Third Quarter 2022

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

by Susan Motter

No doubt summer continues to be a scorcher! Meanwhile, the *Quarterly Update* team continues to deliver the latest on the hottest areas of interest to our readers.

Many employers have "red-hot" interest in diversity, equity, and inclusion (DEI) programs and the "Great Resignation" trend as these ultimately relate to an employer's ability to attract and retain employees for its workforce. At first glance, it may not be apparent how these issues intersect with employee benefit plan issues, particularly retirement plans. However, there is a growing trend among employers supporting DEI as a key element of their compensation and benefits programs. We open this edition with an article on how employers can support DEI through their retirement plans while attracting and retaining its needed workforce and achieving a retirement program that is equitable to all participants.

Department of Labor (DOL) and Internal Revenue Service (IRS) audits continue to occupy plan fiduciaries' concerns and efforts. Since the April 2021 DOL cybersecurity guidance, the DOL continues its laser focus on efforts to audit fiduciary processes as they apply to plan-related data security—all the while litigation involving data breaches and plan data have been increasing. We update our reporting in this edition with the latest cybersecurity developments in terms of DOL audit efforts and litigation. Most recently, in June 2022, the IRS rolled out a new pilot pre-examination retirement plan compliance program. This new IRS pilot program gives a plan sponsor a 90-days' "heads-up" prior to the IRS starting an audit. The pilot program allows the plan sponsor to identify and correct errors—potentially at a significantly lower cost—thus permitting the plan sponsor to preempt what otherwise may turn out to be a full-scale IRS audit.

Plan sponsors are aware that excessive fee litigation cases involving retirement plans continue to rise in frequency and severity. Not surprisingly, these cases have considerably affected the fiduciary liability insurance market—from decreases in coverage capacity to significant increases in pricing and retentions (i.e., deductibles). This edition of the *Quarterly Update* updates our prior reporting on how a pooled employer plan (PEP) can provide significant benefits to organizations that wish to provide retirement benefits to their employees, by outlining the benefits of joining a PEP from a number of perspectives including the cost of fiduciary liability insurance.

Plan sponsors have long considered adding and implementing certain provisions impacting the claims and appeals process for their employee benefit plans. Examples of these are a plan-specified claims limitation period to shorten the period of time during which a participant can raise a claim in federal court, or a requirement for mandatory arbitration. We close out this edition with two articles reporting on the latest attempts by plan sponsors to enforce these types of provisions and the issues a court will examine in determining whether these provisions are enforceable.

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.

Supporting DEI in Retirement Plans

by Matthew Bond and Tamara O'Brien

The Case for DEI in Compensation and Benefits Programs

Employers increasingly view support for diversity, equity, and inclusion (DEI) as a key element of their compensation and benefits programs. Half of respondents in **Aon's 2020 Health Survey** indicated they are currently adapting their benefits programs to more effectively support and advance DEI. In the 8th Edition of the **2022 Global HR Pulse Survey**, 64% of respondents said that a DEI-focused strategy was a priority, and 70% of those said they had a strategy in place with an approved budget. Key motivations for the trend include the following:

- **Cost Effectiveness While Improving Attraction, Engagement, and Retention of Employees.** The "Great Resignation" has intensified talent and turnover challenges for employers, and DEI is increasingly viewed as a differentiator by job candidates. Expressing an organization's DEI values through benefits offerings can help establish a human connection with the team, supporting employee engagement and lowering turnover.
- **Better Outcomes for Employees and Society.** By designing programs to be fair, equitable, efficient, and responsive to the needs of an increasingly diverse workforce, employers can produce better outcomes for employees and society in general.
- **Stronger Branding for the Organization.** By demonstrating the authenticity of its values to employees and other stakeholders, the organization's branding is strengthened.

