



Labor & Employment Issues Employee Benefits In Focus

Pitta LLP
For Clients and Friends
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PITTA LLP NEWS

We are pleased to announce that our partner, Marcelle J. Henry, has been appointed to the Professionals Committee and reappointed to the International Foundation of Employee Benefits Plans (“IFEBP”) Health Care Management Committee effective January 1, 2024.

IRS ISSUES TRANSITIONAL RELIEF TO DEFINED CONTRIBUTION PLAN SPONSORS WITH RESPECT TO CATCH-UP CONTRIBUTIONS

As we previously reported in our July 2023 *Employee Benefits In Focus* edition, in an article titled “*Questions Abound Over Roth Catch Up Contributions*,” currently, plan sponsors may allow retirement plan participants aged 50 and over to make catch-up contributions up to \$7,500 on a pre-tax and/or Roth basis at the participant’s election. [Click here](#) to see a full copy of the article. However, pursuant to the SECURE 2.0 Act of 2022 (“SECURE 2.0”), individuals (i) who are eligible to make catch-up contributions and (ii) whose Social Security wages in the prior year exceeded \$145,000 would no longer have the ability to make catch-up contributions on a pre-tax basis. SECURE 2.0 amended section 414(v) of the Internal Revenue Code by adding section 414(v)(7), requiring that effective January 1, 2024, eligible individuals must make their catch-up contributions on a Roth (i.e., after-tax) basis. However, on August 25, 2023, the Internal Revenue Service (“IRS”) issued Notice 2023-62, providing for an “administrative transition period,” which, in effect, grants plans a two-year delay in the effective date of the provision. The administrative transition period is scheduled to end on December 31, 2025, and plans must be in compliance with the law no later than January 1, 2026.

IRS Notice 2023-62 makes several clarifications, including that “plan participants who are age 50 and over can continue to make catch-up contributions after 2023, regardless of income” and that SECURE 2.0 “does not prohibit plans from permitting catch-up contributions.” Accordingly, plans may continue to allow eligible participants to make catch-up contributions in 2024 on a pre-tax basis. During the administrative transition period, the IRS will be treating plans as though they are in compliance with the law. IRS Notice 2023-62 provides, in pertinent part, that “[s]pecifically, until taxable years beginning after December 31, 2025, (1) those catch-up contributions will be treated as satisfying the requirements of section 414(v)(7)(A), even if the contributions are not designated as Roth contributions, and (2) a plan that does not provide for designated Roth contributions will be treated as satisfying the requirements of section 414(v)(7)(B).”

D.C. DISTRICT COURT SIDES WITH DOL ON CAUTIONARY CRYPTOCURRENCY GUIDANCE

The U.S. Department of Labor (“DOL”) recently beat a challenge in a District of Columbia District Court to guidance it issued in March 2022 cautioning against the use of cryptocurrencies in retirement plans. ForUsAll Inc., a provider of administrative and other services to retirement plans, brought a complaint against the DOL alleging that the DOL overstepped by issuing Compliance Assistance Release No. 2022-01 (the “Release”). See *ForUsAll v. USDOL et. al*, 1:21-cv-01551. We reported on the complaint in our June 2022 *Employee Benefits In Focus* edition in an article titled “DOL’s Anti-Crypto Guidance Faces Legal Challenge.” [Click here](#) for a full copy of the article.

The Release “questioned the prudence of exposing 401(k) plan participants to investments in cryptocurrencies and reminded plan sponsors of their fiduciary duties under the Employee Retirement Income Security Act of 1974,” as amended. ForUsAll argued that the DOL guidance caused it to lose “approximately one-third” of its interested client base, which backed out of discussions about partnering with ForUsAll to provide plan participants with access to cryptocurrency investment options. ForUsAll brought its claim under the Administrative Procedure Act (“APA”), arguing that the DOL was overstepping its authority because its attempt to limit cryptocurrencies in benefit plans was “arbitrary and capricious.” In addition, ForUsAll alleged that the DOL violated the APA by foregoing the required notice-and-comment period.

The Court held that, although ForUsAll could possibly prove that the Release caused it to lose business, it was unlikely that any of its requested relief – a declaration that the Release was unlawful, an order vacating it and setting it aside, and an injunction preventing the DOL from applying it – could redress the company’s alleged injury. Essentially, ForUsAll was unable to show that any of its lost client base would return or renew discussions about the previously contemplated partnerships if the Court granted the requested relief. Moreover, the Court found that the Release was not final and thus unreviewable because it “neither marks the consummation of the [DOL’s] decisionmaking nor determines any entities’ legal rights or obligations,” and both conditions are required in order for an agency action to be considered final.

U.S. DOL FIDUCIARY RULE ANNOUNCEMENT

In what appears to be a final attempt to revive a 1975 five-part investment advice fiduciary rule, the U.S. Department of Labor (“DOL”) sent a rulemaking for review to the Office of Management and Budget (“OMB”). Early this month, OMB posted on its website that the DOL submitted a proposed rulemaking titled “Conflict of Interest in Investment Advice.” We wrote about the DOL’s prior attempts to revise the definition of fiduciary and the challenges it faced in our April 2022 EBIF titled “*DOL Prohibited Transaction Exemption 2020-02 and Related Guidance Triggers Lawsuits.*” [Click here](#) to see a full copy of the article. OMB’s announcement has caused major speculation among industry leaders, who generally opine that the text of the rule is expected to have been carefully considered and crafted by the DOL in an attempt to avoid further challenges. The text of

the rule will not be made available to the public before OMB concludes its review in an estimated timeframe of ninety (90) days.

