Year-End Update: Recent Developments and Risk Mitigation Strategies for Plan Sponsors and Fiduciaries

October 2022

Contents

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Introduction

This Year-End Update starts with describing the delayed effective dates for amendments required or permitted under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), and the Bipartisan American Miners Act of 2019 (Miners Act). The Update then focuses on issues of specific importance for plan fiduciaries as they consider strategies to mitigate risk and simplify plan administration. This Update also notes some strategies that sponsors of traditional defined benefit (DB) pension plans (final average pay, or career average pay) may want to consider if their plans currently permit participants to take their entire accrued benefit in a large amount lump-sum distribution. Additional thoughts on plan governance (including cybersecurity and proxy voting responsibilities) that plan fiduciaries may want to consider before year end are also described.

The information contained in this Year-End Update also reflects Aon's perspective on various required[1] and discretionary[2] plan amendments that sponsors of DB and defined contribution (DC) plans may find advisable based on a variety of factors, including current plan design, priority enforcement areas identified by the Internal Revenue Service (IRS) and the U.S. Department of Labor (DOL) and recent litigation developments in the federal courts. [3]

Lastly, to the extent helpful, Appendix A provides a summary of various CARES Act, SECURE Act, and Miners Act statutory changes, and Appendix B suggests some strategies for employers that may be considering terminating their DB plans—plan terminations can be a multi-year process and can often be accomplished more efficiently and less expensively with careful plan drafting.

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[1] Amendments listed in an annual Required Amendments (RA) List such as Notice 2021-64.pdf. In general, current IRS guidance requires that legally required plan amendments need to be adopted by the end of the second year following publication in an RA List.

[2] "Discretionary" plan amendments generally need to be adopted by the end of the plan year in which the amendment is operationally put into effect (or in advance of any change that would reduce protected benefits that accrue prospectively (Rev. Proc. 2016-37)).

[3] Retirement plans subject to collectively bargaining should not be amended for a "discretionary" change described in this summary before the sponsor discusses any proposed changes with labor counsel and determines if such changes are subject to "effects bargaining" thereby triggering notice and negotiation with each applicable union.

Due Dates for CARES Act, SECURE Act, and Miners Act Amendments Extended to December 31, 2025

Amendments required, deemed advisable, or permitting additional design changes based on the above-referenced recent law changes were previously reflected in Aon's 2020-2021 Year-End Amendments Update. An updated description for many of these law changes are also listed at Appendix A to this Year-End Update.

The deadlines to adopt amendments for the CARES Act, the SECURE Act, and the Miners Act have been extended to December 31, 2025 for nongovernmental retirement and 403(b) plans. Governmental plans and plans covering collectively bargained employees may have delayed adoption dates. See IRS Notices 2022-33 and 2022-45 for additional information. While the time to adopt an amendment has been extended, plans are required to be operated presently in accordance with applicable statutory changes. And many plan sponsors may find it advisable, therefore, to amend their plans during the remainder of 2022 if they have not previously adopted such amendments for a variety of reasons including providing clarity for participants, beneficiaries and to third-party recordkeepers.

To the extent that any plan amendments modify information in an existing summary plan description (SPD), a timely summary of material modifications or updated SPD should also be considered.

This summary is intended to reflect our understanding of certain required or permissive updates to retirement plan documents or procedures. The nature, extent, and associated timing of these plan amendments can be quite specific depending on the terms and the operational history of each qualified plan. Moreover, plan requirements and due dates can change or be interpreted differently following issuance of this Year-End Update. As a result, clients may wish to use this summary to evaluate, in consultation with their retirement plan advisers, how their tax-qualified retirement plans are impacted. Any member of Aon's Retirement Legal Consulting & Compliance practice can assist with such a review.

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Risk Mitigation Strategies for Plan Sponsors and Fiduciaries to Consider in 2022