DEI Challenges in Retirement Plans

Retirement plans are the second largest benefits expense for most employers, after health and wellness programs. However, retirement programs historically have tended to magnify socioeconomic disparities in wealth and income. The first step to achieving an equitable retirement program is understanding the barriers that diverse employees encounter when preparing for retirement. These may include:

- **Wage Gaps Impact Savings.** Women and people of color earn less than their peers on average, and these disparities persist at all income and education levels. However, retirement programs magnify these disparities. On average the gender pay gap is 18%, but the retirement income gap between men and women is 34%.
- **Barriers to Saving for Retirement.** Covering basic expenses, managing the burden of debt, establishing emergency savings, and competing financial priorities such as family and education often serve to further limit diverse employees' savings to a retirement plan. Match-only or primarily match-driven defined contribution plans result in lower retirement benefits provided to those who do not save or save below the match threshold. Black and Hispanic Americans disproportionally receive lower benefits from matched savings formulas, exacerbating the gap in retirement savings.
- **Shorter Total Service.** Women and people of color are more likely to engage in part-time work or experience more breaks in service over their career. This makes it more difficult for these groups to meet vesting requirements or qualify for early retirement eligibility/subsidies. Similarly, age- or points-graded formulas and plans only available to those hired before a certain date can also amplify inequities.
- **Differences in Longevity.** At retirement age, women are expected to live two years longer than their male peers. Women's greater longevity means that they need more savings to secure adequate lifetime income.

How to Support DEI Via Retirement Plans

The simple truth is decisions made the world the way it is, and better decisions can change it. At Aon, we are invested in recognizing the decisions that created the disparities in retirement plans, and in helping sponsors make better decisions to achieve more equitable outcomes. Evaluating your demographics and specific retirement programs through a DEI lens can reveal targeted opportunities to solve challenges through plan design, communications, investments, and advice.

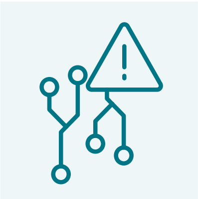
We have seen in our work with plan sponsors that even thoughtful, well-designed plans may not provide the intended inclusive and equitable results if employee choices are disproportionately impacting specific groups of employees. Pairing a plan-level review with a participant-level study of behaviors and outcomes may provide additional powerful insights that help inform your next steps in aligning your benefits program with your company's values.

For example, tailored participant communications should be a central focus when delivering retirement benefits that support DEI values. Participants are looking for support and advice that take into account their lifestyle and personal financial challenges and opportunities. Also, Black and Hispanic employees indicate a connection to or commonality with their retirement advisor is important. As previously covered in the **First Quarter 2022** issue of our *Quarterly Update*, Aon's Pooled Employer Plan (PEP), an innovative 401(k) solution, provides customized materials on financial wellness for women, Black families, and the LGBTQ+ community. Select materials from our PEP Information Center are publicly available **here**.

Bringing DEI values to life in your organization's retirement plan has the potential to create better participant outcomes for all employees while creating returns for the company in terms of attraction, retention, and strengthening your brand. No matter where you are on your DEI journey, Aon's tools and expertise can empower you to better align your benefits with your values. If you'd like to learn more about how we can partner on this mission, reach out to your Aon consultant.

Cybersecurity Continues to Be a Hot Topic: DOL Audits and Litigation on the Rise

by Tom Meagher



It has now been over a year since the Department of Labor (DOL) released its guidance on how plan fiduciaries should fulfill their fiduciary responsibility to protect plan and participant data.

Since the release of the DOL's April 2021 guidance, we have observed a fair amount of activity involving data security and benefit plans. While the DOL has taken the position that its April 2021 guidance was nothing new and that the DOL always expected plan fiduciaries to protect plan data, we have seen a heightened awareness involving regulators and plaintiffs' attorneys to the prospect that failing to protect plan data may be a breach of a fiduciary's duty to the plan.

From an audit perspective, we have seen the DOL requesting employers to provide documentation supporting their fiduciary processes as they apply to plan-related data security and to describe what efforts they have made to reach out to the plan's third-party service providers. While the DOL has not necessarily been challenging the various safeguards that may be in place, they are looking to see that the fiduciaries are aware of their responsibility to protect plan data and that there is a process to monitor both internal and external plan-related safeguards.