In one of its major attempts to redefine the fiduciary rule, on December 18, 2020, the DOL issued PTE 2020-02. In general, PTE 2020-02 enacted a new prohibited transaction exemption under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Internal Revenue Code of 1986 (“IRC”) for investment fiduciaries relating to employee benefit plans and individual retirement accounts (“IRAs”). PTE 2020-02 sought to protect prohibited transactions that were the result of rollover advice as well as advice regarding how to invest assets within a plan or IRA. In adopting PTE 2020-02, the DOL restored a 1975 five-part investment advice fiduciary rule providing that a person is defined as an investment-advice fiduciary when the person: “[1] renders advice to the plan as to the value of securities or other property . . . [2] on a regular basis . . . [3] pursuant to a mutual agreement, arrangement or understanding . . . that such services [4] will serve as a primary basis for investment decisions . . . and that . . . person will [5] render individualized investment advice to the plan based on the particular needs of the plan[.]” See 29 C.F.R. § 2510.3-21(c)(1) (1975).

PTE 2020-02 was met with much discontent leading to several lawsuits which in general vacated the DOL’s attempts to redefine the rule. See, e.g. *Am. Sec. Ass’n v. U.S. Dep’t of Labor*, No. 8:22-cv-00330 (M.D. Fla. Feb. 09, 2022).

As of the date of publication of this issue, OMB’s website states that the intention of the rulemaking is to “more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code.” Accordingly, it is expected that the rulemaking would amend the definition of “fiduciary” set forth in 29 CFR 2510.3-21(c) to more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code.

A FEW REMINDERS **(Based on calendar-year plans)**

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

SEPTEMBER

HEALTH AND WELFARE PLANS

- **Summary Annual Report (“SAR”)**
 - September 30, 2023 is the deadline by which health and welfare plans must distribute the SAR to all plan participants.

DEFINED BENEFIT PLANS

- **Actuary Certification**
 - September 30, 2023 is the last day by which the actuary must certify the 2023 Adjusted Funding Target Attainment Percentage (“AFTAP”) to avoid October 1, 2023 presumption that the 2023 AFTAP is less than 60%.
- **SAR**
 - September 30, 2023 is the deadline by which the SAR must be distributed to all plan participants unless the defined benefit plan is covered by the Pension Benefit Guaranty Corporation’s (“PBGC”) termination insurance program; PBGC-covered DB plans are required to furnish their participants with an annual funding notice instead.

DEFINED CONTRIBUTION PLANS

- **SAR**
 - September 30, 2023 is the deadline by which the SAR must be distributed to all plan participants.

OCTOBER

ALL PLANS

- **Form 5500 Extended Deadline**
 - October 16, 2023 is the date by which the Form 5500 for the 2022 plan year is due if a Form 5558 extending the due date was filed (while the due date is technically October 15, 2023, because it falls on a Sunday, the due date is automatically extended to the next business day).
- **Form 8955-SSA Extended Deadline**
 - October 16, 2023 is the due date for Form 8955-SSA and participant statements for the 2022 plan year if a Form 5558 extending the due date was filed (while the due date is technically October 15, 2023, because it falls on a Sunday, the due date is automatically extended to the next business day).

DEFINED BENEFIT PLANS

- **Third Quarter Contributions**
 - October 15, 2023 is the deadline for third quarter contributions.
- **Retroactive Amendment to Correct Prior Year Coverage/Nondiscrimination Failures**
 - October 15, 2023 is the deadline by which to make a retroactive amendment to correct prior year coverage/nondiscrimination failures.

- **Pension Benefit Guaranty Corporation (“PBGC”) Premium Filing and Payment**
 - October 16, 2023 is the deadline by which to file the prescribed premium information and pay the premium due in accordance with PBGC’s Premium Regulations and instructions (while the due date is technically October 15, 2023, because it falls on a Sunday, the due date is automatically extended to the next business day).
- **PBGC Form 200**
 - October 26, 2023 is the last day by which to file the PBGC Form 200 if a plan sponsor did not make the October 16, 2023 required contribution and the total amount in unpaid contributions (including interest) exceeds \$1 million.

DEFINED CONTRIBUTION PLANS

- **Notice of Intent to Use section 401(k) and section 401(m) Safe-Harbor Formula (if plan is a “safe-harbor” 401(k) plan)**
 - October 2, 2023 is the earliest date by which to send safe harbor notices for 401(k)/401(m) nondiscrimination safe harbor plans and plans with eligible automatic contribution arrangements.
- **Retroactive Amendment to Correct Prior Year Coverage/Nondiscrimination Failures**
 - October 15, 2023 is the deadline by which to make a retroactive amendment to correct prior year coverage/nondiscrimination failures.

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