AON

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Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

by Susan Motter

Welcome readers to our latest edition of the *Quarterly Update* as we close out 2023! While we attempt to anticipate what 2024 may bring, we remain diligent in bringing you the latest on new developments and areas of interest.

We open this edition of the *Quarterly Update* with an article about diversity, equity, and inclusion (DEI) programs in the workplace. DEI programs in recent years have started to evolve and have begun to focus on the retirement readiness of employees. With that in mind, it is important to understand what impact the recent Supreme Court case on affirmative action may have on DEI in the workplace and ultimately retirement plan offerings.

Recent expansion into nontraditional pension plan investments (e.g., hedge funds, limited partnerships, and private equity among other nontraditional investments) may present liquidity issues to plan fiduciaries contemplating significant plan transactions such as a plan spinoff or plan termination. Our article identifies several of these illiquid plan investments and suggests alternative strategies for plan fiduciaries to consider in order to improve liquidity and facilitate a plan-related transaction.

As we continue to await additional guidance on SECURE 2.0, we bring you the latest update on the Roth high-paid catch-up rule—specifically the two-year administrative delay announced by the IRS in August 2023. Briefly, SECURE 2.0 required catch-up contributions for certain employees earning FICA wages exceeding $145,000 (as adjusted for cost of living) to be made as Roth (after-tax) contributions. We provide our readers the details surrounding this administrative delay as well as next steps to consider with respect to the Roth high-paid catch-up rule.

We continue to bring our readers the latest developments and litigation on fiduciary risk and responsibilities with two articles. The first article is a follow-up to our prior reporting on 401(k) plan investments in cryptocurrencies and the Department of Labor (DOL) Compliance Assistance Release No. 2022-01 on such investments. Our latest article will update our readers on the aftermath of the DOL guidance, specifically the litigation that arose challenging the DOL guidance.

This edition of *Quarterly Update* closes with reporting on a recent Ninth Circuit Court of Appeals case involving alleged excessive plan fees. What makes this case interesting is the Ninth Circuit's departure from prior precedent from the Third and Seventh Circuits as well as what appears to be the Ninth Circuit's expansion of what is required of plan fiduciaries while evaluating plan investments and fees. We will continue to monitor this case and similar litigation, including whether the Supreme Court will take up what appears to be growing conflict among the Circuit Courts.

A new feature that we have added to the *Quarterly Update* is a section with links to Aon's thought capital on a variety of topics. This section will highlight Aon white papers, best practices, year-end strategies, and other hot topics. We welcome our readers to routinely watch this space in future editions of the *Quarterly Update*.

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.

Affirmative Action Challenged in the U.S.: What It Might Mean for DEI

by Karthik Balaji and Tamara O'Brien

Since 2020, we have seen a sharp increase in the focus employers have placed on diversity, equity, and inclusion (DEI) programs in the workplace. This has resulted in an increase in dedicated DEI leaders, as well as explicit strategies, goals, and corresponding budgets for DEI initiatives. In 2021, 48% of organizations reported having DEI metrics or goals, as published in the HR Pulse Survey: Global, Preparing For the Future: How COVID-19 is Changing How and Where People Work Forever, Aon, May 24, 2021. To access a copy of this survey, click **here**. Just one year later, our Global Diversity, Equity and Inclusion Survey Report, Aon, Nov. 2022 reveals:

- 84% of respondents have identified colleagues responsible for leading DEI initiatives; and
- 93% of companies have reported having strong senior leadership support and sponsorship for related initiatives.

To access a copy of this report, click **here**.

A few years into this era of data-driven policies and holding leaders accountable through specific DEI metrics, some employers have been met with external challenges, including:

- **Affirmative Action Overturned.** In June 2023, the U.S. Supreme Court in a landmark case decided in favor of Students for Fair Admissions, Inc. ruling that race-conscious admissions programs used by Harvard College and the University of North Carolina are constitutionally impermissible.
- **Challenges to Corporate DEI Programs.** Starbucks, Coca-Cola, and McDonald's have all been targets of lawsuits or investigations citing race- and gender-based discriminatory policies that are generally aimed at increasing representation of women and people of color in key roles. While these employers may all have reasonable defenses to the allegations, the lawsuits and investigations continue to focus attention on these issues.

