Aon Quarterly Update

Fourth Quarter 2020

Retirement Legal Consulting & Compliance

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Editor's Note

As we approach the close of 2020, we have much to reflect on, and this year indeed will be one that our readers, families, and communities will discuss in the years to come.

In the March Special Edition, we first reported on the game-changing value-added open multiple employer plan or Pooled Employer Plan (PEP). This edition begins with an update on the trends Aon sees in the marketplace, including real interest among employers in participating in PEPs, and reports on proposed rulemaking related to pooled plan providers.

We include an article on the proposed DOL rule intended to clarify an ERISA fiduciary's duties relating to the voting of proxies (and exercise of shareholder rights). And, in a case of déjà vu, we report on the DOL's reinstatement of its 1975 five-part test for determining when a financial institution or investment professional is considered a fiduciary for providing "investment advice" as well as other new guidance.

This edition includes two litigation-related articles. We provide an update related to the actuarial equivalence litigation now involving 12 lawsuits against large pension plans, including two case dismissals. We also discuss the revival of a federal case alleging a breach of fiduciary duties where the plan fiduciaries are alleged to have failed to diversify stock holdings of a former parent company.

Of particular note for plan sponsors wanting to address document and operational errors with their tax-qualified plans without unnecessarily exposing themselves to the IRS, we have an article that may be of particular interest. The article discusses the IRS's anonymous VCP submission process under which a plan sponsor can initially file a VCP submission anonymously and seek potential IRS approval of the plan sponsor's proposed corrections.

The IRS, DOL, and PBGC have been busy issuing new guidance in several areas of interest to our readers. We expand our coverage on the SECURE Act with two articles on DOL and IRS guidance on lifetime income disclosures, qualified birth and adoption in-service distributions, retirement plan participation by long-term, part-time employees, as well as discuss guidance related to the minimum permissible age for in-service distributions under a pension plan. We also include an article on the proposed regulations which clarify the rollover rules for qualified plan loan offset (or QPLO) amounts.

We have several other great articles that we think are timely, helpful, and that you will enjoy.

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.

Susan Motter

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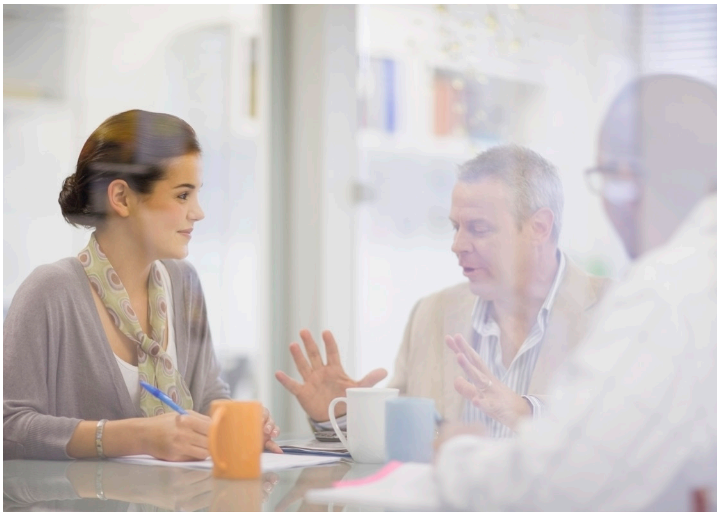
Pooled Employer Plans: As We Learn More

by Beth Halberstadt and Meghan Lynch



There was a lot of press early this year on the value-add for open multiple employer 401(k) plans, or Pooled Employer Plans (PEPs). We believe PEPs will be a true game-changer for small and large businesses and employees' retirement savings. The ability for unrelated employers to join together to create a value-added retirement plan allows employers of all sizes to take advantage of scale and shift operational and fiduciary responsibility, as well as operational expertise, to the pooled plan provider (PPP).

As we get further into 2020, we are also seeing real interest from organizations of all sizes as they better understand the advantages of operational expertise and scale, as well as the risk mitigation in today's increasingly litigious environment. With growing concerns over plan-related litigation risk, the need for dedicated staff and consultants to support the complex regulatory burden of the Employee Retirement Income Security Act of 1974 (ERISA) and compliance with Department of Labor (DOL) rules and regulations has come. For this reason, alternative solutions like a PEP are attractive. What started out in the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) as a desire to make available more cost-effective retirement solutions to small and mid-market businesses, has attracted the attention of large plan sponsors as well.

PEPs will offer some major advantages for sponsors of individually designed plans:

- **Lower plan costs** resulting from the benefits of larger scale including recordkeeping, plan auditor, legal consultants, and investment management fees;
- **Improved and affordable access** to participant tools and services;
- **Reduced staff time commitments** related to plan management, compliance, and governance (i.e., transfer of many tasks such as government filings, plan audits, etc.) allowing companies to repurpose their talent on their core business;
- **Less fiduciary and litigation risk** since the PPP will retain virtually all administrative and fiduciary responsibility for operating the PEP; and
- **Improved governance** (i.e., overall process, speed to act, breadth of discussion) being developed and executed by professional staff dedicated to operating retirement plans as their full-time occupation.

When we surveyed employers about what they found most appealing about a PEP, 37% cited the *outsourcing of responsibility*.[1] We also have seen a potential to lower plan costs for plans ranging in size from $4 million to over $1 billion—the total Aon PEP costs were projected to be lower by more than 40% on average (based on the over 42 plan sponsors that we have modeled as of October 7, 2020).

Cost pressures on recordkeepers are a constant focus, leading many providers to consider outsourcing and/or leveraging offshore resources and technology. This requires more time and effort from plan sponsors to monitor the performance of their plan administration and satisfaction of their participants. In addition, the rise of cybercrime has increased pressure on plan sponsors and recordkeepers to ensure systems (and plan assets) are protected against attacks and other fraudulent actions. These competing demands on capital can slow down or prevent new innovations and capabilities from being offered in the market, especially to small and mid-size employers. Recordkeeper scale continues to be important in this arena as these competing demands between cost and innovation look to be with us indefinitely.

There has been dramatic growth in litigation across the retirement market. Litigation has focused on three main areas: (1) inappropriate investment options; (2) excessive fees; and (3) self-dealing in terms of using plan assets to benefit the plan sponsor. The lawsuits have evolved over time broadening their initial investment focus to broader areas of compliance, investment manager fee structures, and other new areas. This has resulted in plan sponsors having to increasingly focus on tighter governance practices despite being hamstrung by limitations imposed by their administrative vendors. While the largest of plans were always a target, recent data indicates that litigation is now an increasing reality for smaller plans as well.

Plan sponsors are more concerned today about fiduciary liability and, according to a recent *Hot Topics in Retirement and Financial Wellbeing* report by Alight Solutions (based on their annual survey to employers),

[1] Aon surveyed 420 employers during a January 22, 2020 webinar on the SECURE Act. The other appealing factors were: provide greater access 30%; gain scale 20%; rely on experts 13%. While offering a 401(k) or other retirement savings program is table stakes in the employee value proposition for most organizations, there are also risks every plan sponsor must consider. Risks such as cost pressures, if not addressed, could potentially lead to litigation risk; cyber risk is growing daily; and there are potentially new risks post-COVID we haven't identified yet.

