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BENEFITS BRIEF

NEW DEVELOPMENTS AND UPCOMING REQUIRED CHANGES IN DEFINED CONTRIBUTION RETIREMENT PLANS

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In this *Benefits Brief*, we will summarize some new developments and upcoming required changes in tax-qualified and tax-favored defined contribution retirement plans.

"Extreme Care" Required For Cryptocurrency Investment Options

Few investment options are explicitly prohibited by ERISA. Nevertheless, the Department of Labor recently issued a Compliance Assistance Release cautioning that fiduciaries of ERISA-governed plans[1] must exercise "extreme care" before adding a cryptocurrency option to a defined contribution plan's investment menu or permitting a cryptocurrency option under a self-directed brokerage option under the plan. Given the infancy of cryptocurrencies and the significant risks of fraud, theft, and loss to participant accounts due to an evolving but incomplete regulatory environment, valuation issues, and other concerns, the Department of Labor questions the prudency of exposing plan participants to cryptocurrencies or investment products tied to cryptocurrencies and has made clear that plan fiduciaries who allow these investments must be prepared to justify offering them.

Most plan fiduciaries have historically viewed their responsibility over self-directed brokerage options as only requiring them to investigate the prudency of the brokerage "window" and not the investments acquired under the brokerage option. This DOL guidance calls into question the legitimacy of that interpretation, at the very least with respect to cryptocurrencies and investments tied to cryptocurrencies but perhaps more broadly. Recently, however, a high-level DOL official speaking *unofficially* at a fiduciary duties webinar suggested this guidance was not intended to change the Department's traditional view on the level of oversight plan fiduciaries must exercise over self-directed brokerage windows but rather to address what was perceived as extremely aggressive marketing of cryptocurrency investments to participants in plans with self-directed brokerage options.

Employer/Plan Fiduciary Action Items. The unmistakable message from the DOL guidance is that ERISA-governed retirement plans should not permit investments in cryptocurrencies or investments tied to cryptocurrencies and that plans that allow them will be targeted for examination. Employers and plan fiduciaries therefore should assure their self-directed brokerage window and the fund line-up do not permit investments of this nature or begin preparing to justify their actions in the event of an investigation or participant claim.

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[1] ERISA-governed plans include plans of for-profit and tax-exempt employers but generally excludes plans of governmental entities, plans of churches and related church organizations that have not affirmatively elected to be subject to ERISA, and plans benefitting only the business owner and his/her spouse where there are no other employees of the business (so-called "owner-only plans").

Obligation to Provide Lifetime Income Disclosures

Soon, the first of annual "lifetime income disclosures" must be provided to participants in most defined contribution retirement plans. The goal of these disclosures is to help participants better understand how their retirement savings to date will convert to an estimated monthly payment for their lifetimes and how their level of savings impacts their retirement planning.

Affected Plans. The plan administrator of an ERISA-governed defined contribution plan[2] must provide these disclosures at least annually in, or as part of, the periodic participant account statements. Thus, these disclosure obligations apply to plan administrators of 401(k) plans, profit sharing plans, money purchase pension plans, employee stock ownership plans, and Section 403(b) plans but do not apply to plan administrators of governmental plans, church plans, or "owner-only plans."

Disclosure Content. Participants in covered plans must be provided annually a statement that includes (i) the beginning and ending dates of the statement period; (ii) the value of the account balance as of the last day of the statement period; and (iii) the equivalent income stream of the participant's current account balance payable at age 67 (or the participant's age, if older) in the form of a single life annuity and as a joint and 100% survivor annuity (even if the participant is currently unmarried). In addition, certain additional disclosures are required to assist the participant in understanding the information provided, including the actuarial assumptions utilized in determining the disclosure amounts, and how that amount corresponds to what he/she will actually receive. The Department of Labor has provided model language that can be used for this purpose. Plans that provide a deferred income annuity are subject to additional disclosures.

Initial Disclosure Deadline. The initial disclosure deadline depends upon whether the participant may elect how his/her plan account is invested. The deadline for participant-directed plans is the last quarterly participant statement required to be distributed by September 18, 2022; for calendar year plans, the second quarter 2022 statement would be the latest statement to which the disclosure can be timely made. In plans in which participants are not permitted to elect how their account is invested, the distribution deadline is the due date for the required annual participant statement for the first plan year ending on or after September 18, 2021, which in the case of calendar year plans is the due date of the Form 5500 for 2021, as extended.

Fiduciary Protection. If the plan administrator prepares and distributes the disclosure in accordance with the regulations and includes the required explanations provided by the Department of Labor without any substantive changes, then no one, including the plan administrator, the employer, or any other party, will have liability for providing those disclosures. Other disclosures may also be included on or with the participant statement without jeopardizing this relief so long as the other illustrations are clearly explained, are presented in a manner that is designed to avoid confusing or misleading participants, and are based on reasonable assumptions.

Employer/Plan Administrator Action Items. Plan administrators should be talking with the plan's third party administrator and plan recordkeeper about assistance with these disclosures. Our experience is that the larger plan recordkeepers have been working on this

[2] See Note 1.

for some time and will be prepared to provide the disclosures for calendar year plans in a timely fashion.

Plan administrators in plans whose plan recordkeeper is not prepared to make those disclosures or where not all plan assets are held by the investment recordkeeper will need to discuss a disclosure strategy with the plan's third party administrator.