  Though the Supreme Court ruling does not impact private employers and the *Starbucks* lawsuit was dismissed, we anticipate increased legal scrutiny on corporate DEI programs to persist in the near-term. More broadly, these challenges raise questions on how employers might pursue certain DEI goals, particularly as it relates to racial and gender equity.

  The counteracting external force is the increasing focus globally on companies' environmental, social, and governance (or ESG) practices, of which DEI is a significant factor. Research has consistently shown the link between DEI practices and favorable business results:

- **Impact of DEI Leaders.** A recent report[1] by The Drucker Institute shows that companies with a dedicated DEI executive outperformed those companies that did not have anyone in that role.
- **Measurable Outcomes of DEI Strategies.** A 2023 study[2] by Enterprise Strategy Group observes, "More than four out of five respondents said their organization's DEI strategies were having a measurable positive impact in areas like agility (83%), recruitment and retention (84%), the ability to engage customers (84%), and company reputation (86%)."

To better address the external challenges and stakeholder demands, there continues to be a growing need for data and analytics to support corporate strategy and governance. While the common focus is on diversity within recruitment, promotion channels, and board composition, it is also important to examine talent retention systems, including workplace culture and employee benefits. Employee benefits are a means of expressing an organization's DEI values and can help establish a human connection with the team, making employees feel seen while supporting their engagement. At Aon, we view inclusivity in benefits programs as having the following features:

- **Accessibility.** Ability for all employees to take advantage of benefits offered;
- **Affordability.** Benefits within reach for employees across the socio-economic spectrum;
- **Consistency.** Equitable benefits, programs, and support available to all employee groups; and
- **Flexibility.** Benefits that support diverse colleagues with different needs.

[1] The Wall Street Journal Management Top 250, The Wall Street Journal in conjunction with the Drucker Institute, Dec. 11, 2022

[2] A Mature Approach to Diversity, Equity, and Inclusion Delivers Real Results, Adam DeMattia of the Enterprise Strategy Group, Mar. 2023

What steps can an organization take to achieve these objectives? It starts with assessing your current state to develop a baseline. Tangible approaches for examining benefit programs include:

- **Discover.** Conduct a systematic review of benefits programs for features of inclusivity, benchmarking against industry and peers, and identifying high-impact opportunities to enhance wellbeing and benefits experience for vulnerable cohorts;
- **Quantify.** Review plan participation, benefit elections, and utilization of programs and services to understand unintended biases or barriers in the current benefit offering;
- **Listen.** Survey employees for feedback on DEI initiatives, their needs and values, and their perception of gaps in the current benefits program; and
- **Re-envision.** Review and rethink benefits messaging and communication channels to ensure employees are aware of the value of their benefits and how to effectively take advantage of current programs, which could include leveraging employee resource groups and supporting managers to promote engagement.

These data-driven tactics can serve as the basis for establishing DEI goals, measuring progress, and conveying the impact to stakeholders. Outcomes are not always controllable, and progress takes time. However, an organization's consistent actions can help influence its trajectory. Having a systematic approach to track progress toward goals through well-defined metrics is critical to the success of any DEI program.

The landscape surrounding corporate DEI initiatives is ever changing. Despite the recent challenges in the U.S., many employers are staying the course in prioritizing DEI initiatives, continuing to protect human capital, and solidifying the integrity of their organizations' values. In this way, we see DEI initiatives continuing to play a key role in effective corporate strategies.

For a holistic assessment of your organization's current state and potential actions to explore, please feel free to contact the authors of this article or your Aon consultant. We can help you support DEI throughout the employee lifecycle, from recruitment to retention to retirement.

Dealing with Illiquid Pension Assets

by Hitz Burton and Tom Meagher

In recent years, plan fiduciaries seeking to maximize returns on pension plan assets have expanded their investment alternatives to include hedge funds, limited partnerships, private equity, and other nontraditional investments.

With this expansion into nontraditional investments, plan fiduciaries are encountering situations where the plan assets may need to be used or transferred for other purposes far earlier than originally contemplated. For example, if there is a plan spinoff transaction in the near future, there may be a need to allocate a portion of the pension assets to the spinoff plan—that may be quite easy if all of the assets are liquid (e.g., mutual funds), but can be quite more complex if the assets are held in an investment vehicle that does not lend itself to being easily split between the two plans. Similarly, with many defined benefit pension plans considering pension risk transfers or plan terminations, the illiquidity of certain pension plan assets may make moving forward with such a transaction more difficult.