Topic	Comments	Pertinent Litigation/Other Guidance
DC Plans: Employer Stock Monitoring Process	Many employer plans continue to offer employer stock as an investment feature. With recent litigation involving employer stock and the role of plan fiduciaries, now may be a good time to review the fiduciary process in place to evaluate the prudence of maintaining an employer stock fund in the plan. Aon's plan governance team has worked with a number of clients that are interested in continuing to offer employer stock in their plan. At the same time, plan fiduciaries want to mitigate their fiduciary exposure to "stock drop" litigation but often without having to hand control over to an independent fiduciary. Developing a process that can support the maintenance of an employer stock fund—or that can help identify the situations where a closer review may be necessary—is an important fiduciary process that Aon's plan governance team can assist plan fiduciaries in developing and documenting.	*Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) *Retirement Plans Committee of IBM v. Jander,* 589 U.S. ___ (2020) *Stegemann v. Gannett Co.*, 970 F.3d 465 (4th Cir. 2020)
ERISA Plans: Fiduciary Obligation to Safeguard Plan Data: Cybersecurity	The DOL's April 2021 guidance requires that plan fiduciaries develop a process to monitor internal data security safeguards that apply to plan and participant data and that are in place – both internally and with third-party service providers. Recent DOL audits of employers have focused on the data security processes that the fiduciaries have in place to safeguard plan data. While employers may have very capable IT departments, plan fiduciaries should be undertaking a separate review of these processes (both internal and with third parties). From the DOL's perspective, plan fiduciaries should confirm the prudence of their own existing safeguards. (It is difficult for a plan fiduciary to support a prudent process if it simply relies on the statements of the individuals responsible for protecting plan data without conducting some due diligence to support conclusions reached.) Aon's cyber team can work directly with plan fiduciaries to confirm and/or develop existing processes to support the plan fiduciaries' obligation to protect plan and participant data without duplicating the efforts of the IT organization. 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.	*Disberry v. Employee Relations Committee of the Colgate-Palmolive Co.*, No. 1:22-cv-05778 (S.D.N.Y. filed Jul. 7, 2022) *Sherwood v. Horizon Actuarial Services, LLC,* No. 22-cv-1495 (N.D. Ga. filed Apr. 19, 2022) (this case was consolidated with several other data breach cases involving the consulting firm) *Berman v. Estee Lauder Inc.,* No. 3:19-cv-06489 (N.D. Cal. filed Oct. 9, 2019) (subsequently settled) *Bartnett v. Abbott Laboratories*, No. 1:20-cv-02127 (N.D. Ill. filed Apr. 3, 2020) (subsequently settled) *Leventhal v. The MandMarblestone Group LLC,* 2020 WL 2745740 (E.D. Pa. 2020) (subsequently settled)

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Topic	Comments	Pertinent Litigation/Other Guidance
Proxy Voting Process—Plan Governance **86 Fed. Reg. 57,272 (October 14, 2021)**	Prudent plan governance is critical to protecting the actions of plan fiduciaries. While proxy voting guidance from the DOL is still in proposed form and changes may be needed, it is important for plan fiduciaries to note that having a proxy voting process in place is an important fiduciary requirement. In the preamble to the DOL ESG and proxy voting proposed regulations (86 Fed. Reg. 57272 (October 14, 2021)), the DOL did note that, consistent with the fiduciary obligations set forth in ERISA, the act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares. Thus, a statement of proxy voting policy is an important part of any comprehensive investment policy statement. While employers may choose to address proxy voting any number of ways (*e.g.*, delegate to the trustee, an investment manager, or proxy voting service), reviewing investment policy statement provisions regarding the proxy voting process should be presently considered and further updated once final DOL regulations are issued.	Although the DOL has issued proposed regulations on proxy voting, the DOL received almost 900 comment letters both in favor and opposed to the proposed guidance. Since we understand that the DOL's intent is to issue the guidance in final form and that proposed final regulations for ESG investing and proxy voting are now being reviewed by the White House Office of Information and Regulatory Affairs, plan fiduciaries should plan on reviewing the guidance and its impact on ESG investing and proxy voting as soon as the guidance is issued. **Regulatory Guidance** Proposed Regulations: FR – 86 Fed. Reg. 57272
Forum Selection (Choice of Law) Provisions	Federal court decisions support the enforceability of plan-specified forum selection provisions in retirement plans provided that adequate notice is given to participants.	*Clause v. Sedgwick Claims Management Services, Inc.*, 2016 WL 213008 (D.C. Ariz. 2016) *Mathias v. Caterpillar, Inc.*, 203 F. Supp. 3d 570 (E.D. Pa. 2016)
Plan-Specified Limitation Periods	Plans under the Employee Retirement Income Security Act of 1974 ("ERISA") may include provisions that reasonably limit the time during which a claim for benefits may be filed.[4] Aon is aware, however, of at least one situation where a DOL investigator challenged similar language on plan audit and required that the provision be limited to civil actions under ERISA § 502(a)(1)(B). (If such provisions exist in a plan, they should also be included in the related summary plan description.)	*Heimeshoff v. Hartford Life & Accident Insurance Co.*, 571 U.S. 99 (2013)
Mandatory Arbitration Provisions	Plan provisions requiring participants to seek relief for a claim for benefits or on behalf of a plan for a fiduciary breach can be subject to a mandatory arbitration provision.	*Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019)

[4] Any decision made by the plan in response to a formal claim for benefits or on the appeal of a denied claim should include reference to the plan terms that seek to enforce a choice of law, plan-specified limitations period, or mandatory arbitration provisions. Beyond these threshold disclosures, plan sponsors may wish to also consider other opportunities to communicate and highlight these types of plan changes to participant.