Unfortunately, DOL audits are not the only areas of exposure that employers and their plan fiduciaries must address. There has been an increase in litigation involving data breaches and plan data. The most prominent cases focus on whether the fiduciary had a prudent process to protect plan and participant data and whether that process was followed. Most recently, on July 7, 2022, Colgate-Palmolive Co. was sued in the federal court for the Southern District of New York by a former employee (*Disberry v. Employee Relations Committee of the Colgate-Palmolive Co.*) who alleged that the plan administrator and recordkeeper did not have reasonable procedures in place to avert the theft of the employee's plan account balance, and that the procedures they had were not followed.

Similarly, in April 2022, several proposed class action lawsuits were commenced against Horizon Actuarial Services, LLC in the federal court for the Northern District of Georgia. These five class action lawsuits (*Sherwood v. Horizon Actuarial Services, LLC; Bedont v. Horizon Actuarial Services, LLC; Quan v. Horizon Actuarial Services, LLC; Hill v. Horizon Actuarial Services, LLC;* and *Torrano v. Horizon Actuarial Services, LLC*) were subsequently consolidated in May 2022. The complaints allege that there was a data breach in November 2021 at Horizon during which third parties apparently accessed data stored on the company's servers. The complaints state that the breach affected hundreds of thousands of current and former Horizon customers who were signed up for benefit plans through their employers. The complaint further alleges that data breach victims will now face a heightened risk of identity theft and fraud for years to come due to the defendant's alleged failure to safeguard their information. While Horizon may not be treated as an ERISA fiduciary based on its recordkeeping role, the situation is all too common in terms of plan fiduciaries outsourcing their recordkeeping to third parties. It will not take long for plaintiffs' attorneys to begin to allege (as they did in the *Colgate-Palmolive* case referenced above) that when employers fail to monitor the recordkeeper and its data security policies, the employers will have breached their fiduciary obligations to participants to protect plan and participant data.

While no employee benefit plan data can be completely safeguarded, there is an ability to mitigate the risk of a data breach. That effort to protect against the risk of a data breach is the type of process that the DOL is looking to see from plan fiduciaries—and what plaintiffs' attorneys hope not to see.

Aon's team of cybersecurity and plan governance experts has worked extensively in this area well before the April 2021 DOL guidance. As an experienced cybersecurity team, we can provide the type of assistance needed for plan fiduciaries to demonstrate a prudent process to monitor and protect plan and participant data from adverse DOL audit findings and participant claims of fiduciary breach.

IRS Pre-Audit Notification and Self-Correction Program for Retirement Plans

by Dan Schwallie

The Internal Revenue Service (IRS) is piloting a program under which a retirement plan sponsor will be notified in advance that its retirement plan has been selected for audit. The plan sponsor will be provided an opportunity to self-correct plan document errors and operational errors prior to the audit.

Notification Prior to the Audit

Under this IRS pilot program, which began in June 2022, the IRS will notify a retirement plan sponsor by letter that its plan has been selected for an upcoming audit (or "examination" in IRS parlance). The letter provides the plan sponsor a 90-day window to review the plan documents and operations to determine whether they satisfy current tax requirements. If the plan sponsor does not respond within 90 days, the IRS will contact the sponsor to schedule a full examination.

Self-Correction of Errors Prior to the Audit

Errors in plan documents or operations uncovered during the pre-audit review may be eligible for self-correction using the correction principles of the IRS Employee Plans Compliance Resolution System (EPCRS), currently described in Revenue Procedure 2021-30, which improved self-correction options. (Please see the article titled, "Updated IRS Program Improves Self-Correction Options," in the **Fourth Quarter 2021** issue of our *Quarterly Update*.) The IRS will review the plan sponsor's documentation of the self-corrections.

For errors that are not eligible for self-correction under EPCRS, the plan sponsor can request a closing agreement with the IRS. The fee structure applicable to the Voluntary Correction Program (VCP) of EPCRS will apply to the monetary sanction the plan sponsor pays under such closing agreement, rather than the potentially more costly sanctions that can be applied under the Audit Closing Agreement Program of EPCRS. VCP fees are based on plan asset amounts and are generally capped at $3,500.