61% of respondents believe the threat of plan-related lawsuits is a factor to the organization's ability to deliver new innovations to their plan participants. Growing litigation risk means more emphasis is being placed on plan governance and process documentation. Much like the defensive measures being taken by the medical community, these actions can increase ongoing administrative costs and drain the limited corporate resources that are needed to meet this ever-growing compliance burden.

On August 20, 2020, the DOL issued a Notice of Proposed Rulemaking (NPRM) surrounding PPP registration. While the NPRM is proposed and not final issued guidance, it does give PEP participating employers and PPPs an indication of what's to come and where the DOL stands on PPP transparency. At a high level, the NPRM requires the PPP entity to register with the DOL and the Treasury Department (Treasury) and provide a variety of representations and disclosures—including the new Form PR. Finally, PPPs will have ongoing supplemental filing and reporting requirements for outlined changes—meaning, ongoing PPP transparency is expected at the DOL and Treasury.

What might the new risks or business models/needs be in a post-COVID world? We have already changed the way we shop for everything from groceries to clothes, school supplies, and basic living necessities. The companies that have demonstrated nimbleness and flexibility have continued to grow in this new environment. As we continue to experience the dynamic changes in the way we consume or how and where we are employed (i.e., gig workforce), it will be critical that our retirement plan solutions become equally as nimble and are delivered in a safe and prudent manner.

Many have worked tirelessly for almost a decade to make this retirement benefit option a reality. Aon has brought together a team of retirement plan experts and partner vendors to launch a PEP on January 1, 2021 to meet the evolving needs of employers and employees in these unprecedented times where the risk landscape is changing rapidly. Please contact your Aon consultant to learn more about this new program and set up a discussion.

Please see the applicable Disclosures and Disclaimers on page **15**.

Proxy Voting under ERISA—New Developments for Plan Fiduciaries

by Tom Meagher

On September 4, 2020, the Department of Labor (DOL) published a proposed rule in the Federal Register intended to clarify an ERISA fiduciary's duties relating to the voting of proxies (and exercise of shareholder rights) on individual shares of stock held by employee benefit plans. (The rules do not apply to the voting of proxies involving shares of mutual funds—although the DOL has requested comments as to how the proposed rules might influence plans' exercise of shareholder rights for SEC-registered funds, or their selection of such funds as plan investments.) The proposed rules, if finalized, may require significant changes to a plan's fiduciary analysis and recordkeeping requirements for the voting of proxies involving plan investments.

As a starting point, the proposed regulations maintain the DOL's position that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) and, therefore, fiduciaries are subject to the duties of loyalty and prudence when considering whether to vote proxies. In terms of who has responsibility for the plan's exercise of shareholder rights—including the voting of proxies—such responsibility lies exclusively with the plan trustee except to the extent that either: (i) the trustee is subject to the directions of a named fiduciary or (ii) the power to manage, acquire, or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers.

The DOL notes in the preamble to the proposed regulations that fiduciaries must manage voting rights prudently and for the "exclusive purpose" of securing economic benefits for plan participants and beneficiaries. Such an analysis may or may not require a proxy vote to be cast. (In the DOL's view, there may have been a misunderstanding among plan fiduciaries that they must research and vote all proxies, causing some plans to expend their assets unnecessarily on matters not economically relevant to the plan.)

Under the proposed regulations, a plan fiduciary must vote a proxy where the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan. In undertaking such an evaluation, the proposed regulations indicate that the following factors should be considered: will the proxy vote affect the economic value of the plan's investment; what is the likely impact of the proxy vote in view of the size of the plan's holdings of the issuer; would the proxy vote be viewed as subordinating the financial interests of plan participants to non-pecuniary objectives; has the fiduciary investigated the material facts relating to the proxy vote; will the fiduciary maintain records of proxy voting to support decisions to vote; and has the fiduciary exercised prudence and diligence regarding the use of third parties advising on proxy voting. It, of course, follows that a plan fiduciary must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering the above factors.

The proposed regulations cover certain other proxy-voting areas that should be of interest to plan fiduciaries:

- **Delegation to Investment Managers.** The proposed regulations require plan fiduciaries to monitor the proxy-voting decisions made by their investment managers to ensure such entities are voting, or refraining from voting, in a manner that maximizes investment returns and does not sacrifice economic benefits for non-pecuniary objectives. This may require the plan fiduciary to obtain documentation of the rationale for proxy-voting decisions so that fiduciaries can periodically monitor proxy-voting decisions made by third parties (including use of any proxy advisory firm).
- **Permitted Practices.** In recognizing the time and effort that could be expended in evaluating whether to vote proxies on individual stocks, the DOL's proposed regulations permit proxy-voting policies to establish parameters that may permit the process to move forward more efficiently and serve the plan's economic interests. Such policies may include, for example: (i) voting proxies in accordance with the voting recommendations of the issuer's management or with respect to particular types of proposals that the fiduciary has prudently determined are likely to have a significant impact on the value of the plan's investment; (ii) voting of proxies only on particular types of proposals (e.g., mergers and acquisitions) that the fiduciary has prudently determined are substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment; and (iii) refraining from voting on proposals or particular types of proposals when the plan's holding in a single issuer relative to the plan's total investment assets is below a quantitative threshold. The plan fiduciary is required to review any such proxy-voting policies at least once every two years.

While the regulations are in proposed form, they are anticipated to be on a fast track for final approval. Comments on the proposed regulations were required to be submitted by October 5, 2020, and the regulations are expected to be final before year end.

Please do not hesitate to reach out to Aon's Retirement Legal Consulting & Compliance consultants or Aon's investment consultants to discuss these issues and their implications to your plan's investment policies in more detail.

Everything Old is New Again: "New" Fiduciary Rules

by Jan Raines

On July 7, 2020, the Department of Labor (DOL) reinstated its five-part test issued in 1975 for determining when a financial institution or investment professional is considered a fiduciary for providing "investment advice." The DOL further clarified what is considered "investment advice" regarding individual retirement accounts (IRAs) and proposed a new prohibited transaction exemption allowing fiduciaries providing investment advice broader relief than current exemptions.

Five-Part Test. If the following five-part test is satisfied, then the advice will be considered "investment advice" and the financial institution or investment professional (not otherwise considered to be a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA)) providing the advice will be considered an "investment advice fiduciary."

1. The advisor renders advice to the plan as to the value of securities or other property or makes recommendations as to the advisability of investing in, purchasing, or selling securities or properties;
2. The advice must be provided on a regular basis;
3. That advice must be pursuant to a mutual agreement, arrangement or understanding with the plan, plan fiduciary, or IRA owner;
4. The advice serves as a primary basis (but not necessarily "the" primary basis) for investment decisions with respect to the plan or IRA assets; and
5. The advice will be individualized based on the particular needs of the plan or IRA.