The purpose of this article is to start with the premise that the plan is holding illiquid assets and must now evaluate possible alternatives to improve the plan's liquidity by addressing those assets. While the decision to dispose of the illiquid assets and how best to do so is a fiduciary decision, there are a number of alternatives that may be considered. In some cases, if the plan fiduciary does not have the necessary expertise to evaluate the best course of action, consideration should be given to bringing in a third party or independent fiduciary to assist.

To the extent that a pension plan spinoff is contemplated or there is a need to allocate illiquid assets, some possible alternatives for the division of illiquid assets may include the following. Several of these alternatives may also be considered to the extent that the fiduciary wants to simply unwind the investment.

- **Consider Transferring Illiquid Investments into a Group Trust.** A group trust is an arrangement under which individual trusts (in this case the trusts that exist on behalf of two or more pension plans) pool all or a portion of their assets in a group trust, where the group trust is declared to be part of each of the qualified plans. Thus, the assets would not need to be sold or otherwise liquidated; when the assets become liquid, the group trust could be directed to return the funds to each of the participating trusts.

- **Negotiate with General Partners to Divide Asset.** Depending on the nature of the investment (e.g., limited partnerships) and whether to split the illiquid asset into two illiquid parts, consideration could be given to negotiating with the general partner to divide the trust's interest in the asset such that each of the pension trusts would receive a separate (albeit illiquid) investment in the limited partnership. Such a review may require a current valuation of the asset for purposes of equitably allocating between the two trusts.

- **Identify Alternate Investors.** Depending on the nature of the investment, it may be possible to discuss with the general partner or other investors to determine if another limited partner may be interested in taking on an additional percentage of the investment, or if other third parties may be interested in the investment going forward.

- **Retain Independent Third Party to Evaluate Asset Value.** Consideration could be given to having an independent third party evaluate the value of the illiquid assets with an eye to allocating the illiquid assets between the two trusts (without splitting or dividing the illiquid assets) based on various fiduciary considerations including expected asset value, future liquidity needs, investment risk, etc.

- **Sell Illiquid Asset on Secondary Market.** Although this is an alternative, in view of the fiduciary requirements under the Employee Retirement Income Security Act of 1974 (ERISA), it would seem that such a sale (through a secondary market broker) of what is considered an illiquid asset may result in a discount to the current value of the investment, unless the asset is viewed as being in demand. Liquidating an otherwise illiquid asset may be difficult for the plan fiduciaries to support in terms of acting in the best interests of the plan and its participants. Any effort to dispose of the asset for less than the fair market value would likely require consideration of fiduciary concerns under ERISA.

- **Sell Illiquid Asset to a Party in Interest (Employer).** The Employee Benefits Security Administration Voluntary Fiduciary Correction Program (VFCP) permits the sale of illiquid assets to a party in interest (e.g., the employer). The VFCP notes that a prior transaction may be "corrected" by the sale of the asset to a party in interest, provided the plan receives the higher of (i) the fair market value of the asset at the time of resale, without a reduction for the costs of sale; or (ii) the original purchase price, plus lost earnings.

There are a number of important issues for plan fiduciaries to consider when dealing with illiquid assets. Aon's Retirement Legal Consulting & Compliance and Aon Investment USA Inc. consultants have recently helped several clients work through these issues and are available to work with clients and their plan fiduciaries in determining an appropriate course of action.

Roth High-Paid Catch-Up Rule Catches a Cold

by Dan Schwallie

IRS Announces Two-Year Delay of Roth High-Paid Catch-Up Rule

IRS Notice 2023-62 (Notice), issued August 25, 2023, announces that the first two tax years beginning after December 31, 2023 will be regarded as an administrative transition period with respect to the Roth high-paid catch-up rule enacted as part of SECURE 2.0. Catch-up contributions during the last two tax years beginning prior to January 1, 2026 will be treated as satisfying the rule, whether or not made as Roth contributions and irrespective of a participant's prior year FICA wages. Also, during the last two tax years beginning prior to January 1, 2026, a plan that does not provide for Roth contributions will be treated as satisfying the rule. This delay is good news for plan sponsors and practitioners who had expressed concerns regarding their ability to implement these requirements beginning in 2024.

