



Employee Benefits In Focus

Pitta LLP
For Clients and Friends
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IRS ROLLS OUT NEW PRE-AUDIT PILOT PROGRAM

On June 3, 2022, the Internal Revenue Service (“IRS”) announced that starting this month it would institute a new pre-audit pilot program for retirement plans. Under the program, a plan sponsor will be notified by letter that their retirement plan has been selected for an upcoming examination and will be given 90 days to review their plan documents and operations for compliance with applicable law.

Upon review, should the plan sponsor find any failures, the plan sponsor will have the opportunity to self-correct the failures under the Employee Plans Compliance Resolution System (“EPCRS”). Subsequently, the IRS will review the plan sponsor’s documentation and issue a closing letter or conduct either a limited or full scope examination. Should the plan sponsor find failures that cannot be corrected through EPCRS, then the plan sponsor may request a closing agreement and the IRS will use the Voluntary Correction Program fee structure to decide the sanction amount the plan sponsor must pay under the closing agreement. Should the plan sponsor not follow up on the letter, the IRS will contact the plan sponsor to schedule a full scope examination.

According to the IRS announcement, the goal of the program is to reduce not only taxpayer burden but also the amount of time spent on retirement plan examinations. At the conclusion of the pilot program, the IRS will evaluate the pilot program’s effectiveness and make a decision as to whether to continue to use the program as part of their general compliance strategy.

PROPOSED RETIREMENT PROTECTION LEGISLATION

On May 26, 2022, the Senate Health, Education, Labor and Pensions Committee Chair Senator Patty Murray (D-WA) and Ranking Member Senator Richard Burr (R-NC) released a draft of a proposed bipartisan retirement package called the “Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act” (“RISE & SHINE Act” or “Act”). The Act is expected to serve as the Senate’s latest version of the SECURE Act 2.0 package because it builds upon the Setting Every Community Up for Retirement Enhancement Act passed in December 2019 (“SECURE Act”). For a summary of the SECURE Act, please [click here](#) to read our March 2020 In Focus article entitled “Retirement Plan Reform: The SECURE Act.”

The RISE & SHINE Act builds off of provisions in other retirement bills such as the “Retirement Improvement and Savings Enhancement Act” (“RISE Act”), the “Retirement Security & Savings Act” introduced by Senators Ben Cardin (D-MD) and Rob Portman (R-OH), and the “Securing a Strong Retirement Act of 2022” (“SECURE Act 2.0”), which was passed by the House on March 29, 2022. While the House and

Senate versions of the bill have the same moniker – SECURE Act 2.0 – the bills break with each other on several provisions described below.

The RISE & SHINE Act would create additional protections for workers regardless of their age, including permitting employers to offer emergency savings accounts and requiring plan sponsors to improve communication and transparency for pension plan participants around lump-sum buyout offers. Under the Act, employers with qualified automatic contribution arrangements and eligible automatic contribution arrangements taking effect after December 31, 2024, would be required, at least every three plan years but not more than once annually, to offer employees the chance to reconsider whether to enroll in the automatic contribution arrangement or eligible automatic contribution arrangement.

Generally, the House version of SECURE Act 2.0 would allow older workers to take advantage of catch-up savings by permitting them to contribute larger amounts and enable small employers (with up to 50 employees) to offer retirement plans by providing them with an increased tax credit. The House version of SECURE Act 2.0 would also change the required minimum distributions (“RMDs”) age from 72 to 73 for 2022, age 74 for 2029, and age 75 for 2032. In addition, it provides for employers to match student loan payments and expands self-correction of plan administration errors, among other measures. Under the House version of SECURE Act 2.0, employers establishing new defined contribution plans would be required to automatically enroll newly hired employees, when eligible in the plan at a pretax contribution level of 3% of the employee’s salary, though employees may elect to opt-out of coverage. While employees may elect a different contribution rate, the 3% initial contribution rate would increase by 1% annually up to at least 10% and no more than 15%. Small businesses with 10 or fewer employees, church plans, governmental plans and businesses less than three years old would be exempt from this requirement.

Both proposed bills, it is important to note, are far from final because at this stage the RISE & SHINE Act is only a draft. However, Senators Murray and Burr are expected to introduce and mark up final legislation this week. As for the House version of SECURE Act 2.0, on March 30, 2022, it was received in the Senate, read twice and referred to the Committee on Finance.

DOL’S ANTI-CRYPTO GUIDANCE FACES LEGAL CHALLENGE

We reported on the Department of Labor’s (“DOL’s”) Compliance Assistance Release No. 2022-01 (the “Release”) in both our Employee Benefits In Focus issues entitled, [“Are Retirement Plans Ready to Invest in Cryptocurrencies?”](#) and [“Is the Department of Labor’s Anti-Crypto Guidance Foreshadowing of a Regulatory Change?”](#) published in April and May 2022, respectively. Currently, the Release faces a legal challenge by a San Francisco based plan provider called ForUsAll Inc. who alleges that the Release was enacted in contravention of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Administrative Procedure Act (“APA”). See *ForUsAll v. USDOL et. al*, 1:21-cv-01551.