If the IRS agrees the plan sponsor appropriately corrected the errors, the IRS will issue a closing letter to that effect. Otherwise, the IRS will conduct either a limited or full-scope examination. While not explicitly stated, it is understood that this program applies to 403(b) plans as well as 401(k) plans and other tax-qualified defined contribution and defined benefit plans.

Program Is Temporary, Subject to Evaluation

The IRS's stated goal of this pilot program is to reduce taxpayer burdens and reduce the time spent on retirement plan examinations. The IRS will evaluate the effectiveness of the program at the end of the pilot period and determine if the program should continue to be part of their overall compliance strategy. How long the pilot program will last was not specified.

Aon Can Provide Expedited Retirement Plan Compliance Reviews

For plan sponsors who receive the 90-day letter, Aon's Retirement Legal Consulting & Compliance consultants are available to provide an expedited review of plan documents and operational processes. Nevertheless, plan sponsors may wish to consider the more prudent approach of a nonreactive compliance review prior to receiving a 90-day letter. A nonreactive, pre-planned compliance review would include a sampling of participant data to uncover systemic operational errors and a more extensive examination of plan administration procedures of third parties or the plan sponsor. Aon recommends compliance reviews be conducted on a periodic basis, but especially when there are suspected compliance concerns, changes in recordkeepers or other plan administrators, and in anticipation of plan mergers or corporate transactions involving potential plan acquisitions.

Pooled Employer Plans Provide Cost Savings and Fiduciary Risk Reduction Opportunities

by Jay Desjardins and Rick Jones

Excessive fee litigation cases involving retirement plans have risen dramatically in frequency and severity and have put pressures on the fiduciary liability insurance market. These cases, which generally focus on fees that 401(k) and 403(b) plan participants pay for investment management or administration, have led to considerable changes in the fiduciary liability insurance marketplace, with decreases in capacity, and significant increases in pricing and retentions (i.e., deductibles).

Heightened Litigation Expected to Continue

Based on Aon's research, in 2020 alone, there were no fewer than 99 excessive fee cases in the United States, four times the average of each of the previous three years (2017–2019). In 2021, at least 55 excessive fee cases were filed, well below the pace of 2020 but still more than double the annual average. Defense counsel and industry experts suggest that the drop in filings in 2021 was due to the *Hughes v. Northwestern University* case then pending before the U.S. Supreme Court. In January 2022, the Supreme Court issued its decision, which largely favors plan participants. The *Northwestern* ruling could bolster plaintiffs' efforts and result in more excessive fee litigation and further exacerbate the challenging fiduciary liability insurance market.

Plans representing approximately 15% of the combined 401(k) and 403(b) market by assets have been subject to this litigation. This is not a "needle in a haystack" risk, and the fiduciary liability insurance marketplace is providing ample confirmation of that. Plaintiffs' attorneys do not only target "jumbo" plans ($1 billion or more in assets). According to Aon's research, between 2020 and 2021, over 40% of all claims filed have targeted plan sponsors with plan assets below the $1 billion "jumbo" plan threshold.

In this challenging climate, what can employers do to manage costs to avoid excessive fee claims and risks, minimize work for management teams, and improve retirements for participants?

Consider a Pooled Employer Plan (PEP)

A PEP is a 401(k) arrangement that allows unrelated businesses to participate in a plan managed by a pooled plan provider (PPP). The PPP is the fiduciary of the PEP and has discretion over plan administration and investments, which can reduce the administrative burden and risks for participating companies. Streamlining and delegating retirement plan administration to experts allows employers to focus on their core business and more strategic priorities, while still controlling plan design decisions to meet their human resources and workforce needs.

Employers May Now Participate in a PEP Instead of Sponsoring a Stand-Alone 401(k) Plan

The PPP is also responsible for selecting and monitoring third-party vendors, including trustees/custodians, recordkeepers, investment managers, and external advisors such as plan auditors. PEPs have emerged as an attractive alternative to traditional 401(k)s—reducing the work and risk involved in sponsoring a plan. Moreover, PEPs offer significant opportunities for economies of scale and improved retirements for American workers. In fact, we are seeing average savings realized following adoption of the Aon PEP among participating employers in excess of 40%. Much of that savings is typically realized by plan participants through lower charges to their accounts.