Background on the Roth High-Paid Catch-Up Rule

Section 603 of SECURE 2.0 provides that, if a participant who is eligible to make catch-up contributions due to attaining age 50 has FICA wages (i.e., wages for purposes of Social Security reporting) exceeding $145,000 (as adjusted for cost of living) for the preceding calendar year from the participant's employer that sponsors a 401(k), 403(b), or governmental 457(b) plan, any catch-up contributions of that participant to such plan must be Roth contributions. This Roth high-paid catch-up rule (Rule) was intended to be effective for tax years beginning after December 31, 2023.

Many plan sponsors and recordkeepers expressed serious concerns about the fast-approaching effective date and the ability to timely implement administration of the Rule. Section 603 of SECURE 2.0 also expressly restated the universal availability rule for catch-up contributions that requires, if Roth catch-up contributions are made available to some participants in a plan (in this case the high-paid), then Roth catch-up contributions must be available to all participants. Some plans do not currently permit Roth contributions, which created additional concerns about adequately introducing Roth contributions to participants. Further, FICA wages are reported in Box 3 of Form W-2, while most plans base contributions (and the determination of who are "highly compensated employees") on a different definition of compensation, which thereby adds another compensation number to be tracked by plan sponsors and recordkeepers.

Section 603 of SECURE 2.0 also deleted, for tax years beginning after December 31, 2023, the provision in Section 402(g)(1)(C) of the Internal Revenue Code (Code) that excludes catch-up contributions in excess of the dollar limit on elective deferrals to a 401(k) or 403(b) plan from gross income of the individual. This created concerns that catch-up contributions technically would no longer be permitted. Governmental 457(b) plans were not affected because those catch-up contributions are permitted by Section 457(e)(18) of the Code. In a letter to the IRS and Treasury Department earlier this year, the chairmen and ranking members of the House Ways and Means Committee and Senate Finance Committee indicated that it was not Congress's intent to disallow catch-up contributions, and that they intend to introduce technical corrections legislation to correct erroneous statutory language.

Guidance on (Inadvertent) Elimination of Catch-Up Contributions by SECURE 2.0

The Notice states that the elimination of Section 402(g)(1)(C) of the Code by SECURE 2.0 does not make catch-up contributions for tax years beginning after December 31, 2023 impermissible. Pursuant to Section 414(v)(1) of the Code, an applicable employer plan is not treated as failing to satisfy any requirement of the Code solely because the plan permits an eligible participant to make catch-up contributions that satisfy Section 414(v) of the Code. And non-Roth catch-up contributions continue to be excluded from gross income. The Notice further states that the elimination of Section 402(g)(1)(C) of the Code does not affect the requirement to aggregate all an individual's elective deferrals during a tax year to determine whether the dollar limitation of Section 402(g)(1)(B) of the Code is exceeded and to apply the limitation of Section 414(v)(2) of the Code on the total amount of the individual's catch-up contributions.

Forthcoming Guidance on Implementing the Roth High-Paid Catch-Up Rule

According to the Notice, future guidance on implementing the Rule is expected to include:

- Clarification that the Rule would not apply to a participant who does not have FICA wages for the preceding calendar year from the employer sponsoring the plan. For example, an individual receiving self-employment income or who is a state or local government employee whose services are excluded under Section 3121(b)(7) of the Code.
- Permission for the plan administrator and employer to treat an election of pre-tax catch-up contributions by a participant subject to the Rule as an election of Roth contributions instead.
- Provision that a participant's wages for the preceding calendar year from one employer, participating in a multiple employer or a multiemployer plan, would not be aggregated with wages from another participating employer when determining whether the participant's FICA wages for that year exceed $145,000 (as adjusted). For example, if a participant's FICA wages in the preceding year did not exceed $145,000 from any participating employer, the participant would not be subject to the Rule, even if the total from all participating employers exceeded $145,000. Further, even if the participant's FICA wages in the preceding year from one participating employer exceeded $145,000 (as adjusted), the Rule would not also apply to catch-up contributions made on behalf of the participant by another participating employer, unless the participant's FICA wages in the preceding year from that other participating employer also exceeded $145,000 (as adjusted).