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Discretionary Amendments for DB and DC Plans

The summary provided below considers certain recent announcements or law changes that may involve discretionary amendments to an employer's DB or DC plans. To the extent that a plan sponsor has made any discretionary design changes or operationally introduced other discretionary features to its retirement plan that are effective during 2022, the plan sponsor should be certain that it has adopted conforming plan amendment language no later than the last day of the applicable plan year (*e.g.*, by December 31, 2022, for calendar year plans).

Change/Reference	New Guidance	Comments and Links to Additional Guidance
Impact of Rising Interest Rates on the Development of Lump-Sum Payments from a DB Plan (Traditional Benefit Formula Plans Only) **Code § 417(e)**	Code § 417(e) mandates that lump-sum benefits, and other decreasing annuity forms of payment (*e.g.*, Social Security level income option) must be developed using the "applicable interest rate." Given the dramatic rise in market-based interest rates experienced in 2022, including the segment rates under Code § 417(e), lump-sum benefits developed in 2023 may be reduced by 20 to 30% or more from the lump-sum amount payable in 2022 (*i.e.*, a lower interest rate produces a larger lump sum, and a higher interest rate produces a smaller lump sum).	Participants nearing early or normal retirement age may elect to terminate employment earlier than otherwise planned in 2022 to preserve a lump-sum payment that is larger than it will otherwise be in 2023 or later. Plan sponsors interested in providing their employees with more flexibility may wish to consider possible plan amendments, including the addition of an in-service distribution option at age 59½ or later, a retroactive annuity starting date or other possible amendments to alleviate the impact of rapidly rising interest rates to avoid employees' reactions to lower lump sums.
Qualified Plan Lump-Sum Windows/Payments—Potential Impact on Certain Grandfathered Nonqualified Plans **Code § 409A**	Some nonqualified retirement plans that decided to "grandfather" or exempt pre-2005 accruals from being subject to Code § 409A also link the time and form of payment in the grandfathered plan to the time and form of payment in the employer's qualified plan. To maintain its grandfathered status (*i.e.*, being exempt from 409A), the nonqualified plan may not be materially modified.	The amendment of a qualified DB plan to add a temporary lump-sum window, in anticipation of a plan termination or otherwise, generally should not be applied to an otherwise permissibly linked nonqualified plan, since the addition of a temporary right to a lump-sum payment under the qualified plan may represent an indirect material modification of the grandfathered nonqualified plan subjecting the nonqualified plan to Code § 409A. Therefore, consideration should be given to excluding from the qualified plan window any grandfathered participants in the linked nonqualified plan if retention of grandfathered status is intended. **Aon Publications** IRS Releases Final Section 409A Regulations (May 2007) Nonqualified Deferred Compensation 2007 Strategic Planning for IRC Section 409A

Appendix A: Mandated or Discretionary Changes Under the SECURE Act, CARES Act, and the Miners Act

Change/Reference	New Guidance	Comments and Links to Additional Guidance
Required Beginning Date (RBD) Extended from April 1 Following Year of Attainment of Age 70½ to April 1 Following Year of Attainment of Age 72 for Participants Attaining Age 70½ after 2019 **SECURE Act § 114**	Minimum distribution rules under Code § 401(a)(9) require commencement of retirement benefits no later than the RBD. Prior to the SECURE Act, employees have been required to commence as of the April 1 of the calendar year following the later of (i) the calendar year in which they attain age 70½; or (ii) if they are not a 5% owner, the calendar year in which they retire. The SECURE Act extends the RBD for eligible individuals attaining age 70½ after December 31, 2019 (*i.e.*, born after June 30, 1949) to the April 1 of the calendar year following the later of the calendar year in which the participant attains age 72 or retires (if not a 5% owner).	The new RBD rules provide the latest date by which benefits must commence. Sponsors of qualified plans are not required to amend their plans to allow otherwise eligible participants to defer commencement until the new, later RBD. Nevertheless, most DC plan sponsors have amended (or will likely amend) their plans to allow at least certain participants to delay benefit commencement until the latest RBD permitted by the SECURE Act. DB Plan sponsors already facing challenges to pay benefits timely to vested terminated or missing participants, however, should evaluate the likely impact to plan administration before deciding to adopt the SECURE Act change to allow eligible participants to defer commencement to the new, later RBD. Additionally, it is important to note that while the SECURE Act revised the definition of the RBD for participants born after June 30, 1949, the SECURE Act did not change the long-standing qualification requirement that most DB plans provide for an actuarial increase for the period from April 1 following the year a participant attains age 70½ until actual benefit commencement. This actuarial increase requirement continues to apply to all participants regardless of their Code-specified RBD. Therefore, before amending their DB plans to permit otherwise eligible DB plan participants to defer benefit commencement until their new, latest RBD, employers should assess the resulting administrative implications and plan costs that any such amendment may have. Also, please note that distributions prior to age 72 under the SECURE Act changes for eligible participants are not RMDs for purposes of the rollover rules. **Legislation** H. R. 1994 - SECURE Act **Regulatory Guidance** IRS Notice 2020-68 **Aon Articles** "SECURE Act Becomes Law in Year-End Spending Bill": 1Q2020 Legal Consulting & Compliance *Quarterly Update*; and *Quarterly Update* - Special Edition "IRS Provides Guidance on SECURE Act and Miners Act": 4Q2020 Legal Consulting & Compliance *Quarterly Update*