The proposal also states that a person's status as an investment advice fiduciary is based on facts and circumstances, noting that if the institution or professional meets the five-part test and receives a fee or other compensation, it will be deemed an "investment advice fiduciary" under ERISA, and if providing investment advice to an ERISA-covered employee benefit plan, will be subject to ERISA fiduciary duties.

Clarification on IRA Advice. The DOL changed its tune and contradicted its own prior guidance, stating that IRA rollover advice is a recommendation to liquidate or transfer the plan's property to initiate the rollover. Meaning that advice on whether to take a distribution from a retirement plan and roll it over to an IRA (or roll it over to another employer's plan, or from one IRA to another) may be covered by the five-part test, if the advice is part of an ongoing relationship or the start of an ongoing relationship.

Proposed Exemption. Aligning with the SEC's Regulation Best Interest (issued in June 2019), described in the **Third Quarter 2019** issue of the *Quarterly Update*, the DOL issued a new proposed prohibited transaction class exemption allowing financial services companies and their investment professionals to (1) receive compensation while acting as "investment advice fiduciaries" and (2) execute certain principal transactions in which they could sell or purchase certain securities or other investments for retirement assets for which they act as investment advisers. However, fiduciary investment advice must still meet the three Impartial Conduct Standards issued in DOL Field Assistance Bulletin 2018-02:

- Provide advice in the best interest of investors (i.e., advice meets the prudence and loyalty fiduciary standards);
- Must charge only reasonable compensation; and
- Must not make any materially misleading statements about investment transactions and other relevant matters.

And in order to protect the interest of plans, participants and beneficiaries, and IRA owners, investment advice fiduciaries must:

- Disclose their status as an investment advice fiduciary to investors, provide an accurate, written description of their services and address material conflicts of interest, and provide an annual retrospective compliance review; and
- Document the reasons that recommendations to roll over employee benefit plan assets from a plan to an IRA or from one plan to another, are in the best interest of the investor.

The new proposed exemption will not cover advice arrangements that rely only upon robo-advice; however, it will cover "hybrid" robo-advice arrangements that involve advice generated by computer models in conjunction with interaction with an investment professional.

Investment advice fiduciaries could lose access to the proposed exemption for up to 10 years for certain criminal convictions regarding investment advice or for egregious conduct related to compliance with the exemption.

In view of the timing concerns associated with possible changes in the Administration following the election, the DOL allowed only 30 days for comments, much to the dismay of industry groups and other interested parties. However, even with this shortened comment period, the DOL heard from over 20 witnesses during a six-hour long virtual hearing. Not surprising, given the history of other attempts at passing similar rules, there were those who: argued against the package, urging the DOL to withdraw it; opposed the guidance, but offered suggestions; welcomed the guidance, but also offered improvements; and praised the guidance and urged it be finalized immediately.

Aon will continue to follow the DOL's proposal and report on any future updates.

Please see the applicable Disclosures and Disclaimers on page 15.

Two Actuarial Equivalence Lawsuits Dismissed, One Added

by Jennifer Ross Berrian

As reported previously, 11 lawsuits have been filed (now 12 if you include two against AT&T) challenging the actuarial equivalence factors used by pension plans to calculate optional forms of benefits and early retirement reductions. Since the last update, two more cases have been dismissed although one has now been refiled with new plaintiffs, leaving us with eight pending cases.

On August 27, 2020, the district court judge granted the defendants' Motion to Dismiss filed in *Brown v. UPS* for failure to exhaust available administrative remedies. The plaintiffs brought suit in federal court without making a claim under the plan's claims procedure in advance. The judge reiterated that exhaustion of a plan's claims procedure was required prior to filing a lawsuit and rejected the plaintiffs' arguments that a claim filing was not necessary due to the relief sought (reformation of plan terms) and the perceived futility of pursuing administrative remedies.

A month later, on September 28, 2020, the actuarial equivalence lawsuit against AT&T (*Eliason v. AT&T*) was dismissed by the district court judge. This case originally alleged that the early retirement factors used to compute early retirement benefits were not actuarially equivalent. However, the defendants were able to prove to the court that the factors used were based on the factors set forth in Section 417(e) of the Internal Revenue Code (Code). Use of the factors under Section 417(e) of the Code is required when calculating a lump-sum payment and are deemed to be reasonable and actuarially equivalent. These factors have been utilized by plaintiffs in other cases as the baseline for comparison between the amounts received by the plaintiffs using the factors in the plan and the contemporary factors produced using the 417(e) factors.

In addition, the plaintiffs in the AT&T case also alleged that the plan used a joint and survivor annuity factor to calculate joint and survivor annuity benefits that resulted in participants taking those benefits receiving less than the actuarial equivalent of the single life annuity. However, these factors were not used when the original plaintiffs' benefits were calculated as they all elected to receive their benefit in a lump sum (417(e) factors were used for their calculations). The plaintiffs attempted to add additional plaintiffs to the lawsuit whose benefits were calculated using the joint and survivor annuity factors, but the judge concluded that there was no harm to the original plaintiffs based on AT&T's use of the 417(e) factors. Thus, the original complaint suffered from a jurisdictional defect that could not be cured by adding additional plaintiffs after the litigation commenced. Following the decision, the plaintiffs' attorney noted that the court had not addressed the harm to the additional plaintiffs that were added after the start of the lawsuit. So, no surprise, on October 12, 2020, lawyers for the plaintiffs filed a new lawsuit against AT&T (*Scott v. AT&T*) in which new plaintiffs attempt to demonstrate that AT&T shortchanged their pensions by using outdated actuarial data that did not account for recent increases in lifespan, causing certain workers to have their benefits improperly reduced.

While we have seen a number of actuarial equivalence cases dismissed on procedural grounds, it appears to only be a matter of time before the courts start wrestling with the merits of these cases. Stay tuned!

Court Allows Non-Diversified Stock Fund Case to Proceed

by Hitz Burton

On August 11, 2020, in *Stegemann v. Gannett*, a split three-judge panel for the Fourth Circuit Court of Appeals reversed a lower federal court dismissal. The Court of Appeals in *Stegemann* found that plaintiffs' allegations that a plan sponsor and management committee violated the Employee Retirement Income Security Act of 1974 (ERISA) when they ignored or failed to timely act in response to the inherent risks associated with a non-diversified stock fund were sufficient to allow the litigation to continue.

By way of background, in connection with a corporate restructuring, Gannett assumed sponsorship of the 401(k) plan of TEGNA, its former parent company, in 2015. Prior to the Gannett spin-off from TEGNA, the plan, then sponsored and maintained by TEGNA, included an employer stock fund consisting of "qualified employer securities" exempt from ERISA's general investment diversification requirements. When Gannett assumed sponsorship of its former parent's plan, however, that same investment now constituted a non-diversified stock fund subject to ERISA's prudence and asset diversification requirements.