Comments were requested by October 24, 2023. The Notice expressly asked for comments as to whether guidance should address a plan that permits catch-up contributions but not Roth contributions, specifically, whether the guidance should provide that a plan will not fail either:

- The universal availability requirement for catch-up contributions of Section 414(v)(4) of the Code; or
- The Roth high-paid catch-up rule requirement of Section 414(v)(7)(B) of the Code,

merely because participants not subject to the Rule are permitted to make catch-up contributions, but participants subject to the Rule are not permitted to make catch-up contributions. Sponsors of plans that do not permit Roth contributions and do not wish to add Roth should welcome such guidance.

Next Steps to Consider for the Roth High-Paid Catch-Up Rule and Other SECURE 2.0 Changes

The two-year delay is a welcome relief that was sought by many employers and recordkeepers alike. Most plan sponsors permit catch-up contributions, but many currently do not permit Roth contributions. Some plan sponsors may need to choose between offering Roth contributions or catch-up contributions to comply with the Rule at the end of the two-year delay. Based on Code language and current guidance, requiring that all catch-ups (or all contributions) be Roth contributions, appears not to be a solution.

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

Plan Fiduciaries: What's Next for Crypto and 401(k) Plans?

by Tom Meagher

As we reported in the **Second Quarter 2022** and **Fourth Quarter 2022** issues of our *Quarterly Updates,* the Department of Labor (DOL) had issued a Compliance Assistance Release No. 2022-01 (Guidance) with a warning to plan fiduciaries to "exercise extreme care" if offering cryptocurrencies within a defined contribution (DC) plan's investment menu, including self-directed brokerage windows. The DOL issued this Guidance as the popularity and curiosity for cryptocurrencies was on the rise.

At the time that the Guidance was released, there was a significant outcry from a number of cryptocurrency and investment fund managers upset with the DOL Guidance and the expected chilling effect the Guidance would have on plan fiduciaries considering such investments for their plans.

In the article that was published in the Fourth Quarter 2022 issue, we noted that one provider, ForUsAll, Inc., had filed a lawsuit against the DOL claiming that the DOL exceeded its authority by threatening "an investigative program" aimed at plan sponsors and fiduciaries that offer cryptocurrency investments. In responding to the lawsuit, the DOL noted that the Guidance was not necessarily final guidance, that it contemplated further agency action, and that it was issued more as an "interpretive rule," that would not be subject to the notice-and-comment requirements in the Administrative Procedures Act.

On August 29, 2023, the District Court for the District of Columbia issued a Memorandum Opinion in which the court ruled in favor of the DOL. In its opinion, the court concluded that the plaintiff lacked standing because it was highly speculative that the requested relief (i.e., having the DOL withdraw the Guidance or precluding DOL enforcement) would redress the alleged injuries to its business (e.g., plan sponsors are not likely to disregard the Guidance when considering cryptocurrency as a plan investment). Claims by the plaintiff that the DOL lacked authority to issue the Guidance also failed based on the court's conclusion that the Guidance did not represent final agency action and was therefore not reviewable.

While the Guidance along with recent financial developments involving cryptocurrency may rightfully give plan fiduciaries pause before offering such an investment in their DC plans, the normal fiduciary rules relating to making prudent investment decisions continue to apply, as they did before.

Please do not hesitate to reach out to Aon's Retirement Legal Consulting & Compliance consultants or our Aon Investment USA Inc. team if you have any questions regarding cryptocurrency or establishing a fiduciary process for considering the prudence of alternative plan investments.

Ninth Circuit Takes Expansive View of Fiduciary Requirements

by Hitz Burton

On August 3, 2023, the Ninth Circuit Court of Appeals issued its decision in *Bugielski v. AT&T Services, Inc.* finding that AT&T and its 401(k) plan recordkeeper, Fidelity Workplace Services (Fidelity), as a party in interest to the retirement plan, entered into a prohibited transaction under the Employee Retirement Income Security Act of 1974 (ERISA) when AT&T amended its contract with Fidelity to add a brokerage window and an optional fiduciary advisory service. The Ninth Circuit then remanded to the district court the issue of whether AT&T and plan fiduciaries satisfied the requirements under ERISA for an exemption to the prohibited transaction as a necessary service.

