



Retirement Plans Outlook and Implications for 2022

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Today's Topics

- Preparing for SECURE Act
- Preparing for CARES Act and CAA
- Cybersecurity
- Missing Participants
- ESG and Proxy Voting
- Mandatory Arbitration
- Form 5500 Changes
- Form W-4 Updates
- Proposed Legislation
- 2022 Dollar Amount Predictions

Preparing for SECURE Act – RMD Choices

- Individually designed plan amendment must carefully track what service provider will actually do (often less than what 401(a)(9) regs allow)
- Likely need amendment for updated distribution period and life expectancy
- Recommendations for plan sponsor
 - Ask recordkeeper how they will administer the new rules – is that what plan sponsor prefers? Amendment drafter must fully understand how the RK may limit full options
 - What options will be allowed? Below are **just some** of the questions:
 - What is default force-out method for P's and Spousal B's – total distribution, or RMD only?
 - What is default force-out for Non-Sp B's? – e.g., will recordkeeper be allowing the SECURE Act option for minors, disabled, less than 10 years or younger to stretch the payout?
 - For 10-year payouts, will RK allow complete deferral until year 10, or require installments?
 - What elections do P's and B's have? Is election paperwork accurate?

Preparing for SECURE Act – Lifetime Income Disclosures

- Annual disclosure including estimate of the monthly amount that a participant's current account balance would pay in the form of a life annuity and a 100% qualified joint and survivor annuity
- Effective September 18, 2021 but, for most participant-directed account plans, first compliant disclosures are not due until the end of the second quarter of 2022
- Interim final rule provides explanations and model language, but final rule not yet issued
- Service providers are getting ready
- Recommend asking for mock-up to understand potential participant questions

Preparing for SECURE Act – Qualified Birth or Adoption Distributions

- Qualified birth or adoption distributions (“QBoADs”) provide new parents early, penalty-free access to their defined contribution plan accounts
- QBoAD is available to an individual:
 - Up to \$5,000 for each birth or adoption (applies across all plans in employer’s controlled group)
 - During the one-year period beginning on the date a child is born or the adoption of an eligible child is finalized
- Optional, but if distributable event, QBoAD not dependent on whether plan permits
- An individual may recontribute all or part of the QBoAD to plan from which received distribution or IRA at any time, provided individual is eligible to make contributions
- Most recordkeepers can accommodate QBoADs at this time
- If offered, need to confirm administrative details (e.g., available sources, frequency, and repayment mechanics) and review participant communications

Preparing for SECURE Act – Part-Time Workers

- SECURE Act now requires long-service, part-time workers to be eligible to make elective deferrals after completing 500 hours/year for three years
 - N/A if plan provides for immediate eligibility or more liberal service requirements for part-time workers
 - N/A to statutorily excluded employees
- Only for elective deferrals—employer match or other contributions not required but, if made, special vesting rule applies
- Nondiscrimination testing/top-heavy rules not required
- Beginning January 1, 2021, employers needed to begin to capture data necessary to determine long-term, part-time workers; earliest date of classification as long-term, part-time worker is 2024

Preparing for CARES Act Amendments

- Gather evidence of options chosen under CARES Act to ensure amendment reflects what elected and effective dates of implementation of same
 - Coronavirus-related distributions (CRDs)
 - Increased loan limit
 - Repayment suspension – how was reamortization implemented/repayments restarted
 - Required minimum distribution suspension – default to pay or not to pay
- Amendment by last day of plan year beginning on or after January 1, 2022
- Participant communications (recordkeeper and SPD/loan procedures)
- Repayment of CRDs
 - All or any portion of CRDs that were eligible for tax-free rollover may be recontributed by participant (not beneficiary) to plan or IRA within three years of distribution date
 - Treated as rollover contribution except for purposes of one-per-year limitation