Understanding that the stock fund, as a non-diversified asset, carried additional risk for large investment losses, Gannett did not permit additional investments in the TEGNA stock fund following the June 2015 spin-off. Additionally, but only after the fund experienced comparatively poor investment returns for an approximate two-year period, Gannett allegedly decided to implement a forced liquidation of the TEGNA stock fund within 12 months or by no later than August 2018. As of August 2018, the intended liquidation had not yet been fully completed.

According to the plaintiffs, this change in status for the TEGNA stock fund attendant to the 2015 spin-off, meant that Gannett and the plan's fiduciaries should have liquidated the stock fund coincident with or shortly after the corporate restructuring. As support for their position, plaintiffs point to an employee matters agreement which called for a forced redemption of the TEGNA stock fund as well as various concerns or questions raised by the plan's outside auditors between 2015 and 2018.

While it is certainly true that a plan sponsor and fiduciaries may be subject to litigation where they are alleged to have sold a non-diversified plan investment "too soon" as occurred in connection with the corporate restructuring of RJ Reynolds and Nabisco (as previously covered in the **Second Quarter 2016** issue of the *Quarterly Update)*, it is perhaps reasonable to conclude here that Gannett's failure to implement a forced liquidation of the stock fund closer in time to the restructuring (e.g., within 12-18 months of June 2015) explains why a divided three-judge panel of the Fourth Circuit remanded the decision to the lower court and will permit additional discovery as to whether Gannett or plan fiduciaries violated ERISA.

While deliberate and thoughtful fiduciary processes cannot avoid all possible ERISA litigation, Aon's Retirement Legal Consulting & Compliance consultants are well versed on the types of procedural protections and plan governance that a plan sponsor and fiduciary charged with oversight on a non-diversified stock should evaluate. This evaluation should include a number of procedural safeguards including the possible appointment of an independent third-party ERISA investment fiduciary, possible plan amendments to support the action to be taken, as well as targeted communication strategies to plan participants, all of which are designed to be implemented over a discrete period of time. This process, if well documented, can be very helpful in avoiding litigation outright or to increasing the likelihood that any litigation filed will be quickly resolved at an initial pleading stage before a court, as the Fourth Circuit did here, permits potentially expensive and time-consuming discovery.

Anonymous Correction of Qualified Plan Issues—With IRS Approval!

by Tom Meagher and Beverly Rose

While most employers do their very best to comply with ERISA and the Internal Revenue Code to maintain the qualified status of their defined benefit or defined contribution plan, we know that no plan is perfect.

And, while employers may discover document or operational defects during a compliance review, merger and acquisition transaction, or during the normal operation of the plan, there is always a concern as to how best to address those issues. Although many failures may lend themselves to a fairly straightforward correction method, when the failure is unique, or the proposed correction method is not directly comparable to methods presented in guidance previously issued by the Internal Revenue Service (IRS), the employer may wonder how best to proceed. In these situations, the employer may be hesitant about disclosing the failure and proposed correction to the IRS without the ability to gracefully remove itself from the process if things do not work out as anticipated.

But all is not lost for employers wanting to make sure that their corrective action would be acceptable to the IRS. In the IRS Employee Plans Compliance Resolution System (Revenue Procedure 2019-19), the IRS permits anonymous filings to be submitted with respect to proposed corrective action involving qualified plans, 403(b) plans, SEPs, or SIMPLE IRA plans. These filings would be under the Voluntary Correction Program (VCP). Most importantly, the filing can be made without initially identifying the applicable plan, the plan sponsor, or the eligible organization but nonetheless can result in obtaining the IRS's potential approval of the correction method. If the employer does not agree with the IRS's response to the proposed correction method, the employer can remain anonymous but would lose the user fee.

The IRS anonymous submission requirements can be quite straightforward. At the time of the anonymous submission, information identifying the plan, or the plan sponsor is redacted. The submission is normally made on behalf of the plan sponsor by an authorized representative pursuant to an unsubmitted power of attorney form (IRS Form 2848) along with the required user fee. A fully executed IRS Form 2848 is required to be submitted once the IRS has responded to the submission and the plan sponsor has decided that it will move forward with the approved corrective action. Once the IRS and the authorized representative reach agreement with respect to the submission, the authorized representative will then need to identify the plan and plan sponsor and submit the executed Form 2848 to the IRS. If the identifying documents are not timely submitted, the matter will be closed.

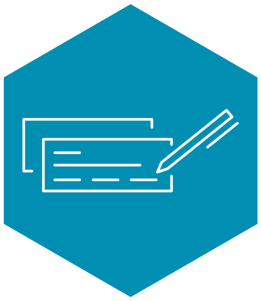
Despite the relative comfort an employer may have in using an anonymous submission, it is important to note that an anonymous submission does not "preclude or impede" an IRS examination of the sponsor or the plan during the pendency of the anonymous submission. Thus, for example, if the plan comes under IRS examination prior to the date the plan sponsor's identity is disclosed to the IRS, the plan sponsor will no longer be eligible under VCP. This treatment of anonymous submissions is distinct from the protection from IRS examination afforded a plan during a pending VCP submission where the plan sponsor's identity has been disclosed as part of the submission.

The opportunity to explore possible corrective actions without the need to identify the plan sponsor or the plan does provide a significant opportunity for employers to evaluate possible corrective actions without fear that they will be subject to IRS audit by reason of the filing. Moreover, since determination letters are not generally available except under very limited circumstances, the ability to obtain a compliance statement in support of certain corrective action may prove quite helpful if the IRS identifies a qualification failure during a future audit that has been addressed and the corrections approved by the IRS through the anonymous submission process.

To the extent you are evaluating possible corrective actions for your qualified plans, please feel free to reach out to one of Aon's Retirement Legal Consulting & Compliance consultants to discuss whether the anonymous submission approach would be helpful to addressing the issues.

Lifetime Income Illustration Guidance Issued

by Jennifer Ross Berrian



As part of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), Congress amended the law to require defined contribution (DC) plan sponsors to educate participants about the value of their account balances over their lifetimes. Amendments were made to the rules in the Internal Revenue Code (Code) and the Employee Retirement Income Security Act of 1974 (ERISA) regarding required annual DC plan statements. Plan sponsors will need to include illustrations of how participants' account balances translate into lifetime income streams. This disclosure will be required even if the plan does not offer lifetime income distribution options.

The Department of Labor (DOL) has issued interim final rules regarding the assumptions to be used when making these calculations and has issued model language that plan sponsors can use to explain the illustrations. Plan sponsors are required to provide the explanation but are not required to use the provided model language. The interim final rule will take effect on September 18, 2021 and will apply to plan statements issued after that date.