As background, ERISA provides qualified retirement plans with various exemptions permitting plans to engage in a transaction with a related party (here, the plan's recordkeeper) that would otherwise be prohibited. To satisfy the necessary services exemption, however, AT&T and plan fiduciaries needed to demonstrate that the fees paid to Fidelity were reasonable.

Previously, federal courts have typically evaluated the reasonability of fees paid for recordkeeping services based on the direct costs paid by a plan for recordkeeping services. Examples of direct costs include the annual per-participant fee a plan pays for recordkeeping services or a charge assessed by the recordkeeper when a participant requests a loan from their vested account balance. Here, based on information reflected in various pleadings, the AT&T fiduciaries used their 401(k) plan's large asset size to significant advantage by negotiating for low annual per-participant service fees of approximately $30 or less over time and a so-called "best-in-class" commitment from Fidelity. Under the "best-in-class" commitment, Fidelity was contractually obligated to reduce its annual per-participant fee further if another plan sponsor negotiated a lower annual fee structure with Fidelity.

In a departure from prior precedent in the Third and Seventh Circuit Courts of Appeals, however, the Ninth Circuit held that, in addition to evaluating the direct costs paid to Fidelity from plan assets for its recordkeeping services (e.g., the $25 annual per-participant fee), the AT&T fiduciaries also needed to understand and evaluate the reasonability of both the (i) revenue sharing received by Fidelity from investments made by participants in third-party mutual funds and other investments available through the plan's brokerage window; and (ii) the fees paid to Fidelity by the third-party financial advisor from the charges assessed by that advisor on the account balances of participants who sought its investment advice.

Following the August 3 decision, AT&T filed a motion for a rehearing with the Ninth Circuit. The Ninth Circuit denied that motion on November 9, 2023.

Whether ERISA fiduciaries need only to evaluate the direct fees paid by the plan to a recordkeeper or other parties in interest to the plan to fulfill their obligations under the necessary services exemption or if they must also evaluate other indirect revenue streams paid to their plan's recordkeeper is unclear at present given the conflicting holdings arrived at by the Courts of Appeals that have evaluated this issue. In light of the Ninth Circuit's decision not to rehear the matter, AT&T may now request review by the U.S. Supreme Court which, if it agrees to accept the case, could clarify the matter.

In the interim, members of Aon's Retirement Legal Consulting & Compliance group are available to help plan sponsors or plan fiduciaries with responsibility for overseeing the negotiation of recordkeeping service agreements and can provide additional insight as to when and under what circumstances evaluation of indirect revenue streams paid to a recordkeeper from plan assets may be appropriate.

Quarterly Roundup of Other New Developments

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

Gen X Retirement Panic

More than half (55%) Generation X (Gen X) workers (born from 1965 through 1980) say they won't be financially prepared for retirement when the time comes according to a recent Northwestern Mutual report, "2023 Planning & Progress Study." As this generation approaches retirement, numerous factors contribute to their concerns.

Gen X is the bridge generation between company-provided pensions and 401(k) savings plans. As pension plans faded, 401(k) plans became more popular. Due to the time it took these plans to catch on, the average age a Gen X worker began to save is 30 years old per the recent study released by the Transamerica Center for Retirement Studies and Transamerica Institute. With these plans came the worker responsibility to choose to participate and the responsibility to manage their investments.

The nickname for Gen X is the "sandwich generation." This name comes from the group getting married and having children later in life than previous generations. That has resulted in Gen X workers managing parenting responsibilities while caring for aging parents at the same time.

Gen Xers also have concerns about the future of Social Security, compounding their retirement worries. Only 55% believe Social Security will be there for their retirement. According to a Transamerica study, only 17% of Gen Xers feel very confident they will be able to retire with a comfortable lifestyle.

Each generation of employees comes with specific challenges. These differences can be addressed via plan provisions or targeted participant communications. Talk to your Aon consultant regarding how to review your plan and participation rates to determine the best ways to meet the needs of your Gen X employees.