Preparing for Non-Coronavirus-Related Disaster Relief in 2021 CAA

- Consolidated Appropriations Act of 2021 (CAA) generally provided relief for major disasters declared from January 1, 2020 through February 25, 2021 (such as California wildfires in late summer/early fall of 2020 and recent hurricanes)
 - Disaster-related distributions (similar to CRDs)
 - Recontribution of hardship withdrawals for home purchases
 - Increased loan limit and loan repayment suspension (similar to CARES Act)
- Repayment of disaster-related distributions similar to CRDs
- Amendment by last day of plan year beginning on or after January 1, 2022

Department of Labor (DOL) Cybersecurity Initiative

- On April 14, 2021, the DOL published informal guidance for plan fiduciaries, record-keepers, and participants with best practices for maintaining cybersecurity and protecting participants' plan benefits.
- The guidance included tips for hiring service providers with strong cybersecurity practices that are intended to help plan fiduciaries meet their responsibilities under ERISA to prudently select and monitor retirement plan service providers.
 - Highlights the questions a plan fiduciary should ask current and prospective service providers regarding their information security practices and any issues or breaches they may have experienced; and
 - Recommends standard provisions to include in a plan's vendor contracts to ensure ongoing compliance with cybersecurity and information security standards.
- Shortly after issuing cybersecurity guidance, the DOL has begun issuing information and document requests under the new cybersecurity audit initiative.
 - The DOL audit requests issued thus far appear to focus on the types of critical data maintained by the plan and the information security systems on which such data is maintained.
 - The DOL generally asks for third-party audits and policies, procedures, and guidelines relating to information systems that handle critical plan data, whether maintained by the plan sponsor or by a vendor; the DOL also asks for detailed documentation of the response to any cybersecurity breach.

Cybersecurity Best Practices

What practical steps can plan fiduciary take to protect the plan and its participants from a cybersecurity breach?

- Understand what data is stored and how it is used by, and transmitted to/from, the plan
- Establish a cybersecurity policy
- Ask service providers to present (annually or more often, if needed) on information security standards (compliance with DOL guidance), third-party validation of same, and breach response
- Include data privacy requirements in RFP/contract, and monitor service provider compliance with contractual requirements
- Review protection program offered by 401(k) plan record-keeper
- Review company coverages (e.g., fidelity bond, fiduciary insurance, and cyber coverage)
- Communicate with 401(k) plan participants, including SPD language

Missing Participants

- On January 12, 2021, DOL issued best practices for pension plans; missing participants remain active audit initiative
- Develop missing participants procedure
 - Pension—process for reaching out to terminated, vested participants approaching normal retirement age (65) and required beginning date (72)
 - Ongoing compliance—
 - Process for maintaining up-to-date contact information
 - Regular requests for updated address and beneficiary information
 - Data cleanup upon recordkeeper change or M&A transaction
 - Implementing effective communication strategies—language(s) and prior employer name
 - Searching for lost participants—procedure for handling regular death and lost participant searches, returned mail, and uncashed checks
 - Annual report of service provider to plan fiduciary re missing participants

ESG Funds and Proxy Voting

- DOL approach to ESG flip-flopped with each administration
- Will Biden “encourage” ESG funds?
- What plan fiduciaries should do
 - Ask investment adviser if plan investment options are ESG
 - Determine if your plan participants are asking for ESG options
 - Brokerage windows
 - Disclosure
- Proxy voting
 - Be sure you know how shares are voted in your plan (pass-through? Trustee? Adviser?)
 - Proxy voting policy

Mandatory Arbitration Clause in ERISA Plan

- Applies to **all claims related to plan participation**
- Waives class, collective, and representative actions (i.e., participant may arbitrate on **individualized** basis only)
 - Some arbitration clauses limit relief to the participant's individual account/benefit and restrict the award of plan-wide remedies, such as a plan-wide injunction, reformation of plan terms, or removal of a fiduciary
 - However, in September 2021, Seventh Circuit held that arbitration clauses that prohibit relief that ERISA expressly permits are unenforceable
- Includes a **non-severability clause**, which voids all or part of the arbitration provision if court holds that arbitration on an individualized basis is not enforceable; in this case, case stays with court

