties for failing to provide a required withholding notice to $100 per day (but not to exceed $50,000 maximum penalties per year). It also would increase penalties for failures to file a registration statement for deferred vested benefits or file a required notification of change generally to $10 per day (but not to exceed $50,000 and $10,000, respectively).
- Effective for returns due after December 31, 2019.

Increase in Penalty for Failure to File (Section 402)

- Increases the Code penalty for a late tax return to the lesser of $400 (adjusted for inflation) or 100 percent of the amount required to be shown as tax on the return.
- Effective for returns with due dates (including extensions) after December 31, 2019.

Nondiscrimination Flexibility for Frozen Plans (Section 205)

- Provides nondiscrimination, minimum coverage, and 401(a)(26) relief with respect to benefit accruals and benefits, rights and features for a closed class of participants under a defined benefit plan that has been closed for new hires, provided that the plan satisfies certain requirements.
- Change is particularly important to "soft" frozen plans, with more mature, highly compensated participant populations.
- Generally effective upon enactment.

Legislation: Medicare-for-all

- Four general categories

(1) Medicare-for-all, single national health insurance program

(2) New public plan option, based on Medicare, offered through ACA marketplace

(3) Medicare buy-in option for older individuals not yet eligible for current Medicare

(4) Medicaid buy-in options that states can offer through ACA marketplace

Legislation: Strengthen ACA

- House bills
  - Funding for state reinsurance programs
  - Funding to assist states to run their own exchanges
  - Funding for ACA navigators, outreach, and marketing
  - Reverse 1332 guidance and STLDI rule

Legislation: Strengthen ACA

- Senate bill
  - Require STLDI plans to meet ACA standards
  - Block AHPs
  - Guarantee CSR payments
  - Require ACA plans to cover 80% OOP costs
  - Limit premiums to 8.5% of income

Legislation: Repeal/replace ACA

- Sen. McConnell: No interest in pursuing repeal/replace
- Unlikely Republicans will coalesce around ACA replacement strategy in near future

Legislation: Surprise billing

- Several states have enacted surprise billing legislation
- No current federal law
- Bills approved:
  - House Energy and Commerce Committee approved legislation to address surprise medical bills; the legislation includes a benchmark rate for certain OON providers, with the ability to appeal to arbitration
  - Senate Health, Education, Labor and Pensions (HELP) Committee approved legislation that favors a benchmark rate for certain OON providers

Legislation: Drug Pricing

- Several states enacting laws to address drug prices, affordability and access, including:
  - Programs to allow importation
  - Establish state agency to review drug costs and limit price increases
  - Price transparency
- Congress debating a number of bills that target drug costs
  - Speaker Pelosi announced release of drug pricing bill
  - Senate Finance Committee approved legislation that caps seniors' out-of-pocket costs in Medicare Part D, limits price increases to the rate of inflation, and limits price increases in Medicare Part B

Department of Labor

Missing Participants

- Area of enforcement/focus of investigations
- Sponsor & service provider frustration
- Pension plans and defined contribution plans
- Focus on-
  - Delayed distributions between NRD and RBD
  - Search methods
  - Restoration of “uncashed checks”/other payments
  - Second guessing application for FAB 2014-1
  - PBGC program for defined contribution plan missing participants
- Plan sponsors and service providers have requested updated guidance.
- DOL working on regulation or sub-regulatory guidance

DOL Reaction to Regulation Best Interest ("Reg BI")

- SEC issued final Reg BI on June 5, 2019
- Regulation Provides for a standard of care to recommendations made to retail customers.
- Includes regarding distribution/rollover from plan, trades within IRA account, trades within retail plan account
- General Obligation to act in best interest
  - Disclosure Obligation
  - Care Obligation
  - Conflict of Interest Obligation
  - Compliance Obligation
- EBSA representatives have commented informally that an amendment of the current regulation defining "investment advice" ("Current Rule") appears likely.
- A proposal to amend the Current Rule would likely be accompanied by a new prohibited transaction exemption.
- Proposal package could go to OMB in August.

Association Health Multiple Employer Plans ("AHP")

- June 19, 2018, DOL issues final regulation, "Definition of 'Employer 'under Section 3(5) of ERISA – Association Health Plans" ("Final AHP Regulation") to be effective December 2018. DOL's intent is to broaden access to association multiple employers ("MEPs") that provide health benefits by expanding its interpretation of a "bona fide association."
- On March 28, 2019, the D.C. Federal District Court in New York v. United States Dep't of Labor, No. CV 18-1747, 2019 WL 1410370 (D.D.C. Mar. 28, 2019) blocked key provisions of the Department's final AHP Regulation.
- Court stated the AHP Regulation was an attempt at an "end run" around certain requirements of the Affordable Care Act.
- Court concluded that common geography does not ensure that associations sponsoring a plan share a commonality of interest and, therefore, creates no "meaningful limit" on these associations.
- Court rejected DOL's attempt to expand its own prior guidance on the test for "bona fide association" by allowing a "bona fide association" to exist even if the primary purpose of the association was to provide employee benefits so long as the association had "'at least one substantial business purpose' unrelated to the provision of health care…"
- Court rejected the AHP Regulation's attempt to expand Association MEP access to sole proprietors without employees because their inclusion in such plans is "contrary to the text of ERISA."
- DOL has appealed the decision.
- On May 15, 2019, DOL provided transitional relief in a series of FAQs for AHPs created after the implementation of the final AHP regulation.