This Department of Labor guidance was issued in the form of an interim final rule, as the DOL was required by statute to issue their guidance in about a year's time. The Department is expected to make revisions once the regulations are finalized but has given no timeline for those changes. We can hope the DOL will provide sufficient advance notice to enable plan administrators and plan recordkeepers to timely implement any revisions to the required disclosure.

> *Observation*: It remains to be seen how meaningful these disclosures will be to participants. The disclosures are based only on the participant's *current* account balance, and the annuities are calculated based on the amount payable at age 67 (or current age, if greater than 67). They have been roundly criticized as not being particularly helpful to participants so it is reasonable to expect much more robust disclosures will be required once the DOL finalizes the regulations.

Pre-Approved Plan Amendment and Restatement Deadline

Tax-qualified defined contribution plans maintained on an IRS pre-approved plan document (historically referred to "prototype" or "volume submitter" plans) are required to be amended and restated every six years to reflect changes in the law. The deadline for the current six-year amendment and restatement (called the "Cycle 3" remedial amendment period) expires on July 31, 2022. A different amendment and restatement deadline applies to Section 403(b) plans so they are not subject to this deadline.

Eligibility of "Long-Term Part-Time" Employees

Section 401(k) plans frequently require satisfaction of a minimum age and period of service as a condition of participation. For example, a requirement that an employee be at least age 21 and have a "year of service" defined as a 12-month eligibility period in which the employee has completed at least 1,000 hours of service is not unusual in 401(k) plans. Provisions like these prevent many part-time employees from ever becoming eligible to participate so Congress has now amended the Internal Revenue Code to require Section 401(k) plans to allow certain long-term part-time employees to make salary deferral contributions.

Affected Plans. These new rules apply only to Section 401(k) plans that are not collectively-bargained. They do not apply to Section 403(b) [tax-sheltered annuity] plans of non-profit entities, as those plans are already subject to the "universal availability" requirement with respect to deferrals.

Affected Employees. These new rights apply to "long-term part-time" employees ("LTPT" employees), which are defined as employees who have completed at least 500 hours of service for the employer in each of three consecutive 12-month periods and who have attained age 21 by the end of the third of those consecutive 12-month periods.

Initial Effective Date. This provision was effective for plan years beginning after December 31, 2020, except, however, the determination of the three consecutive years does not begin until that date. Thus, this provision is *practically* first effective on or after January 1, 2024.

Deferral Rights for Affected Employees and Impact on Nondiscrimination Testing. LTPT employees are only required to be offered the right to make salary deferral contributions, including Roth deferrals if permitted under the plan; plan sponsors do not have to make employer contributions (e.g., matching or profit sharing/non-elective contributions) on behalf of LTPT employees. Salary deferral contributions by LTPT employees can be ignored for purposes of nondiscrimination and for top-heavy testing purposes.

While not entirely clear, the most reasonable reading of the statute is this exception applies only to excuse the service requirement to become a participant but does not excuse other non-service eligibility criteria. For example, a LTPT employee should still be ineligible if the plan limits participation to a particular class of employees or employees at a particular facility if the LTPT employee is not a member of that class or employed at the covered facility.

Special Vesting Rules. Special vesting rules apply to LTPT employees if the employer not only allows the LTPT employees to make deferrals (which are always 100% vested) but also makes them eligible for employer contributions. In those plans, a year of service for vesting purposes for LTPT employees is calculated based on 500 hours of service (rather than the typical 1,000 hours of service), however, for this purpose, hours of service prior to January 1, 2021 must be considered.

Employer/Plan Administrator Action Items. At this point, the most important action items for plan administrators and plan sponsors whose plans may potentially be subject to these requirements is to assure the necessary hours information can be obtained from the sponsor's payroll system. Those plan administrators and plan sponsors will also need to consult with the plan recordkeeper to assure the recordkeeping system will be able to separately track these employees so they are excluded for testing purposes and, if the LTPT employees will be eligible for employer contributions, the recordkeeper can administer the separate vesting recordkeeping needed.

The IRS has unfortunately only issued limited guidance on this provision. As with so many things in the benefits arena, the devil is in the details and this provision is no exception. Hopefully additional guidance will be forthcoming before plans must be amended (see below); if not, plan sponsors would be well-advised to limit participation to deferrals only until there is further clarity of the rules.

Amendments Required by Last Day of 2022 Plan Year;
Operational Compliance in the Meantime

A number of recent law changes were adopted with delayed plan amendment deadline even though administrative compliance has been required since the statutory effective date of those provisions. Absent IRS administrative action, defined contribution plans must be amended by the last day of the 2022 plan year (i.e., December 31, 2022 in the case of a calendar year plan) to reflect the changes described below:

- Plans that allowed "coronavirus-related distributions" or modified the plan's loan provisions for the changes permitted by the CARES Act for 2020, must be amended to reflect those changes. A summary of those provisions may be found at: https://www.butlersnow.com/2020/08/cares-act-retirement-plan-distribution-and-loan-rules-liberalized-2/.
- Plans must be amended to reflect the changes in the required minimum distribution provisions that became effective January 1, 2020. A summary of those provisions may be found at: https://www.butlersnow.com/2020/09/navigating-the-required-minimum-distribution-rules-for-2020-and-thereafter-2/. Of note, the IRS recently issued proposed regulations implementing these provisions; if finalized in their current form, they will change a common interpretation of how quickly amounts must be withdrawn after the death of a participant.
- Finally, Section 401(k) plans must be amended to reflect the "long-term part-time" employee provisions described above.

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