Less work
for management teams

Less risk
for employers and fiduciaries

Lower costs
and improved outcomes for employees

What Are the Benefits of Joining a PEP from a Fiduciary Liability Insurance Perspective?
While insurers are not yet willing to offer premium reductions, we anticipate they will do so within the next few years once PEPs have established a longer track record. Aon continues to engage in discussions with all major fiduciary liability insurers on this point. We believe that organizations should capitalize on the cost savings of PEPs while the market matures.

Virtually all insureds have seen dramatic increases in their fiduciary liability insurance retentions (i.e., the amount which the plan sponsors must pay before gaining access to the actual policy proceeds). For example, many fiduciary liability insurers are imposing retentions of $5 million or more for insureds who sponsor a 401(k) plan with assets of $500 million or more. One way to avoid paying such a large retention is to reduce the likelihood of being sued in the first place and joining a PEP should do just that.

Joining a PEP has also helped to alleviate the increased underwriting scrutiny that has become the norm as insurers now ask detailed questions related to third-party fees and expenses through so-called “Excessive Fee Questionnaires.” For insureds that join a PEP we recommend that the PPP assist in responding to the Excessive Fee Questionnaire, to demonstrate the reduction in risk and expense which the participating employer enjoys by having joined the PEP.

Aon Is in the Business of Better Decisions
For a discussion on how effective a PEP could be for your organization, and a free side-by-side comparison of current 401(k) plan costs relative to the Aon PEP, we only need a few pieces of readily available information. If you have interest, or if you have any questions, please contact your Aon representative or either of the authors of this article (their contact information is included on page **12**).

Federal Court Declines to Enforce Specified Limitation Period

by Hitz Burton

In two companion opinions, *E. F. v. United Healthcare Ins. Co.* (attempt to enforce three-year limitation period) and *Anne A. v. United Healthcare Ins. Co.* (attempt to enforce 180-day limitation period), both issued March 30, 2022, the United States District Court for Utah rejected United Healthcare’s efforts to enforce plan-specified limitation periods which sought to define (and shorten) the period during which participants could litigate an administrative denial of benefit coverage.

As you may recall, the Employee Retirement Income Security Act of 1974 (ERISA) does not specify a time period in which participants can bring a claim in federal court for benefits. As a result, federal courts typically look to underlying state contract law for an applicable limitation period. To mitigate risk and to shorten the period during which a participant can raise a claim in federal court, some plan sponsors have attempted to define a specific period of time during which litigation claims can be brought without being time-barred. To successfully enforce a plan-specified limitation period, the relevant plan document must explicitly describe the relevant period. It is further clear that the plan’s summary plan description (SPD) should also describe the plan-specific claims limitation period.

It is also clear, however, that specific language in the legal plan document and the SPD is not sufficient. ERISA specifically requires a claim denial notice to include a description of any applicable time limits that the plan will attempt to enforce on a participant’s right to file a claim for benefits in federal court. Among other considerations, the district court found that (i) it was more likely that a participant would read and understand the description of a limitation period in a brief denial notice versus a lengthy plan document; (ii) that the burden on the plan sponsor to add the relevant information to a claim denial notice was minimal; and (iii) that the documentary requirements regarding denial notices in the relevant ERISA regulations were unambiguous.

If you are attempting to effectively implement a plan-specified claims limitation period in your ERISA retirement or health and welfare plan, and you have questions or concerns about how to do so, please reach out to Aon’s Retirement Legal & Consulting consultants for further advice and recommendations on how to best proceed.

Sixth Circuit Rejects Employer Attempt to Compel Arbitration

by Hitz Burton

The enforceability of mandatory arbitration agreements against claims made by one or more participants in a retirement plan covered by the Employee Retirement Income Security of 1974 (ERISA) continues to be frequently litigated. Recently, on April 27, 2022, in *Hawkins v. Cintas Corp.*, the Sixth Circuit Court of Appeals rejected an employer's attempt to compel arbitration of fiduciary breach claims brought by two participants in a tax-qualified defined contribution plan.