Change/Reference	New Guidance	Comments and Links to Additional Guidance
Modification of Required Distribution Rules for Non-Spousal Beneficiaries (DC Plans) **SECURE Act § 401**	DC plans (*e.g.*, 401(k) and 403(b) plans) will often need to distribute a participant's entire vested account balance within 10 years after the participant's death for employees who die after 2019 without a surviving spouse beneficiary. The new 10-year rule does not apply if the beneficiary is an eligible beneficiary and benefits commence, over the life or a period not exceeding the life expectancy of the participant or over the lives or a period not exceeding the joint life expectancy of the participant and eligible beneficiary, within one year after the participant's death (in the case of a non-spousal eligible beneficiary) or by the end of the year in which the participant would have attained age 70½ or 72, as applicable (in the case of a spousal beneficiary).	For purposes of the exception to the new 10-year rule, an eligible beneficiary is a beneficiary who is (i) a surviving spouse; (ii) a minor child; (iii) "totally and permanently" disabled; (iv) chronically ill; or (v) not more than 10 years younger than the employee. Under the SECURE Act, minor children will generally lose their status as eligible beneficiaries (and will be subject to the 10-year rule) upon reaching the age of majority. These new RBD rules do not apply to employees who died prior to 2020. **Legislation** H. R. 1994 - SECURE Act
Expansion of Deferral Opportunities in 401(k) Plans for Long Service Part-Time Employees **SECURE Act § 112**	Part-time employees who complete more than 500 hours of service for three consecutive years starting in 2021 (excluding periods prior to January 1, 2021) will be eligible to participate in their employer's 401(k) plan for purposes of making elective deferrals. However, all service (even prior to January 1, 2021) generally must be taken into account for purposes of determining the employee's vested interest in employer contributions (if any) under the plan, unless the service can be disregarded under "traditional" pre-SECURE Act service crediting rules.	This new service counting rule for long service part-time employees applies to elective deferrals under 401(k) plans only and does not apply to other retirement plans. The general age and service participation rules under Code § 410(a) that have long applied to all qualified retirement plans (*e.g.,* age 21 and 1,000 hours of service) continue to apply. For example, a part-time employee, age 25, who completes 501 hours in 2021 and then more than 1,000 hours in 2022 would generally need to participate in the employer's 401(k) plan no later than the first applicable entry date in 2023, since the one-year service requirement that applies under Code § 410(a) would have been satisfied in 2022. Employers may, but are not required to, make any employer contributions on behalf of long service part-time employees. In addition, employers may exclude long service part-time employees from the nondiscrimination rules of Code § 401(a)(4), ADP testing under Code § 401(k), and ACP testing under Code § 401(m), as well as the minimum coverage rules of Code § 410(b). **Legislation** H. R. 1994 - SECURE Act **Regulatory Guidance** IRS Notice 2020-68