Emergency Savings Plans: Education Is Key

Retirement plans are a crucial aspect of financial security, and one element that is often overlooked is the importance of emergency savings accounts within retirement plans. These accounts, now available in retirement plans through SECURE 2.0, serve as a safety net for individuals during unexpected financial crises and help mitigate the risk of depleting retirement funds prematurely.

For plan sponsors considering adding an emergency savings provision to their retirement programs, it is important to note that participant education plays a crucial role in promoting usage. By actively promoting and educating participants about these accounts, retirement plan providers can assist individuals in building a solid financial foundation. In addition to simply acknowledging the importance of emergency savings accounts, retirement plans should incorporate comprehensive participant education programs. These programs should go beyond basic retirement planning information and extend to emphasizing the significance of emergency funds and provide educational resources on topics such as budgeting, managing debt, and building an emergency savings fund.

Your Aon team can assist with plan design considerations along with required plan amendments that meet your organizational objectives and goals, as well as assist in coordinating an annual strategic participant communication planning meeting with your recordkeeping provider.

The Burning Question: When Will I Retire?

Transamerica and MIT AgeLab recently published a new paper, "Longevity as Opportunity – New Conversations on Work, Finances, and Well-Being." The paper discusses how participants are realizing they will need to work beyond the normal retirement age of 65.

The paper broke respondents into three groups: adults (age 20 – 39), adults in midlife (40 – 59), and older adults (60 and up). Each of the groups felt that well-being and retirement were important in future financial planning, but unfortunately other life events preclude them from fully focusing on their ability to prepare as 33.4% of the respondents did not believe they would have enough assets to retire.

Each participant will have his or her own experience and require his or her own solution. Some plan to work longer and acknowledge they would consider working part-time if available at their workplace. Financial planners and employers are also trying to find ways to help these participants. Aon routinely has discussions with clients related to plan design alternatives featuring a benefit formula which includes a stretch match plus automatic enrollment and automatic escalation of deferrals at a rate of 1% or 2% each year. The stretch match encourages participants of all ages to defer at a higher rate to be able to get a full match to build larger retirement plan account balances.

Participants are thinking about passive income streams while financial advisors are encouraging investment portfolios that will match the participants' planned spending. Employers can look to Aon to review plan design, investments, and communications to improve participants' retirement incomes.

Assets Values Are Up, But So Are Hardships

After a difficult 2022 for capital markets, this year has been more profitable with markets rebounding through mid-year and participants in defined contribution (DC) plans seeing growth in their accounts compared to last year. According to Bank of America's 2023 Participant Pulse report which includes data on over four million participants, the average account balance has increased by almost 10% in 2023 through the end of June. Additionally, the average account balance has risen for three straight quarters according to Fidelity.

Unfortunately, there is some bad news as there has been an increase in hardship withdrawals and loans from DC plans. According to Bank of America, hardship withdrawals have increased by 12% since the first quarter of 2023, and by 36% compared to the second quarter of last year. Additionally, Bank of America's data shows that while average loan amounts remain relatively static, the number of participants taking loans has increased quarter over quarter. Potential reasons for this spike could be the impact of higher interest rates on personal debt and higher inflation levels over the past year.

Two provisions included as part of SECURE 2.0 might help plan sponsors address plan asset leakage. The first is allowing a participant the ability to take a DC plan distribution up to $1,000 for personal emergencies. The second option allows employers to offer an Emergency Savings Account (or "sidecar" account). This would allow non-highly compensated participants to save up to $2,500 after tax in a savings account. According to a recent BlackRock study, low-income workers who had at least $1,000 in savings were significantly less likely to take a hardship distribution if an emergency arose. While both of these provisions are optional, this approach could benefit participants.

Contact your Aon consultant regarding your plan leakage and ways to potentially encourage participants to remain in their DC plan and avoid unnecessary withdrawals.

Fiduciary Fast Facts

- **Schlichter New Wave of Litigation.** Schlichter Bogard, LLC is soliciting employees (potential plaintiffs) who are participating in a few specific healthcare plans for purposes of commencing a possible class action against the plan sponsors. This possible change in the direction of lawsuits may be based on the Consolidated Appropriations Act, 2021, which in part requires a determination of "reasonableness" of vendor fees and services for healthcare and prescription drug reporting for plan years 2020, 2021, and 2022.