In *Hawkins*, the lead plaintiffs alleged that the plan sponsor breached its ERISA duties of loyalty and prudence when it failed to offer lower-cost indexed funds as a designated investment alternative under the plan. Based on the terms of an employment agreement signed by each plaintiff, and which included mandatory arbitration provisions, Cintas moved to have the case dismissed.

As we previously discussed in the **Third Quarter 2019** issue of our *Quarterly Update*, participant claims involving an ERISA retirement plan are typically either a claim for benefits or an allegation that a fiduciary breach under ERISA has occurred. A claim for benefits is usually specific to an individual's particular facts and circumstances—for example, a claim that a participant's matching contribution was not properly calculated. In contrast, fiduciary breach claims are typically brought by a participant on behalf of the plan itself rather than in an individual capacity and typically involve related claims for similarly situated participants.

Prior federal case law suggests that successful enforcement of a mandatory arbitration agreement against an individual claim for benefits is often possible. On the other hand, federal courts have generally been reluctant to enforce mandatory arbitration claims where one or more participants allege a breach of fiduciary duty under ERISA on behalf of the plan itself (as previously discussed in the **Second Quarter 2021** issue of our *Quarterly Update*). In rejecting the employer's motion to dismiss, the Sixth Circuit noted this exact distinction when it held that the participants' fiduciary breach claims were not covered by the arbitration provisions in their respective employment agreements because the breach of loyalty and prudence claims belong to the plan itself.

Plan sponsors interested in the broadest possible application of a mandatory arbitration provision might consider adding such provisions directly into the ERISA plan document as opposed to attempting to rely on provisions in an individual employment or other contractual agreement. In a 2019 decision, which was summarized in the **Fourth Quarter 2019** issue of our *Quarterly Update*, the Ninth Circuit Court of Appeals upheld mandatory arbitration provisions to dismiss ERISA fiduciary breach claims where such provisions were directly added to the plan document itself.

Employers interested in how to amend their retirement plans to add mandatory arbitration provisions and to effectively communicate those provisions to participants through a summary plan description and other benefit claims correspondence should contact Aon's Retirement Legal Consulting & Compliance consultants for additional advice on how best to update a specific retirement plan's provisions and related ERISA-covered communications.

Quarterly Roundup of Other New Developments

by Sandy Combs, Teresa Kruse, Mark Manning, and Jan Raines

U.S. Bans Russian Securities

The U.S. Treasury Department (specifically, the Office of Foreign Assets Control) recently issued guidance clarifying the Presidential executive orders that were signed earlier this year regarding the purchase of Russian securities. The guidance noted that U.S. investors cannot purchase new securities or add to existing holdings of both debt and equities issued by an entity in the Russian Federation. However, U.S. investors are not required to sell or divest their current holdings. Additionally, U.S. investors are allowed to purchase shares in commingled trusts or mutual funds that continue to hold Russian securities if these securities don't represent a predominant position of assets in the portfolio.

As result of this guidance, institutional investors need to confirm that their investment managers are compliant with this guidance and understand how their investment managers are handling Russian securities, if any are owned. Over the last few months there have been liquidity issues and trading restrictions for investors which have created complications. Aon Investments USA Inc. can help committees understand if there is exposure to their portfolios that need to be addressed.

The Land of Missing Balances

As discussed in the **Second Quarter 2021** issue of our *Quarterly Update*, the Department of Labor (DOL) issued guidance in early 2021 regarding fiduciary best practices for locating missing participants. The flipside to having missing participants is that participants may have vested balances in their 401(k) plans that possibly have been left behind at prior employers. In a recent white paper issued by Capitalize, a financial services company, they estimated that as of May 2021, there were 24.3 million forgotten 401(k) accounts in the U.S., with $1.35 trillion of assets (representing 20% of the $6.7 trillion total assets in 401(k) plans.[1]

What can fiduciaries do to help solve this issue beyond following the DOL's best practices? Often recordkeepers will help by reaching out to new hires (or newly eligible employees) to remind these participants that they may be able to roll over the balance in their prior employer's plan into their new plan. But this is often a one-and-done communication. Plan fiduciaries may want to consider more frequent communications or reminders that a rollover option is available, and that in the long run, participants may be better off if their account balances are consolidated in one place. Also reminding the participants that they are likely paying administrative fees in their "old" accounts may be an incentive to get their attention.