Change/Reference	New Guidance	Comments and Links to Additional Guidance
Coronavirus-Related Distributions (CRDs) in the CARES Act **CARES Act § 2202**	"Qualified individuals" (*e.g.*, participants diagnosed with SARS-CoV-2 or COVID-19 or who suffered an adverse financial condition because of SARS-CoV-2 or COVID-19) may treat a distribution (or series of payments) of up to $100,000 received in 2020 as a CRD. CRDs are entitled to favorable tax treatment, including income recognition over a 3-year period (2020-2022) and relief from the 10% additional tax under Code § 72(t) for an early distribution, if applicable. A plan is permitted, but not required, to treat an eligible plan distribution as a CRD.	The $100,000 limit must be monitored by plan sponsors across all plans that are maintained within their Code § 414 controlled group. Because of this requirement, sponsors may not want to add a CRD provision to more than one qualified plan as monitoring the $100,000 limit across more than one eligible retirement plan (and perhaps more than one recordkeeping platform) may be difficult. Any payment received by a qualified individual in 2020, including monthly annuity payments paid to retirees who commenced distribution of their accrued benefit (or vested account balance) prior to 2020, can be treated by the individual as a CRD. Additionally, distributions received during 2020 can be treated as a CRD by a qualified individual regardless of whether the plan sponsor amends its retirement plan to add a CRD feature. Although the CARES Act added a special CRD distribution opportunity for eligible DC plans, the law change did not likewise add a new CRD distribution event for DB plans. As a result, CRDs in a DB plan can only be paid to participants who are otherwise entitled to a distribution under current law (*e.g.*, current employees who have attained age 59½ or older, or former employees with a deferred vested benefit) under long-standing tax principles and a plan's specific provisions. **Legislation** CARES Act **Regulatory Guidance** IRS Notice 2020-50 **Aon Article** "Guidance Issued on CARES Act Distributions" 3Q2020 Legal Consulting & Compliance *Quarterly Update*
Expanded Loan Limits **CARES Act § 2202**	There was a temporary increase in the available loan limit under Code § 72(p) from $50,000 (or 50% of the vested account balance or accrued benefit) to $100,000 (or 100% of the vested account balance or accrued benefit) for loans that were originated between March 27, 2020 and September 22, 2020, inclusive.	CARES Act relief also provides for a temporary suspension in loan repayments otherwise due between March 27, 2020 and December 31, 2020, inclusive. The amortization schedule for a qualified individual with a loan can be deferred for up to one year beyond the original schedule. **Legislation** CARES Act **Aon Article** "Proposed Plan Loan Rollover Regulations Provide Relief" 4Q2020 Legal Consulting & Compliance *Quarterly Update*

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Change/Reference	New Guidance	Comments and Links to Additional Guidance
Guidance on Waiver of 2020 Required Minimum Distributions (RMDs) **CARES Act § 2203**	The CARES Act provides a waiver of RMDs for 2020 under a DC plan (*e.g.*, 401(k) or 403(b) plan) or an IRA. This relief also extends to individuals who turned age 70½ in 2019 and who would have otherwise had to take their first RMD (for 2019) by April 1, 2020. Participants who previously received waived RMDs may roll over the distribution back into the same plan if the plan permits incoming rollovers and the rollover rules are otherwise satisfied.	The IRS has issued a sample plan amendment for DC plans that plan sponsors may adopt to implement this change. The CARES Act RMD waiver does not apply to DB plans. **Regulatory Guidance** IRS Notice 2020-51
In-Service Distributions under DB Plans Permitted upon Attainment of Age 59½ **Miners Act § 104**	Before enactment of the Miners Act, in-service distributions under a DB plan generally could not be paid to participants prior to the attainment of age 62. The Miners Act reduces the permissible age for in-service distributions under a DB plan from age 62 to 59½.	This Miners Act change aligns the permissible minimum age to receive an in-service distribution in DB plans to the long-standing rule for receipt of non-hardship in-service distributions of elective deferrals in 401(k) plans. For traditional DB plans (*e.g.*, final average or career average benefit formula), which offer large amount lump-sum distributions, the addition of an age 59½ in-service distribution feature during 2022 may reduce the risk of loss of key workforce members who want to lock-in use of lower 2021 interest rate assumptions (*i.e.*, a lower interest rate produces a higher lump-sum benefit) in the development of their lump-sum benefit payable this year (assumes the plan uses an annual stability period to determine the “applicable interest rate” under Code § 417(e)). **Legislation** H. R. 1994 - SECURE Act Bipartisan American Miners Act of 2019 **Aon Publication** Quarterly Update - Special Edition
Participant Notice Requirements for Electing Safe Harbor 401(k) Plan Status **SECURE Act § 103**	Rules regarding the election of safe harbor 401(k) plan status through the use of nonelective employer contributions have been liberalized.	The safe harbor notice requirement is eliminated with respect to nonelective 401(k) safe harbor plans effective for plan years beginning after December 31, 2019. A 401(k) plan can now be amended to provide nonelective contributions that satisfy the safe harbor requirements under Code § 401(k) for a plan year, if the amendment is adopted before the 30th day before the end of the plan year or, if the nonelective contribution is at least 4% (rather than 3%), before the end of following plan year. It appears (but is not entirely clear) that the notice requirement still applies to 401(k) plans that intend to satisfy the matching contributions safe harbor requirements under Code § 401(m). **Legislation** H. R. 1994 - SECURE Act