The following rules and assumptions are to be used when providing the information:

- The participant's account balance on the last day of the period is to be used to commence the calculation.
- All participants will receive information on both a single life annuity and a qualified joint and 100% survivor annuity regardless of the participant's marital status.
- The annuities will be assumed to commence on the last day of the period (the same day as the account balance is determined).
- Participants will be assumed to be age 67 (or their actual age if older) on the commencement date.
- Spousal beneficiaries will be assumed to be the same age as the participant.
- The interest rate will be the 10-year Constant Maturity Treasury (CMT) rate in effect on the first business day of the last month of the period to which the statement relates.
- The mortality table will be the applicable mortality table described in Section 417(e) of the Code that is in effect for the last month of the period to which the statement relates.
- Insurance loads and inflation adjustments are not factored into the calculations.
- There are special rules for plans that offer annuities as distribution and/or investment options.

The rules are interim and may be modified before they're finalized. The DOL has requested comments on specific provisions such as the date on which the interest rate is determined. We will continue to monitor these rules for changes and will keep you informed.

IRS Provides Guidance on SECURE Act and Miners Act

by John Van Duzer

On September 2, 2020, the Internal Revenue Service (IRS) released Notice 2020-68 (Notice), which offers helpful "Q&A" guidance on a number of issues relating to the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and the Bipartisan American Miners Act of 2019 (Miners Act). This Notice provides welcome guidance for sponsors of qualified plans, sponsors of 403(b) and 457(b) governmental plans, and IRA holders.

Qualified Birth or Adoption Distributions

One important topic addressed in the Notice is the permissible in-service withdrawal opportunity for qualified birth or adoption expenses, introduced into law by the SECURE Act. The Notice clarifies that this benefit may be added to a qualified defined contribution plan, a 403(a) or (b) plan, a 457(b) plan, or an IRA (but may not be added to a defined benefit pension plan). In general, withdrawals may be up to $5,000 per child (and per parent), must be made within one year of the birth or adoption, and will not be subject to the 10% penalty tax on certain pre-age 59½ distributions.

The new guidance provides that these distributions are not treated as eligible rollover distributions, so the mandatory tax withholding and tax notice requirements are not applicable. Furthermore, a participant receiving this type of distribution must be permitted to make a repayment to the plan, assuming the participant is eligible to make a rollover contribution to the plan.

Plans are not required to provide for qualified birth or adoption distributions. For plans that don't, but nevertheless provide for other in-service distributions, a participant may elect to treat one of those other distributions as a qualified birth or adoption distribution, thereby avoiding any 10% penalty tax (assuming certain other requirements are satisfied).

Long-term, Part-time Employees' Participation in 401(k) Plan

The SECURE Act provides for (and requires) a new alternative service requirement applicable to 401(k) plans. In general, qualified plans are permitted to require that an employee earn one year of service and attain age 21, prior to becoming a plan participant. (Many plans include eligibility requirements that are less strict. Plans that do incorporate a one-year service requirement often require 1,000 hours of service to be performed during that year.)

Beginning in 2021, 401(k) plans must also consider 12-month periods during which an employee completes at least 500 hours of service. Furthermore, beginning in 2021 (so no earlier than the end of 2023), if an employee earns three consecutive "reduced service" years (i.e., years with at least 500 hours of service) that employee will be treated as having satisfied the service requirement. (Note that the one-year/1,000 hours of service requirement will continue to apply, if that requirement is satisfied first. Also note that a plan may impose an alternative two-year/100% vesting requirement, but this is not common.)

The SECURE Act limits the ability of plan sponsors to exclude "long-term, part-time employees" from eligibility, beginning as early as 2024. A 401(k) plan is now required to permit part-time employees who earn at least 500 hours of service each year over a three-consecutive-year period as satisfying the plan's service requirement.

The Notice clarifies that a Plan may continue to impose an age 21 eligibility condition, even if an employee has satisfied the three-year "reduced service" requirement. In addition, somewhat surprisingly, the Notice indicates that these "reduced service" years must be counted in determining a participant's vested percentage and that reduced service years prior to 2021 must be taken into account.

Minimum Age for In-service Distributions under Pension Plan

Prior to passage of the Miners Act, in-service distributions under a defined benefit or other pension plan were permitted to commence as early as age 62. This permitted distribution age has now been reduced to age 59½. (A similar change applies under Section 457(b) of the Internal Revenue Code, applicable to certain governmental plans.) Note that a pension plan is generally not required to permit in-service benefit commencement at all, and plans that do choose to allow this type of commencement may continue to require attainment of age 62 or any other age which is later than age 59½.

The Notice clarifies that even though these types of in-service distributions are now permitted from pension plans, a plan is not necessarily permitted to reduce its normal retirement age (NRA) down to age 59½. Rather, an NRA as young as age 62 is deemed permissible, but any NRA younger than 62 will be permitted only if the age is no earlier than the earliest age which is reasonably representative of the typical retirement age of the applicable industry.

Other Miscellaneous Changes

The Notice addresses other changes relating to the SECURE Act that may be significant to some plan sponsors. One such change provides a $500 tax credit for an employer with no more than 100 employees earning at least $5,000 of compensation. This credit is generally available in the first year that an "eligible automatic contribution arrangement" (EACA) is added to a qualified employer plan (e.g., 401(k) and 403(a) plans), and also in the following two years.

Another SECURE Act change removes the maximum age for IRA contributions, which prior to SECURE was age 70½. The Notice describes how the deduction for qualified charitable distributions is affected by the removal of the age restriction and also clarifies that post-age 70½ contributions may not be used to offset required minimum distributions, that are now required to commence at age 72 under SECURE.

Finally, so-called "difficulty of care" payments (relating to payments for qualified foster care that are generally excludable from a participant's income) are now included as "section 415 compensation" under a qualified plan. In addition, a taxpayer may elect to include these types of payments in order to increase the nondeductible contribution IRA limit, in situations where this limit would otherwise have applied to the taxpayer's IRA contribution.

Plan Amendments

In general, the SECURE Act permits qualified plans to delay adopting amendments until the end of the 2022 plan year, assuming that the Plan is administered to comply with current SECURE Act requirements and that any amendments are made retroactively effective. The Notice clarifies that this deadline (as well as an extended 2024 deadline for certain collective bargaining and government plans) applies to both required and discretionary amendments. Nonqualified plans—such as 403(b), 457(b), and IRAs—generally have comparable deadlines for amendments extending at least until the end of 2022.

Aon's Retirement Legal Consulting & Compliance group would welcome the opportunity to assist with any questions or needs you have relating to either (i) changes in the design of your plan relating to these new legal provisions or (ii) incorporating these design and legally required changes into a plan amendment. In some cases, there may be reasons to adopt some form of plan amendment (e.g., a "good faith" amendment) earlier than the legally permitted deadline. Please let us know if we can be of assistance.

IRS Relief for Midyear Safe Harbor Changes

by Dan Schwallie

The Internal Revenue Service (IRS) issued Notice 2020-52 (Notice) on June 29, 2020 (midyear) to address certain changes to the rules regarding midyear amendments to plans utilizing safe harbor designs with respect to actual deferral percentage and/or actual contribution percentage tests (i.e., ADP/ACP safe harbor plans). The Notice clarifies requirements that apply to a midyear amendment reducing contributions made only on behalf of highly compensated employees (HCEs). The Notice also provides temporary relief from certain requirements that would otherwise apply to a midyear amendment adopted between March 13, 2020 and August 31, 2020 to reduce or suspend safe harbor contributions in connection with the ongoing COVID-19 pandemic. These updates apply to ACP safe harbor 403(b) plans as well as to ADP/ACP safe harbor 401(k) plans.