Consider targeting participants who are more established in their careers (age 40 and over) but have been working with your organization for less than five years, or more senior participants who have been working with your organization for over 15 years but didn't start until they were in their 40s or 50s. Many of these employees may have balances in their prior employers' plans. Other participants to target may be those who were part of an acquisition, whose balances were not automatically transferred into your plan. These participants are the ones who likely have 401(k) plan balances elsewhere—and they just need that reminder that a rollover is possible and easy to facilitate. Getting rollover monies into your plan will not only help these participants but may help the plan overall—the more assets in the plan the more options fiduciaries may have to offer lower-cost investment funds/vehicles. This not only benefits those participants who rolled over their balances but also benefits all participants in the plan.

If participants aren't sure if they have retirement money in an old plan, you can refer them to their prior employer's human resources department, the prior employer's plan recordkeeper, the National Registry of Unclaimed Retirement Benefits, or the National Association of Unclaimed Property Administrators' database. Your participants will thank you for reminding them that they may have accounts that had ended up in the "Land of Missing Balances!"

Aon's defined contribution plan consultants are available to discuss strategies for addressing missing participants and facilitating communications to existing plan participants.

Saver's Credit—Can It Save Your Employees More Money?

The "Saver's Credit" was established under the Economic Growth and Tax Reconciliation Relief Act of 2001 and made permanent in the Pension Protection Act of 2006. However, it's a piece of legislation that gets little press—perhaps because it benefits low- to moderate-income earners, rather than higher-paid individuals. Even though it seems to get very little attention, it can actually save certain employees money by reducing their federal income taxes. A recent survey issued by the Transamerica Center for Retirement Studies found that while awareness of the Saver's Credit has increased from 23% in 2007 to 48% in 2021, and the number of tax filers claiming the Saver's Credit increased from 5.9 million in 2007 to 6.2 million in 2021, there are still a great many employees who are not taking advantage of this tax savings.[2]

[1] Capitalize, *The True Cost of Forgotten 401(k) Accounts*, June 2, 2021

[2] Transamerica Center for Retirement Studies, *22nd Annual Transamerica Retirement Survey*, April 2022

Single federal income tax filers or those married filing jointly with 2022 adjusted gross income of up to $34,000 or $68,000, respectively, who are contributing to a 401(k) (or similar) plan or IRA (other than rollover contributions) may be able to take advantage of the Saver's Credit. These employees have an opportunity to lower their federal income taxes by 50%, 20%, or 10% of the amount of their salary deferrals or voluntary after-tax employee contributions, depending on their income level.

Plan sponsors may want to consider a targeted communication campaign to alert the low- to moderate-income earners of this additional way to save money, especially in these difficult economic times. Providing real-life examples and using specific income levels (rather than terms like low- to moderate-income levels) may grab employees' attention and allow them to take advantage of this tax savings opportunity.

Investment Manager Must Face DOL's 401(k) Plan Lawsuit

A federal judge in the U.S. District Court for the Southern District of New York recently denied a motion to dismiss a lawsuit brought by the DOL against an investment manager and the fiduciaries of a corporate-sponsored profit sharing plan. The profit sharing plan investments were managed by Ruane Cunniff & Goldfarb, Inc. using a concentrated, low turnover strategy. One of the stocks held in the plan plummeted in value causing significant losses over a two-year period. While the investment manager had investment discretion regarding plan assets, the fiduciary committee was aware of the investment strategy and concentration of holdings.