Change/Reference	New Guidance	Comments and Links to Additional Guidance
Increase in 10% Cap for Automatic Enrollment Safe Harbor 401(k) Plans after First Plan Year **SECURE Act § 102**	The maximum automatic deferral rate under a qualified automatic contribution arrangement (QACA) safe harbor design 401(k) plan is increased from 10% to 15% (10% for the initial deferral period).	The employer may, but is not required to, amend its 401(k) plan that uses a QACA safe harbor design to increase the maximum automatic deferral rate to 15% after the first deferral period. **Legislation** H. R. 1994 - SECURE Act
Closed Plan Relief **SECURE Act § 205**	Nondiscrimination relief is provided with respect to benefit accruals for a closed class, and with respect to benefits, rights, and features for a closed class of participants, under a DB plan that meets certain requirements. Additionally, nondiscrimination relief is provided to contributions in a DC plan ("make-whole" contributions) provided for certain participants to make up, at least in part, for the loss of future DB plan accruals amended to cease or be reduced, if the DB and DC plans meet certain requirements. A closed or frozen applicable DB plan may satisfy the Code's minimum participation requirements if it met the requirements when the plan was closed or frozen.	DB plans containing any groups with benefits or features closed to new entrants and/or with frozen accruals should be reviewed to ensure they satisfy the new rules. Similarly, related DC plans providing make-whole contributions to closed groups from a DB plan should also be reviewed. In addition, amendments to a DC plan may be desirable to provide new make-whole contributions. Appropriate nondiscrimination testing will be required. Care should be taken to ensure that no current or future amendments to closed group benefits or features relying on relief substantially favor HCEs. **Legislation** H. R. 1994 - SECURE Act
Distributions for Birth or Adoption of a Child **SECURE Act § 113**	DC plans (401(a), 403(b), or governmental 457(b) plans) may offer a new, permissible in-service distribution option of up to $5,000 per child (per parent) for the one-year period beginning on the child's birth or adoption.	Eligible distributions are not subject to the 10% additional tax under Code § 72(t) for early withdrawals. A plan that makes an eligible distribution must accept a recontribution by the recipient if the recipient is eligible to and wants to make a rollover contribution to the plan. **Regulatory Guidance** IRS Notice 2020-68 **Aon Article** "IRS Provides Guidance on SECURE Act and Miners Act" 4Q2020 Legal Consulting & Compliance *Quarterly Update*

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Appendix B: Discretionary Amendments to Consider When Terminating DB Plans [5]

Provision/Reference	Possible Update	Comments/Links to Additional Guidance
Plan Administrator **ERISA §§ 404–414**	If the plan sponsor or, perhaps less commonly, a single individual is designated as the "plan administrator" under ERISA and the plan document, the sponsor may wish to consider adopting a plan amendment designating a committee to make the selection of the insurer or insurers from which an annuity contract will be purchased.	The nature and financial significance of a plan's selection of a "safest available annuity" provider within the meaning of DOL Interpretive Bulletin 95-1 (as revised in 2008) are such that most plan terminations proceed by having a fiduciary committee of, for example, three or five individuals decide on the eventual annuity placement based on a well-documented and prudent process involving the evaluation and selection of potential annuity providers. **Regulatory Guidance** 2509.95-1 Interpretive Bulletin 2008 Amendment to Interpretive Bulletin-95-1
QJSA Election and QPSA Waiver Periods **Code § 417(a)** **Treas. Reg. § 1.401(a) 20, Q&A 8**	If the plan currently has a 90-day maximum benefit election period, plan sponsors may wish to consider adopting a plan amendment to extend the period to 180 days. Also, sponsors may wish to consider amending a plan that provides a QJSA benefit (and modifying election materials) to provide that an election of an optional form and a waiver of the QJSA includes a waiver of the QPSA, in case the participant dies before payments commence. This change should avoid a possible need to revert to payment as a QPSA, if the participant dies prior to the annuity starting date. Plan sponsors who implement a DB plan lump-sum window immediately prior to a plan termination will want to consider whether they will honor a lump-sum election by a participant who dies after making a valid election but prior to commencement or, alternatively, pay the plan's QPSA, if applicable.	Expanding the maximum benefit election period from 90 to 180 days may assist with potential DB plan termination election timing, particularly if the sponsor is evaluating whether or not to proceed with a lump-sum window opportunity ahead of the plan termination. **Regulatory Guidance** Internal Revenue Manual § 4.72.9.4.5.1: Internal Revenue Manual

[5] Changes to DB plans subject to collectively bargaining should not be amended before the sponsor discusses any proposed changes with labor counsel and determines if such changes are subject to "effects bargaining" and require notice and negotiation with each applicable union.

