



Labor & Employment Issues Employee Benefits In Focus

Pitta LLP
For Clients and Friends
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DEPARTMENT OF LABOR ROLLS OUT NEW RULE PROPOSING NEW ERISA DEFINITION OF “INVESTMENT ADVICE FIDUCIARY”

On October 31, 2023, the United States Department of Labor (“DOL”) issued a new proposed rule seeking to modify the current definition of “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Titled the Retirement Security Rule: Definition of an Investment Advice Fiduciary (“Proposed Rule”), the Proposed Rule provides that investment advisors would be subject to higher standards of care and loyalty when making investment recommendations. The new proposed definition of fiduciary aims to close loopholes and account for the realities of today’s investment models. Further, it would replace the current definition, which was originally adopted in 1975 and catered to the American retirement savings landscape as it was when IRAs were less common, and 401(k) plans had yet to exist.

Fiduciary duties generally developed from the common law of trusts, and they require that individuals who are “fiduciaries” adhere to heightened standards of prudence and loyalty. ERISA requires that fiduciaries act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,” as well as perform their duties “solely in the interest of the [plan] participants and beneficiaries.” See ERISA section 404, 29 U.S.C. § 1104. ERISA also prohibits plan fiduciaries from engaging in certain prohibited transactions, such as transactions that “deal with the assets of the plan in [a fiduciary’s] own interest or for his own account” or allow a fiduciary to “receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.” See ERISA section 406(b)(1), (3), 29 U.S.C. § 1106(b)(1), (3).

Currently, ERISA’s statutory definition of “fiduciary” provides that a person is a fiduciary with respect to a plan, to the extent “(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A). Following ERISA’s enactment, in 1975 the DOL issued a regulation further defining “investment advice,” which created a five-part test that substantially narrowed the scope of who might be considered a fiduciary in relation to plan assets investments. 29 CFR 2510.3–21(c)(1). Under this five-part test, a person will only be a fiduciary if they (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant

to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets and that (5) the advice will be individualized based on the particular needs of the plan. 29 CFR 2510.3-21(c)(1).

Importantly, because the 1975 test requires that a financial service provider's advice be given "on a regular basis," it currently does not apply to a provider who gives one-time advice to a participant in a 401(k) plan, such as advice regarding whether a participant should roll over their 401(k) into an IRA. However, the DOL notes in the Proposed Rule that "decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make." Accordingly, the newly expanded definition of fiduciary would apply to these investment advice providers as well.

Specifically, under the Proposed Rule, a person would be considered an investment advice fiduciary if they (1) provide investment advice or make an investment recommendation to a "retirement investor"; (2) for a "fee or other compensation, direct or indirect"; and (3) make the recommendation in one of three contexts: (i) the provider has discretion over the retirement investor's investment decisions; (ii) the provider makes investment recommendations to investors on a regular basis as part of their business, and the recommendation seems personalized, and the advice may be relied upon by the retirement investor as a basis for making investment decisions that are in the retirement investor's best interest; or (iii) when making the investment recommendation, the provider acknowledges or represents that they are acting as a fiduciary. The DOL's aim in implementing these changes is to ensure that investment professionals who characterize themselves as "experts" will be statutorily required to provide advice that is in the best financial interest of the investor as opposed to that of the investment professional.

The Proposed Rule, which can be read in its entirety [here](#), includes a 60-day period for public comments as well as instructions on how to submit comments. Despite a request by a group of trade associations who asked for an extension of the comment period, the DOL has decided to maintain the original due date for comments of January 2, 2024. A public hearing on the Proposed Rule will be held December 12-13, 2023 in Washington, D.C. Meanwhile, Republicans in the House of Representatives are attempting to block the Proposed Rule by adding amendments to their appropriations bill that would deny funding for implementation of the Proposed Rule. However, President Joe Biden has announced that he intends to veto the appropriations bill as it stands.

IRS ANNOUNCES 2024 RETIREMENT-RELATED COST-OF-LIVING ADJUSTMENTS

On November 1, 2023, the Internal Revenue Service ("IRS") announced increases to contribution limits for employees who participate in 401(k), 403(b), most 457 plans, and the federal government's Thrift Savings Plan. According to Notice 2023-75, titled "2024 Limitations Adjusted as Provided in Section 415(d), etc.," the cost-of-living increases for 2024 include, but are not limited to, the following:

- Individual employee contributions to a 401(k), 403(b), most 457 plans and the federal government's Thrift Savings Plan are increased from \$22,500 to \$23,000, while the catch-up contribution limit for individuals aged 50 and over remains at \$7,500.
- The amount an individual may contribute to an individual retirement account ("IRA") is increased from \$6,500 to \$7,000.
- The amount an individual may contribute to a SIMPLE retirement account is increased from \$15,500 to \$16,000, while the catch-up contribution limit for individuals aged 50 and over who contribute to a SIMPLE retirement account remains at \$3,500.
- For single taxpayers who contributed to a traditional IRA, the phase-out range is increased from between \$73,000 and \$83,000 to between \$77,000 and \$87,000. For married couples who file jointly, if the spouse making the IRA contribution participates in a workplace retirement plan, then the phase-out range is increased from between \$116,000 and \$136,000 to between \$123,000 and \$143,000.
- For an individual who contributes to an IRA, but who does not participate in a workplace retirement plan and is married to someone who participates, the phase-out range is increased from between \$218,000 and \$228,000 to between \$230,000 and \$240,000. However, if the married individual files a separate return, the phase-out range is not affected by an annual cost-of-living adjustment and continues to be from between \$0 and \$10,000.
- For singles and heads of household taxpayers who contribute to a Roth IRA, the income phase-out range is increased from between \$138,000 and \$153,000 to between \$146,000 and \$161,000.
- For taxpayers who are married and file jointly, the adjusted gross income phase-out range for taxpayers making contributions to a Roth IRA is increased from between \$218,000 and \$228,000 to between \$230,000 and \$240,000. However, for a married taxpayer filing a separate return, the phase-out range is not affected by an annual cost-of-living adjustment and continues to be between \$0 and \$10,000.