The complaint alleges that the defendants violated their fiduciary duties of diversification, loyalty, and prudence by inadequately diversifying investments.[3] Of specific concern was that one of the individual stocks held by the plan represented approximately 45% of the portfolio prior to collapsing. Additionally, the fiduciaries allegedly did not follow the plan document by failing to have a written investment policy statement as well as failing to monitor the investment advisor. It is also noteworthy that in this case, the DOL is the plaintiff suing for the breach of fiduciary duty and also has raised claims against the employer along with individual members of the employer's retirement plan and compensation committee. There are other plaintiff claims against the employer and plan fiduciaries.

While this case will proceed, it is important to remember that fiduciaries have a duty to diversify assets, follow the plan document, and monitor service providers consistent with their obligations under the Employee Retirement Income Security Act of 1974 (ERISA). Aon Investments USA Inc. can help fiduciary and investment committees with evaluating their plan governance processes and other aspects of meeting their fiduciary obligations. *Walsh v. Ruane Cunniff & Goldfarb, Inc., 19-CV-9302 (ALC) (S.D.N.Y. Mar. 28, 2022).*

Fiduciary Follies

Aon Investments USA Inc. offers fiduciary training sessions for retirement plan committees to help them become fully familiar with their fiduciary obligations. Within the context of our training, we note that there is little risk in being a good fiduciary; rather, the risk lies in being a bad fiduciary. Below are examples of consequences that were levied against companies and/or fiduciaries as the result of a fiduciary breach.

- **Missing Contributions.** Bicallis, LLC and its owner did not forward employees' payroll deductions or employer matching contributions to the plan from October 2017 through December 2019. The court ordered the company and owner to restore more than $150,000 in missing contributions and earnings to the plan; and the company and its owner have been barred from serving as a plan fiduciary in the future. The court also appointed an independent fiduciary to administer the plan. *Hererra v. Bicallis, LLC et al., 1:2021cv01746 (D. Md. July 13, 2021).*
- **Failure to Monitor Stock Value.** Kurt Manufacturing Co. failed to monitor the determination of the value of the employer stock and overpaid for shares of the company's employee stock ownership plan (ESOP) in 2011. The U.S. District Court ordered the trustee to restore $8.4 million to the plan and pay a penalty of over $800,000 for violating ERISA. Board members and senior executives of the company were ordered to pay a penalty of over $200,000; and senior executives are barred from serving as fiduciaries to the ESOP and other retirement plans in the future. *Walsh v. Reliance Trust Co. et al., 17-CV-04540 (SRN/ECW) (D. Minn. Jan. 5, 2022).*

If you would like to schedule fiduciary training for your committee or your executives, please contact your Aon consultant.

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans, among others. Defined contribution plan cases generally fall into the following three areas: inappropriate or imprudent investment choices; excessive fees; and self-dealing. Recently, several cases involving corporations, universities, and other institutions have been dismissed (in full or in part) or settled, including cases involving: Coca-Cola Consolidated Inc. (settled for $3.5M and other remedies); John Hancock (dismissed); Seventy Seven Energy Inc. (settled for $15M); Washington University (settled for $7.5M and other remedies); and Wells Fargo & Co. (settled for $32.5M).

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[3] Diversification does not ensure a profit, nor does it protect against loss of principal. Diversification among investment options and asset classes may help to reduce overall volatility.

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.

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. Excessive fee cases this quarter were brought against Clean Harbors Environmental Services, Inc.; DaVita Inc.; DENSO International America, Inc.; Grifols Shared Services North America, Inc.; NFP Retirement, Inc.; O'Reilly Automotive, Inc.; and Reyes Holdings, LLC. In addition, cases were filed against International Business Machines Corp. (mortality tables); Horizon Actuarial Services, LLC (data breach); United Airlines, Inc. (retirement benefits); and United Parcel Service of America, Inc. (retirement benefits). Lastly, a non-ERISA lawsuit was filed against Newport Group, Inc.; Symetra Financial Corp.; and the African Methodist Episcopal Church and others for mismanagement of plan assets.

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

Please see the applicable Disclosures and Disclaimers on page 13.

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About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement, and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

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