- **SEC Finalizes Money Market Reforms.** In July 2023, the Securities and Exchange Commission adopted a group of rule amendments regarding the money market fund industry. The amendments will increase money market funds' minimum daily and weekly liquid asset requirements to 25% and 50%, respectively, from 10% and 30%.[1]

- **DEI Best Practices for Talent Acquisition.** The Insured Retirement Institute has published a compendium of best practices to incorporate diversity, equity, and inclusion into hiring practices for early- and mid-career employees.[2]

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, plan fiduciaries, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans, among others. DC plan cases generally fall into the following three areas: inappropriate or imprudent investment choices; excessive fees; and self-dealing. Recently, several cases involving corporations, universities, and other institutions have been dismissed (in full or in part) or settled, including cases involving Atrium Health Wake Forest Baptist formerly known as the Wake Forest Univ. Baptist Med. Ctr. (settled for $3.8M); DST Systems, Inc., including investment management firm Ruane, Cunniff & Goldfarb Inc. (settled for ~$124.6M); and Verizon Comm., Inc. (settled for $30M). It should be noted that the settlement of these litigation matters does not necessarily mean that the plan sponsors or fiduciaries were at fault or did not have defensible positions. Many factors may go into a plan sponsor's or fiduciary's decision to settle plan-related litigation.

[1] Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A, SEC Release Nos. 33-11211; 34-97876; IA-6344; IC-34959 (July 12, 2023)

[2] Insured Retirement Institute, *Best Practices Compendium, Embedding DEI in Early- and Mid-Career Talent Acquisition* (June 2023)

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

Litigation in the third quarter of 2023 had familiar themes. 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. An excessive fees case was brought against Pfizer Inc., and a fund performance case was brought against Mitsubishi Chem. Am., Inc. Lawsuits alleging both excessive fees and fund performance issues were brought against Waters Corp. and Cedars-Sinai Med. Ctr. A lawsuit involving an abandoned plan was brought by the DOL against Professional Payroll Concepts Inc. (doing business as Personnel Mgmt. of WV 401(k) Plan). A misappropriation of funds case was brought against Dierkes Heating & Air and its SIMPLE IRA. As with plan settlements, the allegations of excessive fees or fund performance issues are not a decision on the merits, and plan sponsors and fiduciaries may have defenses to all such allegations. Aon will continue to track these cases, and others, as they develop.

Please see the applicable Disclosures and Disclaimers on page **14**.

Hot Topics: Recent Aon Publications

Aon 2024 Limits for Benefit Plans

Each year, the U.S. government adjusts the limits for retirement plans, Social Security, Medicare, and other benefit programs to reflect price and wage inflation, and changes in the law. As a result, employee benefit plans must be adapted annually to accommodate the new limits. The Internal Revenue Service recently announced the annual dollar limitations for pension and other retirement-related plans—including limits on the amount of contributions that may be made to defined contribution plans, the annual amount that can be paid from defined benefit plans, and the amount of compensation that can be used while calculating benefits. The limits are adjusted for price and wage inflation and general law changes.

Click **here** to download your copy of Aon's annual, comprehensive report that includes all dollar limitations for 2024.

Year-End Update: Action Items and Planning Opportunities for Your Retirement Plans

As we approach the end of 2023, there are several strategic planning and risk mitigation opportunities for retirement plan sponsors and fiduciaries to consider.

Aon has prepared a Year-End Update that focuses on many of these issues and concerns, including risk mitigation strategies, some best practices for plan sponsors to consider, along with plan amendments that plan sponsors may want to consider in anticipation of future transactions and law changes.

Click **here** to download and read this Year-End Update.

Fiduciary and Litigation Risk in Today's 401(k) and 403(b) Plans

There are increasing fiduciary, compliance, and litigation risks associated with today's 401(k) and 403(b) plans. While employers may be aware of these risks, many may not be aware of their full extent. For plan sponsors and fiduciaries, the level of personal accountability can be significant and not always well understood.

Aon has recently published a white paper discussing these issues and, more importantly, steps that can be taken to mitigate these issues and associated risks. Among other things, the adoption of a pooled employer plan can significantly mitigate these risks, while also reducing plan costs and a plan sponsor's administrative workload while achieving better retirement outcomes for plan participants.

Click **here** to download and read this white paper.

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