For more information on cost-of-living adjustments to retirement plan contributions, please see Notice 2023-75 by clicking [here](#).

FEDERAL IDR PROCESS

On September 26, 2023, the United States Departments of Labor, Health and Human Services, and the Treasury (the “Departments”) issued a proposed rule that would affect the fees associated with the Federal independent dispute resolution (“IDR”) process under the No Surprises Act. The proposed rule reflects changes required by an adverse ruling in a federal district court case from the Eastern District of Texas, which we featured in our August 2023 issue, and can be read [here](#). See *Texas Medical Association et al v. United States Department of Health and Human Services et al*, Docket No. 6:23-cv-00059 (E.D. Tex. Jan 30, 2023). There, the Court held that a previously issued Fee Guidance was substantive guidance as opposed to interpretative guidance, and as such, required a notice and comment period under the Administrative Procedure Act.

Essentially, the proposed rule would amend existing regulations by establishing that both the administrative fees charged by the Departments and the ranges for certified IDR entity fees for single and batched determinations will be set by the Departments via the notice and comment rulemaking process. The proposed rule establishes methodologies to be used to calculate those fees. Finally, for disputes initiated on or after the later of the effective date of the proposed rule or January 1, 2024, the administrative fee will be \$150 per party per dispute, and this amount would remain in effect until subsequent notice and rulemaking takes place. The Departments aver that this arrangement will allow the flexibility to alter the fee more or less frequently than annually. For certified IDR entity fee ranges in disputes initiated on or after the later of the effective date of the proposed rules or January 1, 2024, certified IDR entities could charge a fixed certified IDR entity fee for single determinations between \$200 and \$840, and for batched determinations, between \$268 and \$1,173. The proposed rule provides that these fee ranges will remain in effect until new ranges are established by subsequent notice and comment rulemaking.

A summary and full copy of the proposed rule may be accessed [here](#).

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.

NOVEMBER

DEFINED BENEFIT PLANS

□ PBGC Form 10

- November 15, 2023 is the deadline by which to file the Form 10 if the DB plan 1) has more than 100 participants, 2) missed its October 17 required contribution and the contribution remains unpaid as of November 15, 3) could not have satisfied the contribution by a Prefunding or Carryover

Balance election and 4) had not filed a PBGC Form 200 for the same incident.

DECEMBER

HEALTH AND WELFARE PLANS

- **Summary of Benefits and Coverage (“SBC”)**
 - December 2, 2023 is the deadline by which the plan administrator or health insurer must send the SBC to participants and beneficiaries if the plan does not conduct open enrollment and if the plan operates on a calendar-year cycle.
- **Summary Annual Report (“SAR”)**
 - December 15, 2023 is the deadline by which health and welfare plans must distribute the SAR to all plan participants if the Form 5500 deadline was extended by Form 5558 or because of a corporate tax filing extension.

DEFINED BENEFIT PLANS

- **SAR**
 - December 15, 2023 is the deadline by which defined benefit plans must distribute the SAR to all plan participants if the Form 5500 deadline was extended by Form 5558 or because of a corporate tax filing extension.
- **Actuary’s Certification of 2022 Adjusted Funding Target Attainment Percentage (“AFTAP”)**
 - December 31, 2023 is the deadline by which the actuary must certify the 2023 AFTAP to avoid a presumed AFTAP of less than 60%.
- **Election to Reduce January 1, 2023 Credit Balances**
 - December 31, 2023 is the deadline by which the plan sponsor must elect to reduce January 1, 2023 credit balances.
- **Revocation of Election to Use Credit Balances in Excess of 2023 Minimum Required Contributions**
 - December 31, 2023 is the deadline by which the plan sponsor must revoke an election to use credit balances in excess of 2023 minimum required contributions excluding small plans that use year-end valuation dates.

DEFINED CONTRIBUTION PLANS

- **401(k) Plan Annual Safe Harbor Notice for 2024 Plan Year**
 - December 1, 2023 is the deadline by which the 401(k) Plan Annual Safe Harbor Notice for the 2023 Plan Year is due.
- **Annual Auto-Enrollment Notice(s) for 2024 Plan Year**
 - December 1, 2023 is the deadline by which the annual auto-enrollment notice(s) for the 2024 Plan Year are due.
- **Annual Qualified Default Investment Alternative (“QDIA”) Notice for 2024 Plan Year**
 - December 1, 2023 is the deadline by which the annual QDIA Notice for the 2024 Plan Year must be furnished.
- **SAR**

- December 15, 2023 is the deadline by which the SAR must be distributed to all plan participants if Form 5500 deadline was extended by Form 5558 or because of a corporate tax filing extension.
- **Ongoing Required Minimum Distributions**
 - December 31, 2023 is the deadline by which eligible participants must receive their ongoing required minimum distributions for 2023.

THANKSGIVING MESSAGE

As the Thanksgiving Holiday begins, we at Pitta LLP would like to extend our sincere thanks and gratitude to all of our clients and friends for their confidence and friendship throughout this year and always. May you all celebrate a healthy, peaceful, and happy Thanksgiving and may you enjoy this Thanksgiving and the coming year with all good things in abundance.

WE WISH YOU AND YOUR FAMILIES A HAPPY AND HEALTHY THANKSGIVING!

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