Provision/Reference	Possible Update	Comments/Links to Additional Guidance
Commencement at Age 65 **Code §§ 401(a)(14) and 401(a)(9)** **Treas. Reg. § 1.401(a) 14**	Evaluate if plan terms should be revised to clarify whether terminated vested participants are required to commence benefits upon attainment of normal retirement age (*e.g.*, 65) or, alternatively, if there is a right to defer commencement (*e.g.*, to April 1 of the year following attainment of age 70½ or 72, as applicable). If there is a right to defer, the steps necessary to exercise that deferral right should also be described in sufficient detail in both the plan document and the related benefit election materials.	Prior operational history should be evaluated, since a prior, consistent administrative practice may have either required mandatory commencement at normal retirement age or given rise to a right to defer payment of the vested benefit up to the RBD. Evaluation should consider whether any such right to defer may be a protected optional form of payment subject to anti-cutback protections. The commencement of retirement benefits at age 65 has been identified during both IRS/DOL audits and during Aon's compliance reviews as an area that is often not properly administered by plan sponsors and recordkeepers. **Regulatory Guidance** Required Distributions: IRS Explanation 9, Required Distributions
Suspension of Benefits **DOL Reg. § 2530.203-3**	If the plan provides that participants who remain in active employment with the sponsor after normal retirement age (*e.g.*, age 65) or are reemployed will receive a suspension of benefits notice meeting the requirements of DOL Reg. § 2530.203-3 such that the participant is not entitled to benefit payments or an actuarial increase for any period payments are not made until after April 1 of the calendar year following the calendar year in which the participant attains age 70½, the sponsor may want to consider amending the plan to eliminate the suspension of benefits provision effective upon the successful transfer of liabilities to one or more insurers. As a result, participants who have attained their normal retirement age (or perhaps earlier) or who are reemployed after the plan termination date may elect to receive in-service benefits from the insurer.	Some insurance companies are reluctant (or will decline) to administer a suspension of benefits provision with respect to their annuity contract administration, particularly for smaller DB plan terminations (based on asset size). As a result, plan sponsors should consider adopting a plan amendment before the plan is terminated, effective prospectively (*e.g.*, coincident with the transfer of accrued benefit liabilities from the plan to an insurer, or possibly earlier but not earlier than the date of adoption), such that no suspension of benefit notice will be provided and that any participant who remains in active employment with the employer past their normal retirement age or are reemployed after the plan termination date may elect to commence or (as applicable) continue benefits in-service or have their accrued benefit actuarially increased to reflect the time period that such accrued benefit is not being paid. **Regulatory Guidance** IRS Retirement Topics - Notices
Supplemental Disability Benefits **Treas. Reg. §§ 1.411(d)-3(g)(2) and 1.411(d)-4**	If the plan provides for a protected optional form of payment triggered by a qualifying disability, evaluate if those terms must or should be retained in the plan. In addition, if the plan provides for additional service to be recognized in certain situations where a participant incurs a qualifying disability, consider whether the plan can be permissibly amended to remove the additional service recognition (*e.g.*, for participants who become disabled after the amendment date).	The employer should determine whether any such plan amendment would be subject to collective bargaining (*e.g.*, hourly plans) or is otherwise not permitted. **Regulatory Guidance (Treasury Regulations)** Treas. Reg. 1.411(d)-3 Treas. Reg. 1.411(d)-4