Association Retirement Multiple Employer Plans ("ARP")

- DOL issued July 29, 2019 a final regulation intends to broaden access to association MEPs that provide retirement benefits by expanding its interpretation of a "bona fide association."
- DOL included "commonality of interest" provision, "bonafide association" definition, and definition of "employee" found in the AHP final regulation.
- Decision in New York v. United States Dep't of Labor, No. CV 18-1747, 2019 WL 1410370 (D.D.C. Mar. 28, 2019) raises questions whether ARP regulation will withstand a legal challenge.

Electronic Disclosure

- Executive Order – August 31, 2018
- Review to include an exploration of the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens.
- DOL considering amendments to its current electronic delivery safe harbor regulation and other guidance.

DOL Reorganization

- Substantial reorganization
- Attempt to put more control in hands of political appointees, establish uniformity, & produce results
- Impact on policy, enforcement, etc. remains to be seen

Department of the Treasury/IRS

“One Bad Apple” Proposed Regulation

- Treasury and IRS released proposed rules in response to an Executive Order (84 Fed. Reg. 31777 (July 3, 2019)), which provides an exception to the “unified plan” rule, also known as the “one bad apple rule.”
- The proposed regulations provide a detailed road map for a defined contribution MEP to avoid disqualification in the event of a participating employer’s qualification failure (or failure to provide necessary information).
- Threshold Requirements:
  - As a threshold matter, the plan administrator must have established practices and procedures (formal or informal) that are reasonably designed to promote and facilitate overall compliance with applicable Code requirements.
  - The plan document must contain language that describes the procedures that would be followed to address participating employer failures.
- If a compliance issue under the Code arises, proposal requires a number of steps.

"One Bad Apple" Proposed Regulation cont.

- Final deadline for the participating employer to take corrective action could be close to a full year after the first notice is provided.
- MEP plan administrator has 180 days from the date on which the participating employer initiates the spinoff to implement and complete such spinoff, such process could go an additional six months before the matter is finally resolved.
- Possible Shortcomings
  - Elaborate procedures
  - Only applies to defined benefit plans
  - DOL suggests fiduciary issues may arise
  - Involuntary spinoff and termination may be problematic
- Public comments must be filed by October 1, 2019.

162(m) Proposed Regulations

- Code Section 162(m) restricts publicly held corporations' ability to take an income tax deduction for compensation paid to its "covered employees" in excess of $1 million.
- Public Law 115-97 (the "Act") made substantial changes to Section 162(m) of the Code that would make deductibility of such compensation more difficult.
- Generally, the changes to Code Section 162(m) by the Act are applicable for tax years beginning after December 31, 2017.
- The Act provides a "grandfather rule" with respect to compensation provided under a written binding contract which was in effect on November 2, 2017, and which is not materially modified on or after such date.
- Such grandfathered compensation would be subject to the Code Section 162(m) rules prior to the enactment of the Act (including the performance-based compensation exception).
- On August 21, 2018, the Internal Revenue Service ("IRS") issued Notice 2018-68 to, among other things, clarify how to apply the grandfathering provision in the Act.
- Treasury/IRS working on proposed regulations.

Hardship Distribution Final Regulations

- Bipartisan Budget Act of 2018
  - Eliminates the requirement that a participant must first request all available plan loans.
  - Directs Treasury to amend regulations to eliminate the 6-month suspension period.
  - Allows hardship withdrawal to include QMACs, QNECs, 401(k) safe harbor plan contributions, and earnings (including post-1988 earnings on elective deferrals).
- Treasury/IRS issued proposed regulations – Nov. 2018
- Treasury/IRS issued final regulations – Sept. 23, 2019
  - Elimination of 6-month suspension (optional for 2019 plan year, mandatory beginning 1/1/2020)
  - Elimination of requirement to first take plan loans (optional, beginning with 2019 plan year)
  - Expansion of amounts eligible for hardship distributions (optional, beginning with 2019 plan year)
    - Different rule for 403(b) plans
  - Casualty loss expenses not tied to a disaster (optional for 2018 and 2019, mandatory beginning 1/1/2020)
  - New withdrawal reason – disaster event (optional beginning with 2019 plan year)
  - Catch-all "facts and circumstances" test eliminated (optional for 2019 plan year, mandatory beginning 1/1/2020)
  - Timing of plan amendments

Unrelated Business Taxable Income ("UBIT") – Pension Plan Investments

- Tax Cuts and Jobs Act of 2017 (Act), enacted in December of 2017, made major changes to the Code provisions impacting unrelated business taxable income UBIT.
  - Restricts netting of gains and losses where a retirement plan or IRA holds multiple "trades or businesses"
  - Restricts use of post-2017 "NOL" to future income from that trade or business
  - Impacts ability to pension plan trust, VEBA, etc. to avoid UBIT
- IRS Notice 2018-67 (Aug. 20, 2018) provides considerable relief pending future guidance (public comments were due by Dec. 3, 2018)
  - Follow "reasonable, good faith interpretation" of "trade or business"; Safe harbor for 6–digit code listed in Sec. 3.03 of NAICS.
  - Three additional relief rules allow aggregation of multiple trades or businesses held through a partnership(e.g., fund of funds)
- Treasury/IRS working on proposed regulations/other guidance.

Health Regulations: Future prospects?

- Administration issued a number of Executive Orders/regulations designed to limit ACA (2017 & 2018)
- Federal courts have ruled against Trump administration policies at least 65+ times
- 2/3 of cases accuse Trump administration of violating Administrative Procedure Act (APA)
- Administration may be more hesitant to issue future regulations

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