Midyear Amendment Reducing Contributions to HCEs

A midyear amendment that reduces only contributions made on behalf of HCEs is not a reduction or suspension of safe harbor contributions because contributions made on behalf of HCEs are not safe harbor contributions under the applicable Treasury Regulations. However, such a midyear amendment is a midyear change to the plan's required safe harbor notice content. Therefore, an updated safe harbor notice, along with an election opportunity, must be provided to HCEs who are affected by the midyear change, determined as of the date the updated safe harbor notice is issued. The safe harbor notice and election opportunity requirements apply generally to changes that affect required safe harbor notice content and not just to reductions or suspensions of safe harbor contributions. In a footnote, the IRS points out that the Notice does not address the elimination of the safe harbor notice requirement for plans that satisfy the ADP/ACP safe harbor with safe harbor nonelective contributions rather than safe harbor matching contributions provided by the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). For more information, please refer to our **Special Edition** of the *Quarterly Update*.

Temporary Relief for Amendment Reducing Safe Harbor Contributions Due to COVID-19

A plan amendment, adopted between March 13, 2020 and August 31, 2020, that reduces or suspends safe harbor matching contributions or safe harbor nonelective contributions during a plan year is excepted from the requirements that the employer either:

- Is operating at an economic loss for the plan year; or
- Has included in the plan's safe harbor notice for the plan year a statement that the plan may be amended during the plan year to reduce or suspend the safe harbor contributions and that the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension.

A plan amendment, adopted between March 13, 2020 and August 31, 2020, that reduces or suspends safe harbor *nonelective contributions* during a plan year is excepted from the requirement that a supplemental notice about the suspension or reduction must be provided to eligible employees at least 30 days before the reduction or suspension is effective, provided that:

- The supplemental notice was provided to eligible employees no later than August 31, 2020; and
- The plan amendment is adopted not later than the effective date of the reduction or suspension of safe harbor nonelective contributions.

However, there is no relief with respect to the timing of the supplemental notice for a midyear reduction or suspension of safe harbor *matching contributions*. There is no relief because information communicated to employees about the plan's matching contributions has a direct effect on employee decisions regarding elective contributions (and, if matched, a direct effect on employee after-tax contributions).

Aon's Retirement Legal Consulting & Compliance consultants are available to assist plan sponsors in understanding how these updated rules may apply to their plans and administration.

New PBGC Rule Updates Assumptions Used to Pay Lump Sums

by Hitz Burton and Monica Gajdel

On September 9, 2020, the Pension Benefit Guaranty Corporation (PBGC) published final regulations announcing that the assumptions it uses, and, therefore, also used by certain defined benefit pension plans, to develop lump-sum payments will change. Effective for distributions after December 31, 2020, the PBGC will determine small amount lump-sum benefits payable by the agency using interest rate and mortality table assumptions under Section 417(e) of the Internal Revenue Code (Code) (417(e) assumptions). In addition, the PBGC will discontinue the publication of PBGC interest rate assumptions it has historically published for use in determining lump-sum benefits. Instead, the PBGC will replace the published interest rates with a lookup table which can be used to replicate the rates the PBGC would have produced after 2020, using an interest rate published monthly by the Internal Revenue Service (IRS).

This new final rule is particularly important to defined benefit pension plans that previously decided to preserve (or grandfather) the use of PBGC interest rates to pay lump sums (e.g., this is common in many plans that cover collectively bargained employees). Years ago, many, but not all, single employer pension plans decided to phase out use of PBGC assumptions to calculate lump sums in response to tax law changes included in the Retirement Protection Act of 1994 (RPA '94). RPA '94 mandated that single employer plans use 417(e) assumptions when paying lump-sum benefits.

Pension plans typically eliminated use of these PBGC assumptions in the late 1990s through a plan amendment made possible by temporary anti-cutback relief that has long since expired. Plans that decided not to make the transition to 417(e) assumptions approximately 20 years ago were then required to calculate lump-sum benefits on an ongoing basis under two sets of assumptions—with their legacy PBGC assumptions and with 417(e) assumptions—paying the larger lump sum. PBGC interest rates, which have generally been lower than corresponding rates under Section 417(e) of the Code (417(e) interest rates) recently, would then generally apply.

Plans using the PBGC assumptions for lump sums or other purposes will need to be evaluated to determine which assumptions should be utilized effective January 1, 2021. Some plan documents may contain language that simply refers to the assumptions used by the PBGC and thus the plan assumptions will automatically change to using the 417(e) interest rate, mortality table, or both. Though the current 417(e) interest rates are greater than those published by the PBGC, generally producing lower lump sums, the IRS indicated to the PBGC that such a change is not considered a cutback in benefits. However, sponsors should understand how this change will impact the lump-sum benefits payable to participants, including participants who are close to retirement or participants who recently received an estimate of their pension benefit. Based on current interest rates, lump-sum benefits in 2021 for some plans may be 10% to 40% lower than 2020 if a plan sponsor decides that the 417(e) assumptions will apply effective January 1, 2021. Given the size of this possible reduction, plan sponsors should evaluate whether some type of targeted communication to participants nearing normal retirement or who have recently received a benefit estimate may be appropriate.

In other cases, plan documents may refer to the PBGC interest rates that will be determined from the lookup table using the IRS interest rate in the future. For these situations, no change will essentially occur in the calculation of the lump sum or other benefits under the plan. The same assumptions and calculation will continue. The only change is the PBGC will not actually publish the interest rates effective January 1, 2021, and the rates will need to be determined from the lookup table provided in the final regulations.

Unfortunately, the plan language referring to the PBGC assumptions is typically not clear. A review of the language and use of the assumptions will likely be necessary to determine which assumptions are specified by the plan going forward—the PBGC assumptions changing to the 417(e) or the PBGC assumptions historically used to calculate lump sums (i.e., those which are not changing). In some cases, plan sponsors may wish to clarify plan language to ensure the reference is clear in the future.

Aon's Retirement Legal Consulting & Compliance group and actuarial consultants are familiar with this new PBGC final rule and can help plan sponsors evaluate their plans to determine whether a change in assumptions is applicable and possible changes to plan document language. We can also assist fiduciaries to effectively implement and communicate the change to ensure compliance and mitigate the risks of future ERISA claims or litigation.

Proposed Plan Loan Rollover Regulations Provide Relief

by Dan Schwallie

The Problem of Plan Loans When Participants or Plans Terminate

Many plan participants have outstanding loans from their 401(k), 403(b), or governmental 457(b) plans when either their employment terminates or the plan terminates, whether due to a corporate transaction or otherwise. Most plans require that plan loan repayments be made via payroll deduction, which cease when a participant terminates employment. A small minority of plans permit continued loan repayments by check or ACH directly to the plan's recordkeeper after a participant terminates employment (assuming the plan has not terminated). Failure to make any plan loan repayment when due results in a taxable *deemed distribution*, which is not eligible for rollover to another qualified employer plan or an individual retirement arrangement (IRA).