According to its Complaint, filed on June 2, 2022, ForUsAll Inc. is the first company to make cryptocurrency available to 401(k) plan participants via a self-directed brokerage window. ForUsAll Inc. argues that the Release amounted to an arbitrary and capricious attempt by the DOL to restrict the use of cryptocurrency in defined contribution plans, exceeding its authority under ERISA and without following the notice and comment process required pursuant to the APA.

For additional details on this developing lawsuit, please [click here](#) to see our In Focus article titled “Crypto Strikes Back – Lawsuit Challenges DOL Criticism of Cryptocurrency Investments in 401(k) Plans” published on June 9, 2022.

IRS FURTHER EXTENDS RELIEF FROM PHYSICAL PRESENCE REQUIREMENT IN RESPONSE TO COVID-19

Pursuant to Internal Revenue Service (“IRS”) regulations, certain participant elections are required to be made in the physical presence of a plan representative or a notary public. However, in light of the COVID-19 pandemic, the IRS provided temporary relief from the physical presence requirement via Notices 2020-42, 2021-03 and 2021-40 published in June 2020, December 2020 and June 2021, respectively. Most recently, on May 13, 2022, the IRS issued Notice 2022-27 extending the temporary relief from the physical presence requirement for six months through December 31, 2022. The relief is impactful as it extends the ability to use an electronic system subject to certain requirements as set forth below, to satisfy the physical presence requirement.

Under Notice 2021-03, the IRS advised that the physical presence requirement is deemed satisfied with an electronic system that uses remote notarization if it is executed via live audio-video technology. For the live audio-video technology to satisfy the physical presence requirement, the following four-step process must be met:

1. The individual signing the participant election must present a valid photo ID during the live audio-video conference (transmittal of a copy of the photo ID before or after the witnessing is not acceptable).
2. The individual and the plan representative must have direct interaction during the live audio-video conference (a pre-recorded video of the person signing is not adequate).
3. On the date of the live audio-video conference, the individual must send by fax or electronically a legible copy of the signed document to the plan representative.
4. After receipt of the signed document, the plan representative must acknowledge that he or she witnessed the signature during the live audio-video conference and return the signed document, including the acknowledgement, to the individual. Both documents must be returned via a medium that the individual has the effective ability to access and must include

a notice advising the individual of their right to request a paper copy free of charge. Upon such request, a paper copy of the signed document and acknowledgment must be provided.

In Notice 2022-27, the IRS advised that it does not anticipate providing any further temporary relief beyond the next six months given the “recent easing of public health precautions relating” to COVID-19. However, the IRS confirmed that it is considering whether to make the relief permanent – an issue on which the IRS sought comments in the 2020 and 2021 Notices. Should the IRS decide to make the relief permanent, it would have to do so through the federal regulatory process which is subject to a notice and comment period.

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.

JUNE

DC PLANS

- **Corrective Distributions for Failed Actual Deferral Percentage (“ADP”) and Actual Contribution Percentage (“ACP”) Tests for Certain Eligible Automatic Contribution Arrangements (“EACAs”)**
 - June 30, 2022 is the deadline by which certain EACAs must process corrective distributions for failed ADP/ACP tests without incurring a 10% excise tax.

JULY

ALL PLANS

- **Summary of Material Modifications (“SMM”)**
 - July 29, 2022 is the deadline by which plan administrators must furnish an SMM to participants and beneficiaries receiving benefits explaining a material plan change that was adopted in Calendar Year 2021 unless a revised Summary Plan Description containing the modification was distributed.
- **Form 5500 Series (Annual Return/Report of Employee Benefit Plan) and Schedules**
 - July 31, 2022 is the deadline by which a plan administrator must file the Form 5500 unless an extension is granted after filing the Form 5558 before the due date.

HEALTH AND WELFARE PLANS

- **Form 720, Quarterly Federal Excise Tax Return**

- July 31, 2022 is the deadline by which self-insured group health plans must pay fees to the Patient-Centered Outcomes Research Institute (“PCORI”) through the Form 720.
- **Transparency Rule – Disclosure to Public**
 - July 1, 2022 is the deadline by which plan administrators must post machine-readable files related to in-network negotiated rates and out-of-network allowed amounts on a public-facing website.
 - This requirement is applicable to: group health plans and health insurers.
 - This requirement is not applicable to: excepted benefits, account-based plans or grandfathered health plans.

DEFINED BENEFIT PLANS

- **Quarterly Installments of Required Contributions**
 - July 15, 2022 is the deadline by which second quarter 2022 contributions are due.

DEFINED CONTRIBUTION PLANS

- **Form 5330**
 - July 31, 2022 is the deadline by which the Form 5330 must be filed which is required if your plan had delayed contributions for the prior calendar year.
- **Cycle 3 Plan Document Restatements**
 - July 31, 2022 is the deadline by which all pre-approved defined contribution plans must restate plan documents.

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