Provision/Reference	Possible Update	Comments/Links to Additional Guidance
Supplemental Death Benefits **Treas. Reg. §§ 1.411(d)-3(g)(2) and 1.411(d)-4**	Plan sponsors should check plan provisions regarding what benefits are payable if a participant dies while actively employed. In addition to reflecting certain required QPSA provisions for married participants and required provisions for participants performing qualified military service, the plan may also include certain discretionary provisions regarding a participant's ability to name a non-spousal beneficiary to receive some or all of the participant's preretirement death benefits under the plan.	Preretirement death benefits other than the QPSA preretirement survivor annuity can often be removed from a plan, at least to the extent they apply to non-collectively bargained employees. The proposed elimination of non-QPSA death benefits may require coordination with the changes described above regarding QJSA election and QPSA waiver periods. **Regulatory Guidance (Treasury Regulations)** Treas. Reg. 1.411(d)-3 Treas. Reg. 1.411(d)-4
Plan Termination **IRM § 7.12.1.17.1.2**	Plan sponsors should consider modifying the plan to include certain provisions that are specific to terminating plans if those provisions are not already in the plan document, including adding (i) certain relevant plan termination authority to the enumerated list of specified fiduciary duties within the purview of the designated plan administrator (*e.g.,* settling of all liabilities, purchasing an irrevocable annuity contract, etc.); (ii) required provisions applicable to the interest crediting rate under terminating cash balance plans (such provisions, if applicable, must be included); and (iii) provisions regarding the ability to direct any surplus plan assets in a terminating DB plan to a "qualified replacement plan" or to any other eligible purpose that will not trigger a reversion and excise tax.	A terminating plan should be amended before the termination date to include all required or desirable provisions. It is not uncommon for a DB plan to have surplus assets following the final annuity purchase for a variety of reasons, including demographic adjustments made by the sponsor and the insurer. Sponsors should carefully evaluate their options with respect to such surplus assets, particularly where the DB plan previously required mandatory employee after-tax contributions. Additionally, if the terms of the plan document have not allowed reversions for at least five calendar years preceding the plan proposed termination date, excess plan assets must be allocated among plan participants in accordance with existing plan provisions. **Regulatory Guidance** Internal Revenue Manual § 7.12.1.17.1.2: Internal Revenue Manual
Cash-outs and Missing Participants **Code § 411** **ERISA § 4050**	If current plan terms provide for involuntary cash-outs of the accrued benefit only for benefits that are not in excess of $1,000, consider adding a voluntary or involuntary cash-out provision for accrued benefits over $1,000 but not more than $5,000 for participants and surviving beneficiaries. Also, to ensure participants receive their vested accrued benefits, consider amending plans to specify how to handle missing participants and stale-dated checks and implement consistent administrative procedures to locate participants.	In light of the PBGC's administrative position on "missing participants," including non-responders, sponsors amending plan documents for termination will need to carefully evaluate their policies regarding involuntary cash-outs and stale-dated checks. In many situations, sponsors may decide to direct payment of the accrued benefits of missing participants in a terminated DB (or DC) plan to the PBGC. **Regulatory Guidance** Protected Benefits: Treas. Reg. 1.411(d)-4 Missing Participants: ERISA Reg. 4050.101 through 107 PBGC PR 17-12: Missing Participants Program for PBGC-insured Single-Employer Plans

Provision/Reference	Possible Update	Comments/Links to Additional Guidance
Deemed Cash-outs **Code § 411(a)(11)**	If a plan does not include "deemed cash-out" language for participants whose employment terminates before they are vested to any extent in their accrued benefit, evaluate whether it would be advisable to add such language to the plan.	DB plans may include a "deemed cash-out" provision. However, ERISA § 4044(d)(2)(A) provides that any amendment increasing the amount which may be distributed to the employer following a plan termination cannot be treated as effective before the end of the fifth calendar year following the date the amendment is adopted. DB plan terms should be reviewed regarding the treatment of participants who previously separated from service and have not yet incurred a five-year break in service when the plan terminates. **Regulatory Guidance** Deemed Cash-outs: Improper Forfeiture by Defined Benefit Plans Breaks-in-Service: IRS Employee Plans News (Vol. 2, Fall 2002) PBGC Guidance: PBGC Standard Termination Filing Instructions (footnote 17b) **Aon Article** Plan Terminations, Strategic Planning For 2012 and Beyond (*Journal of Compensation and Benefits* July/August 2011)
Plan Expenses **ERISA §§ 401–409**	Determining what plan termination expenses are payable from plan assets depends on plan provisions and ERISA requirements. Evaluation should also consider the DOL's enforcement position that expenses associated with a discretionary amendment adopted in connection with a plan termination (*e.g.,* a lump-sum window) are not properly payable from plan assets until the amendment is both authorized and adopted (signed).	Plan sponsors should evaluate whether the timing of a plan amendment to reflect various plan termination changes should be accelerated to follow more closely the decision to terminate. The applicable plan fiduciary should determine what expenses are properly payable from plan assets. The decision to pay expenses with plan assets is a fiduciary decision. **Regulatory Guidance** DOL Advisory Opinion 2001-01A DOL Hypothetical Fact Patterns

Aon Contacts

For additional information, please contact:

Thomas Meagher	Senior Partner, Wealth Solutions – Legal Consulting & Compliance	thomas.meagher@aon.com
Hitz Burton	Partner, Wealth Solutions – Legal Consulting & Compliance	hitz.burton@aon.com
Linda M. Lee	Project Manager, Wealth Solutions – Legal Consulting & Compliance	linda.lee.2@aon.com

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