A plan may also provide that, if a participant terminates employment, the participant's obligation to repay the loan is accelerated and, if not immediately repaid, the loan is cancelled or treated as in default, with the participant's account balance being offset by the amount of the unpaid loan balance. Or the plan may provide for a *plan loan offset* upon the participant's termination of employment (or upon taking a distribution from the plan) without a repayment opportunity. Such *plan loan offset* is treated as an actual distribution from the plan equal to the unpaid loan balance rather than a deemed distribution. Unlike a deemed distribution, the amount of the plan loan offset distribution is eligible for tax-free rollover to another eligible retirement plan and is generally not subject to 20% federal income tax withholding. Prior to the Tax Cuts and Jobs Act of 2017 (TCJA), an indirect rollover of a plan loan offset amount had to be made within 60 days. The indirect rollover would require the participant to come up with the dollar amount of the plan loan offset and roll over that amount to another eligible retirement plan or IRA within the 60-day period. However, TCJA amended Section 402(c)(3) of the Internal Revenue Code (Code) to extend the period during which a *qualified plan loan offset* (QPLO) amount may be indirectly rolled over. Note that a plan is not required to offer a *direct rollover* with respect to such plan loan offset amount, and many do not.

Proposed Plan Loan Offset Rollover Regulations

Consistent with the TCJA amendments, the proposed regulations provide that a participant (or the participant's spousal distributee) with an eligible rollover distribution that is a QPLO amount may roll over any portion of the QPLO distribution to an eligible retirement plan, including another qualified retirement plan (if that plan permits) or an IRA, by the individual's deadline for filing income taxes, including extensions, for the year in which the QPLO occurs and the QPLO amount is treated as distributed. This TCJA rule is distinct from other federal tax provisions, such as the temporary three-year period permitted by the CARES Act, that may extend the period to roll over a plan loan offset. A plan loan offset amount that is not a QPLO must still be rolled over within 60 days.

The proposed regulations define a QPLO amount as a plan loan offset amount that satisfies each of the following three requirements:

1. Is distributed from a qualified employer plan solely by reason of the termination of the qualified employer plan, or the failure to meet the repayment terms of the loan from such plan because of the severance from employment of the employee (i.e., when the participant ceases to be an employee of the employer maintaining the plan, including if the participant's new employer becomes the employer maintaining the plan);
2. Relates to a plan loan that met the plan loan requirements of Section 72(p)(2) of the Code and Section 1.72(p)-1 of the Treasury Regulations immediately prior to the termination of the qualified employer plan or the severance from employment of the participant, whichever applies; and
3. Occurs within the period beginning on the date of the participant's severance from employment and ending on the first anniversary of that date.

A *qualified employer plan* for purposes of the proposed regulations means an employer plan qualified under Section 401(a) of the Code, an annuity plan under Section 403(a) of the Code, a 403(b) plan under Section 403(b) of the Code, and any governmental plan, whether qualified or not.

Taxpayers may rely on the proposed regulations with respect to plan loan offset amounts, including QPLO amounts, that are treated as distributions on or after August 20, 2020 until final regulations are published in the Federal Register.

Determining whether a plan loan offset amount is a QPLO amount is important to correctly report a plan loan offset amount as a QPLO amount using Code M in box 7 of IRS Form 1099-R. If the plan loan offset amount is not a QPLO amount, the offset should still be reported as an actual distribution, but without Code M in box 7 (nor should Code L be used, which is for a deemed distribution). The proposed one-year anniversary rule is intended to assist plan administrators by providing a bright-line rule for determining whether a plan loan offset amount following a severance from employment is a QPLO amount.

The interaction of loan defaults, deemed distributions, plan loan offsets, and qualified plan loan offsets can be complicated and confusing, and their interaction depends in large part on how the provisions of a plan are drafted to deal with them. Aon's Retirement Legal Consulting & Compliance consultants are available to assist plan sponsors in understanding how these concepts interact and how to administratively comply with these proposed regulations.

Quarterly Roundup of Other New Developments

by Sandy Combs, Teresa Kruse, and Bridget Steinhart

Fiduciary Committees Part 4—Fiduciary Investment Best Practice

The act of hiring an outside investment adviser for the defined contribution plan is a fiduciary decision. This means thoroughly researching the background, relevant experience, and qualifications of potential advisers with whom the committee may work and documenting the information relied upon and the decisions that are made. As fiduciaries, committee members should not blindly rely on the information and advice provided by outside experts because the committee members have an inherent responsibility to thoughtfully review the information and advice provided and make the ultimate decision. Be prepared, ask questions, or request additional information when needed.

As a fiduciary, it is important to remember there are three basic principles regarding positioning plan assets for investment: (1) long-term returns are key; (2) market timing does not pay; and (3) optimize risk and return. In an individual account plan, participants should be given the opportunity to construct a well-diversified portfolio that allows them to take on as much, or as little, risk as is comfortable for them. When fiduciaries are selecting asset classes to include in the plan, this decision needs to be deliberate, with the understanding that these options should provide the diversification participants need. Aon's best practice is to select one fund for each asset class available in the plan. This helps prevent participants from becoming overwhelmed with too many choices.

The Investment Policy Statement (IPS) can be thought of as a business plan for how fiduciaries select and monitor the investments in the retirement plan. Although a formal IPS is not required, it is usually the first thing the Department of Labor will request if your plan is audited. The IPS should include the roles and responsibilities of the committee and other parties, criteria for selecting and eliminating funds, proxy-voting guidelines, and guidelines for the committee when reviewing the investments. Include enough detail so that the plan fiduciaries have a plan to follow, but be careful to not make the IPS so specific that you are forced to make changes frequently. It is noteworthy that the only thing worse than not having an IPS is having an IPS and not following it.

Another of Aon's best practices regarding investments is to follow, and monitor, what funds or plan features are put in place. Monitor outside advisers. Monitor investment funds and fund managers. Follow the IPS, review it periodically, and make updates if needed.

This article completes our four-part series regarding Fiduciary Committees. Please refer to the **First Quarter 2020**, **Second Quarter 2020**, and **Third Quarter 2020** issues of the *Quarterly Update* to read the prior three pieces in this series.

If your committee has need to provide or update your fiduciary training, Aon has fiduciary experts who can help committees and their members understand their fiduciary responsibilities under the Employee Retirement Income Security Act (ERISA)—from both an administrative and an investment perspective.

Retirement Plan Website Design—What You Need to Know

Over the past several years, we have seen retirement plan features become more automated. Many of these automated functions, such as automatic enrollment and automatic deferral increases, have increased enrollment and helped participants save for retirement. But is it enough, and how does the recordkeeping provider's website influence participant decisions?