Pros/Cons of Arbitration Under ERISA Plans

PROS

- Class Action Waiver
 - Over 200 ERISA class actions filed in 2020
 - May be helpful to defend excessive fees and imprudent investment option challenges, stock drop cases, and actuarial equivalence lawsuits
- Faster, Less-Costly Resolution
- Limited Scope of Discovery
- Flexible Procedures

CONS

- Separate Resolution of Each Individual Claim with Potentially Conflicting Results
- Artificial Intelligence Could Replicate Arbitration Claims on a Mass Scale
- Fear That Arbitrator Not Well Versed in ERISA (i.e., “Split the Baby”)
- Limited/No Appellate Rights
- Legally Enforceable?
- Remedies Available through Arbitration?
- Standards of Review?
- Impact Varies with Different Types of ERISA Plans

Proposed Form 5500 Changes

- **Adds Code compliance questions “to better identify non-compliant plans”**
- Did the employer aggregate plans in 401(a)(4) and 410(b) nondiscrimination and coverage testing?
- Did the plan sponsor use:
 - the design-based safe harbor rules
 - “prior year” ADP Testing or
 - “current year” ADP test?
- Employers with pre-approved plans that received a favorable IRS Opinion Letter must enter the date and serial number of the Opinion Letter

Updates to Form W-4P

- The IRS has published drafts of the redesigned Form W-4P and new Form W-4R
 - New default withholding rate of single rather than married with three allowances
- Employers expected to use redesigned forms for participants commencing benefit payments on and after 2022 but would not be required to request resubmitted forms from participants already in pay status
- Systems updates will be required

Highlights from Legislative Proposals

- Focus on retirement plan reform
- Proposals reflect significant changes to some retirement plan policies
- Some proposed changes have bipartisan support

Budget Reconciliation Bill – FY 2022

The bill is currently under review by the House. Following a vote in late September, it will be reviewed and amended by the Senate, before passage by the end of the year.

- Automatic Enrollment: Employers that do not offer a retirement savings plan option would be required to automatically enroll employees into an IRA or 401(k) plan. No employer contribution is required.
- Saver's Credit: A refundable tax credit which can only be received as a direct contribution to a Roth IRA or Roth contribution account under an employer-sponsored plan.
- Contribution Cap and Mandatory Distributions: If aggregate IRA and defined contribution account balances exceed \$10 million:
 - Contributions to IRA or Roth IRA prohibited; and
 - Immediate distributions required.
- Elimination of Certain Roth Conversions: Roth IRA conversions and in-plan Roth conversions of after-tax contributions would be prohibited.
- Section 162(m) Deduction: Accelerated application of expanded Section 162(m).

SECURE 2.0

Despite broad bipartisan support, it is unclear whether SECURE 2.0 will pass this year. Some provisions incorporated in some form into other legislative proposals.

- Student Loan Payments: Permit elective deferrals and matching contributions for qualified student loan repayments.
- Required Minimum Distributions: Incremental increase of the RMD age up from 72 (under the SECURE Act) to 75 in 2032.
- Catch-Up Contributions: Amount of catch-up contributions increased for older individuals and indexed for inflation.
- Expanded EPCRS: Expansion of IRS correction program to provide broader opportunity for self-correction and additional safe harbor correction methods.
- Retirement Savings Lost and Found: Establishes national database for retrieval of lost retirement accounts.

Estimated 2022 Dollar Limits

- Significant increases in qualified plan limits are projected for 2022

Plan Limits	2021	Projection for 2022
Elective Deferrals	\$19,500	\$20,500
Defined Contribution Limits	\$58,000	\$61,000
Annual Compensation	\$290,000	\$305,000
HCE Threshold	\$130,000	\$135,000
Defined Benefit Limits	\$230,000	\$245,000