In a paper written by Saurahb Bhargava, Lynn Conell-Price, Richard Mason, and Shlomo Benartzi titled, "Save(d) by Design," the authors review how the design of participant websites can affect participant behavior. Specifically, could they change the website to encourage participants to make active elections? Three field studies were conducted to vary the design of an online enrollment interface for over 8,500 employees across 500 automatic enrollment retirement plans. The paper showed some of the following results when providing an enhanced web design to participants:

- More participants opted to personalize their savings rate;
- Savings rate amounts increased; and
- Participants became more aware of the retirement plan match amount.

This paper shows that the physical design of a participant website may help drive participant decisions and nudge participants into becoming more engaged in selecting the amount of their retirement savings. Fiduciaries who are looking for a more behavioral approach to retirement plan website design should pay attention to vendor websites and request demonstrations during vendor reviews. Aon's Defined Contribution Consulting practice can help with vendor searches and in the review of participant websites.

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, plan fiduciaries, administrative committees, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans. 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 financial institutions and universities have been dismissed (in full or in part) or settled, including:

- Universities
  - *Nicolas v. Trs. of Princeton Univ.* – Settled for $5.8M and other remedies
- Other Institutions
  - *Bhatia v. McKinsey & Co., Inc.* – Settled for $39.5M and other remedies

- *Casey v. Reliance Tr. Co.* – Settled for $6.3M
- *Obeslo v. Great-West Capital Mgmt., LLC* – Dismissed with prejudice

Plan sponsors seeking to reduce their litigation risk exposure use a variety of strategies including increasing the number of passive funds in their plans, continually reviewing recordkeeping and investment fees, and implementing better fee transparency.

Nicolas v. Trs. of Princeton Univ., No. 3:17-cv-03695 (D.N.J. July 28, 2020); Bhatia v. McKinsey & Co., Inc., No. 1:19-cv-01466-GHW-SN (S.D.N.Y. Aug. 10, 2020); Casey v. Reliance Tr. Co., No. 4:18-cv-00424 (E.D. Tex. Aug. 6, 2020); Obeslo v. Great-West Capital Mgmt., LLC, No. 1:16-cv-00230-CMA-SKC (D. Colo. Aug. 7, 2020).

IRS Guidance on COVID-19 Employee Layoffs/Rehires

Under current Internal Revenue Service (IRS) rules, a partial plan termination is presumed to have occurred when the turnover rate for a given year is 20% or more of total plan participants. The "turnover rate" generally is based on all of the facts and circumstances and does not include voluntary terminations but does include both vested and nonvested employees (as provided in Revenue Ruling 2007-43). In a partial plan termination, the employer must determine which participants require full vesting, as a result. This can be tricky in that participants who were "improperly" forfeited that year before the partial termination would have occurred are owed their forfeited amounts. So, what happens in 2020 with the COVID-19 environment and many employers laying off employees because of the pandemic? Are employees laid off due to COVID-19 and subsequently rehired prior to the end of 2020 treated as part of the turnover rate? The IRS issued *Coronavirus-related Relief for Retirement Plans and IRAs Questions and Answers* providing guidance on provisions of the CARES Act. Specifically, Q&A 15 indicates that employees laid off as a result of COVID-19 and subsequently rehired prior to the end of 2020 generally will not be treated as having an employer-initiated severance to be included in the turnover rate. For related information on layoffs versus furloughs please refer to the **Third Quarter 2020** issue of the *Quarterly Update*.

Three New ERISA Lawsuits Question Actively Versus Passively Managed TDFs

Actively managed target date funds (TDFs) are in the news for all the wrong reasons. Three new lawsuits question offering actively managed TDFs to retirement plan participants instead of less expensive passively managed options. Lawsuits against Quest Diagnostics, IQVIA Holdings, and Eversource follow a recent lawsuit filed by a participant in Costco's retirement plan claiming the fiduciaries of the plan breached their duties under ERISA by offering expensive and underperforming actively managed TDFs. These lawsuits have to play out, but raise the question of what fiduciaries can do to ward off this kind of lawsuit. Can actively managed TDFs be a prudent and safe offering in a retirement plan? The answers lie in the fiduciary duty of prudence and the process fiduciaries follow in choosing and monitoring a target date series. Proper process includes the following:

- Understanding the basics of TDFs—active versus passive management (and more);
- Benchmarking funds for performance and fees;
- Reviewing the risk profile and considering whether it's appropriate for plan participants;
- Regularly reviewing the performance of the target date series against DOL expectations;
- Monitoring the underlying investments in the fund to ensure that they align with participant disclosures; and
- Documenting the evaluation performed in choosing, monitoring, and retaining a target date series.

Offering an actively managed TDF over a less expensive passively managed version might be defended if fiduciaries demonstrate that the decision was informed and intentional. While fiduciary duties do not require that the lowest priced TDF series be chosen, executing and documenting a prudent and deliberate process may be beneficial in a challenge.

New Retirement Plan Cases

Retirement plan cases continue to be filed and, in many cases, proceed to trial. 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.

- Participant personally identifiable data as a plan asset
  - *Berkelhammer et al. v. ADP TotalSource Grp., Inc.*
- Excessive fees (administration and/or investment fees)
  - *Albert v. Oshkosh Corp. et al.*
  - *Bailey et al. v. LinkedIn Corp. et al.*
  - *Soulek v. Costco Wholesale Corp. et al.*
  - *Gerken v. ManTech Int'l Corp. et al.*
  - *Kendall v. Pharm. Prod. Dev., LLC et al.*
  - *Hill et al. v. Mercy Health Corp. et al.*
  - *Maisonette v. Omnicon Grp. Inc. et al.*
  - *Santiago v. Univ. of Miami*

Aon will continue to track these cases, and others, as they develop.

Berkelhammer et al. v. ADP TotalSource Grp., Inc., No. 2:20-cv-05696 (D.N.J. May 7, 2020); Albert v. Oshkosh Corp. et al., No. 1:20-cv-00901-WCG (E.D. Wis. June 16, 2020); Bailey et al. v. LinkedIn Corp. et al., No. 5:20-cv-05704 (N.D. Cal. Aug. 14, 2020); Soulek v. Costco Wholesale Corp. et al., No. 1:20-cv-00937 (E.D. Wis. June 23, 2020); Gerken v. ManTech Int'l Corp. et al., No. 3:20-cv-00350 (E.D. Va. May 15, 2020); Kendall v. Pharm. Prod. Dev., LLC et al., No. 7:20-cv-00071-D (E.D.N.C. Apr. 15, 2020); Hill et al. v. Mercy Health Corp. et al., No. 3:20-cv-50286 (N.D. Ill. Aug. 4, 2020); Maisonette v. Omnicon Grp. Inc. et al., No. 1:20-cv-06007-MKV (S.D.N.Y. July 31, 2020); Santiago v. Univ. of Miami, No. 1:20-cv-21784-MGC (S.D. Fla. Apr. 29, 2020).

Please see the applicable Disclosures and Disclaimers on page **15**.

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About Aon

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